APPENDIX

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
NO. 16-01248

MARIANNE BAPTISTE, individually and as legal guardian and next friend[1] & another[2]

vs.

MASSACHUSETTS EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES & others[3]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

The plaintiffs, Marianne Baptiste and Gregory Williams, Sr., brought this action to recover damages against the defendants, the Massachusetts Executive Office of Health and Human Services ("EOHHS"), the Department of Youth Services ("DYS"), Volunteers of America of Massachusetts, Inc. ("VOAMA"), and certain of their employees after a DYS- committed juvenile injured their son, Gregory Williams, Jr., while he was in DYS custody at the Casa Isla Short-

[1] To Gregory Williams, Jr.

[2] Gregory Williams, Sr.

[3] The Secretary of the Massachusetts Executive Office of Health and Human Services; the Department of Youth Services; the Commissioner of the Department of Youth Services; the Regional Director of the Department of Youth Services; Certain Unknown Individual Employees of Department of Youth Services; Volunteers of America of Massachusetts, Inc.; Theresa Conti; Matthew Marrano; Michael Shanks; Jalise Andrade; Avanell Peters; Jaasiel Gomes; Hermano Joseph; Certain Unknown Individual Employees of Volunteers of America of Massachusetts, Inc.; and Douglas K. Chin.

term Treatment and Revocation Center ("Casa Isla"). The defendants EOHHS, the EOHHS Secretary, DYS, DYS's Commissioner, and DYS's Regional Director (collectively, the "Commonwealth Defendants"), have moved to dismiss the claims against them. For the reasons stated below, the motion is **ALLOWED.**

BACKGROUND

As I must on a motion to dismiss under Rule 12(b)(6), I accept as true all of the factual allegations in the plaintiffs' complaint.

Casa Isla, located on Long Island in Boston Harbor, was a staff-secure facility for juvenile males operated by VOAMA, a non-profit entity. VOAMA also ran a second residential program on Long Island in a separate facility called "Project Rebound," a residential drug and alcohol recovery program for juvenile males exhibiting behavioral or emotional problems and/or recovering from substance abuse ("Project Rebound").

For approximately twenty years, VOAMA was a support contract vendor under agreement with DYS and EOHHS. Pursuant to the terms of their agreement, VOAMA was required to comply with all applicable laws and regulations, and to implement policies and procedures equal to or better than those of DYS to ensure a safe and secure environment to residents. Among these regulations were: 109 Code Mass. Regs. § 11.04 (2013), which authorizes necessary medical care when there is a medical emergency; 109 Code Mass. Regs. § 11.28 (2013), which requires facility administrators to develop written plans and procedures for the secure storage and administration of medications; and 109 Code Mass. Regs. § 11.26 (2013), which requires "[a]ll

facility personnel responsible for the care and custody of clients ... [to be] trained in emergency first-aid procedures."

EEOHS and DYS were responsible for the oversight of VOAMA. A DYS audit in February 2013 stated that Casa Isla was not in compliance with the required first-aid trainings and certifications of staff. DYS had earlier documented this noncompliance in 2010 and 2012, and DYS directed Casa Isla to rectify it immediately. An audit completed in March 2014 noted that the failure of Casa Isla staff members to attend some required trainings had been a consistent problem since 2010. The plaintiffs assert that DYS's Commissioner and Regional Director disregarded VOAMA's noncompliance with safety requirements.[4]

On May 21, 2012, the plaintiffs' son, Gregory Williams, Jr. ("Gregory"), was adjudged a Youthful Offender pursuant to G. L. c. 119, § 58(c), and was committed to DYS's custody and care. On March 25, 2013, following a series of placements, Gregory was transferred to Casa Isla.

On April 19, 2013, Gregory participated in a flag football game between residents of Casa Isla and Project Rebound. During the football game, at approximately 12:00 p.m., a Project Rebound resident, defendant Douglas Chin, ran towards Gregory and struck him, including on the left side of his throat and jaw, several times with a closed fist. Earlier that day, Chin had stated that he wanted to

[4] The complaint does not specifically allege that DYS's Commissioner and Regional Director were aware of the results of the audits.

get kicked out of Project Rebound and these statements were known to Project Rebound staff.[5]

Two staff members, both from Casa Isla, were present and supervising the game at the time of the incident. They and a Project Rebound supervisor, who was radioed to the scene to assist, stopped Chin's attack.

At the lunch immediately following the game and on two occasions thereafter, Gregory complained of a headache to Casa Isla staff.[6] A VOAMA staff member gave him ibuprofen. No one took Gregory to see the nurse on staff or to the hospital. At approximately 5:00 p.m., Gregory told a staff member that, in addition to his headache, he also was experiencing severe pain on his right side, and asked to see a nurse. The staff member noted that Gregory was experiencing facial asymmetry, right side weakness, and trouble speaking, and contacted Boston Emergency Medical Services ("EMS") around 5:10 or 5:15 p.m. Boston EMS arrived at 5:40 p.m. and transferred Gregory to Boston Medical Center ("BMC"). Gregory suffered a traumatic carotid artery dissection and occlusion resulting in a middle cerebral artery stroke, seizures, and cerebral edema. As a result, he now suffers from permanent and severe brain damage. Gregory currently resides in a

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[5] The complaint also alleges that Chin stated that he wanted to punch someone so that he would be discharged and that he was going to attack the "big one," referring to Gregory. However, the complaint does not allege that Chin made these statements to VOAMA staff, or that VOAMA staff knew of the statements as of the time of Chin's attack.

[6] The complaint alleges that Gregory complained of a headache on other occasions that afternoon, but the complaint does not allege that these other statements were made to, or known by, VOAMA staff.

residential program and requires twenty-four-hour care.

Casa Isla's program director conducted an internal investigation of the incident. The resulting report indicates that the staff had not followed certain procedures required by Casa Isla or DYS standards. For example, staff incorrectly entered information related to the incident in a log book and failed to retain copies of Gregory's medical records sent to BMC. The report recommended that Casa Isla discontinue the practice of permitting joint sporting events with Project Rebound unless DYS provides specific permission to do so.

DISCUSSION

The plaintiffs assert three claims against the Commonwealth Defendants: a claim pursuant to 42 U.S.C. § 1983 for failure to provide adequate medical care against DYS's Commissioner and Regional Director (Count II); a negligence claim pursuant to the Massachusetts Torts Claims Act ("MTCA"), G. L. c. 258, against EOHHS, the EOHHS Secretary, and DYS (Count IV); and a loss of consortium claim against all of the Commonwealth Defendants (Count IX).[7] Pursuant to Mass. R. Civ. P. 12(b)(6), the Commonwealth Defendants move to dismiss Counts II and IV in their entirety and Count IX as to them.

