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THE HONORABLE DAVID A. NICHOLS

SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY

JESSICA BRAAM, a minor child, by and through her guardians, Dale and Vickie Braam; JENNEIVA BURSCH, a minor child, by and through her guardians, Greg & Sherry Bursch; CASSIDEE BURSCH, a minor child, by and through her guardians, Greg & Sherry Bursch; DESI MORGAN, a minor child, by and through her guardians, Lori Morgan and Lonnie Morgan; TIM OLSON, a minor child, by and through his guardians, David and Diane Olson; SHAUN SANCHEZ, a minor child, by and through his court appointed GAL, Virginia DeCosta; AMIE ANDERSON, a minor child, by and through her court appointed GAL, Jim Haynes; ROBYN BRANDON, a minor child, by and through her guardian, E. Sparrowhawk Brandon; BETH HARDIN a minor child, by and through her guardians, David and Mary Hardin; ERYK HARDIN, a minor child, by and through his guardians, David and Mary Hardin; IVORY HARDIN, a minor child, by and through her guardians, David and Mary Hat-din; EBONEY HARDIN, a minor child, by and through her guardians, David and Mary Hardin,

Plaintiffs,

v.

STATE OF WASHINGTON and the DEPARTMENT OF SOCIAL AND HEALTH SERVICES, and LYLE QUASIM, individually, and as Secretary of the Department of Social and Health Services,

Defendants.

No. 98-2-01570-1

DEFENDANTS' 12(b)(6) MOTION TO DISMISS PLAINTIFFS' FEDERAL STATUTORY CLAIMS

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs in this lawsuit seek to certify a class action based primarily on their claims that defendants have violated two federal statutes allegedly giving a right to notice and a hearing, as well

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1 as amendment of an individual case plan, and in doing so have violated plaintiffs' rights under federal
2 law which they claim is actionable under 42 U.S.C. 4 1983. Defendants move this Court under CR
3 12(b)(6) to dismiss plaintiffs' federal statutory claims, because there is no private right of action under
4 these statutes, and thus they have failed to state a claim under which relief can be granted.
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6 II. FACTUAL BACKGROUND

7 On July 11,2000, plaintiffs moved to certify a class "limited to the following issues:"

- 8 > Whether the defendants' ,practice of shuttling children from placement to placement
9 and the resulting harms to class members violate [sic] class members' rights under
10 Washington statutes and regulations and rights to substantive due process under the
11 Fourteenth Amendment to the Constitution of the United States.
- 12 > Whether defendants' failure to provide notice and an opportunity to be heard prior to a
13 change in placement violates class members' rights to procedural Due Process under
14 the Fourteenth Amendment to the Constitution of the United States.
- 15 P Whether defendants' failure to provide notice of a change in placement to the child, his
16 parent, his legal representative, court-appointed special advocate, or guardian ad litem
17 and an opportunity to be heard prior to the move, violates 42 U.S.C. 675(5)(C).
- 18 > Whether defendants' failure to revise a child's case plan to take into account the new
19 placement after a child is moved from one home or facility to another violates 42
20 U.S.C. §§671 (a)(16) & 675 (1).

21 Class Action Motion at p. 5. With the exception of the substantive due process claim asserted in the
22 first paragraph, these claims track the class claims asserted in plaintiffs' Second Amended Complaint
23 As shown below, plaintiffs' claims for relief under 42 U.S.C. \$5 671(a)(16), 675(l) and 675(5)(C),'
24 the last two bulleted points in the quotation above, must be dismissed because there is no private
25 cause of action under these statutes.

' Copies of these statutes are attached.

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III. ARGUMENT

Motions under CR 12(b)(6) are a proper means by which to test the legal sufficiency of a plaintiffs claim. See *Brown v. MacPherson k, Inc.*, 86 Wn.2d 293,298 n.2 (1975); *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735,742 (1977). Such motions should be granted when “there is no state of facts which plaintiff could have proven entitling him to relief under his claim.” *Id.*

A. Plaintiffs’ Claims Based On 42 U.S.C. §6 671(a)(16) And 675(l) Must Fail, As These Statutes Do Not Provide A Private Right Of Action.

Plaintiffs have failed to state a cause of action with regard to their claim that defendants’ alleged failure to revise a child’s case plan to take into account a child’s new placement after the child is moved fi-om one home or facility to another violates 42 U.S.C. §0 671(a)(16) and 675(l). The sections of these federal statutes upon which plaintiffs rely do not provide a private cause of action under which plaintiffs may obtain relief. *Washington State Coalition for the Homeless v. Department of Sot. and Health Sews.*, 133 Wn.2d 894,929 (1997). I

The relevant statutory provisions are found in the Adoption Assistance and Child Welfare Act of 1980 [“Adoption Act” or “Act”], 42 U.S.C. §9 620-28,670-679a. The Adoption Act establishes a federal reimbursement program for certain expenses that states incur while administering foster care and adoption services. See *Suter v. Artist M.*, 503 U.S. 347,350-51 (1992);² *Coalition for the Homeless*, 133 Wn.2d at 925. To be eligible to participate in the program, states must develop a plan for the delivery of child welfare services that must be approved by the federal Secretary of Health and Human Services. *Id.* 42 U.S.C. 9 671 contains 18 requirements for a state plan to qualify under the

² Copies of all non-Washington authority are attached.

