COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

FAR No. 27321
(Appeals Court No. 2018-P-1568)

RHEA R., RALPH R., and RAMONA R., a minor by and through her next friends/parents, Rhea R. and Ralph R.,

Plaintiff-Appellants,

v.

THE MASSACHUSETTS DEPARTMENT OF CHILDREN AND FAMILIES,

Defendant-Appellee.

DEFENDANT-APPELLEE MASSACHUSETTS DEPARTMENT OF CHILDREN AND FAMILIES' APPLICATION FOR FURTHER APPELLATE REVIEW

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REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Defendant-Appellee the Massachusetts Department of Children and Families ("DCF") respectfully requests further appellate review pursuant to Mass. R. App. P. 27.1 of the Appeals Court's published decision in this case. *Rhea R. v. Dep't of Children & Families*, 96 Mass. App. Ct. 820 (2020).

The Plaintiff-Appellants brought tort and contract claims against DCF arising out of DCF's alleged failure to provide them with the sexual abuse history of a foster child (both his own experience as a victim of sexual abuse and a single, unsubstantiated, and recanted allegation of perpetration of sexual abuse) placed in their home, who subsequently sexually assaulted their daughter. The Appeals Court held Plaintiff-Appellants' claims fell within an exception to the Commonwealth's immunity from suit for claims "based upon explicit and specific assurances of safety or assistance," G. L. c. 258, § 10(j)(1). Specifically, the Appeals Court held that DCF's general representation, stated in its standard-form foster care agreement, to provide every foster family "with sufficient information about a child who is in DCF care or custody" so that the foster family "can knowledgeably determine whether or not to accept the child" and "provide adequate care to that child" was an "explicit and specific assurance[]" that DCF would disclose all "information known to it" about the child's sexual abuse history

prior to placement. RA 91; Add. 38 (slip op. 11).[1] Finding the exception of § 10(j)(1) applicable, the Appeals Court allowed the tort and contract claims to proceed on remand.

DCF seeks further appellate review of the decision for three "substantial reasons affecting the public interest." Mass. R. App. P. 27.1.

First, the Appeals Court's expansive application of § 10(j)(1) to the standard-form foster care agreement provision at issue is inconsistent with the plain language of the exception and contrary to this Court's decisions in *Campbell v. Boston Housing Authority*, 443 Mass. 574 (2005) and *Sullivan v. Chief Justice for Administration and Management of the Trial Court*, 448 Mass. 15 (2006). This Court's precedent limits § 10(j)(1) to exceptional cases where public employers make assurances that are "definite, fixed, and free from ambiguity" with respect to their specific subject matter. *Campbell*, 443 Mass. at 586; *Lawrence v. City of Cambridge*, 422 Mass. 406, 410 (1996). By characterizing a general and open-ended representation in the standard-form foster care agreement as an "explicit and specific assurance[] of safety or assistance," the Appeals Court misapplied this Court's precedent and substantially expanded the scope of the previously narrow

[1] Citations to "RA" are to the Record Appendix filed in the Appeals Court. Citations to "Add." are to the Addendum appended to this application.

exception of § 10(j)(1), a result that could impact agencies across state government.

Second, by finding that the agreement required DCF to turn over all information known to the agency about the child's sexual abuse history (substantiated or not, and including alleged victimization as well as alleged perpetration), the Appeals Court has placed DCF in the position of having to disclose to prospective foster parents information about children's histories as *victims* of sexual abuse, as well as allegations about children as perpetrators of abuse even when those allegations are unsubstantiated and recanted, as Plaintiff-Appellants have alleged here. This result not only threatens to further stigmatize already-vulnerable children, it has created a conflict between § 10(j)(1) and G. L. c. 119, §§ 33B and 51E, the statutes that govern DCF's disclosure obligations regarding a child's sexual abuse history, which DCF complied with here and which, in the case of G. L. c. 119, § 51E, prohibits disclosure to prospective foster parents of the kind of information contained in the allegations of the Complaint.

Third, by allowing the tort and contract claims to proceed against DCF, where both claims sound in personal injury and are alleged to have arisen out of the exact same set of facts, the Appeals Court's decision violates the exclusivity provision of § 2 of the Massachusetts Tort Claims Act ("MTCA"), which states that "[t]he remedies provided by [the MTCA] shall be exclusive of any other civil

action or proceeding by reason of the same subject matter against the public employer." G. L. c. 258, § 2.

Because the Appeals Court ignored an elemental requirement of the MTCA, misapplied this Court's precedent on the scope of § 10(j)(1), and created an irreconcilable conflict between § 10(j)(1) and G. L. c. 119, §§ 33B and 51E, further appellate review is appropriate.

STATEMENT OF PRIOR PROCEEDINGS

In July 2016, Plaintiff-Appellants[2] filed a two-count complaint in the Middlesex Superior Court against DCF alleging claims of negligence and breach of contract. RA 4-15. In February 2017, DCF filed a motion for judgment on the pleadings as to both counts. RA 26-65. The Superior Court (Lu, J.) allowed the motion and dismissed the Complaint in its entirety on October 13, 2017. RA 96-101.

Plaintiff-Appellants filed a notice of appeal on November 7, 2017, and in a published opinion dated January 16, 2020, the Appeals Court reversed the Superior Court's judgment dismissing the Plaintiff-Appellants' Complaint and remanded the case to the Superior Court for further proceedings on both the tort claim and the contract claim. RA 102; Add. 39 (slip op. 12). DCF sought and received from this

[2] Rhea R., Ralph R., and Ramona R., a minor, by her parents and next friends, Rhea R. and Ralph R. The parties' names are pseudonyms.

