UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

TIMOTHY B., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Case No. 1:22-cv-1046
KODY KINSLEY, in his official capacity as	)	
Secretary of the Department of Health and Human Services,	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Slightly more than a year ago, on January 1, 2022, the Defendant, Kody Kinsley, was appointed as the Secretary of the Department of North Carolina Health and Human Services ("DHHS"). Within a month of his appointment, Secretary Kinsley reorganized the Department to create a new Division of Child and Family Well-Being, bringing together programs and staff operating across multiple department divisions to support the physical, behavioral and social needs of children. In March 2022, the Child Welfare and Family Well-Being Transformation Team released a "Coordinated Action Plan for Better Outcomes" focused on what it recognized as an "urgent crisis of the growing number of children with complex behavioral health needs who come into the care of child welfare services." DHHS, *Coordinated Action Plan* (Mar. 2022), https://www.ncdhhs.gov/media/14828/download?attachment. At his confirmation hearings in June 2022, Secretary Kinsley told the committee that improving services for children with behavioral health needs in the foster care system, including investing in prevention programs, was one of his top priorities.

Achieving that goal requires coordinated efforts not only by the Secretary and DHHS officials, but also, at a minimum, by the county Department of Social Services ("DSS") in each of North Carolina's 100 counties that, by law, are responsible for the placement and treatment of foster children in their counties; the six Local Management Entities/Managed Care Organizations ("LME/MCOs") that, by law, arrange and pay for mental health and substance use disorder services in their regions and communities, including for foster children; and the North Carolina General Assembly, which must fund

the initiatives, services, and workforce to address those needs. It is a long-term, herculean effort, in which DHHS plays an important, but not solitary, role.

Before any of these efforts could bear fruit – indeed, before Secretary Kinsley had been in his position for even a year – Plaintiffs brought suit. Plaintiffs claim that DHHS has a "policy or practice" of discriminating against foster children with mental health impairments; of "prioritizing or permitting" placement of foster youth with severe behavioral and mental health needs in psychiatric residential treatment facilities; of "permitting shortages" of community-based placements and services; and of failing to make "reasonable modifications" to those policies and practices that would enable more foster children with behavioral health needs to be served in the community. In other words, the Complaint alleges that the DHHS is failing to address the issues on which Secretary Kinsley, DHHS, and other stakeholders across the State have been working tirelessly over the last 14 months.

The Complaint should be dismissed. First, Plaintiffs' claims that DHHS has violated the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act fails to state a claim upon which relief can be granted. Plaintiffs claim that DHHS has violated these anti-discrimination mandates on the basis of the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), which held that "unjustified institutional isolation of persons with disabilities is a form of discrimination." But, unlike the plaintiffs in *Olmstead*, the placement of Plaintiff children follows the recommendations of the State's treatment professionals as to the best treatment option for the child at the time. Two of the Named Plaintiffs have been stepped down from a Psychiatric Residential

Treatment Facility ("PRTF") to a community residential program. For the one Plaintiff who alleges she has been recommended for community treatment but remains at a PRTF, it takes time to find a foster family willing and able to provide the intensive treatment environment to ensure the child's continued well-being in the community. As the Supreme Court recognized in *Olmstead,* there is no ADA violation when a State has a "waiting list" for community services "that move[s] at a reasonable pace." *Id.* at 605-606.

Second, the issue of whether Named Plaintiffs' placements in PRTFs are "unnecessary," as the Complaint asserts, has already been fully litigated and decided by state courts. North Carolina law requires a state court to review any admission of a minor to a 24-hour psychiatric facility – including not only foster children, but also children whose admission is sought by their families – and the minor may only remain in the facility if the state court finds by "clear, cogent, and convincing evidence" that the child is "mentally ill or a substance abuser, in need of treatment at a 24-hour facility," and that "lesser measures will be insufficient." G.S. §§ 122C-224; 122C-224.3(f), (g). The minor is appointed counsel in those proceedings. G.S. §§ 122C-224.3(f), (g).

Finally, the only relief sought in the Complaint is systemic change: an increase in placement options and treatment services that will likely take years to fully fund and develop. The individual Named Plaintiffs have not asked for individual relief, and cannot demonstrate that the injury they have purportedly suffered would likely be redressed were the Court to grant that systemic relief. Accordingly, under fundamental precepts of federal court jurisdiction, they do not have standing. Perhaps in recognition of that fact, two of Plaintiffs' organizational counsel also seek to appear as Plaintiffs themselves; but an

association cannot have standing beyond the individual standing of its members, unless it alleges harm to the association itself, which neither organization has done here.