I. Standard of Review

In considering a motion to dismiss under Mass. R. Civ. P. 12(b)(6), the court "accept[s] as true the allegations in the complaint and draw[s] every

[7] The plaintiffs also make these claims against certain unknown, individual employees of DYS. However, the Commonwealth does not represent those unnamed defendants and did not bring its motion to dismiss on their behalf. See Defs.' Mot. at 4 n. 1.

reasonable inference in favor of the plaintiff." *Curtis* v. *Herb Chambers 1-95, Inc.,* 458 Mass. 674, 676 (2011). To survive a motion to dismiss, the complaint must set forth "factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief." *Iannacchino* v. *Ford Motor Co.,* 451 Mass. 623, 636 (2008) (internal quotations omitted), quoting *Bell Atl. Corp.* v. *Twombly,* 550 U.S. 544, 557 (2007). Detailed factual allegations are not required; nevertheless, "a plaintiffs obligation to provide the grounds of entitle[ment] to relief requires more than labels and conclusions .... Factual allegations must be enough to raise a right to relief above the speculative level ... [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact) ...." *Id.* (Internal quotations omitted) (alterations in original), quoting *Twombly,* 550 U.S. at 555.

II. Section 1983 Claim Against DYS's Commissioner and Regional Director (Count II)

In Count II, the plaintiffs assert that DYS's Commissioner and Regional Director ("DYS Defendants") are liable in their official and personal capacities under 42 U.S.C. § 1983 because they failed to provide adequate and appropriate medical care to Gregory.[8] The DYS Defendants move to dismiss this claim on the grounds that the plaintiffs improperly base their claim on a respondeat superior theory that is inapplicable to § 1983 claims. While the DYS Defendants may be liable as supervisors, the

[8] To the extent that the plaintiffs allege constitutional violations other than a failure to provide adequate medical care, the court does not address them because they are not alleged in the complaint. See Compl. ¶¶ 162-166.

complaint's allegations are insufficient to support such a claim.

To succeed on a § 1983 claim, a plaintiff must establish: "(1) that the complained-of conduct was committed under the color of state law, and (2) that such conduct violated his constitutional or federal statutory rights." *Miller* v. *Town of Wenham,* 833 F.3d 46, 51 (1st Cir. 2016). See *Gomez* v. *Toledo,* 446 U.S. 635, 640 (1980) (in order to state a cause of action under § 1983, plaintiff is only required to raise these two allegations). As a general rule, "the tort theory of respondeat superior does not allow imposition of supervisory liability under § 1983." *Ramirez-Lluveras* v. *Rivera-Merced,* 759 F.3d 10, 19 (1st Cir. 2014). However, a supervisor may still be held liable for the constitutional violations of his or her subordinates "where 'an affirmative link between the behavior of a subordinate and the action or inaction of his supervisor exists such that the supervisor's conduct led inexorably to the constitutional violation.'" *Morales* v. *Chadbourne,* 793 F.3d 208, 221 (1st Cir. 2015), quoting *Maldonado* v. *Fontanes,* 568 F.3d 263, 275 (1st Cir. 2009). This affirmative link can be demonstrated when "a responsible official supervises, trains or hires a subordinate with deliberate indifference toward the possibility that deficient performance of the task eventually may contribute to a civil rights deprivation." *Id.,* quoting *Sanchez* v. *Pereira-Castillo,* 590 F.3d 31, 49 (1st Cir. 2009). See *Guadalupe-Baez* v. *Pesquera,* 819 F.3d 509, 515 (1st Cir. 2016) (affirmative link requires conduct that can be characterized as "supervisory encouragement, condonation, or acquiescence or gross negligence amounting to deliberate indifference"). In order to establish deliberate indifference, there must be a "known history of widespread abuse sufficient to

alert a supervisor to ongoing violations," as opposed to "isolated instances of unconstitutional activity" *Ramirez-Lluveras,* 759 F.3d at 20, quoting *Maldonado-Denis* v. *Castillo-Rodriguez,* 23 F.3d 576, 582 (1st Cir. 1994).

The plaintiffs' § 1983 claim is premised on the assertion that the DYS Defendants were aware of VOAMA employees' noncompliance with the safety regulations through the DYS audits and that the DYS Defendants did not take appropriate steps to rectify that known noncompliance. The plaintiffs argue that the DYS Defendants allowed DYS-committed youth to remain in VOAMA's care despite these known safety risks and, as a result, Gregory received inadequate medical care while in DYS custody in violation of his Eighth Amendment rights. The plaintiffs' claim fails for two reasons.

First, the plaintiffs fail to allege sufficient facts to suggest that the DYS Defendants were on notice of, and were deliberately indifferent to, the constitutional violation alleged. The plaintiffs allege only that the DYS Defendants were aware of VOAMA's noncompliance with the requirement that all facility personnel responsible for the care and custody of youth have emergency first-aid training, as set forth in 109 Code Mass. Regs. § 11.26, through the 2010, 2012, and 2013 audits.[9] The alleged notice of

[9] Although plaintiffs also allege that VOAMA staff who supervised Gregory failed to comply with other regulations after the incident at issue, their complaint contains no allegation that the VOAMA staff failed to comply with these regulations before or at the time of the incident or that the DYS Defendants were on notice of any such noncompliance. *Guadalupe-Baez*, 819 F.3d at 515 (supervisor must have actual or constructive notice of unconstitutional conditions); *Ramirez-Lluveras*, 759 F.3d at 20 (same).

this failure to adhere to one safety regulation does not plausibly suggest that the DYS Defendants were on notice of a substantial risk of the constitutional violation alleged. See *Ramirez-Lluveras,* 759 F.3d at 20-22 (finding that police officer's disciplinary record that included seven instances of alleged misconduct, including one domestic violence claim, over fourteen years insufficient to put supervisors on notice of substantial risk of shooting arrestee).

Second, the plaintiffs also fail to allege any causal connection between VOAMA's alleged noncompliance with 109 Code Mass. Regs. § 11.26 and Gregory's injuries. *Id.* at 19 (strong causal connection is required). The complaint does not allege that any facility personnel who supervised Gregory on the day of the incident had not received the required emergency first aid training. It merely alleges generally that the DYS Defendants were on notice that some VOAMA staff had not received such training in the past and that the failure of VOAMA staff members to administer proper emergency first aid treatment on the day of the incident worsened Gregory's injuries. Stated another way, the plaintiffs have failed to allege any affirmative link between the DYS Defendants' alleged conduct, and the alleged violation of Gregory's Eighth Amendment right to adequate medical care. See, e.g., *Guadalupe-Baez,* 819 F.3d at 515 ("[C]ausal link between a supervisor's conduct and the constitutional violation must be solid."); *Maldonado-Denis* v. *Castillo-Rodriguez,* 23 F.3d 576, 582 (1st Cir. 1994) ("To succeed on a supervisory liability claim, a plaintiff ... must affirmatively connect the supervisor's conduct to the subordinate's violative act or omission.").

Because the complaint fails to allege sufficient facts to support the plaintiffs' claim that the DYS

Defendants were deliberately indifferent to a known constitutional violation, the DYS Defendants' motion to dismiss the § 1983 claim against them in Count II is allowed.

III. Negligence Claim Against EOHHS, the EOHHS Secretary, and DYS (Count IV)

During the hearing on the motion to dismiss, the plaintiffs conceded that the EOHHS Secretary is immune from suit pursuant to G. L. c. 258, § 2, because she is a public employee acting within the scope of her employment. Accordingly, the motion to dismiss Count IV as to her is allowed.