Court an extension of time in which to file this application to and including March 9, 2020. Dkt. #1, No. FAR-27321. No party has sought reconsideration or modification in the Appeals Court.

STATEMENT OF FACTS

I. Relevant Statutory Framework.

A. Section 10(j) of the Massachusetts Tort Claims Act.

In enacting the Massachusetts Tort Claims Act (the "MTCA"), the Legislature waived public employers' sovereign immunity for certain negligence claims. *See generally* G. L. c. 258. Prior to this Court's decision in *Jean W. v. Commonwealth*, 414 Mass. 496 (1993), the Court "had precluded liability for otherwise valid [negligence claims brought pursuant to the MTCA] if the plaintiff could not establish a special relationship between himself and the public employee." *Lawrence*, 422 Mass. at 408. In *Jean W.*, the Court announced its intention to abolish this so-called "public duty rule" and invited the Legislature "to respond to this anticipated change by passing additional limitations on liability." 414 Mass. at 499. The Legislature responded, *inter alia*, by enacting the language of § 10(j) to operate as "in effect . . . a statutory public duty rule providing governmental immunity." *Carleton v. Town of Framingham*, 418 Mass. 623, 627 (1994).

As relevant here, § 10(j) bars:

> [A]ny 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.

G. L. c. 258, § 10(j) (emphasis added). However, pursuant to § 10(j)(1), the immunity generally provided by § 10(j) does not extend to:

> [A]ny claim based upon explicit and specific assurances of safety or assistance, beyond general representations that investigation or assistance will be or has been undertaken, made to the direct victim or a member of his family or household by a public employee, provided that the injury resulted in part from reliance on those assurances.

G. L. c. 258, § 10(j)(1).

B. General Laws c. 119, §§ 51E and 33B.

When a statutorily mandated reporter has reasonable cause to believe a child is suffering from abuse or neglect, including sexual abuse, the mandated reporter must report such allegation to DCF immediately, pursuant to G. L. c. 119, § 51A ("51A report"). Upon receipt of a 51A report, DCF must screen the report to determine whether the allegation meets the applicable statutory and regulatory requirements. *See* 110 CMR 4.21. Once a 51A report is "screened in," DCF is required to investigate the allegation and make a written evaluation to include the identity of the alleged perpetrator and a determination of whether the allegation is supported ("51B report"). G. L. c. 119, § 51B, *see also* 110 CMR 4.32. Thus, as a general matter, information held by DCF concerning suspected sexual abuse of

children or perpetrated by children is contained in 51A reports and 51B investigations.

General Laws c. 119, § 51E governs the confidentiality of 51A reports and 51B investigations. The statute states that:

> [DCF] shall maintain a file of the written reports prepared under this section and sections 51A to 51D inclusive. These written reports shall be confidential. Upon request and with the approval of the commissioner, copies of written reports of initial investigations may be provided to: (i) the child's parent, guardian, or counsel, (ii) the reporting person or agency, (iii) the appropriate review board, (iv) a child welfare agency of another state for the purpose of assisting that agency in determining whether to approve a prospective foster or adoptive parent, or (v) a social worker assigned to the case. No such report shall be made available to any persons other than those specified in this section without the written and informed consent of the child's parent or guardian, the written approval of the commissioner, or an order of a court of competent jurisdiction.

G. L. c. 119, § 51E. By incorporating §§ 51A and 51B, this section governs the confidentiality and limited disclosure of the identities of children who are suspected victims and perpetrators of sexual abuse and of DCF's findings of whether or not such allegations are supported.[3] *See* G. L. c. 119, §§ 51A, 51B.

[3] Disclosure of this information can also occur in other very limited circumstances not relevant here. *See, e.g.*, G. L. c. 119, § 51B(k)(2) (requiring DCF to notify the local district attorney of *substantiated* 51A reports of sexual assault) (emphasis added); G.L. c. 119, § 51F (requiring DCF to maintain a central registry of children whose names are reported under §§ 51A and 51B but making that information available "only with the approval of the commissioner or upon court order" or to a child welfare agency of another state for purposes of assisting that agency).

General Laws c. 119, § 33B, titled "Placement in family home care of juvenile who has or may have committed a sexual offense or arson," serves as an exception to G. L. c. 119, § 51E's confidentiality rules and governs those circumstances where DCF is required to provide information about a child's history of sexual abuse to a placement despite the fact that such information would otherwise remain confidential. The statute states in pertinent part:

> At the time of placing a child in family home care[4] … [DCF]… shall determine whether the child has been adjudicated delinquent for a sexual offense … or has admitted to such behavior, or is the subject of a documented or substantiated report of such behavior….
>
> Where [DCF]…makes a referral of such child to a foster home…, [DCF]…shall disclose the child's behavioral history, including adjudications, if any, to the designated recipient of the referral, prior to placement or at referral.

G. L. c. 119, § 33B. Thus, when DCF is attempting to find a foster care placement for a child who is *known* to have committed a sexual offense – whether that knowledge has come through an adjudication of delinquency, an admission, or a documented or substantiated report – DCF must disclose that information to the prospective foster family. But where allegations of a sexual offense are

[4] Although "family home care" is not defined in G. L. c. 119, it is generally understood to refer to foster care. *See* 3 Charles P. Kindregan, Jr. et al., *Family Law and Practice*, § 87:2 (4th ed. 2013); 3 Mass. Prac., Family Law and Practice § 87:2 (4th ed.).

unsubstantiated or recanted, DCF *may not* disclose that information because § 33B does not apply, and therefore the confidentiality rules of § 51E remain in place.

