STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

DAVID MEEHAN

v.

STATE OF NEW HAMPSHIRE,
DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.

217-2020-CV-00026
and all consolidated YDC and YDSU CASES

STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO STATE DEFENDANTS' FIRST AND SECOND MOTIONS TO DISMISS

In accordance with this Court's February 28, 2023, *Order*, the State Defendants[1] hereby submit this Response to *Plaintiffs' Supplemental Memorandum in Opposition to State Defendants' First And Second Motions to Dismiss* (filed Feb. 10, 2023) (the "*1st Supp. Memorandum*") to address the three main issues raised in the *1st Supp. Memorandum*. First, Plaintiffs' discussion of the New Hampshire Supreme Court's recent decision in *Petition of N.H. Div. for Children, Youth & Families*, No. 2021-0563, __ N.H. __, 2023 WL 1806722 (Feb. 8, 2023) [hereinafter *Petition of DCYF*] vastly overstates the decision's holding and scope. Second, Plaintiffs' fiduciary duty argument ignores the most significant point: whether characterized as a fiduciary or special-relationship duty, the contours of the duty are the same and Plaintiffs cannot recover on both. And finally, Plaintiffs' newly minted characterization of their deprivation-of-education allegations is not supported by a fair reading of the Master Complaint. In Part IV, State Defendants respond briefly to *Plaintiffs' Second Supplemental Memorandum in Opposition*

[1] In legal reality there is only one proper State Defendant: DHHS.

to State Defendants' First and Second Motions to Dismiss (filed Mar. 20, 2023) (the "*2d Supp. Memorandum*").

I. PLAINTIFFS' READING OF *PETITION OF DCYF* IS OVERBROAD.

Plaintiffs' discussion of *Petition of DCYF* claims too much. *See 1st Supp. Mem.* 3-4. *Petition of DCYF* does not concern the sexual assault limitations provision (RSA 508:4-g) and has no bearing on Plaintiffs' argument regarding Part I, Article 8 of the New Hampshire Constitution. Yet Plaintiffs would have the Court believe that the decision's "broad[] implications" strike at the very heart of sovereign immunity, essentially rendering the doctrine unconstitutional in New Hampshire and requiring the State to "justify each assertion of sovereign immunity with proof that satisfies the intermediate scrutiny test." *1st Supp. Mem.* 3-4.

But *Petition of DCYF* does no such thing. In fact, the Supreme Court confirmed its longstanding position that "[t]he doctrine of sovereign immunity is deeply entrenched in this jurisdiction" with a "long history" in this State's jurisprudence and recognized that "it is the legislature's prerogative to adequately address sovereign immunity in our laws." *Petition of DCYF* at *2. The legislature has already done so with regard to RSA 508:4-g by making a distinction, for example, between municipalities and their agencies, to whom the expanded limitations period applies, and the State and its agencies (such as State Defendants), to whom this limitations period does *not* apply. *See State Defendants' Mem. in Support of Second Master Mot. to Dismiss* (filed Oct. 20, 2022) (hereinafter "*State Defendants' 2d Mem.*") at Part I.C.2. Furthermore, to the extent *Petition of DCYF*'s conclusion regarding the minor-limitations provision was motivated by a concern that it is "unfair to foreclose an injured person's cause of action before he has had a reasonable chance to discover its existence," at *3 (quotation marks omitted), that concern cannot support incorporation of RSA 508:4-g in these particular

consolidated cases. Plaintiffs *do not* allege they did not *know* they had been sexually abused. Instead, they allege only that they did not think they could *prove* it. *State Defendants' 2d Mem.* 18-19; *see generally id.* at Part I.B.[2]

In short, *Petition of DCYF* does allow Plaintiffs to invoke the minor limitations provision, RSA 508:8, in these consolidated cases. But it does no more. State Defendants submit that even applying this provision, many Plaintiffs' claims are likely barred by statutes of limitations. Plaintiffs are incorrect to assert that *Petition of DCYF* applies beyond its facts to provide this Court a basis to usurp the legislature's role in altering the doctrine of sovereign immunity.

