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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

JESSICA BRAAM, a minor child, by and)
through her guardians, Dale and Vickie)
Braam; JENNEIVA BURSCH, a minor child,)
and through her guardians, Greg and Sherry)
Bursch,)

CASE NO. 98 2 01570 1

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

Plaintiffs,)

vs. i

STATE OF WASHINGTON and the)
DEPARTMENT OF SOCIAL AND HEALTH)
SERVICES, and LYLE QUASIM,)

DAVID A. NICHOLS

Defendant. ;

1. Introduction

Twenty-five years ago, at a joint Congressional hearing on the problems facing children in state foster care systems, child psychiatrist, Dr. Albert Solnit, warned members of Congress that "the most tragic consequences follow upon a child living out his or her life in a series of foster homes or in a combination of foster homes and institutions." Quoting his colleague at the Yale Child Study Center, he explained that "through multiple placements for a single child, foster care has come to be employed to keep a child "familyless for the duration of his or her childhood." More than twenty years after Dr. Solnit's and Professor Goldstein's admonition! Jean Soliz, the former Secretary of the Washington Department of Social and Health Services! described the "misery" of foster children in the custody of her agency She wrote :

Joint Hearing Before the Subcommittee on Children and Youth of the Committee on Labor and Public Welfare U.S. Senate and the Subcommittee on Select Education of the Committee on Education and Labor, U.S. House of Representatives, Foster Care Problems and Issues : Examination of Problems Which Profoundly Affect the Development of Children in the Foster Care System (December 1, 1975), at IO- 12

2 The children who go in and out of our child protection system are in the worst
3 position of any people in our society. Study after study shows these children are
4 bounced from placement to placement for years on end. They get no say in
5 where they live or with whom. . . Abused and neglected children who are
6 removed from their homes are further damaged in state care by . . . instability
7 and inadequacy of foster home settings'

8 Upon leaving her position, Ms. Soliz and her former deputy secretary sought out the resources
9 to fund a lawsuit against her former agency to alleviate the misery to which it subjected
10 children in foster care. In this lawsuit, plaintiffs seek to enforce their federal rights - rights
11 which were intended to reduce the devastating instability they and others in foster care
12 experience as they are shuttled from home to home with little or no fore warning and no say
13 whatsoever in who will be their next state-designated parents. The same rights that former
14 Secretary Soliz conceded the state violated.³

15 In order to stop the "drift" of foster children through the system and the chaos that
16 results from this lack of permanency⁴, Congress enacted the Adoption Assistance and Child
17 Welfare Act of 1980, Title IV-E of the Social Security Act, codified at 42 U.S.C. § 670 et seq.
18 (hereinafter 'AACWA'). The linchpins of this statutory scheme were the Congressional
19 mandates that each child have a case plan which fulfilled certain requirements and that the state
20 also provide for each child a number of case and status reviews and procedural protections. By
21 imposing these requirements on the states, Congress meant to compel thoughtful planning

22 ¹ Jean T. Soliz & Suzanne Petersen, Background Memo for Washington State Children's Justice Center. Exhibit 4
23 to the Deposition of Suzanne Petersen, (6/20/00).

24 ³ Deposition of Jean Soliz dated (9/6/00).

25 ⁴ David Fanshel, who would testify before Congress several times in the hearings leading up to passage of
26 AACWA, described this "drift." He found that 19% of children discharged during the second year of placement
had three or more placements while 42.5% in care for more than four years had three or more placements. Dr.
Fanshel observed that "the length of time a child spends in care is probably the best predictor of number of
placements; the longer a child is in care, the more exposed he is to the possibility of transfer." Status Change of

1 elated to both the child's placement and the services necessary to ensure healthy development.
2 'he reviews and procedural safeguards were intended to ensure that fundamental decisions
3 ffecting the child and parents made by the child welfare agency would be subject to some
4 sassessment and periodic reassessment by someone or some body outside the agency. Plaintiffs
5 n this lawsuit seek declaratory and injunctive relief enforcing their rights to a case plan and
6 :ase reviews, including the requisite procedural safeguards, as required by 42 U.S.C.
7 j671(a)(16) and defined by 42 U.S.C. §675.⁵

8 9 **:I. Summary of Argument**

10 Following the inquiry that the Supreme Court began with in *Wilder v. Virginia Hosp.*
11 4ss 'y1., 496 U.S. 498 (1990), plaintiffs review the legislative history leading up to passage ot
12 .he Adoption Assistance and Child Welfare Act. That history, spanning four years of hearings
13 and studies, reveals that Congress' goal in enacting the Act was to stop children from endlessly
14 hifting in foster care, shuttling from one temporary placement to another. The case plan anC
15 :ase review mandates were two solutions to these problems. Made applicable to each ant
16 every child in care, Congress intended that these mandates would promote greater stability fol
17 zchildren in foster care. Compliance with case plan provision, requires that the case worke:
18 stop and think to ask certain fundamental questions before making a change in the child'
19 placement. Then, it also requires that the worker justify the assessment in writing for others to
20 evaluate. The procedural safeguards provision in the case review section, complements the
21 case plan mandate. It provides for further scrutiny of the decision to change the child',

22
23 Children in Foster Care : Final Results of the Columbia University Longitudinal Study, Fanshel, D., 55 CHILD
WELFARE 143, 163-166 (1976)

24 ⁵ Neither the individual plaintiffs nor the putative class seek monetary damages for violation of their federal
25 statutory rights.