II. Facts Relevant to This Appeal.

In May 2013, DCF was seeking an appropriate foster care placement for Frank,[5] a 12-year old boy in their custody whose custodial grandmother had recently passed away. RA 6. DCF contacted Plaintiff-Appellants Rhea R. and Ralph R., licensed foster care parents and the parents of Plaintiff-Appellant Ramona R., and asked to place Frank in their home. RA 6.

Pursuant to 110 CMR 7.111, all licensed foster care parents in the Commonwealth must enter into a written agreement with DCF, which provides, among other things, "a statement of the responsibilities of the foster[] parent" and "a statement of [DCF's] responsibilities to the foster[] parents." This agreement follows a standard form, and with respect to DCF's obligations, generally tracks and incorporates the regulatory requirements appearing at 110 CMR 7.112. *See* 44A Mass. Prac., Juvenile Law § 6.19 (2d ed.); RA 91-95 (Agreement Between the Massachusetts Department of Children and Families and Foster/Pre-Adoptive Parents (the "Agreement")). Consistent with 110 CMR 7.112(1), the Agreement includes a provision regarding disclosure of information about a foster child to potential foster parents, which states:

[5] A pseudonym.

> [DCF] AGREES TO…provide the family with sufficient information about a child who is in DCF care or custody, prior to placement, so that she or he can knowledgeably determine whether or not to accept the child, and to provide the foster/pre-adoptive family with sufficient information on an ongoing basis about the child who is in DCF care or custody to enable the foster/pre-adoptive family to provide adequate care to that child and to meet the individual needs of that child.[6]

RA 91. As foster parents, Rhea R. and Ralph R. entered into the Agreement with DCF.[7] RA 5.

Plaintiff-Appellants allege that when DCF contacted them about placing Frank in their care, DCF provided only Frank's name, age, and the fact that his grandmother had died. RA 6. Plaintiff-Appellants allege that at that time DCF

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[6] The language of the provision tracks 110 CMR 7.112(1), a portion of Section 7 of 110 of the Code of Massachusetts Regulations, which governs DCF's behavior in its provision of services to children in its custody through social service providers. 110 CMR 7.001. 110 CMR 7.112(1) states:

> Pre-Placement. Before a child is placed in a foster[] home, [DCF] shall provide the prospective foster[] parent with sufficient information about the child to enable the foster[] parent to determine whether to accept placement of the child. The foster[] parent will receive information about the service plan for the child, behavior management guidelines and techniques, the child's medical needs, the child's educational needs, current health and education information and/or records available, legal status and any other special conditions or requirements.

110 CMR 7.112(1).

[7] The standard-form Agreement provided to all foster parents includes a section at the end for DCF and the foster parents to "note any additional agreements and/or responsibilities" specific to the parties. RA 95. Plaintiff-Appellants do not allege any specific provisions were added to this section of the Agreement by themselves or DCF in this case.

knew and failed to disclose that Frank had been a victim of sexual abuse by his step-grandfather. RA 9. Plaintiff-Appellants also allege that Frank had been the subject of a single, unsubstantiated, and later-recanted allegation from his twin sister that he had attempted to touch or kiss her inappropriately, which Frank denied. RA 9. Plaintiff-Appellants base these allegations on a medical record later obtained by Rhea R. and Ralph R. stating:

> According to Karen Wilson, DCF supervisor, [Frank] and his twin sister [had previously] both disclosed that they were sexually abused by their step grandfather…. [Frank]'s twin sister disclosed to her foster mother that [Frank] would try to come into her bed, try to touch her and kiss her. *However, she later recanted the story and [Frank] denied the incidents that [sic] it was unclear if or what exactly happened.*

RA 9 (emphasis added).[8]

On or around May 9, 2013, Frank was placed in Plaintiff-Appellants' home where he lived for four months. RA 6-8. On September 2, 2013, Ramona R. made a disclosure to her father, Ralph R., that led him to believe that Frank had sexually assaulted his daughter. RA 8-9.

Plaintiff-Appellants later filed suit as described above, alleging that DCF's failure to disclose information about Frank's sexual abuse victimization and alleged perpetration was both negligent and a breach of the Agreement. RA 4-15.

[8] The Appeals Court decision omits the italicized portion of the medical record and omits any mention of the fact that the allegation against Frank was recanted – even though that portion of the medical record and the fact of the recantation were included in Plaintiff-Appellants' Complaint. Add. 31 (slip op. 4 n.4); RA 9.

DCF moved for judgment on the pleadings, arguing that Plaintiff-Appellants' tort claim was barred by § 10(j) of the MTCA because DCF was not the "original cause" of the harm, and that Plaintiff-Appellants' contract claim was merely a recast of their negligence claim and thus also barred. RA 26-65. Plaintiff-Appellants never argued to the Superior Court that DCF was the "original cause" of the assault under § 10(j), but argued that their suit was not barred because it fell under the exception of § 10(j)(1) allowing claims to go forward "based upon explicit and specific assurances of safety or assistance." RA 66-82; *see also* Add. 34 (slip op. 7 n.7). Specifically, Plaintiff-Appellants contended that the Agreement's general provision regarding disclosure of information amounted to an "explicit and specific assurance of safety" within the meaning of § 10(j)(1). RA 66-82. The Superior Court (Lu, J.) allowed DCF's motion, finding that § 10(j)(1) did not apply to Plaintiff-Appellants' claims. RA 96-101.