II. THE CONTOURS OF PLAINTIFFS' FIDUCIARY AND SPECIAL RELATIONSHIP DUTY COUNTS (I AND V) ARE THE SAME AND PLAINTIFFS CANNOT RECOVER ON BOTH.

Plaintiffs appear to have misconstrued State Defendants' argument regarding Counts I and V (fiduciary and special-relationship duties, respectively) in their *1st Supp. Memorandum*. State Defendants' position at the January 27, 2023, hearing is not inconsistent with their briefing: State Defendants do not contest that the cause of action for breach of fiduciary duty or breach of special-relationship duty *may* exist as to certain Plaintiffs (in contrast to other alleged causes of action that do not exist under New Hampshire law). But one or the other of these counts must be dismissed because, among other reasons, the counts are duplicative—the contours of the two alleged duties are the same. *See, e.g.*, *Tveter v. Derry Coop. Sch. Dist. SAU #10*, 2018 WL 3520827, at *9 (D.N.H. July 20, 2018), *summarily aff'd*, No. 21-1041 (1st Cir. Mar. 3, 2023).

[2] Plaintiffs make a passing reference to their previously asserted Part I, Article 8 argument. *1st Supp. Mem.* 4. *Petition of DCYF* does not even remotely concern this subject. In any event, the 2018 amendment to Part I, Article 8 regarding taxpayer standing does not address, and has no bearing on, sovereign immunity. *See State Defendants' Reply to Plaintiffs' Objection to Second Master Mot. to Dismiss* (filed Dec. 22, 2022) ("*State Defendants' 2d Reply*"), at Part I.A.

Plaintiffs rely heavily on *Schneider v. Plymouth State College*, 144 N.H. 458 (1999). *See 1st Supp. Mem.* 5-6. However, *Schneider* expressly disclaimed basing the fiduciary duty on the *in loco parentis* doctrine, instead grounding the fiduciary duty on the "unique relationship" between a college and college students that is "rarely seen outside the academic community." 144 N.H. at 463. Indeed, in *Marquay v. Eno*, 139 N.H. 708 (1995), the New Hampshire Supreme Court imposed the special-relationship duty (not a fiduciary duty) upon school employees "who have supervisory responsibility over students and who thus have stepped into the *role of parental proxy*" since "[s]chool attendance impairs both the ability of students to protect themselves and the ability of their parents to protect them." *Id.* at 717-18 (emphasis added).

State Defendants do not dispute that, under New Hampshire law, an appointed guardian has a fiduciary relationship with a ward. Contrary to Plaintiffs' assertion that it is "no huge leap" to apply those principles here, *1st Supp. Mem.* 7, all Plaintiffs' guardianship cases concern appointed guardians, who clearly do have a fiduciary duty to their respective wards under New Hampshire law.[3] Plaintiffs point to *[Redacted] v. Spaulding Youth Center, et al.*, No. 216-2015-

[3] For this reason, it is far from clear that Plaintiffs' cited guardian-ward cases (*see 1st Supp. Mem.* 6-7) provide guidance applicable to Plaintiffs here.

The foreign cases Plaintiffs cite concerning fiduciary duty (*see 1st Supp. Mem.* 9-10) are distinguishable not merely because they are not New Hampshire cases, nor interpreting New Hampshire law, but also on their facts. *Dapo v. State*, 454 P.3d 171 (Alaska 2019), concerned the construction of a state statute of repose. *Kane v. Chester Cnty. Dep't of Child., Youth & Fams.*, 10 F. Supp. 3d 671 (E.D. Pa. 2014), concerned foster children. *In re Leah S.*, 96 Conn. App. 1 (2006), is an appeal of a trial court's contempt finding, not a case concerning breach of fiduciary duty, and the quoted language is not a holding and did not cite any authority for its conclusion. As to *Doe v. Harbor Schools, Inc.*, 446 Mass. 245 (2006), contrary to Plaintiffs' assertion that this case is "cited in State Defendants' briefing," *1st Supp. Mem.* 10, State Defendants have not cited this case in any of their briefing. *Harbor Schools* is inapposite because, as Plaintiffs recognize, no government entity was a party. That a Massachusetts court found a fiduciary relationship between a counselor (as a *private* individual) and a juvenile has no bearing on whether the *State* has a fiduciary relationship to these Plaintiffs.