1 Act. As noted in plaintiffs' Class Action Motion at p. 5, the case plan requirement in this case is
2 found at section 671(a)(16):

3 (a) Requisite features of State plan. In order for a State to be eligible for payments
4 under this part, it shall have a plan approved by the Secretary which . . .

5 +**

6 (16) provides for the development of a case plan (as defined in [42 U.S.C. 3
7 675(1)]) for each child receiving foster care maintenance payments under the State plan
8 and provides for a case review system which meets the requirements described in [42
9 U.S.C. 5 675(5)(B)] with respect to each such child [.]

10 42 U.S.C. 5 671(a)(16). Section 675(1) defines the term "case plan," as fully set out in the margk³

11 ³ 42 U.S.C. § 675(1) provides:

12 (1) The term "case plan" means a written document which includes at least the following:

13 (A) A description of the type of home or institution in which a child is to be placed, including a
14 discussion of the safety and appropriateness of the placement and how the agency which is responsible
15 for the child plans to carry out the voluntary placement agreement entered into or judicial
16 determination made with respect to the child in accordance with [42 U.S.C. § 672(a)(1)].

17 (B) A plan for assuring that the child receives safe and proper care and that services are provided to th
18 parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate
19 return of the child to his own safe home or the permanent placement of the child, and address the need
20 of the child while in *foster* care, including a discussion of the appropriateness of the services that ham
21 been provided to the child under the plan.

22 (C) To the extent available and accessible, the health and education records of the child, including--
23 (i) the names and addresses of the child's health and educational providers;
24 (ii) the child's grade level performance;
25 (iii) the child's school record;
(iv) assurances that the child's placement in foster care takes into account proximity to the school
in which the child is enrolled at the time of placement;
(v) a record of the child's immunizations;
(vi) the child's known medical problems;
(vii) the child's medications; and
(viii) any other relevant health and education information concerning the child determined to be
appropriate by the State agency.

(D) Where appropriate, for a child age 16 or over, a written description of the programs and services
which will help such child prepare for the transition from foster care to independent living.

(E) In the case of a child with respect to whom the permanency plan is adoption or placement in
another permanent home, documentation of the steps the agency is taking to find an adoptive family or

1 The language of the Adoption Act does not expressly provide a private cause of action. See
2 *generazi*'y 42 U.S.C. § 620-28,670-679a. Thus, plaintiffs claim under 42 U.S.C. § 1983⁴ that they
3 were deprived of their statutory rights by defendants' alleged failure to revise a child's case plan to
4 take into account a new placement of a child after a child is moved from on home or facility to
5 another. See Second Amended Complaint at 14.1(b). However, "[i]n order to seek redress through 0
6 1983 . . . a plaintiff must assert the violation of a federal right, not merely a violation of federal *law*."
7 *Blessing v. Freestone*, 520 U.S. 329,340 (1997) (emphasis original); *Coalition for the Homeless*, 133
8 Wn.2d at 927, citing *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498,509 (1990). The U.S. Supreme
9 Court has fashioned a test that looks at three factors in determining whether a statutory provision
10 gives rise to a federal right:
11

12 First, Congress must have intended that the provision in question benefit the plaintiff.
13 Second, the plaintiff must demonstrate that the right assertedly protected by the statute
14 is not so "vague and amorphous" that its enforcement would strain judicial
15 competence. Third, the statute must unambiguously impose a binding obligation on
16 the States. In other words, the provision giving rise to the asserted right must be
17 couched in mandatory rather than precatory terms.

18 *Blessing*, 520 US. at 340-41 (citations omitted); *Coalition for the Homeless*, 133 Wn.2d at 929.

19
20 other permanent living arrangement for the child, to place the child with an adoptive family, a fit and
21 willing relative, a legal guardian, or in another planned permanent living arrangement, and to finalize
22 the adoption or legal guardianship. At a minimum, such documentation shall include child specific
23 recruitment efforts such as the use of State, regional, and national adoption exchanges including
24 electronic exchange systems.

25 ⁴ 42 U.S.C. § 1983 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 inunuities, 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.