The Appeals Court reversed the Superior Court's decision, holding that Plaintiff-Appellants had waived any argument that DCF was the "original cause" of Ramona R.'s assault, but that both the negligence and breach of contract claims could nevertheless proceed because of the exception in § 10(j)(1) and DCF's alleged failure to disclose "information known to it" that was "material to the parents' evaluation of whether to accept placement of the foster child in their home." Add. 34, 38-39 (slip op. 7 n.7, 11-12). The Appeals Court held that, "[i]f

the plaintiffs' allegations are proven, the department violated its contractual commitment." Add. 38 (slip op. 11).

POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. Whether in light of this Court's prior decisions, and the plain language and legislative intent underlying G. L. c. 258, § 10(j)(1), a general and non-specific provision in a standard-form contract, whereby DCF agrees to provide a foster family "with sufficient information" about a child who is in DCF care or custody so that the family "can knowledgeably determine whether or not to accept the child" and "provide adequate care to that child," is an "explicit and specific assurance of safety or assistance" within the meaning of G. L. c. 258, § 10(j)(1).

2. Whether the Appeals Court was correct to hold that, under the Agreement, DCF was required to disclose to the foster family all "information known to it" about the child's sexual abuse history (substantiated or not, and including alleged victimization as well as alleged perpetration), even though G. L. c. 119, §§ 33B and 51E, restrict DCF's disclosure obligations to instances where "the child has been adjudicated delinquent for a sexual offense … or has admitted to such behavior, or is the subject of a documented or substantiated report of such behavior."

3. Whether the Appeals Court's decision to reinstate Plaintiff-Appellants' contract claim and tort claim, where both claims are essentially

personal injury claims arising out of an identical set of facts and concerning the same subject matter, violated the exclusivity provision of G. L. c. 258, § 2.

STATEMENT OF REASONS WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

The events alleged in the Complaint are tragic, and the impulse to allow a lawsuit based on them to go forward is understandable. But the Appeals Court's erroneous decision threatens unintended and significant consequences generally and for the child welfare system specifically. By misinterpreting and expanding § 10(j)(1), the decision may lead to liability for state agencies for the wrongful acts of third parties in circumstances well beyond what the Legislature intended. Further, by effectively requiring DCF to disclose to potential foster families a child's history as a *victim* of sexual abuse and *unsubstantiated* allegations of committing sexual abuse, the decision threatens the privacy of children in need of foster care and creates a conflict with the statutes governing the confidentiality of this kind of information. For these reasons and the additional reasons discussed below, further appellate review from this Court is warranted.

I. The Appeals Court's Expansive Interpretation of § 10(j)(1) is Inconsistent with the Plain Language of the Statute and Contrary to Precedent.

The provision of the Agreement at issue is not an "explicit and specific assurance of safety or assistance" under § 10(j)(1), as written or interpreted by this

Court.[9] As the Appeals Court acknowledges, the provision "does not describe the precise contours of the information" DCF will furnish. Add. 37-38 (slip op. 10-11). Under the statute and this Court's cases, the inquiry should end there. Because, on its face, the provision does not specifically and unambiguously require DCF to disclose a defined category of information to foster parents to guarantee their safety from the foster child, it is not an "explicit and specific assurance of safety or assistance" that overrides the Commonwealth's immunity for the tortious conduct of third parties under § 10(j).

This Court first interpreted § 10(j)(1) in *Lawrence v. City of Cambridge*, 422 Mass. 406 (1996). There, this Court held that by "'explicit' the Legislature meant a spoken or written assurance, not one implied from the conduct of the parties or the situation, and by 'specific' the terms of the assurance must be definite, fixed, and free from ambiguity." *Id.* at 410. Because the provision at issue is not "definite, fixed, and free from ambiguity" with respect to its subject matter and contains no express assurance, *Campbell*, 443 Mass. at 586; *Lawrence*, 422 Mass. at 410, it cannot be an "explicit and specific assurance" under the plain text of § 10(j)(1). In holding otherwise, the Appeals Court's decision misread and misapplied the language of the exception and this Court's precedent.

[9] This Court has analyzed § 10(j)(1) in just four cases, most recently in 2006. *See Sullivan*, 448 Mass. 15; *Campbell*, 443 Mass. 574; *Barnes v. Met. Housing Assistance Program*, 425 Mass. 79 (1997); *Lawrence*, 422 Mass. 406.

First, the Appeals Court's decision contradicts *Campbell v. Boston Housing Authority*, 443 Mass. 574 (2005), the nearest case on point. The plaintiff in *Campbell* sued the Boston Housing Authority ("BHA") for injuries from lead exposure due to flaking paint.[10] 443 Mass. at 575. BHA argued there was no evidence of "explicit and specific assurances of safety" under § 10(j)(1). *Id.* 579-80. This Court agreed, finding that representations made by BHA in response to plaintiff's concerns about flaking paint in her apartment—that "it would be taken care of"; the apartment would be made "sanitary and clean"; and she was entitled to "safe, affordable, and decent housing"—did not constitute fact-specific assurances about lead exposure. *Id.* at 585. Although BHA's responses may have been *generalized* assurances of safety, they "contain[ed] no definitiveness, [we]re not fixed, and d[id] not state with any measure of assurance that BHA was actually going to…address the lead-based paint issues in a specified manner." *Id.* at 585-86 (citation omitted). As such, § 10(j)(1) was inapplicable. *Id.* at 586.