In short, none of these cases is persuasive, much less binding, here.

CV-00520 (N.H. Super Ct. Mar. 31, 2016) (attached to Plaintiffs' *1st Supp. Memorandum* as Ex. B) to argue that these principles should apply whenever the State takes custody and control of a child. *1st Supp. Mem.* 7. To the extent that the court in *Spaulding Youth Center* found a fiduciary duty based on *Schneider* despite acknowledging that "the New Hampshire Supreme Court and the U.S. District Court for the District of New Hampshire have narrowly construed *Schneider*," *1st Supp. Mem.* Ex. B at 18 (collecting cases), State Defendants suggest that *Spaulding Youth Center* is not persuasive. *See, e.g.*, *Franchi v. New Hampton School*, 656 F. Supp. 2d 252, 262 (D.N.H. 2009) ("This court predicts that the New Hampshire Supreme Court would not expand the obligations imposed by *Schneider* beyond its context . . . .").

Plaintiffs' discussion of dicta in *Willott v. N.H. Dep't of Health & Human Servs.*, No. 216-2018-CV-00605 (N.H. Super. Ct. Apr. 18, 2019) is also beside the point. *See 1st Supp. Mem.* 8. As Plaintiffs accurately report, the court in *Willott* found that there was no fiduciary duty when plaintiff was never in the State's custody. Plaintiffs' argument that *Willott* somehow provides a basis for judicial estoppel here, *see 1st Supp. Mem.* 8 n.4, is wrong. First, the State did not change position between the briefing and hearing on the Master Motions to Dismiss the Master Complaint. And second, any argument in *Willott* that the State did not have a fiduciary duty to a person not in its custody is simply not equivalent to an admission that the State does have a fiduciary duty to a person in its custody. The State's argument in *Willott* therefore does not trigger estoppel vis-à-vis an argument that the State does not owe fiduciary duties to certain persons even if in State custody because these positions are not clearly inconsistent—in fact, they are perfectly consistent.

Plaintiffs' *1st Supp. Memorandum* largely ignores the crux of this Court's observation at the hearing on the Master Motions to Dismiss: that in the specific context of incarcerated

juveniles, it seems that the State's interests cannot *solely* be the best interest of the juvenile. This reasoning is in accord with New Hampshire law on other incarcerated individuals, which imposes a special relationship duty (not a fiduciary duty) between "jailers and their prisoners" who "[b]y virtue of their incarceration . . . are unable to procure for themselves the essentials of life . . . and are dependent upon their jailers for *all forms of assistance*." *Murdock v. City of Keene*, 137 N.H. 70, 72-73 (1993) (emphasis added). *See also, e.g.*, *Sperry v. Corizon Health, Inc.*, 2020 WL 905745, at *3 (D. Kan. Feb. 25, 2020) ("Kansas courts have not recognized an action for breach of fiduciary duty in the prison context, and courts in other states have found no fiduciary duty between prison officials and prisoners.") (collecting cases).[4] Plaintiffs' response is just a series of ipse-dixit statements culminating in the unsupported assertion that "[I]f the state owes a 'special relationship' duty to an adult inmate . . . then surely the state must hold an even *higher* duty to a child . . . ." *1st Supp. Mem.* 16.

Part II.B of Plaintiffs' *1st Supp. Memorandum* is just a re-hash of Plaintiffs' prior briefing attempting to ground a fiduciary duty in policy-and-purpose provisions of various child welfare statutes. As State Defendants have previously discussed, these statutes do not provide a basis for a fiduciary duty here. For brevity's sake, State Defendants will not repeat that briefing here. *See State Defendants' Mem. in Support of First Master Mot. to Dismiss* (filed Sept. 29, 2022) ("*State Defendants' 1st Mem.*") at Part I.A. Succinctly, as the Superior Court put it in *Willott* (which

[4] State Defendants recognize that Plaintiffs have cited one Northern District of Illinois case, *T.S. v. Twentieth Century Fox Television*, 548 F. Supp. 3d 749, 779-80 (N.D. Ill. 2021), that denied defendants' motion for summary judgment and distinguished this line of reasoning solely on the ground that juvenile prisoners are different. In a later decision denying in part defendants' request for a certificate of appealability as to the interlocutory issue of the existence of fiduciary duty in these circumstances, the court noted that the question was "a matter of first impression" but denied a request to certify an interlocutory appeal because both sides had indicated they would appeal a decision on the merits, so an interlocutory appeal was not appropriate. *T.S. v. Cnty. of Cook*, 568 F. Supp. 3d 940, 945-46 (N.D. Ill. 2021). Given the preliminary posture of *T.S.*, State Defendants suggest it is not persuasive here.