I also allow the motion to dismiss as to DYS and EOHHS because they are immune from suit under G. L. c. 258, § 10(j). Section 10(j) of the MTCA provides that the Commonwealth is immune from a suit for "any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer." A harm is "originally caused" by a public employee when the public employee undertakes an affirmative act "that creates the circumstance which results in the harm inflicted by the third party," *Jane J* v. *Commonwealth,* 91 Mass. App. Ct. 325, 328 (2017), and "materially contribute[s] to creating the specific 'condition or situation' that resulted in the harm," *Kent* v. *Commonwealth,* 437 Mass. 312, 319 (2002). An affirmative act is distinguishable from the failure to prevent harm. A failure to prevent harm, as a matter of law, is not the original cause of the harm for the purposes of § 10(j). *Jane J,* 91 Mass App. Ct. at 328.

Here, the injury at the center of the plaintiffs' claim arose from the violent conduct of a third person, Chin. The plaintiffs do not allege affirmative acts on the part of the Commonwealth Defendants that render § 10(j) immunity inapplicable. Rather, they seek to recast certain failures to prevent harm as affirmative acts sufficient to demonstrate that DYS and EOHHS originally caused the situation or condition that resulted in Gregory's injury. The act of placing Gregory in DYS custody constitutes only the "failure [on the Commonwealth's part] to prevent the assailant from being in a position to attack the plaintiff," and is not an original cause of the harm at issue.[10] *Brum* v. *Town of Dartmouth,* 428 Mass. 684, 695 (1999). Similarly, any alleged failure by the Commonwealth Defendants to enforce DYS policies and regulations in relation to VOAMA was not an affirmative act or the original cause of the harm. See, e.g., *id.* (school's failure to ensure student's safety when it was known that certain attackers planned to retaliate against victim was not original cause of that student's death); *Lawrence* v. *Cambridge,* 422 Mass. 406, 409 (1996) (police's failure to protect witness as promised was not original cause of harm when witness was shot while locking store, but police still

[10] To the extent that the plaintiffs rely on *Devlin* v. *Commonwealth,* 83 Mass. App. Ct. 530 (2013), to support their position that the Commonwealth owes a heightened duty under this analysis because Gregory was in state custody at the time of the attack, the court disagrees. In *Devlin,* the court relied on the Commonwealth's violation of a statute that required the state to house and treat persons civilly committed on an involuntary basis separately from convicted criminals. See *id.* at 533 (citing G. L. c. 123, § 35). Here, the plaintiffs do not allege that any statutory violation relating to the conditions of confinement materially contributed to the original cause of the harm.

may be liable under exception to § 10(j)); *Bonnie W* v. *Commonwealth,* 419 Mass. 122, 125 (1994) (parole officer's failure to supervise parolee under parole board rules not original cause of injury when parolee sexually assaulted resident at trailer park where he worked); *Jane J.,* 91 Mass. App. Ct. at 331 (hospital's failure to segregate patients by gender in recreation room not original cause of female patient's rape by male patient); *Jacome* v. *Commonwealth,* 56 Mass. App. Ct. 486, 490 (2002) (failures to close beach, to post conspicuous warning signs, and of life guards to remain on duty during their scheduled shift not original cause of drowning). In sum, the plaintiffs seek to impose liability on the Commonwealth Defendants based on the Commonwealth's alleged failures to prevent Chin's violent conduct. As a matter of law, such failures cannot serve as the original cause of the alleged harm as required by § 10(j).

Even if the court were to consider VOAMA staff as "person[s] acting on behalf of the public employer" under § 10(j), the complaint's allegations would not be sufficient to plausibly suggest that their conduct was the original cause of the harm. Taken together, those allegations amount merely to an allegation that VOAMA staff failed to prevent Chin from harming another youth during the game.[11] See *Brum,* 428

[11] The plaintiffs' argument that the Commonwealth Defendants are liable for the conduct of VOAMA under the theory of "retained control" is similarly unavailing. In *Ku* v. *Town of Framingham,* 62 Mass. App. Ct. 271, 275 (2004), the Appeals Court distinguished the facts from those in *Brum,* 428 Mass. 684 and *Kent,* 437 Mass. 312, on the basis that the alleged wrongdoer whose affirmative acts had caused the plaintiffs injury was "acting on behalf of the public employer." See *Ku,* 32 Mass. App. Ct. at 275. Here, however, the plaintiffs essentially allege that Chin's affirmative acts proximately caused Gregory's injury and

Mass. at 696 (school not liable for failing to protect student when informed that individuals planned to come to school and retaliate against student).

Finally, the exceptions to § 10(j) immunity in subsections (2) and (4) on which the plaintiffs rely do not apply. Under those exceptions, the Commonwealth is not entitled to immunity if a claim is "based upon the intervention of a public employee which causes injury to the victim or places the victim in a worse position than he was in before the intervention," G. L. c. 258, § 10(j)(2); or if the claim is made "by or on behalf of a patient for negligent medical or other therapeutic treatment received by the patient from a public employee." G. L. c. 258, § 10(j)(4). The complaint alleges that VOAMA's administration of ibuprofen to Gregory worsened his condition, and in their brief, the plaintiffs also assert that VOAMA and its staff may be public employees.[12]

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that the Commonwealth failed to prevent it. The plaintiffs nowhere allege that Chin acted on behalf of the Commonwealth.

[12] None of the cases cited by the parties in the footnotes of their supplemental briefs, see Defs. Resp. at 2 n.2; Pls.' Supp. Br. at 2 n. l, supports the plaintiffs' argument. The cases cited appear distinguishable either because they do not address the issue of whether an entity was a public employee, see *Ku,* 62 Mass. App. Ct. at 273 (addressing whether an independent contractor was acting "on behalf of a public employer," not whether an independent contractor was a public employee); *Thornton* v. *Commonwealth,* 28 Mass. App. Ct. 511, 512 (1990) (parties stipulated that DYS vendor was independent contractor); *Rowe* v. *Town of Arlington,* 28 Mass. App. Ct. 389, 391 (1990) (plaintiff did not challenge factual basis for court's finding that work at issue was done by independent contractor), or because they deal with the fact-specific issue of whether a physician acts under the direction and control of a public employer in his or her practice of medicine based on the unique characteristics of that profession, see, e.g., *Kelley* v. *Rossi,* 395 Mass. 659, 661 (1985) (factual dispute as to whether resident employed by Boston City

However, the complaint does not allege that any public employee, as defined in G. L. c. 258, § 1, intervened and put Gregory in a worse position, or administered negligent medical treatment.[13] Nor does it allege facts that plausibly suggest that any VOAMA staff member was a public employee.[14]

Thus, the Commonwealth Defendants' motion to dismiss Count IV is allowed.

IV. Loss of Consortium Claim Against All Commonwealth Defendants (Count IX)

Because the parties agree that the loss of consortium claim in Count IX is entirely derivative of the claims in Counts II and IV, it likewise must be dismissed as to the Commonwealth Defendants. See, e.g., *Short* v. *Town of Burlington,* 11 Mass. App. Ct. 909, 909 (1981).