The Appeals Court's decision also misreads *Sullivan v. Chief Justice for Administration and Management of the Trial Court*, 448 Mass. 15 (2006). The plaintiffs in *Sullivan* were courthouse employees who learned of asbestos hazards

[10] The plaintiff in *Campbell* also brought a contract claim as a third-party beneficiary to a contract between BHA and the federal government. *Id.* However, contrary to the Appeals Court's characterization of *Campbell*, this Court did not analyze the contractual claim under § 10(j)(1). *Compare id.* at 585 *to* Add. 36 (slip op. at 9).

in the building. *Id.* at 18. In response to plaintiffs' concerns, the Chief Justice for Administration and Management of the Trial Court ("CJAM") released an action plan ensuring advance notice of all renovation work that could cause asbestos exposure. *Id.* at 19-20. Subsequently, renovations began without notice. *Id.* at 20. This Court held that the CJAM's assurances were "definitive, specific, and free of ambiguity." *Id.* at 32. Because the plaintiffs' concern was asbestos exposure, and the CJAM made specific and unambiguous assurances about notifying the plaintiffs of that specific threat, this Court found § 10(j)(1) applied. *Id.* at 33. The holding in *Sullivan*—like the holding of prior Appeals Court decisions—clearly required an assurance to be specific and unambiguous regarding the risk at issue in order for § 10(j)(1) to apply. *See id.; McCarthy v. City of Waltham*, 76 Mass. App. Ct. 554, 561-63 (2010); *Ford v. Town of Grafton*, 44 Mass. App. Ct. 715, 724-25 (1998).

Indeed, the Appeals Court recognized that the assurances in *Sullivan* promised "that [the employees] would receive information necessary to allow them to take steps to ensure their safety *from exposure to asbestos*." Add. 37 (slip op. 10) (emphasis added). But the Appeals Court ignored that it is the very *specificity* of those assurances—that they related to the specific harm of asbestos exposure—that brought them within § 10(j)(1). *See Sullivan*, 448 Mass. at 32. Because there

are no such specific assurances in this case, *Sullivan* does not support the Appeals Court's decision.

Here, rather, the standard-form Agreement is generalized, open-ended, and not specific about what information DCF will provide to foster families—just like the general representations about lead hazards in *Campbell*, 443 Mass. at 585-86, and unlike the factually-specific assurances about providing notice before asbestos exposure in *Sullivan*, 448 Mass. at 32-33. Indeed, the Appeals Court acknowledged this lack of factual specificity stating:

> [T]hough [DCF's] assurance does not describe the precise contours of the information [DCF] would furnish, its *general* expression is *understandable* in light of the *variable* nature of the kind of information that might relate to a particular child….

Add. 37-38 (slip op. 10-11) (emphasis added). But, as a matter of both logic and precedent, a "general expression" is not "specific," and "variable" information is not "definite, fixed and free from ambiguity." *Campbell*, 443 Mass. at 586; *Lawrence*, 422 Mass. at 410.

Further, an "explicit" assurance cannot be "implied" from language that is open-ended or evaluated by reference to a plaintiff's subjective impression of the public employer's words, even if that impression is "understandable." *Barnes*, 425 Mass. at 87-88; *Lawrence*, 422 Mass. at 411. For § 10(j)(1) to apply, the assurance must be objectively evaluated for factual specificity on its face, not—contrary to the Appeals Court's opinion—based on what the hearer believed the assurance

meant or considered "material." *See Lawrence*, 422 Mass. at 411 (an individual's subjective reliance "cannot supply the terms that cause the assurance to suffer from a lack of specificity at the time it was made"); *but see* Add. 38 (slip op. 11) ("If the plaintiffs' allegations are proven, [DCF] violated its contractual commitment by failing to provide . . . information . . . material to the parents' evaluation of whether to accept the placement . . . ."). The plain language of the provision does not support the Appeals Court's conclusion that DCF was required to disclose all "information known to it" about Frank's sexual abuse history. Add. 38 (slip op. 11).

Lastly, in *Barnes v. Metropolitan Housing Assistance Program*, 425 Mass. 79 (1997), this Court explained the Legislature's intention to limit § 10(j)(1) "to the truly exceptional case[s] where direct and explicit assurances are given to a particular person quite apart from the normal carrying out of officials' routine duties…." *Id.* at 87. The Appeals Court's decision is irreconcilable with that narrow conception of the exception's purpose. The provision is a representation DCF gives to *all* foster parents in its standard-form contract—not to a "particular person"—and, as a regulatory matter, DCF *must* provide to a*ll* foster parents. *See* 110 CMR 7.111, 7.112(1). As such, it represents precisely the "carrying out of…routine duties" to which the Legislature never intended § 10(j)(1) to apply.

II. The Decision Contradicts the Disclosure Requirements of G.L. c. 119, §§ 51E and 33B.

By holding that DCF had to disclose all "information known to it" about Frank's sexual abuse history (Add. 38 (slip op. 11)), the Appeals Court created a conflict between § 10(j)(1) and G. L. c. 119, §§ 51E and 33B, the statutes governing the disclosure of a child's sexual abuse history, which provide that such history may be disclosed only in specific circumstances not present here.