Plaintiffs themselves cite as discussed above) regarding RSA 169-C:

> RSA 169-C does not give rise to a private cause of action, *Marquay v. Eno*, 139 N.H. 708, 715 (1995), nor does it articulate any reason to characterize the duties set forth therein as fiduciary in nature. Likewise, [a statute's] *having a primary goal of protecting children in its policies does not speak to the relationship actually formed*.

Willott at 3-4 (citation omitted; emphasis added).

Plaintiffs also attempt to bolster their fiduciary duty argument by asserting that "the 'best interests of the child' is often the guidepost for important decisions that must be made regarding a child's disposition" and noting that *In re Guardianship of D.E.*, 173 N.H. 550 (2020) also used the phrase "best interests standard." *1st Supp. Mem.* 13. Thus, they continue, because *Guardianship of D.E.* noted that a guardian stands in a fiduciary relationship to his ward, the phrase "best interests" must be invoking a fiduciary relationship wherever it appears. *Id.* But *Guardianship of D.E.* was concerned only with the narrow question whether a guardian making end-of-life determinations for a ward pursuant to RSA 464-A:25, I(d) had to use a "substituted judgment" standard (to try to carry out the ward's subjective wishes) or a "best interests" standard (to make such decisions on the ward's behalf in an objective way). The New Hampshire Supreme Court's determination that an appointed guardian, who is a fiduciary, had to use an objective, "best interests" standard does not mean that every instance of the phrase "best interests" in every other context necessarily implies a fiduciary obligation.

In the final analysis, though, State Defendants submit that the distinction between fiduciary and special-relationship duty in these particular consolidated cases is not significant. Characterizing the duty as "fiduciary" instead of "special relationship" may speak to the *source* of the duty (common law rather than Restatement (Second) of Torts § 314A), but it does not change the *contours* of the duty.

> [A]s a fiduciary, a guardian has the duty "to act primarily for the ward's benefit and in good faith." [*In re Guardianship of L.N.*, 173 N.H. 77, 90 (2020)]. In this context, "good faith" means that the guardian's decision is not "affected by a material conflict of interest" and that the guardian has "consider[ed] the available information relevant to the ward's best interests." *Id.* at 90.

In re Guardianship of D.E., 173 N.H. at 561 (cleaned up). As State Defendants have previously briefed, this duty is clearly not some form of a strict-liability-type duty of insurance, contrary to Plaintiffs' repeated attempts to argue to that effect. *See, e.g.*, *Plaintiffs' Sur-Reply to State Defendants' Reply in Response to Plaintiffs' Objection to State Defendants' First Motion to Dismiss the Master Complaint* (filed Nov. 17, 2022) ("*Plaintiffs' 1st Sur-Reply*") 4 ("A fiduciary has an obligation . . . to ensure that the best interests of the beneficiary are upheld."). The special relationship duty, which the *Marquay* court grounded in Restatement (Second) of Torts § 314A, is not meaningfully different. This provision does not impose "an overarching 'duty to . . . supervise' in all instances and against all harms," *Gauthier v. Manchester Sch. Dist.*, 168 N.H. 143, 148 (2015), but "only . . . to exercise reasonable care under the circumstances" and does not create liability if a defendant "neither knows nor should know of the unreasonable risk" of harm. Restatement (Second) of Torts § 314A, cmt. e. Plaintiffs' fiduciary and special relationship claims ultimately describe the same duty and are therefore duplicative. Plaintiffs may recover under one or the other of Counts I and V, but not both. *See, e.g.*, *Transmedia Restaurant Co. v. Devereaux*, 149 N.H. 454, 461-62 (2003) ("Under New Hampshire law, an injured party cannot claim multiple recoveries for the same loss even though different theories of liability are alleged in the complaint. . . . Where, as here, the [Plaintiffs'] claims arise out of the same core of operative facts, they are entitled to a single recovery only.") (quotation omitted).