1 Under this test, 42 U.S.C. 6 671(a)(16), and §675(l) by incorporation, do not give rise to a
2 federal right that may be enforced through a private cause of action. In *Coalition for the Homeless,*
3 *supra*, the Washington Supreme Court squarely held that sections 671(a)(16) and 675(l) do not give
4 rise to a private cause of action. After stating the relevant test quoted above, the court held:

5
6 Plaintiffs seek a ruling that the “case plan” sections of the Act [including 5 671(a)(16)
and § 675(l),] create a federal statutory right that is enforceable in a private action. . . .

7 The Department argues that plaintiffs cannot show that the interests they assert are
8 specific enough to be enforced judicially. We agree. While the provisions of any
9 individual case plan may be specific enough to be enforced judicially, the notion that case
plans in general are to be implemented is too vague and amorphous to be enforced. Any
enforcement would have to await a particular case plan.

10 *Id.* at 928-29.⁵ Courts from other jurisdictions have also held that sections 671(a)(16) and 675(l) do
11 not give rise to a private right of action. For instance, in finding no cause of action, a New Jersey
12 federal court recently held:

13
14 regardless of the detailed nature of the definitions of “case plan” and “case review
15 system,” the statutory provisions relied upon by Plaintiffs in support of their alleged right
16 “to timely written case plans that contain mandate elements and to the implementation
and review of these plans” are not so unambiguous so as to confer upon Plaintiffs a right
enforceable under 6 1983.

17 *Charlie H. v. Whitman*, 83 F.Supp.2d 476,488-89 (D.N.J. 2000); accord *Mark G. v. Sabol*, 677
18 N.Y.S.2d 292,298-99 (N.Y.App. 1998) (“[P]laintiffs’ claims, including one pursuant to paragraph
19 (16) of section 671(a), were foreclosed by the [U.S. Supreme Court] decision in *Suter* inasmuch as,
20 like paragraph (15), each of the paragraphs relied upon is ““merely another feature which the state plan
21 must include to be approved by the Secretary,” and does not create an enforceable right.““).

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' It should be noted that a class that sought to enforce each of its members' *individual* case plans would
be manifestly inappropriate for certification, as there would be no common question of fact and no class
plaintiffs could be said to have claims which are “typical” of the claims of other class members.

1 In light of the Washington Supreme Court holding directly on point, as well as the persuasive
2 opinions from other jurisdictions, there are no set of facts under which plaintiffs can obtain relief
3 under 42 U.S.C. § 671(a)(16) and 675(l), as these provisions are too vague and amorphous to be
4 judicially enforced, and therefore do not provide a private cause of action, These claims must
5 therefore be dismissed.
6

7 **B. Plaintiffs' Claims Based Upon 42 U.S.C. 6 675(5)(C) Must Also Fail, As This Section**
8 **Does Not Provide A Private Cause Of Action.**

9 Plaintiffs claim that defendants' alleged failure to provide notice and an opportunity to be
10 heard to the plaintiff children and/or their guardians prior to changing their placement violates the
11 children's rights under 42 U.S.C. 6 675(5)(C). This claim must fail for the same reason plaintiffs'
12 claim based upon sections 671 (a)(16) and 675(l) fail, namely that the provision does not provide a
13 private cause of action enforceable under section 1983.

14 Section 675(5)(C) defines the term "case review system." The provision relevantly states:

15 (5) The term "case review system" means a procedure for assuring that-

16 ***

17 (C) with respect to each such child . . . procedural safeguards shall also be
18 applied with respect to parental rights pertaining to the removal of the child from the
19 home of his parents, to a change in the child's placement, and to any determination
affecting visitation privileges of parents [.]

20 42 U.S.C. § 675(5)(C).⁶ Plaintiffs' theory apparently is that this section grants them a right to some
21 undefined "procedural safeguards," which may be enforced against the defendants State of
22 Washington and DSHS.

23
24 ⁶ The full provision states,

25 (C) with respect to each such child, procedural safeguards will be applied, among other
things, to assure each child in foster care under the supervision of the State of a permanency
hearing to be held, in a family or juvenile court or another court (including a tribal court) of

1 As noted above, section 671(a)(16), which expressly incorporates the definition of “case
2 review system” from section 675(5), does not provide a private cause of action. This alone should
3 cause plaintiffs’ claim to fail. As one court noted,

4 [having already determined that [another provision of the Act], which incorporates the
5 definition of ‘case review system’ in 42 U.S.C. §675(5), does not confer rights upon
6 Plaintiffs enforceable pursuant to 6 1983, it is not necessary to go further to determine
7 whether 42 U.S.C. § 675(5) standing alone, confers a right upon Plaintiffs enforceable
8 pursuant to § 1983.