For all of these reasons, the Complaint should be dismissed.

BACKGROUND

Under the laws of North Carolina, the safety, care and well-being of foster children is a shared responsibility of both the State and its 100 counties, reflecting the General Assembly's decision that this critical public function requires input and attention from both the State and administrators rooted in their local communities. When it comes to the provision of mental health, substance use disorder, and developmental disability services, the General Assembly has again made the determination that those services are best managed at the community level and should be the responsibility of one of six regional public authorities, known as Local Management Entities ("LMEs"), which are overseen by multi-jurisdictional county boards. The State, through DHHS, has some degree of oversight and authority over both the county DSSs and the LMEs, but decisions in individual cases, including in the case of each of Named Plaintiffs, are uniquely made and implemented at the local level.

North Carolina is one of only nine States in the country that has a "state-supervised, county-administered" child welfare system. Each of North Carolina's 100 counties has either a DSS or a consolidated human services agency that includes social services. *See* G.S. § 108A-1. Among the statutory duties of a county DSS is to "assess reports of child abuse and neglect and to take appropriate action to protect such children" and to "accept

children for placement in foster homes and to supervise placements for so long as such children require foster home care[.]" G.S. § 108A-14(a)(11), (12).

By statute, the county departments are responsible for initiating actions in district court to adjudicate abuse, neglect, or dependency ("A/N/D") proceedings. G.S. § 7B-302. If the court finds by clear and convincing evidence that the child has been abused, neglected, or is dependent, the court must then make a decision as to the appropriate disposition of the child, including whether the child should be removed from the home and placed into county custody. G.S. § 7B-505 ("A juvenile . . . may be placed in nonsecure custody with the department of social services"). If a court places a child in the custody of a county DSS, the order "shall specify that the juvenile's placement and care are the responsibility of the county department of social services[.]" G.S. § 7B-507. Sometimes, a juvenile is placed in nonsecure custody with a county DSS through a delinquency or other type of juvenile justice proceeding, as an alternative to secure custody with the Department of Public Safety. G.S. § 7B-1905.

A child in the custody of a county DSS may be placed in: (1) a licensed foster home or a home otherwise authorized by law to provide such care; (2) a facility operated by the county DSS; or (3) any other home or facility "approved by the court and designated in the order." G.S. § 7B-505; G.S. § 7B-1905(a). Foster family homes are licensed by DHHS but typically are recruited, selected, and trained by county DSS agencies or private "child placing agencies" under contract with the county DSS.

Foster children in the custody of a county DSS receive their health care coverage through the Medicaid program. In North Carolina, the General Assembly has made public

authorities known as “local management entities” or “LMEs” responsible for the management of inpatient and outpatient mental health services, services for individuals with developmental disabilities, and substance abuse services. G.S. § 122C-115.4(a). The LMEs develop and maintain provider networks in their geographic area and then arrange, pay for, coordinate and monitor the provision of these specific categories of services. *Id.* The LMEs contract with North Carolina Medicaid as managed care organizations (“LME/MCOs”) to provide these and other covered services to certain populations of Medicaid enrollees, G.S. § 122C-115, including for foster children in the custody of the county DSS. The LMEs are overseen by boards of county commissioners. G.S. § 122C-117.

Although the county DSS is ultimately responsible for the placement and care of a child placed in its custody, the director of a county DSS “act[s] as agent of the Social Services Commission and Department of Health and Human Services in relation to work required by the Social Services Commission and Department of Health and Human Services in the county[.]” G.S. § 108A-14(a)(5). In that capacity, DHHS provides oversight, technical assistance, and training to the county departments. *See* G.S. § 131D-10.6A. DHHS, through the Social Services Commission, also promulgates regulations which are binding on the DSS. *See* 10A NCAC 70G. Among other things, the regulations require a county DSS to “select the most appropriate form of family foster care or therapeutic foster care for the child consistent with the needs of the child, parents, and guardian” and “when placing the child, . . . select the least restrictive and most appropriate setting closest to the child’s home.” 10A NCAC 70G .0503(e). A county DSS “shall

involve the parents or guardian in the selection of the placement" and "[w]hen the supervising agency intends to change a child's placement, it shall give the parent or guardian notice of its intention unless precluded by emergency circumstances." 70G .0503(h).