Statutes concerning the same subject matter must be construed "together so as to constitute a harmonious whole consistent with the legislative purpose." *Wing v. Comm'r of Probation*, 473 Mass. 368, 373 (2015) (internal quotation omitted). As explained *supra* at 8-9, under § 51E, DCF must generally keep reports and investigations of child sexual abuse confidential and only disclose that information to the limited list of persons enumerated in the statute. Section 33B creates an exception to § 51E where a child has been adjudicated of, admitted to, or been found via a documented or substantiated report to have engaged in a sexual offense. In those limited circumstances, DCF "shall disclose" this information to prospective foster parents. Here, as stated in the Complaint, DCF is alleged to have known Frank was a victim of sexual abuse, and the subject of a single, unsubstantiated, and recanted allegation of perpetration, which Frank denied. RA 9. Where such information of perpetration was unsubstantiated and recanted, DCF

could not have disclosed it to Plaintiff-Appellants under §§ 51E or 33B. *See supra* at 8-11.

Troublingly, the Appeals Court's decision would require that DCF disclose that Frank was a *victim* of sexual assault—a category of information DCF must keep confidential under §§ 51E and 33B.[11] As § 51E makes apparent, one's experience as a victim of sexual assault is highly sensitive. *Cf. Commonwealth v. Aviles*, 461 Mass. 60, 71-72 (2011) (noting "fear, shame, [and] psychological trauma" experienced by victims of sexual assault, particularly children). By interpreting § 10(j)(1) to require DCF to disclose Frank's victimization, the Appeals Court rendered the protections of §§ 51E and 33B meaningless for Frank and other children who are in DCF's custody precisely because they were the victims of abuse in the first place. And by interpreting § 10(j)(1) to require disclosure of an unsubstantiated allegation, the Appeals Court disregarded the Legislature's careful efforts, as reflected in § 33B, to ensure children are not permanently stigmatized as sexually dangerous based on unsubstantiated suspicion and to strike a balance between protecting children's privacy and sharing enough information to support foster families.

[11] Except in circumstances not relevant here. *See supra* at 9 n.3.

III. The Decision to Reinstate the Contract Claim Violates the Exclusivity Provision of § 2 of the MTCA.

Under the MTCA, "[t]he remedies provided by [G. L. c. 258] shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer." G. L. c. 258, § 2. "[A] plaintiff may not avoid the requirements and limitations of the [MTCA] by designating what is essentially a personal injury claim as a contract claim." *Monahan v. Town of Methuen*, 408 Mass. 381, 391 (1990) (internal quotation omitted). Plaintiff-Appellants alleged breach of contract and negligence claims against DCF; however, both claims sound in personal injury and rely on identical facts. RA 11-15. Thus, allowing both claims to go forward on remand violates the MTCA's exclusivity clause. *See Lipsitt v. Plaud*, 466 Mass. 240, 244 n.7 (2013).

CONCLUSION

For the foregoing reasons, the application for further appellate review should be granted.

Respectfully submitted,

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DEPARTMENT OF CHILDREN
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By its attorney,

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Dated: March 9, 2020

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I, Abigail Fee, Assistant Attorney General, hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 27.1(b) because it contains 2000 words in 14-point Times New Roman font (not including the portions of the brief excluded under Rule 27.1), as counted in Microsoft Word (version: Word 2016).

/s/Abigail Fee
Abigail Fee
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2020, I filed with the Supreme Judicial Court and served the attached Defendant-Appellee Massachusetts Department of Children and Families' Application For Further Appellate Review in Rhea R., Ralph R., and Ramona R., a minor by and through her next friends/parents, Rhea R. and Ralph R., v. the Massachusetts Department of Children and Families, FAR No. 27321, through the electronic means provided by the clerk on the following registered users:

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ADDENDUM

18-P-1568 Appeals Court

RHEA R.[1] & others[2] vs. DEPARTMENT OF CHILDREN AND FAMILIES.

No. 18-P-1568.

Middlesex. September 12, 2019. - January 16, 2020.

Present: Green, C.J., Milkey, & Wendlandt, JJ.

Adoption, Foster parents. Massachusetts Tort Claims Act. Governmental Immunity. Negligence, Governmental immunity.

Civil action commenced in the Superior Court Department on July 27, 2016.

The case was heard by John T. Lu, J., on a motion for judgment on the pleadings.

Gregory A. Hession for the plaintiffs.
Gregory Schmidt, Special Assistant Attorney General, for the defendant.

GREEN, C.J. After the Department of Children and Families (department or DCF) placed a foster child in the plaintiffs'

[1] A pseudonym.

[2] Ralph R., and Ramona R., a minor, by her parents and next friends, Rhea R. and Ralph R. The parties' names are pseudonyms.

home, the foster child sexually assaulted the family's young daughter. Under the written foster care agreement between the department and the plaintiff parents, the department had agreed to provide them with sufficient information about any child proposed for placement to enable them "knowledgeably [to] determine whether or not to accept the child." As the parents later discovered, however, the department was aware at the time it placed the child in the plaintiffs' home that the child had a history as both a victim and a perpetrator of sexual abuse, but did not disclose that information to the parents before placing him in their home. The plaintiffs filed a complaint against the department, claiming negligence and breach of contract. At issue on appeal is a judgment of the Superior Court dismissing the plaintiffs' complaint on the ground that their claims are barred by sovereign immunity, G. L. c. 258, § 10 (j) (§ 10 [j]). We reverse.

Background. The case comes before us on the plaintiffs' appeal from a judgment of dismissal, entered on the department's motion for judgment on the pleadings. We accordingly summarize the facts alleged in the plaintiffs' complaint, which we (like the motion judge) take as true for purposes of our evaluation of the department's claim of immunity. See Minaya v. Massachusetts Credit Union Share Ins. Corp., 392 Mass. 904, 905 (1984).