Hospital but on rotation at another hospital is public employee); *Smith* v. *Steinberg,* 395 Mass. 666, 667 (1985) (no factual dispute as to whether doctor and member of University of Massachusetts Medical School group practice was public employee).

[13] Unlike § 10(j) itself, which requires an affirmative act by a public employee *or* a person acting on behalf of a public employer, the exceptions require that the action be taken by a public employee. Compare G. L. c. 258, § 10(j) with § 10(j)(2) and § 10(j)(4).

[14] The complaint merely alleges that VOAMA was a "not-for-profit corporate entity," Compl. § 9, and a "support contractor vendor under agreement with DYS and the EOHHS," *id.* ¶ 22. See also *id.* ¶ 78.

ORDER

The Commonwealth Defendants' motion to dismiss is ALLOWED, and the claims against them in Counts II, IV, and IX are hereby ORDERED dismissed.

/s/ *Karen F. Green*
Karen F. Green
Justice of the Superior Court

October 4, 2017

APPENDIX B

18-P-1353 Appeals Court

MARIANNE BAPTISTE[1] & another[2] vs.
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES & others.[3]

No. 18-P-1353.

Suffolk. December 4, 2019. - February 28, 2020.

Present: Meade, Shin, & Singh, JJ.

Constitutional Law. Civil Rights, Supervisory liability, Immunity of public official. Massachusetts Tort Claims Act. Governmental Immunity. Commonwealth, Claim against,Liability for tort. Department of Youth Services.

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[1] Individually and as legal guardian and next friend of Gregory Williams, Jr.

[2] Gregory Williams, Sr.

[3] Secretary of the Executive Office of Health and Human Services; Department of Youth Services; Peter Forbes, individually and as Commissioner of the Department of Youth Services; and John Hughes, individually and as regional director of the Department of Youth Services.

Civil action commenced in the Superior Court Department on April 15, 2016.

A motion to dismiss was heard by Karen F. Green, J.

Ira H. Zaleznik for the plaintiffs.

Katherine B. Dirks, Assistant Attorney General, for the defendants.

Philip T. Tierney, for Douglas K. Chin, was present but did not argue.

MEADE, J. The plaintiffs, Marianne Baptiste and Gregory Williams, Sr., brought this action to recover damages against the defendants, the Massachusetts Executive Office of Health and Human Services (HHS), the Department of Youth Services (DYS), and certain of their employees[4] after a DYS-committed juvenile injured their son, Gregory Williams, Jr. (Williams),[5] while he was in DYS custody at the Casa Isla Short-Term Treatment and Revocation Center (Casa Isla). As pertinent here, the plaintiffs asserted three claims: (1) a claim, pursuant to 42 U.S.C. § 1983, against DYS Commissioner Peter Forbes and DYS Regional Director John Hughes in their individual capacities (collectively, DYS individual defendants), for failure to provide adequate medical care in violation of the Eighth and Fourteenth Amendments to the United States Constitution; (2) a negligence claim, pursuant to G. L. c. 258, § 2, against HHS, the Secretary of HHS, and DYS; and (3) a claim pursuant to G. L. c. 231, § 85X,

[4] Also named in the complaint are Douglas Chin and Volunteers of America of Massachusetts, Inc. (VOA), and certain of its employees. They are not parties to this appeal. See note 7, infra.

[5] For the sake of clarity, we shall refer to Gregory Williams, Jr., as "Williams," and to his father as "GregoryWilliams, Sr."

against all of the defendants for Baptiste and Gregory Williams, Sr.'s loss of consortium. Defendants HHS, the Secretary of HHS, DYS, DYS's Commissioner, and DYS's Regional Director (collectively, Commonwealth defendants) brought a motion to dismiss pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974).[6] A Superior Court judge allowed the motion, and a separate and final judgment entered for the Commonwealth defendants pursuant to Mass. R. Civ. P. 54 (b), 365 Mass. 820 (1974).[7] The plaintiffs have appealed. We affirm.[8]

Background.[9] 1. The program. Casa Isla was a program for juvenile males located in a facility (now closed) on Long Islandin Boston Harbor. Casa Isla was operated by Volunteers of America of Massachusetts, Inc. (VOA), a nonprofit entity under contract with DYS to operate youth residential programs. VOA also operated a separate residential drug and alcohol recovery program for juvenile males on Long Island known as "Project Rebound." The two programs were housed in separate facilities.

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[6] Although certain unnamed DYS employees were also identified as defendants in each of the above counts, the motionto dismiss was not brought on their behalf.

[7] Neither VOA nor Chin was a party to the Commonwealth defendants' motion to dismiss; VOA and Chin remain defendants in the plaintiffs' suit.

[8] In the Superior Court, the parties agreed that the loss of consortium claim is entirely derivative of the § 1983 and negligence claims; accordingly, we do not discuss it separately.

[9] The facts provided herein are derived from the complaint,which we treat as true for purposes of this appeal. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008).

On May 21, 2012, Williams was adjudged a youthful offender, and was committed to DYS's custody and care pursuant to G. L. c. 119, § 58 (c). On March 25, 2013, following a series of placements, Williams was transferred to Casa Isla to undergo approximately three months of treatment.

2. The assault. On the morning of April 19, 2013, Douglas Chin, a seventeen year old resident of Project Rebound, said he wanted to get "kicked out" of Project Rebound and that he wanted to punch someone so he would be returned to Pembroke House.[10] Later that day, Chin and Williams participated in a flag football game between Casa Isla residents and Project Rebound residents. Two Casa Isla staff members were supervising the game, in which approximately twenty residents were participating.

During the football game, at approximately 12:00 P.M., Chin ran toward Williams, who was looking in a different direction, and repeatedly struck him with a closed fist on the left side of his throat and jaw. Prior to the attack, Williams and Chin had not exchanged words and did not know one another. Two Casa Isla staff members intervened and stopped the attack; the football game was suspended, and the Casa Isla residents were instructed to proceed to lunch.

3. Symptoms and injury. At lunch immediately following the game and on two occasions thereafter, Williams complained of a headache to

[10] The plaintiffs also allege that Chin said that he was going to attack the "big one," referring to Williams. However, the complaint does not allege that these statements were made to VOA staff, or that VOA knew of the statements at the time of the attack.

Casa Isla staff.[11] A VOA staff member gave him ibuprofen. No one took Williams to see the nurse on staff or to the hospital. Between 3:35 P.M. and 4:00 P.M., Williams took a shower at the suggestion of VOA staff members, after which he reported feeling better. At approximately 5:00 P.M., Williams told a staff member that, in addition to his headache, he also was experiencing severe pain on his right side, and asked to see a nurse. Residents reported that between 4:15 P.M. and 5:00 P.M., Williams started complaining that he could not feel his legs. The VOA staff member noted that Williams was experiencing facial asymmetry, right side weakness, and trouble speaking. The staff member contacted Boston Emergency Medical Services (Boston EMS) around 5:10 or 5:15 P.M. Boston EMS arrived at 5:40 P.M. and transported Williams to Boston Medical Center.