1 llacement. These two mandates, taken together, are a key component of the reforms enacted in
2 1980.

3 Under a line of U.S. Supreme Court cases going back to *Wright v. Roanoke*
4 *Redevelopment and Housing Authority*, 479 U.S. 418 (1989), and including *Wilder*, the Court
5 has “looked at three factors when determining whether a particular statutory provision gives
6 rise to a federal right” *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) citing *Wright*, 479 U.S.
7 at 430. The parties agree that the applicable test for determining whether or not the statutory
8 provisions on which plaintiffs rely create rights enforceable by the plaintiffs in a section 1983
9 action is set forth in *Blessing v. Freestone*, 520 U.S. 329 (1997).

10 The case plan and case review provisions satisfy each of the three factors of the
11 *Blessing* test. *Blessing* requires (1) that Congress must have intended that the provision in
12 question benefit the plaintiff; (2) that the statute unambiguously imposes a binding obligation
13 on the states; and (3) that the right assertedly protected by the statute is not so vague and
14 amorphous that its enforcement would strain judicial competence. *Blessing*, 520 U.S. at 340-
15 341.

16 Both the plain language as well as the legislative history of 42 U.S.C. 5 671 (a)(16)
17 provide evidence that Congress clearly intended this provision to benefit children in foster care.
18 Secondly, the statutory provision is couched in mandatory language which has been retained as
19 part of the law for over twenty years, making it clear that the Congress intended to impose a
20 binding obligation upon the state. Finally, with regard to case plans, a supplemental
21 definitional section in the same statute, makes the right to such a case plan not so vague or
22 amorphous that courts are incapable of enforcing its mandate. As for the statutory right to
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procedural safeguards whenever a child's placement is changed or his visitation with a parent curtailed, even in the absence of explicit statutory guidance/definition, courts are uniquely qualified to determine the process due when the substantive rights or interests affected are clearly identified as they are in the federal statute.

For the first twelve years after enactment of the AACWA, federal courts generally concluded that the case plan and case review provisions of the law created rights enforceable by children in foster care seeking injunctive relief under 42 U.S.C.5 1983. Then in 1992, the U.S. Supreme Court held that the "reasonable efforts" provision, 42 U.S.C. 671(a)(15), of AACWA, was not enforceable in a section 1983 action. *Suter v. Artist M.* 503 U.S. 347 (1992). Several courts interpreted *Suter* to bar enforcement of all provisions of the Act. Two years later, in 1994, Congress enacted an amendment for the purpose of explicitly overruling *Suter's* broad holding. 42 U.S.C. 1320a-2. In the years following the Social Security Act ('SSA') Amendment, the courts, applying the traditional three factor test required pre-*Suter*, have upheld the enforceability of the case plan and case review provisions.

The case law upon which defendants rely consists of two groups of cases. The first group includes a series of decisions issued after the U.S. Supreme Court decision in *Suter v. Artist* h4. 503 U.S. 347 (1992) but before the SSA Amendment. Those cases are, in light of the Amendment, no longer good law. Defendants second group of cases consists of the decision of a single federal district court and a holding in a New York state intermediate appellate court. Each of these decisions relies primarily upon the discredited post-*Suter* pre-Social Security Act Amendment cases. The one recent federal district court case creates a new test for determining

1 when Congress has foreclosed private enforcement of SSA provisions under 42 U.S.C. 1983.
2 That test, applied to the AACWA provisions here, is directly at odds with U.S. Supreme Court
3 precedent.

4 Finally, Defendants' rely upon the Washington Supreme Court's opinion in *Washington*
5 *State Coalition for the Homeless v. Department of Soc. and Health Sews.*, 133 Wn2d 894
6 (1997). This reliance is misplaced. First of all, *Coalition for the Homeless*, does not address
7 the case review section of the statute which includes the procedural safeguards at issue in this
8 case. Secondly, their assertion that the decision definitively resolves that the case plan section
9 gives rise to no enforceable rights is based upon an unjustifiably broad reading of the holding in
10 *Coalition for the Homeless*.

13 **III. Background**

14 In order to assess the significance of the case plan and case review provisions and to
15 determine Congress' intent,- it is important to understand both the overall statutory scheme in
16 which they fit and the history leading up to their enactment.