III. PLAINTIFFS' NEW ARGUMENT REGARDING DEPRIVATION OF ADEQUATE EDUCATION IS NOT WHAT THE MASTER COMPLAINT ALLEGES.

The Court should disregard Plaintiffs' attempt to salvage their non-cognizable claims regarding the alleged deprivation of the right to an adequate education. The Master Complaint alleges that, as a "form[] of abuse," State Defendants deprived Plaintiffs of "constitutionally and statutorily guaranteed rights, including the right to an adequate education." Master Complaint ("MC") ¶ 31.f. The Master Complaint does not contemplate or allege educational deprivation as an example of *physical injury* to Plaintiffs. For example, with regard to the breach-of-fiduciary-duty count (Count I), the Master Complaint alleges that:

- State Defendants "bore a constitutional and statutory duty under New Hampshire law to provide Plaintiff, a school-aged minor, with a constitutionally adequate education." MC ¶ 57.
- "[A]s a consequence of State Defendants' specific acts of child abuse alleged in Plaintiff's Short Form Complaint, Plaintiff was deprived of a constitutionally adequate education. . . . Plaintiff received little or no educational instruction or schooling whatsoever. . . . As a consequence of the abuse and confinement, Plaintiff was unable to attend classes and was unable to benefit from what little instruction was made available, resulting in a constitutionally inadequate education." MC ¶ 60.
- "The deprivation of Plaintiff's right to an equal and constitutionally adequate education amounts to a further breach of State Defendants' fiduciary duty to Plaintiff." MC ¶ 62.

But the law is clear that there is no individual private right of action for tort damages for alleged deprivation of the right to an adequate education. *State Defendants' 1st Mem.* 12-13. Plaintiffs' prior briefing on the Master Motions to Dismiss confirms that the alleged deprivation of an adequate education is "not an independent cause of action entitling them to recovery." *Plaintiffs' Objection to State Defendants' First Motion to Dismiss the Master Complaint* (filed Oct. 20, 2022) ("*Plaintiffs' 1st Objection*") 14. Instead, Plaintiffs' theory is that the alleged "violation of [such] rights serves as *evidence* of the State Defendants' breach." *Id.* 8. *But see State Defendants' Reply to Plaintiffs Objection to State Defendants' First Master Motion to Dismiss the Master Complaint* (filed Nov. 3, 2022) ("*State Defendants' 1st Reply*") 4-5 (explaining the error of this theory).

In their present *1st Supp. Memorandum*, Plaintiffs now take a different tack. Now, Plaintiffs argue that "depriving children of an adequate education . . . can result in actual, physical, and lasting injury to the brain . . . ." *1st Supp. Mem.* 19. This is not what the Master Complaint, fairly read, alleges. Plaintiffs cannot amend the Master Complaint in a post-hearing memorandum and the Court should not hesitate to dismiss those portion(s) of the Master Complaint that allege deprivation of education. *See also, e.g.*, *Skinny Pancake-Hanover, LLC v. Crotix*, 172 N.H. 372, 377 n.2 (2019) (noting that "new argument" that "was untimely raised for the first time" in a surreply was an independent ground for denying relief). [5]

[5] Even if Plaintiffs' new theory—that the alleged deprivation of an adequate education resulted in "actual, physical . . . injury to the brain" were fairly contemplated by the Master Complaint, each Plaintiff must make specific factual allegations about, among other things, how exactly State Defendants deprived Plaintiff of an education and how exactly that deprivation (rather than some other life circumstance) caused a specific physical injury to that Plaintiff's brain. Whether any Plaintiff can make such a showing is beyond the scope of briefing on the Master Motions to Dismiss. Furthermore, Plaintiffs' purported preliminary and generalized expert opinion (*see 1st Supp. Mem.* 18-19 and Exs. E-F thereto) is premature at this stage of the litigation and State Defendants expressly reserve their right to address any such expert opinion in due course if necessary after this Court's ruling on the Master Motions to Dismiss.