9 *Charlie H. v. Whitman*, 83 F.Supp.2d 476,490 (D.N.J. 2000); accord *Eric L. v. Bird*, 848 F.Supp. 303,
10 312 (D.N.H. 1994) (“Plaintiffs’ complaint also refers to §§ 625 and 675. These sections are merely
11 definitional and cannot supply a firm basis for describing rights privately enforceable under section
12 1983.”); *Procopio v. Johnson*, 994 F.2d 325,332 (7th Cir. 1993) (finding no private right of action
13 under § 675(5)(C)).

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18 competent jurisdiction, or by an administrative body appointed or approved by the court, no later
19 than 12 months after the date the child is considered to have entered foster care (as determined
20 under subparagraph 0;)) (and not less frequently than every 12 months thereafter during the
21 continuation of foster care), which hearing shall determine the permanency plan for the child that
22 includes whether, and if applicable when, the child will be returned to the parent, placed for
23 adoption and the State will file a petition for termination of parental rights, or referred for legal
24 guardianship, or (in cases where the State agency has documented to the State court a compelling
25 reason for determining that it would not be in the best interests of the child to return home, be
referred for termination of parental rights, or be placed for adoption, with a fit and willing
relative, or with a legal guardian) placed in another planned permanent living arrangement and, in
the case of a child described in subparagraph (A)(ii), whether the out-of-State placement
continues to be appropriate and in the best interests of the child, and, in the case of a child who
has attained age 16, the services needed to assist the child to make the transition from foster care
to independent living; and procedural safeguards shall also be applied with respect to parental
rights pertaining to the removal of the child from the home of his parents, to a change in the
child’s placement, and to any determination affecting visitation privileges of parents.

2 Furthermore, as noted by the *CharZie H.* court, the fact that Congress later specified a right of
3 action under one section of the Adoption Act strongly suggests that there are no private rights under
4 other sections of the Act, including section 675(C):

5 . . . Congress specifically examined the numerous State plan requirements under 42
6 U.S.C. 5 671 and determined that only one such required element confers a private
7 right enforceable pursuant to §1983. Specifically, in 1996, Congress amended 42
8 U.S.C. 4 674 by adding subsection (d) which explicitly provides that “any individual
9 who is aggrieved by a violation of Section 671(a)(18) of this title by a State or any
10 other entity may bring an action seeking relief from the State or other entity in any
11 United States district court.” 42 U.S.C. 3 674(d)(3)(A). That Congress recently chose
12 to amend 42 U.S.C. 3 674 to include a private right of action under 4 1983 for a state or
13 other entity’s failure to comply with 42 U.S.C. Lj 671(a)(18), but did not include the
14 other various elements enumerated in 42 U.S.C. §671(a). . .is strong evidence that
15 Congress did not intend these other various State plan elements in 42 U.S.C. § 671(a)
16 to confer rights enforceable pursuant to 3 1983. . .

17 * * *

18 For the very same reasons, Plaintiffs’ 5 1983 claims.. .under 42 U.S.C. 0
19 671(a)(16). . .and 42 U.S.C. 6 675, are.. .dismissed.

20 *Charlie H.*, 83 F.Supp.2d at 489 & n.2.

21 This result is also supported by Washington law. The Washington Supreme Court has held
22 that another portion of section 675, namely subsection (5)(B), does not provide a private cause of
23 action. Section 675(5)(B) provides, among other things, that a case review system must contain a
24 procedure for assuring that the status of each child is reviewed periodically but no less frequently than
25 once every six months by either a court or by administrative review. 42 U.S.C. 5 675(5)(B). The
Washington Supreme Court held that “the statutory language here [referencing §675(5)(B)] is too
amorphous and vague to be enforced.” *Coalition for the Homeless*, 133 Wn.2d at 929; *accord Char&*
H., 83 F.Supp.2d at 490; *Eric L.*, 848 F.Supp. at 3 12; *Procopio*, 994 F.2d at 332. The language in
section 675(5)(C) dealing with undefined “procedural safeguards” is certainly more vague and

1 ambiguous than the aforementioned language in section 675(5)(B). It follows that plaintiffs have no
2 enforceable right against the State of Washington under these statutes, and thus that this claim must be
3 dismissed.
4

5 IV. CONCLUSION

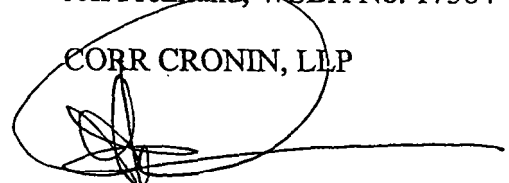
6 For the reasons set forth above, defendants respectfully request that this Court dismiss
7 plaintiffs' claims for relief under the Adoption Act, 42 U.S.C. § 671 (a)(16), 675 (1) and 675(5)(C)
8 because there is no private cause of action under these statutes.

9 RESPECTFULLY SUBMITTED this 74 day of August, 2000.

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15 

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