Williams suffered a traumatic carotid artery dissection andocclusion resulting in a middle cerebral artery stroke, seizures, and cerebral edema. As a result, he now has severe and permanent brain damage. Williams currently resides in a residential program and requires twenty-four hour care.

4. VOA. For approximately twenty years, VOA had been a support contract vendor under agreement with DYS and HHS, which were responsible for the oversight of VOA. VOA's contract with DYS required VOA to comply with all applicable provisions of law relative to the care of clients and to implement policies and procedures that are equal to or better than those of DYS. At the time of the April 19, 2013 assault, DYS regulations then in effect included: a requirement that "[a]ll facility personnel responsible for the care and custody of clients shall be

[11] The complaint does not allege to whom Williams complained.

trained in emergency first-aid procedures," 109 Code Mass. Regs. § 11.26(1) (1993); authorization for the provision of medical care in medical emergencies, see 109 Code Mass. Regs. § 11.04(3)(1993) ("When there is a medical emergency, as determined by any medical provider, no one's consent is required in order to allow a client to receive necessary medical care"); and a requirement that each facility administrator "shall develop written plans and procedures . . . for the secure storage and controlled administration of all medications and drugs." 109 Code Mass. Regs. § 11.28(2) (1993).

In 2002, DYS issued a policy on "Use of Over the Counter (OTC) Medications" that permits nonmedical staff to administer nonprescription medications under specific conditions, such as when a resident's medical complaint is covered by standing orders, i.e., a "standard of treatment for each patient for agiven condition [that is] prepared and signed by a qualified health staff person."

5. The audits. The complaint alleges that the DYS Commissioner and the Regional Director disregarded VOA's noncompliance with safety requirements. In February 2013, DYS conducted a program compliance review of Casa Isla and determined that Casa Isla's director and assistant director were not in compliance with required first-aid training and certifications. However, the plaintiffs' complaint does not allege that Casa Isla's director or assistant director had any involvement in Williams's care on April 19, 2013. DYS had also documented noncompliance with required first-aid training and certifications in 2010, 2012, and 2013, but the complaint does not allege that anyone involved in Williams's care on April 19, 2013, lacked first-aid training and certifications.

A postassault, 2014 audit of Casa Isla conducted by DYS confirmed that several staffers had failed to attend some required trainings, and also reported documentation deficiencies. Casa Isla's log of trainings and certifications does not indicate that "OTC Medication Training" or equivalent training was provided to staff. However, the complaint does not allege that any of the individuals who did not attend the trainings were involved in Williams's care on April 19, 2013.

Discussion. 1. Standard of review. We review the allowance of a rule 12 (b) (6) motion to dismiss de novo. A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transp. Auth., 479 Mass. 419, 424 (2018). We accept "the facts alleged in the complaint as true and draw[] all reasonable inferences in the plaintiff[s'] favor." Edwards v. Commonwealth, 477 Mass. 254, 260 (2017). However, "[w]e do not regard as 'true' legal conclusions cast in the form of factual allegations." Id., quoting Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 39 n.6 (2009). To survive a motion to dismiss, the facts alleged must "'plausibly suggest[] (not merely [be] consistent with)' an entitlement to relief." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully" (citation omitted). Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

2. Supervisory liability under § 1983. a. Underlying constitutional violation. Title 42 U.S.C. § 1983 (2012) provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom,

> or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1983 is "not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred" (quotation and citation omitted). Graham v. Connor, 490 U.S. 386, 393-394 (1989).

Governmental actors "are responsible only for 'their ownillegal acts'" (emphasis omitted). Connick v. Thompson, 563 U.S. 51, 60 (2011), quoting Pembaur v. Cincinnati, 475 U.S. 469, 479 (1986). However, they may be liable under § 1983 if the governmental actors themselves "subject[]" a person to a deprivation of rights or "cause[]" a person "to be subjected" to such deprivation. See Monell v. Department of Social Servs. of the City of N.Y., 436 U.S. 658, 692 (1978). In other words, forpurposes of § 1983, agency officials "may not be held liable forthe unconstitutional conduct of their subordinates under a theory of respondeat superior." Iqbal, 556 U.S. at 676. Of course, supervisory liability itself is premised on there being an underlying constitutional violation of the plaintiff's rightsby agency subordinates. The existence of an Eighth Amendment violation must be evaluated before determining whether the agency officials were deliberately indifferent to a plaintiff's serious medical needs, and whether there is a direct causal link between an agency policy or custom and the constitutional deprivation. See Zingg v.

Groblewski, 907 F.3d 630, 635 (1st Cir. 2018); Pineda v. Toomey, 533 F.3d 50, 54 (1st Cir. 2008). See also Rivera v. R.I., 402 F.3d 27, 39 (1st Cir. 2005) (§ 1983 liability for failure to train or for inadequately training employees premised on underlying constitutional violation of plaintiff's rights [citation omitted]); Maldonado-Denis v. Castillo-Rodríguez, 23 F.3d 576, 581-582 (1st Cir. 1994) (to establish supervisory liability, plaintiff must first show underlying constitutional violation).

Here, the plaintiffs claim that the underlying constitutional violation was that, in violation of the Eighth Amendment, the VOA staff members provided inadequate medical care to Williams, who was in DYS custody. However, the Eighth Amendment does not protect against merely inadequate medical care. Rather, it protects against deliberate indifference to a serious medical need, constituting an "unnecessary and wanton infliction of pain" (citation omitted). Estelle v. Gamble, 429U.S. 97, 104 (1976).

Eighth Amendment claims have both an objective component and a subjective component. Zingg, 907 F.3d at 635. Here, the objective component requires the plaintiffs to prove that Williams had a medical need "that [had] been diagnosed by a physician as mandating treatment, or one that [was] so obvious that even a lay person would easily recognize the necessity for a doctor's attention" (citation omitted). Kosilek v. Spencer,774 F.3d 63, 82 (1st Cir. 2014). "The subjective component requires the plaintiff[s] to show that [VOA employees], in treating [Williams's] medical needs, possessed a sufficiently culpable state of mind. That state of mind is one that amounts to deliberate indifference to [Williams's] health or safety." Zingg, supra. To establish a deliberately indifferent state of mind, the

plaintiffs must "provide evidence that the [VOA employees] had actual knowledge of impending harm, easily preventable, . . . and yet failed to take the steps that would have easily prevented that harm. Such a showing may be made by demonstrating that the defendant[s] provided medical care that was so inadequate as to shock the conscience, . . . or, put otherwise, that was so clearly inadequate as to amount to a refusal to provide essential care" (quotations and citations omitted). Id.

However, "an inadvertent failure to provide adequate medical care cannot be said to constitute an unnecessary and wanton infliction of pain or to be repugnant to the conscience of mankind" (quotations omitted). Estelle, 429 U.S. at 105-106. That is, an accident or mere negligence that produces pain and suffering cannot by itself be characterized as a wanton infliction of unnecessary pain.