IV. THE DOCTRINE OF STATE SOVEREIGN IMMUNITY IS NOT UNCONSTITUTIONAL IN NEW HAMPSHIRE.

The only aspect of briefing on the pending Master Motions to Dismiss the Master Complaint that is "intellectually dishonest," "situationally convenient" or "wrong" (*2d Supp. Mem.* 2) is Plaintiffs' filing of their *2d Supp. Memorandum*. Plaintiffs' *2d Supp. Memorandum* does nothing but re-hash briefing already exhaustively presented by the parties while simultaneously attempting to cast unprofessional aspersions on the integrity of State Defendants and their counsel. State Defendants understand that Plaintiffs' counsel write for the media, not the Court. But enough is enough. State Defendants therefore respond briefly as follows:

Petition of DCYF was a Rule 11 petition which concerned the narrow question of whether RSA 541-B:14, IV, a waiver of sovereign immunity provision, required incorporation of the minor limitations provision, RSA 508:4. The trial court found RSA 541-B:14, IV to incorporate RSA 508:4 as a matter of legislative intent. The New Hampshire Supreme Court affirmed. In doing so, it explained that a failure to incorporate the latter into the former would present an equal protection problem under Part I, Article 14 because waivers of sovereign immunity must comport with equal protection principles. The New Hampshire Supreme Court's opinion dealt entirely with the terms on which the sovereign can waive sovereign immunity. It did *not* hold what Plaintiffs argue: that the very "application of sovereign immunity to Plaintiffs" here would itself violate equal protection. *Plaintiffs' Obj. to State Defendants' Second Mot. to Dismiss the Master Complaint* (filed Nov. 17, 2022) ("*Plaintiffs' 2d Obj.*") 11-12. State Defendants have already set forth in detail why this contention is erroneous as a matter of law and will not repeat that briefing here. *See State Defendants' 2d Reply* at Part I.B (citing, among many other things, the New Hampshire Supreme Court's reasoning in *Sousa v. State*, 115 N.H. 340 (1975)).

Plaintiffs' *2d Supp. Memorandum* continues counsel's penchant for selective use of quotation marks to misconstrue State Defendants' clearly stated position by asserting that State Defendants' briefing here is somehow inconsistent with the State's motion for reconsideration in the separate *Petition of DCYF* matter. *See 2d Supp. Mem.* 2. What State Defendants *actually* argued is that the State does not need to submit facts verified by affidavit each and every time it asserts that a waiver of sovereign immunity does not permit a claim to proceed, as Plaintiffs erroneously contend. *See State Defendants' 2d Reply* 13 & n.5 (citing *Plaintiffs' 2d Objection* 54, 56). "Rather, the relevant constitutional provisions, statutes, legislative history, and related New Hampshire Supreme Court jurisprudence may reveal these important governmental objectives," *Id.* 13 (collecting cases), and establish the appropriate relationship between the relevant waiver provision and the important governmental objective. When this occurs, dismissal is appropriate. When this does not occur, the issue proceeds to the summary judgment phase of the case, where additional evidence may be marshalled by the defendants to meet the standard and defend the waiver.

In short, Plaintiffs' counsel's ardent wish that sovereign immunity would simply disappear from New Hampshire jurisprudence—despite their knowing that the doctrine is "deeply entrenched in this jurisdiction," *Petition of DCYF* at *2, and has existed and been applied since the State's founding—does not alter New Hampshire's constitutional, statutory, or common law, all of which confirm the continued viability of sovereign immunity.

Respectfully Submitted,

State of New Hampshire; New Hampshire Department of Health and Human Services; Department of Youth Development Services; Division of Children, Youth, and Families; Division

of Juvenile Justice Services; and Sununu Youth Services Center, a/k/a Youth Development Center and Youth Development Services Unit, f/k/a State Industrial School and Adolescent Detention Center

By their attorneys,

JOHN M. FORMELLA
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Date: March 30, 2023

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via the Court's electronic filing system to all parties of record on the date above.

/s/ Brandon F. Chase

Brandon F. Chase