In extreme circumstances, DHHS has the ability to withhold funding for, or even assume control of, a county DSS if the county DSS fails to demonstrate reasonable efforts to provide foster care services in accordance with state law and that failure poses a substantial threat to the safety and welfare of children in the county. *See* G.S. § 108A-74. DHHS likewise has only a limited ability to contract with an entity other than an LME/MCO for mental health services, if an LME/MCO refuses or has failed to provide services "in a manner that is at least adequate." § 122C-112.1(b)(7), (8).

Plaintiffs' Complaint seeks relief only against DHHS and the county DSS Directors or the LME/MCOs.

STANDARD OF REVIEW

Under Rule 12(b)(6), the court must "accept as true all well-pleaded facts in a complaint and construe them in the light most favorable to the plaintiff." *Matherly v. Andrews*, 859 F.3d 264, 274 (4th Cir. 2017). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Further, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.*

On a motion to dismiss a putative class action, "the Court can only consider allegations related to the named plaintiffs . . . and not generalized allegations concerning unnamed plaintiffs or putative class members." *McCants v. National Collegiate Athletic Association*, 201 F.Supp.3d 732, 740 (M.D.N.C. 2016); *accord Tatum v. Chrysler Grp. LLC*, No. 10-4269, 2012 WL 6026868, at *4 (D.N.J. Dec. 3, 2012) (emphasis added) (unpublished). At the motion to dismiss stage, "the Court only considers allegations pertaining to the named plaintiff because a putative class action cannot proceed unless the named plaintiff can state a claim for relief himself." *Kamath v. Robert Bosch LLC*, 2014 WL 2916570, at *8, n. 4 (C.D. Cal. June 26, 2014) (unpublished).

ARGUMENT

I. Plaintiff Fails to State a Claim Upon Which Relief Can Be Granted.

Title II of the ADA provides that a public entity may not discriminate against a qualified individual with a disability or exclude a qualified individual with a disability from participation in the services, programs, or activities of a public entity. 42 U.S.C. §§ 12101 *et seq.* Section 504 of the Rehabilitation Act similarly prohibits disability discrimination by recipients of federal funds. 29 U.S.C. § 794. The two laws are generally interpreted coextensively, *see, e.g., Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1265 n.9 (4th Cir. 1995), although the implementing regulations differ somewhat.

A. Four of the Five Named Plaintiffs Do Not Allege that the State's Treatment Professionals Have Determined that a Less Restrictive Placement Would be Appropriate; and the Fifth Alleges That She is Awaiting a Community Placement.

In *Olmstead v. L.C.*, the Supreme Court held that "unjustified institutional isolation of persons with disabilities is a form of discrimination" prohibited by the ADA. 527 U.S. 581, 600 (1999). That case involved two adult women who were denied community-based services, even though "[t]he State's own professionals determined that community-based treatment would be appropriate." *Id.* at 603. The Court emphasized that the "State generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program" and "[a]bsent such qualification, it would be inappropriate to remove a patient from the more restrictive setting." *Id.* at 602. In addition, the plurality opinion noted that "the ADA is not reasonably read to impel States to . . . plac[e] patients in need of close care at risk" and that DOJ's regulations require administration of services and programs "in the most integrated setting *appropriate* to the needs of qualified individuals with disabilities." *Id.* at 604, 602 (quoting DOJ regulation) (emphasis in original). Justice Kennedy, joined by Justice Breyer in concurring in the judgment, further observed that "[t]he opinion of a responsible treating physician in determining the appropriate conditions for treatment" should be given the "greatest of deference." *Id.* at 610 (concurrence, Kennedy, J.). In the view of the concurring justices, "it would be unreasonable, it would be a tragic event, then, were the . . . ADA to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and

treatment out of appropriate care and into settings with too little assistance and supervision." *Id.* at 610 (concurrence, Kennedy, J.).

In this case, licensed clinical professionals under contract with the LME/MCOs conduct a comprehensive clinical assessment of any foster children suspected of having mental health conditions or substance use disorders to determine the level and types of services that are clinically appropriate. G.S. § 7B-903(e). The assessment considers what level of treatment is best for the child at that time, which can include outpatient services and/or more acute services, such as residential or inpatient treatment. The treatment professionals apply the Medicaid clinical coverage policies to determine the appropriate level of care. 10A NCAC 27G.0205. As set forth in the clinical coverage policy, the lower two levels of residential-based treatment can be provided in a family setting, by licensed foster homes in which the parents have been specially trained in parenting children with behavioral health issues, and the higher levels of treatment can only be delivered in residential treatment facilities. *See* Medicaid and Health Choice, Residential Treatment Services Clinical Coverage Policy No: 8-D-2 (March 15, 2019), https://files.nc.gov/ncdma/documents/files/8D-2.pdf; *see also* G.S. § 131D-10.2(14) (definition of therapeutic foster home).