Here, as alleged, when Williams complained of a headache, VOA staff gave him ibuprofen but did not refer him to medical services for assessment. This does not suffice as an allegation that VOA had actual knowledge of any easily preventable, impending harm to Williams, "and yet failed to take the steps that would have easily prevented that harm." Zingg, 907 F.3d at 635. Instead, the plaintiffs' allegations amount to no more than negligence, which does not rise to the level of a constitutional violation. See Estelle, 429 U.S. at 106; Braga v. Hodgson, 605 F.3d 58, 61 (1st Cir. 2010).

b. Deliberate indifference. Supervisory liability under § 1983 is different in kind from vicarious liability. That is,"[a]lthough a supervisor need not personally engage in the subordinate's misconduct in order to be held liable, his own acts or omissions must work a constitutional violation."

Parker v. Landry, 935 F.3d 9, 15 (1st Cir. 2019). See Iqbal, 556 U.S.at 676. "Facts showing no more than a supervisor's mere negligence vis-à-vis his subordinate's misconduct are not enough to make out a claim of supervisory liability." Parker, supra. "At a minimum, the plaintiff must allege facts showing that thesupervisor's conduct sank to the level of deliberate indifference." Id. "A showing of deliberate indifference has three components: 'the plaintiff must show "(1) that the officials had knowledge of facts, from which (2) the official[s] can draw the inference (3) that a substantial risk of serious harm exists."'" Id., quoting Guadalupe-Báez v. Pesquera, 819 F.3d 509, 515 (1st Cir. 2016). See Board of Comm'rs of Bryan County, Okla. v. Brown, 520 U.S. 397, 410 (1997) ("'[d]eliberate indifference' is a stringent standard of fault, requiring proof that a[n agency employee] disregarded a known or obvious consequence of his action").

Even if we were to assume that the action or inaction by the VOA employees violated the Eighth Amendment, the motion judge properly found that the plaintiffs failed to allege sufficient facts to suggest that the DYS individual defendants were on notice of, and were deliberately indifferent to, the existence of a substantial risk of serious harm. As the judge held, "[t]he plaintiffs allege only that[, as a result of the 2010, 2012, and 2013 audits,] the DYS [individual d]efendants were aware of VOA[]'s noncompliance with the requirement that all facility personnel responsible for the care and custody of youth have emergency first-aid training, as set forth in 109 Code Mass. Regs. § 11.26 . . . ." However, as the judge held, knowledge of noncompliance with a single safety regulation "doesnot plausibly suggest that the DYS [individual d]efendants were on notice" of the

existence of a substantial risk of serious harm or that they were deliberately indifferent to such a risk.See Ramirez-Lluveras v. Rivera-Merced, 759 F.3d 10, 20-22 (1st Cir. 2014). See also Parker, 935 F.3d at 15 ("isolated instances of a subordinate's constitutional violations . . . will not clear the causation bar" [quotation and citation omitted]).

Furthermore, the plaintiffs do not allege that the DYS individual defendants had any involvement with VOA or the Casa Isla program, or more specifically, with medicine administration policies or staff members' training and certification records. Although the plaintiffs allege that DYS had identified deficiencies in VOA's certifications and training, they do not allege that the DYS individual defendants were aware of this. The plaintiffs allege that VOA did not adhere to a DYS policy on the controlled administration of medications, but they do not allege that the DYS individual defendants were aware of, let alone encouraged, condoned, or acquiesced to, this alleged nonadherence. See Connick, 563 U.S. at 61 (["a supervisor's] culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train"). See also OklahomaCity v. Tuttle, 471 U.S. 808, 822 (1985) (alleged policy of inadequate training "far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in Monell").

Finally, the plaintiffs do not allege that the DYS individual defendants had notice of any prior failures by VOA staff members to monitor residents' injuries or symptoms, which might have indicated a risk of a violation of Williams's Eighth Amendment rights. More directly, the plaintiffs do not allege that the DYS individual defendants engaged in any "supervisory encouragement, condonation or

acquiescence" that amounted to deliberate indifference to any VOA conduct. Pineda, 533 F.3d at 54. The DYS individual defendants cannot be deliberately indifferent to an omission or deficiency in a first-aid training program of which they had no knowledge.

c. Affirmative link. Finally, for a supervisor to be held liable for a subordinate's constitutional violation, there must be "an affirmative link" between the subordinate's behavior and the supervisor's action or inaction "such that the supervisor's conduct led inexorably to the constitutional violation" (citation omitted). Morales v. Chadbourne, 793 F.3d 208, 221 (1st Cir. 2015). See Guadalupe-Báez, 819 F.3d at 515 (affirmative link requires conduct that can be "characterized as supervisory encouragement, condonation, or acquiescence or gross negligence amounting to deliberate indifference" [citation omitted]).

Here, the plaintiffs failed to allege any causal connection, let alone a strong one, between VOA's alleged noncompliance with the first-aid training requirements of 109 Code Mass. Regs. § 11.26 and Williams's injuries. As the motion judge held, the plaintiffs do "not allege that any facility personnel who supervised [Williams] on the day of the incident had not received the required emergency first aid training. [Rather, they] merely allege generally that the DYS [individual] defendants were on notice that some VOA[] staff had not received such training in the past and that the failure of VOA[] staff members to administer proper emergency first aid treatment on the day of the incident worsened [Williams's] injuries. [In other words,] the plaintiffs have failed to allege any affirmative link between the DYS [individual d]efendants' alleged conduct, and the alleged

violation of [Williams's] Eighth Amendment right to adequate medical care." See Guadalupe-Báez, 819 F.3d at 515; Maldonado-Denis, 23 F.3d at 582. The § 1983 count of the complaint against the individual DYS defendants was properly dismissed.

3. Immunity from negligence claim under public duty rule. The plaintiffs also brought a negligence claim, pursuant to the Massachusetts Tort Claims Act (act), G. L. c. 258, § 2, against HHS and DYS.[12] This claim is actually against the Commonwealth,and it too was properly dismissed.

The act is a limited waiver of the Commonwealth's sovereign immunity. See Cormier v. Lynn, 479 Mass. 35, 39 (2018). Within the act are a variety of exclusions from that limited waiver. One such exclusion can be found in G. L. c. 258, § 10(j), which provides the Commonwealth immunity from suit for

> "any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer."

See Kent v. Commonwealth, 437 Mass. 312, 317 (2002). Section 10(j) has been described as a "'statutory public duty rule providing governmental immunity,' Carleton v. Framingham, 418 Mass. 623,

[12] The plaintiffs also named the Secretary of HHS, in her official capacity, as a defendant in this count, but concede that she is immune from liability under c. 258. The complaint did not name her as a defendant in her individual capacity.

627 (1994), the purpose of which is to 'provide some substantial measure of immunity from tort liability to government employers.' Brum v. Dartmouth, [428 Mass. 684,] 695[(1999)]." Kent, supra at 317-318. The Supreme Judicial Court has construed the "original cause" language to mean an affirmative act (not a failure to act) by a public employer that "materially contributed to creating the specific 'condition or situation' that resulted in the harm" inflicted by a third party. Cormier, supra at 40, quoting Kent, supra at 319. In other words, § 10(j) provides immunity from tort liability to public employers "for a public employer's act or failure to act to prevent harm from the wrongful conduct of a third party unless the condition or situation was 'originally caused' by the public employer." Cormier, supra, citing Brum, supra at 692, 695.