The plaintiffs are two parents and their minor daughter. The parents have taken in hundreds of foster children under contract with the department since 1999. The written foster care agreement between the parents and the department, which is signed by both parents and (on behalf of the department) by the parents' department family resource worker, sets out in considerable detail the parents' and the department's respective responsibilities, imposing twenty specific obligations on the department and thirty-three specific obligations on the parents. Among the provisions of the agreement (and among the specific obligations undertaken by the department) is the following:

> "THE DEPARTMENT . . . AGREES TO:
>
> 1. provide the family with sufficient information about a child who is in [the department's] care or custody, prior to placement, so that she or he can knowledgeably determine whether or not to accept the child, and to provide the foster/pre-adoptive family with sufficient information on an ongoing basis about the child who is in [the department's] care or custody to enable the foster/pre-adoptive family to provide adequate care to that child and to meet the individual needs of that child."[3]

In May 2013, the department telephoned the mother to ask if it could place a twelve year old boy, to whom we shall refer as Frank, in her home for a few days. The only information about Frank furnished to the mother was that his grandmother had

[3] That provision tracks the language of regulations promulgated by the department in 110 Code Mass. Regs. § 7.112(1) (2009).

passed away and his aunt did not have legal custody. At the time of the department's request, the parents were not taking any new foster child placements and had notified their foster care supervisor of that decision. After a second request by the department (based on its expressed desire to avoid requiring Frank to change schools before the end of the school year), the mother "reluctantly" agreed to accept the placement, but stated to both Frank's caseworker and the parents' foster care supervisor that they would not keep him for the summer.

Prior to Frank's placement in the parents' home, the mother requested additional information about him from Frank's caseworker but did not receive any, despite the department's awareness that Frank had a history of sexual abuse.[4] Had the parents known the information that was known to the department regarding Frank's history of sexual abuse, they would not have agreed to the foster placement.

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[4] Medical records subsequently obtained by the parents from a hospital included an entry that stated:

> "[Frank] is a 12-year old boy who came to live with the [plaintiff parents] in May 2013. According to Karen Wilson, DCF supervisor, [Frank] and his twin sister both disclosed that they were sexually abused by their step grandfather and went through the SAIN interview a few months ago. [Frank's] twin sister disclosed to her foster mother that [Frank] would try to come into her bed, try to touch her and kiss her."

Following Frank's placement in their home, the parents twice requested the department to end the placement due to behavioral problems, but the department took no action. In fact, the placement continued through the summer, and as fall approached Frank's caseworker enrolled him in the public school in the town in which the plaintiffs resided, without telling the parents (who learned of the enrollment only when the school called to verify Frank's enrollment).

On September 2, 2013, as the family awaited the arrival of guests for their daughter's fifth birthday party, the daughter disclosed to her father that Frank had sexually assaulted her.

Discussion. The motion judge concluded that the plaintiffs' claims for negligence and breach of contract are barred by the Massachusetts Tort Claims Act, G. L. c. 258 (MTCA), and specifically by § 10 (j) thereof.[5] Our review of a motion for judgment on the pleadings is de novo, based on our review of the allegations of the complaint. Kraft Power Corp. v. Merrill, 464 Mass. 145, 147 (2013). "The effect of a motion for judgment on the pleadings is 'to challenge the legal

[5] General Laws c. 258, § 10 (j), provides that a "public employer" (as defined in § 1 of that chapter, and which includes the department) is immune from "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 [its employees]."

sufficiency of the complaint.' Burlington v. District Attorney for the N. Dist., 381 Mass. 717, 717-718 (1980). . . . [Therefore,] '[f]or purposes of the court's consideration of the [rule 12 (c)] motion, all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false.' 5 C.A. Wright & A.R. Miller, Federal Practice and Procedure § 1368, at 691 (1969)." Minaya, 392 Mass. at 905.

Section 10 (j) was enacted among a series of amendments to the MTCA in 1993, in response to the announced intention of the Supreme Judicial Court, in Jean W. v. Commonwealth, 414 Mass. 496, 499 (1993), to abrogate the "public duty rule."[6] As indicated by the language quoted in note 5, supra, § 10 (j) bars any claim based upon a public employer's act or failure to act to prevent harm resulting from a condition or situation, including the wrongful act of a third party, unless the condition or situation was "originally caused" by the public

[6] As explained in Jean W., 414 Mass. 500-501, "[t]he public duty rule, broadly stated, is a judicially-created doctrine that protects governmental units from liability unless an injured person seeking recovery can show that the duty breached was a duty owed to the individual himself, and not merely to the public at large" (footnote omitted).

employer.[7] Cormier v. Lynn, 479 Mass. 35, 40 (2018), quoting Brum v. Dartmouth, 428 Mass. 684, 692, 695 (1999). The exclusion of liability is, however, subject to the saving provision of § 10 (j) (1), in circumstances where the claim is "based upon explicit and specific assurances of safety or assistance, beyond general representations that investigation or assistance will be or has been undertaken, made to the direct victim or a member of his family or household by a public employee, provided that the injury resulted in part from reliance on those assurances."

To fall within the saving provision of § 10 (j) (1), an "explicit" assurance must be "a spoken or written assurance, not one implied from the conduct of the parties or the situation," and to be "specific" "the terms of the assurance must be definite, fixed, and free from ambiguity." Lawrence v. Cambridge, 422 Mass. 406, 410 (1996). Several cases have considered the contours of the saving provision, and guide our evaluation of the plaintiffs' claims in the present case.

In Lawrence, the plaintiff (who managed a retail liquor store) had been robbed at gunpoint after closing the store. Id.