Level III is a residential, congregate care setting which provides services through a structured program of residential treatment. *Id.* A "Level IV," which includes PRTFs, is reserved for juveniles whose "treatment needs . . . are so extreme that . . . activities can only be undertaken in a therapeutic context" involving on-site qualified professionals including psychologists and physicians. *Id.* Criteria for this level can include: "frequent

physical aggression including severe property damage or moderate to severe aggression toward self or others;" "severe and pervasive inability to accept age appropriate direction and supervision from caretakers or family members couple with involvement in potentially life-threatening, high-risk behaviors"; "significant deficits in ability to manage personal health, welfare, and safety without intense support and supervision;" or inappropriate sexual behavior that "puts the community at risk for victimization unless specifically treated for sexual aggression problems." *Id.* A minor cannot be assessed at Level IV if their needs can be met at any lower level. *Id.*

In this case, Plaintiffs do not dispute that the State's treatment professionals assessed Plaintiffs Timothy B. and Isabella A. at a Level IV level of need and concluded that placement in a PRTF is medically necessary. Further, Plaintiffs acknowledge that Flora B. and Steph C. have been moved from their PRTFs to Level III placements in accordance with the recommendations of treatment professionals; Plaintiffs acknowledge that the DSS has initiated a process to place Steph C. with his biological aunt after the completion of his Level III treatment; and Plaintiffs do not allege that the placements of Flora B. or Steph C. in PRTFs and Level III treatment programs were inconsistent with the recommendations of the State's treatment professionals. Accordingly, Plaintiffs have not alleged facts sufficient to support a violation of the ADA with respect to Timothy B., Isabella A., Flora B., or Steph C.

Plaintiffs' Complaint suggests that DHHS has violated the ADA because London R. alleges that she is receiving treatment at a PRTF while awaiting a community placement in accordance with the recommendations of treatment professionals. However, in the

Olmstead case, the Court acknowledged that there is no ADA violation when the State has a "waiting list that move[s] at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated." 527 U.S. at 605-606; *see also, Bryson v. Stephen*, 2006 WL 2805238, at *6 (D.N.H. Sept. 29, 2006) (finding that an average wait of 12 months is not an unreasonable period). Finding a suitable community placement for a child with severe behavioral health needs is delicate and complex. Many families who are willing to be foster parents are not interested in fostering teenagers, much less ones who have a history of psychiatric illness and who have ongoing behavioral health needs. Neither DHHS nor the county DSS can force families to foster. Under these circumstances, "it is reasonable for the State to ask someone to wait until a community placement is available." *Olmstead*, 527 U.S. at 606 (quoting State's attorney).

For the foregoing reasons, Plaintiffs' allegations do not support a claim of discrimination under the ADA, as interpreted by the Supreme Court in *Olmstead*, or Section 504.

B. Plaintiffs Do Not Allege that the Parent, Guardian, or Custodian Has Chosen Community-Based Treatment.

In addition to the recommendations of the State's treating professionals, the *Olmstead* decision turned on the choice of the adult plaintiffs to receive services in the community. 527 U.S. at 602.

The analysis is necessarily different when a decision must be made on behalf of a minor child. Under North Carolina law, decisions as to a child's medical care are generally reserved to the parent or guardian, unless the child is emancipated. G.S. § 7B-3400. When

DSS has custody of a child, unless the court orders otherwise, it has authority to arrange for, provide, or consent to the child's routine medical or dental treatment or care, as well as emergency medical, surgical, psychiatric, psychological, or mental health care or treatment. G.S. §§ 7B-505.1(a); 7B-903.1(c). For all other medical care or treatment, DSS still must obtain consent from the child's parent, guardian, or custodian, or it must obtain a court order authorizing the director to provide consent.