Here, as the plaintiffs expressly pleaded, Williams's condition or situation resulted "from Chin's closed-fist strike to the left side of Mr. Williams'[s] neck." The two had never met, and the attack was unprovoked. The plaintiffs do not allege that Commonwealth employees committed any actual affirmative act that led to Chin's assault on Williams, nor do they claim that DYS had any interactions with or knowledge of Chin before the assault. Rather, the plaintiffs repeatedly allege conduct that amounts to failure to prevent the injury caused by a third party and characterize it as an alleged failure by VOA staff to recognize the severity of Williams's injury and an alleged failure by DYS to provide more monitoring and oversight of VOA's program at Casa Isla.[13] These

[13] Examples of allegations in the complaint include the following: "Williams was neither sent to Boston Medical Center for a medical assessment, nor provided with any medical treatment following the attack"; DYS "failed to prepare any written policy

allegations, however, are exactly the type of failure to prevent or diminish the harmful consequences of negligence claims that are barred by § 10(j).[14] To hold otherwise would be to "adopt an interpretation of [§ 10(j)] that construes the words 'originally caused' so broadly as to encompass the remotest causation and preclude immunity in nearly all circumstances." Brum, 428 Mass. at 695. See Jane J. v. Commonwealth, 91 Mass. App. Ct. 325, 330 (2017) (hospital's failure to segregate patients by gender not original cause of female patient's rape by male patient); Jacome v. Commonwealth, 56 Mass. App. Ct. 486, 490 (2002) (failures to close beach, post warning signs, and failure of lifeguards to remain on duty during scheduled shift not original cause of

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or procedure detailing criteria or assessment protocols for evaluating whether . . . or not a resident is in need of a medical assessment by trained medical professionals"; DYS "failed . . . to ensure . . . Williams was provided adequate protection from harm by fellow involuntarily confined youths and adequate medical care"; DYS "failed . . . to ensure that VOA[] complied with all of its legal obligations," including certification and training requirements; and VOA did not have a written policy for the administration of over-the-counter medications.

[14] The plaintiffs' reliance on Devlin v. Commonwealth, 83 Mass. App. Ct. 530 (2013), is misplaced. In that case, a civilly committed patient was assaulted by a criminal convict working at the facility. We concluded that § 10(j) did not bar the claim because an original cause of the assault was the Commonwealth's "affirmative decision to allow convicted inmates[, who come from a higher-risk population,] to work in an area where civilly committed individuals were housed and treated . . . ." Id. at 535. Here, however, the plaintiffs do not allege that DYS had notice that Chin came from a higher-risk population than Williams, or any other basis for asserting that DYS had notice of the risk of an assault. In fact, as alleged, Williams, as a youthful offender, was a higher-risk resident than Chin, who was merely enrolled in a civil drug and alcohol recovery program.

drowning). Finally, the plaintiffs claim that two exceptions to governmental immunity found in G. L. c. 258, § 10 (j) (2), (4), defeat HHS and DYS's immunity. The two provisions are as follows:

> "(2) any claim based upon the intervention of a public employee which causes injury to the victim or places the victim in a worse position than he was in before the intervention; and
>
> . . .
>
> "(4) any claim by or on behalf of a patient for negligent medical or other therapeutic treatment received by the patient from a public employee."

G. L. c. 258, § 10 (j) (2), (4). The plaintiffs claim that VOA's response on April 19, 2013, comes within the purview ofboth of the above exceptions, and thus that HHS and DYS are liable for that response. We disagree.

According to the complaint, VOA is an independent contractor. The plaintiffs do not claim that VOA employees are "public employees," as defined by G. L. c. 258, § 1, such that their actions fall within the exceptions of § 10(j) (2), (4). Nor does the complaint allege, as the motion judge properly held, any facts that plausibly suggest that any VOA staff member was a public employee. Because, within the meaning of the act,"an independent contractor is not a public employee," Chiao-YunKu v. Framingham, 62 Mass. App. Ct. 271, 274 (2004); Thornton v. Commonwealth, 28 Mass. App. Ct. 511, 513 (1990), and because the complaint does not allege that DYS had "retained control" over any part of the work covered by VOA's contract, see Chiao-Yun Ku, supra

at 274-275, the exceptions to governmental immunity do not apply.

Judgment affirmed.

APPENDIX C

From: SJCCommClerk@sjc.state.ma.us
To: Slean, Brendan
Subject: FAR-27501 - Notice: FAR denied
Date: Wednesday, September 30, 2020 6:02:18 PM

Supreme Judicial Court for
the Commonwealth of Massachusetts

RE: Docket No. FAR-27501

MARIANNE BAPTISTE & another
vs.
MASS EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES & others

Suffolk Superior Court No. 1684CV01248
A.C. No. 2018-P-1353

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

The plaintiffs' application for further appellate review is denied. We decline to address the issue of whether the Eighth Amendment "deliberate indifference" standard governs allegations that State officials provided inadequate medical care to a person held in juvenile detention after being adjudged a youthful offender under G. L. c. 119, s. 58(c), or whether, as the plaintiffs argue for the first time in their application, a less demanding due process standard applies. This issue was neither raised in nor decided by the Appeals Court.

Francis V. Kenneally, Clerk

Dated: September 30, 2020

To:
Ira H. Zaleznik, Esquire
John Tennaro, Esquire
Brendan Slean, Esquire
Katherine B. Dirks, A.A.G.
Kevin M. Sullivan, Esquire
Philip T. Tierney, Esquire
Susan E. Devlin, Esquire
Child Advocacy Program of the Harvard Law School
Daniel Louis McFadden, Esquire

APPENDIX D

From: SJCCommClerk@sjc.state.ma.us
To: Slean, Brendan
Subject: FAR-27501 - Notice of Docket Entry
Date: Monday, November 23, 2020 6:28:27 PM

Supreme Judicial Court for
the Commonwealth of Massachusetts

RE: No. FAR-27501

MARIANNE BAPTISTE & another
vs.
MASS EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES & others

NOTICE OF DOCKET ENTRY

Please take note that on November 23, 2020, the following entry was made on the docket of the above-referenced case:

DENIAL of petition to reconsider denial of FAR application.

Francis V. Kenneally Clerk

Dated: November 23, 2020

To:
Ira H. Zaleznik, Esquire
John Tennaro, Esquire
Brendan Slean, Esquire
Katherine B. Dirks, A.A.G.
Kevin M. Sullivan, Esquire
Philip T. Tierney, Esquire
Susan E. Devlin, Esquire
Child Advocacy Program of the Harvard Law School
Daniel Louis McFadden, Esquire

APPENDIX E

42 U.S. Code § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub. L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

Chapter 119

Section 53 DELINQUENT CHILDREN; LIBERAL CONSTRUCTION; NATURE OF PROCEEDINGS

Section 53. Sections fifty-two to sixty-three, inclusive, shall be liberally construed so that the care, custody and discipline of the children broughtbefore the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance. Proceedings against children under said sections shall not be deemed criminal proceedings.