[7] Though the plaintiffs assert on appeal that the department was the original cause of the harm forming the basis for their claims, they did not make that argument in the Superior Court; accordingly, it is waived. See Springfield v. Civil Serv. Comm'n, 469 Mass. 370, 382 (2014); Albert v. Municipal Court of Boston, 388 Mass. 491, 493-494 (1983).

at 407. His assailant was apprehended, and the plaintiff agreed to testify before a grand jury weighing charges against the assailant. Id. In agreeing to testify, the plaintiff relied on a promise by the Cambridge Police to "protect [the plaintiff] when [he] closed the store at night." Id. A police officer thereafter was stationed at the liquor store around closing time for the next three nights. Id. However, on the fourth night (the night before the plaintiff was due to testify before the grand jury), no police officer was present when the plaintiff was shot in the face after leaving the store. Id. The police did not tell the plaintiff that it would stop providing protection before the occasion on which the plaintiff was shot. See id. Though the court recognized some uncertainty regarding the duration of the assurance, it concluded that (at least for purposes of summary judgment) it should be taken as true that the promise of protection extended for so long as his assailant and his companions posed a threat to the plaintiff. See id. at 411-412. Accordingly, the court concluded that the assurance of police protection fell within the saving provision of § 10 (j) (1). See id.

By contrast, in Barnes v. Metropolitan Hous. Assistance Program, 425 Mass. 79, 80-81 (1997), claims arising from lead paint poisoning were barred notwithstanding obligations imposed in a written rent subsidy contract between a local public

housing authority and the plaintiffs' landlord to inspect the premises prior to occupancy, to assure that the premises were "decent, safe, and sanitary."[8] Though the court recognized that the plaintiff tenants were intended third-party beneficiaries of the subsidy contract, it held that the claims were barred by § 10 (j) because the assurances made in the contracts were not "made to the direct victim or a member of [her] family." Id. at 87. Similarly, in Campbell v. Boston Hous. Auth., 443 Mass. 574, 576, 583-584 (2005), the court concluded that § 10 (j) would bar the plaintiff tenant's claim as an intended third-party beneficiary of an essentially identical obligation under a rent subsidy contract between a housing authority and her landlord.[9,10]

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[8] The court also held that the plaintiffs' "understanding" that the unit had passed a safety inspection was the "sort of assurance 'implied from the conduct of the parties or the situation,' that we have held does not meet the requirements of the statute." Barnes, 425 Mass. at 87, quoting Lawrence, 422 Mass. at 410.

[9] The court nonetheless allowed the contractual claim to proceed, because it arose before the enactment of § 10 (j) and the application of § 10 (j) to bar the claim would violate the contract clause of the United States Constitution. See Campbell, 443 Mass. at 581.

[10] As in Barnes, 425 Mass. at 87, the court also expressed its view that certain general verbal statements made by housing authority inspectors were not the sort of "explicit and specific" assurances required to fall within the saving provision of § 10 (j) (1). Campbell, 443 Mass. at 585-586.

We consider Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court, 448 Mass. 15 (2006), to be particularly instructive on the question. In that case, following the discovery of large quantities of asbestos in a court house, the defendant released an action plan that provided (among other things) that all employees working in the building would be notified in advance of all work activities for asbestos removal. See id. at 19-20. However, work took place on several occasions without prior notice to the employees. Id. at 20. The court held that the defendant's assurances were sufficiently definitive, specific, and free of ambiguity to satisfy the requirements of § 10 (j) (1). Id. at 32-33. Though the assurance of notice prior to work activities did not itself provide a promise of safety to building employees, it assured them that they would receive information necessary to allow them to take steps to ensure their safety from exposure to asbestos during performance of the work.

In the present case, the foster care agreement between the department and the parents contained an explicit and specific assurance that the department would provide the parents with sufficient information about a foster child proposed for placement in their home to allow them "knowledgeably [to] determine whether or not to accept the child." That assurance, made to the parents, is unambiguous; though the assurance does

not describe the precise contours of the information the department would furnish, its general expression is understandable in light of the variable nature of the kind of information that might relate to a particular child (and a prospective foster parent's evaluation of whether to accept that child), and the character of the information is adequately described by reference to its purpose. If the plaintiffs' allegations are proven, the department violated its contractual commitment by failing to provide the parents with information known to it, and plainly material to the parents' evaluation of whether to accept placement of the foster child in their home. Moreover, based on the allegations in the complaint the injuries to the parents' daughter resulted at least in part from the parents' reliance on the department's assurances. We conclude that the plaintiffs' claims fall within the saving provision of § 10 (j) (1), and thus are not barred by § 10 (j).[11] The

[11] In its brief, the department suggests that the contractual assurance cannot give rise to liability because it merely restates obligations already imposed on the department by its own regulations. See note 3, supra. While it is true that "a private cause of action cannot be inferred solely from an agency regulation," Frawley v. Police Comm'r of Cambridge, 473 Mass. 716, 722 (2016), quoting Loffredo v. Center for Addictive Behaviors, 426 Mass. 541, 546 (1998), the existence of a regulation does not operate to negate a similarly-worded requirement expressly set forth as a promise in a written contract between a government entity and another specific party. Similarly, an obligation imposed on the department by regulation, even if designed for the benefit of the general public, is not for that reason inadequately "explicit and

judgment dismissing the plaintiffs' complaint is reversed, and the case is remanded to the Superior Court for further proceedings.

So ordered.

specific" to satisfy § 10 (j) (1) when undertaken for the benefit of a specific counterparty in a written contract with the department.