The type of treatment and care that necessitates parental consent (or a court order) authorizing the county DSS to consent includes prescriptions for psychotropic medications; mental health evaluations; and psychiatric, psychological, or mental health care or treatment that requires informed consent. § 7B-505.1(c). In the absence of parental consent, there must be a hearing, and the court must find by "clear and convincing" evidence that the care, treatment, or evaluation that DSS is requesting is in the child's best interests. G.S. §§ 7B-505.1(c); 7B-903.1(e). In these hearings, the child's interests are represented (as they are throughout an A/N/D proceeding) by a Guardian Ad Litem "team" consisting of a guardian ad litem program staff member, an attorney advocate, and a guardian ad litem volunteer. *See* G.S. §§ 7B-601(a), 7B-1108, 7B-1200.

In short, depending on the circumstances of the individual case, the choice as to the mental health services to be provided, and the preferred setting for those services, is exercised on behalf of the child by their natural parents or guardian pursuant to G.S. § 7B-505.1(c); by DSS under its authority to consent to emergency psychiatric care pursuant to G.S. § 7B-505.1(b); or pursuant to a court order in which the court has found – in a proceeding in which the child is represented by a GAL team – that DSS may consent

because there is "clear and convincing evidence that the care, treatment, or evaluation requested is in the juvenile's best interest." *Id.* Absent a choice of community-based treatment by the parent, guardian or county DSS – which Plaintiffs do not allege in their Complaint – they fail to state a claim for a violation of the ADA, as interpreted by *Olmstead*.

In addition, North Carolina requires judicial review of all voluntary placements of any minor (not just a foster child) in a 24-hour mental health or substance abuse facility, including PRTFs. G.S. §§ 122C-224; 122C-224.1(b). This is a separate proceeding from the A/N/D proceeding and takes place in the county where the facility is located. The judicial review process begins within 24 hours of when the child is admitted to the PRTF, when the facility must notify the clerk of court in its county that the minor has been admitted. G.S. § 122C-224(c). Within 48 hours of receiving the notice from the facility, the clerk must appoint an attorney for the child. G.S. § 122C-224.1(a). This is a different attorney than the attorney advocate who serves as part of the GAL team in the A/N/D proceeding. The attorney must meet with the child within 10 days of the appointment and at least 48 hours before the hearing. G.S. § 122C-224.2(a). The minor has the right to be present at the hearing, to appear before the judge to provide testimony, and to respond to the judge's questions unless the judge makes a separate finding that the minor does not wish to appear. G.S. § 122C-224.2(b).

The court can concur in the child's admission and authorize a treatment period for up to 90 days only if the court finds by "clear, cogent, and convincing" evidence that the minor is mentally ill or a substance abuser; is in need of further treatment at the 24-hour

facility; and that less restrictive measures will be insufficient. G.S. § 122C-224.3(f), (g). Otherwise, the minor must be discharged. *Id.* The minor has a right to appeal. If the minor has not been discharged within 90 days, another hearing must be held to authorize a continued stay before the expiration of the treatment period. § 122C-224.4(b), (c). At subsequent judicial reviews, the court may order the child's release or continued admission for up to 180 days. § 122C-224.4(b).

In short, with respect to Named Plaintiffs and the putative class, there are multiple checkpoints to ensure that the minor is receiving services appropriate to their level of need. A minor can be placed in a PRTF only if the State's treatment professionals – on whom the State can reasonably rely, under *Olmstead* – have concluded that inpatient care is appropriate and necessary; the adults responsible for making a decision as to such care have agreed that it is the appropriate choice in the minor's best interest; and a state district court has found by "clear, cogent, and convincing" evidence that less restrictive measures will be insufficient. G.S. § 122C-224.3(f), (g). When a minor is ready to be stepped down to a less intensive level of care in the judgement of the State's treatment professionals, that move is made when an appropriate placement is identified and available. In light of the above, Plaintiffs' claims that they have been "unjustifiably" institutionalized should be dismissed as a matter of law.

II. Any Plaintiff Whose Admission to a PRTF Has Been the Subject of a Section 122C Proceeding in State Court Is Precluded from Arguing that Their Placement in PRTFs is "Unnecessary" or "Unjustified."

The related doctrines of res judicata and collateral estoppel, or claim preclusion and issue preclusion, embody the concept that a "right, question or fact distinctly put in

issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . ." *Montana v. U.S.*, 440 U.S. 147, 153 (1979) (citing *S. Pac. R.R. v. U.S.*, 168 U.S. 1, 48-49 (1897)). Although claim preclusion is an affirmative defense, a court may consider it on a motion to dismiss, and may take judicial notice of facts from a prior judicial proceeding, when the *res judicata* defense raises no disputed issue of fact. *See Andrews v. Daw*, 201 F.3d 521, 526 n.1 (4th Cir. 2000); *Richmond, Fredericksburg & Potomac R. Co. v. Forst,* 4 F.3d 244, 250 (4th Cir. 1993).