Chapter 119

Section 58 ADJUDICATION AS DELINQUENT CHILD OR YOUTHFUL OFFENDER

Section 58. At the hearing of a complaint against a child the court shall hear the testimony of any witnesses who appear and take such evidence relative to the case as shall be produced. If the allegations against a child are proved beyond a reasonable doubt, he may be adjudged a delinquent child, or in lieu thereof, the court may continue the case without a finding and, with the consent of the child and at least one of the child's parents or guardians, place said child on probation; provided, however, that any such probation may be imposed until such child reaches age eighteen or age nineteen in the case of a child whose case is disposed of after he has attained his eighteenth birthday or age 20 in the case of a child whose case is disposed of after he has attained his nineteenth birthday; provided further, that a

complaint alleging a child to be a delinquent child by reason of having violated the provisions of section 13B, 13B1/2, 13B3/4, section 22A, 22B, 22C, 23, 23A, section 23B or section 50 of chapter 265 shall not be placed on file or continued without a finding. Said probation may include a requirement, subject to agreement by the child and at least one of the child's parents or guardians, that the child do work or participate in activities of a type and for a period of time deemed appropriate by the court.

If a child is adjudicated a delinquent child on a complaint, the court may place the case on file or may place the child in the care of a probation officer for such time and on such conditions as it deems appropriate or may commit him to the custody of the department of youth services, but the probationary or commitment period shall not be for a period longer than until such child attains the age of eighteen, or nineteen in the case of a child whose case is disposed of after he has attained his eighteenth birthday or age 20 in the case of a child whose case is disposed of after he has attained his nineteenth birthday.

If a child is adjudicated a youthful offender on an indictment, the court may sentence him to such punishment as is provided by law for the offense. The court shall make a written finding, stating its reasons therefor, that the present and long-term public safety would be best protected by:

(a) a sentence provided by law; or

(b) a combination sentence which shall be a commitment to the department of youth services until he reaches the age of twenty-one, and an adult sentence to a house of correction or to the state prison as is provided by law for the offense. The adult

sentence shall be suspended pending successful completion of a term of probation, which shall include, but not be limited to, the successful completion of the aforementioned commitment to the department of youth services. Any juvenile receiving a combination sentence shall be under the sole custody and control of the department of youth services unless or until discharged by the department or until the age of twenty-one, whichever occurs first, and thereafter under the supervision of the juvenile court probation department until the age of twenty-one and thereafter by the adult probation department; provided, however, that in no event shall the aggregate sentence imposed on the combination sentence exceed the maximum adult sentence provided by law; or

(c) a commitment to the department of youth services until he reaches the age of twenty-one.

In making such determination the court shall conduct a sentencing recommendation hearing to determine the sentence by which the present and long-term public safety would be best protected. At such hearing, the court shall consider, but not be limited to, the following factors: the nature, circumstances and seriousness of the offense; victim impact statement; a report by a probation officer concerning the history of the youthful offender; the youthful offender's court and delinquency records; the success or lack of success of any past treatment or delinquency dispositions regarding the youthful offender; the nature of services available through the juvenile justice system; the youthful offender's age and maturity; and the likelihood of avoiding future criminal conduct. In addition, the court may consider any other factors it deems relevant to disposition. No such sentence shall be imposed until a pre-sentence

investigation report has been filed by the probation department and made available to the parties no less than seven days prior to sentencing.

A youthful offender who is sentenced as is provided by law either to a state prison or to a house of correction but who has not yet reached his eighteenth birthday shall be held in a youthful offender unit separate from the general population of adult prisoners; provided, however, that such youthful offender shall be classified at a facility other than the reception and diagnostic center at the Massachusetts Correctional Institution, Concord, and shall not be held at the Massachusetts Correctional Institution, Cedar Junction, prior to his eighteenth birthday.

If it is alleged in the complaint upon which the child is so adjudged that a penal law of the commonwealth, a city ordinance or a town by-law has been violated, the court may commit such child to the custody of the commissioner of youth services and authorize him to place such child in the charge of any person, and, if at any time thereafter the child proves unmanageable, to transfer such child to that facility which in the opinion of said commissioner, after study, will best serve the needs of the child. The department of youth services shall provide for the maintenance, in whole or part, of any child so placed in the charge of any person.

Notwithstanding any other provisions of this chapter, a person adjudicated a delinquent child by reason of a violation of paragraph (a), (c) or (d) of section ten or section ten E of chapter two hundred and sixty-nine, shall be committed to the custody of the commissioner of youth services who shall place such child in the custody of a facility supported by the commonwealth for the care, custody and training of such delinquent

children for a period of at least one hundred and eighty days or until such child attains his eighteenth birthday or his nineteenth birthday in the case of a child whose case is disposed of after he has attained his eighteenth birthday, whichever first occurs, provided, however, that said period of time shall not be reduced or suspended.

Upon the second or subsequent violation of said paragraph (a), (c) or (d) of said section ten or ten E of said chapter two hundred and sixty-nine, the commissioner of youth services shall place such child in the custody of a facility supported by the commonwealth for the care, custody and training of such delinquent child for not less than one year; provided, however, that said period of time shall not be reduced or suspended.

The court may make an order for payment by the child's parents or guardian from the child's property, or by any other person responsible for the care and support of said child, to the institution, department, division, organization or person furnishing care and support at times to be stated in an order by the court of sums not exceeding the cost of said support after ability to pay has been determined by the court; provided, however, that no order for the payment of money shall be entered until the person by whom payments are to be made shall have been summoned before the court and given an opportunity to be heard. The court may from time to time, upon petition by, or notice to the person ordered to pay such sums of money, revise or alter such order or make a new order, as the circumstances may require.

The court may commit such delinquent child to the department of youth services, but it shall not commit such child to any institution supported by the

commonwealth for the custody, care and training of delinquent children or juvenile offenders.

Except in cases in which the child has attained the age of majority, whenever a court of competent jurisdiction adjudicates a child as delinquent and commits the child to the department of youth services, the court, in order to comply with the requirements contained in the federal Adoption Assistance and Child Welfare Act of 1980 and any amendments thereto, shall receive evidence in order to determine whether continuation of the child in his home is contrary to his best interest, and whether reasonable efforts were made prior to the commitment of the child to the department, to prevent or eliminate the need for removal from his home; or whether an emergency situation existed making such efforts impossible. No such determination shall be made unless the parent or guardian of the delinquent shall have been summoned before the court and, if present, given an opportunity to be heard. The court, in its discretion, may make its determinations concerning said best interest and reasonable efforts in written form, but in the absence of a written determination to the contrary, it shall be presumed that the court did find that continuation of the child in his home was contrary to his best interest and that reasonable efforts to prevent or eliminate the need for removal of the child from his home did occur. Nothing in this section shall diminish the department's responsibility to prevent delinquent acts and to protect the public safety.