Here, state law requires that every child who is admitted to a PRTF have a hearing in state court in the district in which the PRTF is located to determine if there is "clear, cogent, and convincing evidence" that the minor is mentally ill or a substance abuser, in need of further treatment at a 24-hour facility, and that less restrictive measures will be insufficient. Defendant is submitting under seal the relevant orders determining inpatient treatment to be necessary for Named Plaintiffs Flora P., Steph C., and Isabella A.[1] *See* Exs. 1-3 (filed under seal). Plaintiffs should not be able to re-litigate, in federal court, the issue of whether their admission and continued treatment at a PRTF is "unnecessary" or "unjustifiable" such that it violates the ADA.

A federal district court must respect valid state court judgments under the federal full faith and credit statute, 28 U.S.C. § 1738, which provides that state judicial

[1] Because these orders are not part of the DHHS case file, but are instead maintained by the PRTF, Defendant is still in the process of locating the orders for Plaintiff Timothy B., and for Plaintiff London R., who was added as a Plaintiff in the Amended Complaint filed on March 6, 2023.

proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." *In re Genesys Data Techs., Inc.*, 204 F.3d 124, 127 (4th Cir. 2000); *see also Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373, 380 (1985). In North Carolina, "the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Whitacre P'ship v. Biosignia, Inc.*, 591 S.E.2d 870 (N.C. 2004); *Thomas M. McInnis & Assocs., Inc. v. Hall*, 349 S.E.2d 552, 560 (N.C. 1986).

Here, every child subject to a 122C proceeding has a "full and fair opportunity" to litigate whether their admission to PRTF was necessary or whether a less restrictive option was sufficient. The minor has appointed counsel in that proceeding, the right to be present at the hearing, the right to appear before the judge to provide testimony, and the right to appeal. G.S. §§ 122C-224.1(a)-.2(b). That process is renewed within 90 days of the first admission, and at least every 180 days thereafter. § 122C-224.4(b), (c). The state court decision on whether institutionalization is necessary should be given preclusive effect in this federal court action.

III. The Plaintiffs Do Not Have Standing to Bring These Claims.

Plaintiffs bear the burden of pleading and proving that they have standing to pursue the claims brought. *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 320 (4th Cir. 2002). In this case, Plaintiffs cannot meet that burden with respect to either the individual Named Plaintiffs or the organizational Plaintiffs.

A. Plaintiffs Cannot Show that the Relief Sought is Likely to Redress the Alleged Injuries of the Individual Named Plaintiffs.

In a putative class action, the individual named plaintiffs must establish standing to pursue their own individual claims, independently of the standing of any putative class.[2] That is, plaintiffs must prove each of the three elements of standing for each of the individual named plaintiffs: (1) an injury-in-fact that is both "concrete and particularized" and "actual or imminent"; (2) a "causal connection between the injury and the conduct complained of"; and (3) a likelihood that the injury "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife, et al.,* 504 U.S. 555, 560–61 (1992) (internal quotations omitted); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc*., 528 U.S. 167, 180–81 (2000).

With respect to the second and third elements of standing, causation and redressability, plaintiffs must show that the challenged actions of the defendant caused each individual named plaintiff's injury and that each individual named plaintiff's injury is *likely* to be redressed by the relief sought by the plaintiffs. *Friends of the Earth, Inc., et al. v. Gaston Copper Recycling Corp.*, 204 F. 3d 149, 154 (4th Cir. 2000) (citing *Lujan*, 504 at 561); *see also ASARCO, Inc. v. Kadish*, 490 U.S. 605, 615-616 (1989) ("*[E]ach* party seeking to invoke the authority of the federal courts must "allege[] injury that is fairly

[2] *See, e.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1001 n. 13 (1982) (explaining that class representatives must allege and show that they personally have standing to bring the claims, not just that some members of the putative class have standing); *Accord v. Anderson Co.*, No. 21-00077, 2021 WL 6135691, at *3 (M.D. Tenn. Dec. 28, 2021) (unpublished) ("The necessity of Plaintiff alleging *his own* standing is not somehow diminished by his bringing this action on behalf of a putative class." (emphasis in original)).

traceable to the challenged conduct and likely to be redressed by the requested relief" (emphasis in original)).

In this case, Plaintiffs cannot meet their burden of proving that the individual Named Plaintiffs' alleged injuries were caused by DHHS or are likely to be redressed by the relief the Plaintiffs seek. *Cf. Ashley W. v. Holcomb*, 34 F.4th 588, 592-94 (7th Cir. 2022) (in putative class action relating to Indiana child welfare system, explaining that the standing "question" is whether the issues raised in the Complaint affect the individual named Plaintiffs "in a way that a court could redress," and holding that the individual named plaintiffs lack standing to pursue classwide relief that would not affect them).

In the Complaint, Plaintiffs allege that the five Named Plaintiffs have been harmed by being placed in PRTFs, instead of being placed with foster families and receiving community-based mental health treatment. Am. Compl., ¶¶ 41-128. However, the individual Named Plaintiffs' placements and services are determined by the county DSSs and the LME/MCOs; the Complaint does not allege that the individual Named Plaintiffs' placements were the result of any action by DHHS, *see* Am. Compl., ¶¶ 41-128; and the Complaint does not seek any injunctive relief specific to any of the individual Named Plaintiffs, Am. Compl., at 76-77.[3] For example, the Complaint does not allege that DHHS made the decision to place the individual Named Plaintiffs in PRTFs, and the Complaint

[3] The Complaint does allege that Timothy B. and London R. were placed in a PRTF by "agents of DHHS," which is presumably a reference to the county DSS. Am. Compl., ¶ 46, 116. However, the Complaint does not dispute that a state court approved that placement pursuant to the procedures described in Section II, *supra*, and the Complaint does not allege that DHHS directed any of Timothy B.'s or London R.'s placements or even that DHHS could direct those specific placements if it disagreed with the county DSS's decision.

does not seek an injunction requiring DHHS to place the Named Plaintiffs with foster families or provide the Named Plaintiffs with certain community-based services. Nor could Plaintiffs seek such relief, because placement decisions are the responsibility of the county DSS (not DHHS), and a state court has already concluded that each Named Plaintiff's PRTF placement is necessary and that a less restrictive placement for each Named Plaintiff would be insufficient, G.S. § 122C-224.3(f), (g). That is, the individual Named Plaintiffs' placements and services were not caused by decisions or actions of DHHS, and therefore the alleged injury to the Named Plaintiffs cannot be redressed by an injunction against DHHS, as highlighted by the fact that Plaintiffs' Complaint does not even seek any relief specific to the individual Named Plaintiffs. *See Frank Krasner Enter. Ltd. V. Montgomery Cnty, Md.*, 401 F.3d 230, 235 (4th Cir. 2005) (explaining that a plaintiff does not have standing when "the actions of an independent third party, who was not a party to the lawsuit, st[and] between the plaintiff and the challenged actions").

Nor would the systemic injunctive relief sought by Plaintiffs likely redress the alleged injuries of the Named Plaintiffs. Plaintiffs seek an injunction to require DHHS to: (1) make "available a sufficient supply of integrated, community-based placements and services to meet the needs of children with mental impairments in foster care;" (2) "Implement and sustain an effective system for transitioning children with mental impairments in foster care out of PRTFs into integrated, community-based placements and services;" (3) "Make reasonable accommodations or modifications, as necessary, to meet the needs of North Carolina's children with mental impairments in foster care in integrated, community-based placements and services." Am. Compl., ¶¶ 76-77. However, it is purely

speculative whether such broad and vague systemic mandates, even if compliant with Federal Rule of Civil Procedure 65(d), would redress the alleged injuries of Timothy B., Flora P., Isabella A., Steph C., or London R. For example, even if the State had "a sufficient supply of integrated, community-based placements and services" and "an effective system for transitioning children with mental impairments in foster care out of PRTFs," that would *not* necessarily mean that the applicable county DSS or state court would conclude that any of the Named Plaintiffs should be placed with a foster family or receive community-based treatment instead of receiving services in a PRTF.[4]

B. The Organizational Plaintiffs Lack Standing.

Two of Plaintiffs' four sets of counsel – Disability Rights North Carolina ("DRNC") and the North Carolina State Conference of the NAACP – also seek to appear as Plaintiffs in this action. Neither asserts a direct injury, such as a diversion of organizational resources. *Cf. Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982). Rather, both assert standing based on harm to their members. Under the Supreme Court's decision in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), an organizational plaintiff can assert representative standing only if: (1) its members would otherwise have

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[4] *Cf. See Frank Krasner Enter. Ltd. V. Montgomery Cnty, Md.*, 401 F.3d 230, 236 (4th Cir. 2005) (where county law made it prohibitively costly for third party-landlord to rent space to the plaintiff-lessee for a gun show, holding that plaintiff-lessee could not show redressability because an order enjoining the law challenged would not actually force the third-party lessor to rent the space to the plaintiff-lessee); *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 756 (4th Cir. 2013) ("Because the harm that forms the basis for [Plaintiff's] counts arises from [Plaintiff's] inability to access school or church property, and because the statute allows for third parties to grant her permission to enter these properties, [Plaintiff] cannot demonstrate traceability or redressability.").

standing to sue as individuals; (2) the interests at stake are germane to the group's purpose; and (3) neither the claim made nor the relief requested requires the participation of individual members in the suit. *Hunt,* 432 U.S. at 343; *Stasko*, 282 F.3d at 320.

Here, the organizational Plaintiffs fail both the first and third prong of the *Hunt* test. They fail the first prong because, for the reasons set forth above, in the absence of a showing of causation and redressability, their members do not have standing to sue as individuals. *Hunt*, 432 U.S. at 343; *Maryland Highways Contractors Ass'n, Inc. v. State of Md*., 933 F.2d 1246, 1251-52 (4th Cir. 1991); *Lane v. Holder*, 703 F.3d 668, n. 6 (4th Cir. 2012).

In addition, the third prong of *Hunt* is not met because "the nature of the claim and of the relief sought" is inherently individualized. *See Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) (an "organization lacks standing to assert claims of injunctive relief on behalf of its [constituents] where 'the fact and extent' of the injury that gives rise to the claims for injunctive relief 'would require individualized proof'" (quoting *Warth v. Seldin*, 422 U.S. 490, 515-16 (1995)). This is not a case where Plaintiffs are challenging a "methodology" for determining a level of service "commonly applied to all members" such that "the participation of individual members is not necessary." *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 442 (6th Cir. 2020). Rather, as the First Circuit explained in rejecting the standing of an advocacy association pursuing an *Olmstead* claim, "adjudication of the claims here would turn on facts specific to each student, including unique features of each student's unique disability, needs, services, and placement."

Parent/Professional Advocacy League v. City of Springfield, 934 F.3d 13, 35 (1st Cir. 2019).

DRNC appears to claim that, regardless of the *Hunt* factors, it automatically has standing because it is a protection-and advocacy ("P&A") system authorized by statute "to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of individuals" with disabilities, citing 42 U.S.C. § 15043(a)(2)(A)(i). *See* Am. Compl., ¶¶ 25-31. But a P&A system is a federally-funded organization created by statute, not a membership organization. *See id.* A non-membership organization may sue on behalf of their constituents only if they "function effectively as a membership organization." *Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc.*, 675 F.3d 149, 157 (2d Cir. 2012) (quotations and alterations omitted). Two Courts of Appeals have concluded that P&A systems such as DRNC do not have "sufficient indicia of membership" to qualify for associational standing. *See Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 810 (8th Cir. 2007); *Ass'n for Retarded Citizens of Dallas v. Dallas Cty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994).[5]

In any event, DRNC's status as a P&A system does not override the normal rule that an association does not have standing if the claim asserted requires the participation of individual members. *See, e.g., Parent/Professional Advocacy League, supra* (dismissing

[5] While other Courts of Appeals have reached a contrary conclusion, *see Oregon Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1112 (9th Cir. 2003); *Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999), the issue remains undecided in the Fourth Circuit.

P&A system as plaintiff); *see also Disability Rts. of W. Virginia v. Crouch*, No. 2:17-CV-01910, 2017 WL 6045448, at *5 (S.D. W. Va. Dec. 6, 2017) (dismissing P&A system as a plaintiff where the relief requested would require individualized proof from affected Medicaid recipients).

CONCLUSION

For all of the reasons set forth above, the Complaint should be dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6) or for lack of standing under Rule 12(b)(1).

Respectfully submitted,

March 20, 2023

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies pursuant to Local Rule 7.3 and the Motion for an Extension of the Word Limit, Doc. No. 39, that the foregoing memorandum of law contains less than 7,650 words. Counsel relies upon the word count feature of word processing software in making this certification.

March 20, 2023

/s/ Caroline M. Brown
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CERTIFICATE OF SERVICE

I, Caroline Brown, hereby certify that I caused a true and correct copy of the foregoing to be filed through the ECF system and served electronically on the registered participants as identified on the Notice of Electronic Filing.

March 20, 2023

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