17 **A. The Federal Statutory Scheme**

18 Under the Adoption Assistance and Child Welfare Act of 1980, Title IV-E of the Social
19 Security Act, 42 U.S.C. §4670 a. sea. (hereinafter ('AACWA')), states may apply for federal
20 funds to offset the costs of foster care services provided to children, their families, foster
21 families, and adoptive parents. State participation in AACWA is voluntary but if it chooses to
22 participate it must comply with the requirements specified in the statute. These mandates are
23 set forth at 42 U.S.C. §671(a). There are currently 23 conditions the state must fulfill in order
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1 o be eligible for federal funds. Each state must submit a plan for approval by the Secretary of
2 he Department of Health and Human Services. The plan is to be approved by the Secretary
3 rovided that it satisfies each of the requirements set forth in 42 U.S.C. §671(a).⁶

4 AACWA is one of several cooperative federal-state programs funded under the Social
5 ecurity Act each with a history that goes back several decades. These programs include, in
6 addition to AACWA, the federal medical assistance program established under Title XIX of the
7 ocial Security Act, 42 U.S.C. §§1396a, et seq., and the child support enforcement program,
8 rovided for in Title IV-A, 42 U.S.C. §651, et seq., a subchapter of the same title of the Social
9 ecurity Act as the foster care program at issue in this case. The structure of the foster care
10 rogram established under Title IV-E is very similar to these other federal state programs.
11 Each statute provides for a federal share in the costs of the program.⁷ Indeed, the federal share
12 af foster care costs is generally the same as the federal medical assistance percentage. See, 42
13 U.S.C. §674 (1) & (2). In order to be eligible for funds under each of the programs, a state must
14 submit a plan, the plan must certify that it will operate the program in conformity with each of
15 the requirements specified in the statute (for AACWA - 23⁸; for Medicaid - 65⁹; for child
16 support¹⁰ - 33), and that it will do so pursuant to a detailed plan that has been approved by the
17 ecretary of Health and Human Services. Several provisions of AACWA are repeated
18 verbatim in the Medicaid statute - Compare 42 U.S.C. §671 (a)(3) with 42 U.S.C. 5 1396a(s)(l),
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21

22 ⁶ 42 U.S.C. §671 (a) and (b)
23 ⁷ 42 U.S.C. §674, 42 U.S.C. §1396b, 42 U.S.C. §655 (a)
24 ^{*} 42 U.S.C. §671 (a)(1) to (23)
25 ⁹ 42 U.S.C. 5 1396a(s)(l) to (65)
26 ¹⁰ 42 U.S.C. §654 (1) to (33)

1 and 42 U.S.C. §671(a)(12) with 42 U.S.C. §1396a(a)(3), and 42 U.S.C. §671(a)(6) with 42
2 U.S.C. §1396a(a)(6), 42 U.S.C. §671(a)(8) with 42 U.S.C. §1396a(a)(7). Under both the
3 medicaid and the foster care programs the Secretary is also allowed to waive some of the Act's
4 requirements but not others. Compare 42 U.S.C. §1396n(a)(3) with 42 U.S.C. §671(a)(6).

5
6 Federal funds underwrite a substantial proportion of the states' child welfare costs
7 programs costs. For FY 96, states received an estimated \$6.5 billion in federal funds to
8 support their child welfare programs.* During that year federal funds made up more than 40%
9 of the State of Washington's entire budget for child welfare services.¹³ In 1988, Washington
10 State received approximately \$5.3 million in Title IV-E federal funds.¹⁴ In 1996 that amount
11 had grown to \$17.5 million.¹⁵

12 Since its original enactment in 1980, Title IV-E, has been amended several times most
13 recently by the Adoption and Safe Families Act of 1997¹⁶ and the Foster Care Independence
14 Act of 1999.¹⁷ Some of the amendments resulted in the imposition of additional

19
20 ¹³ Rob Geen, Shelly Waters Boots, Karen Tumlin, **THE COST OF PROTECTING VULNERABLE CHILDREN:
21 UNDERSTANDING FEDERAL, STATE AND LOCAL CHILD WELFARE SPENDING** (Urban Institute, January,
1999)(hereinafter, '**CHILD WELFARE SPENDING**')
22 ¹⁴ **CHILD WELFARE SPENDING**, at 11.
23 ¹⁵ **CHILD WELFARE SPENDING**, at 7

24 ¹⁶ Letter of Secretary Jule M. Sugarman to the Honorable Jean Marie Brough (Nov. 18, 1988). Attached as
25 Exhibit 1.

26 ¹⁷ Shelly Boots, Rob Geen, Karen Tumlm, & Jacob Leos-Urbel, **STATE CHILD WELFARE SPENDING AT A GLANCE:
A SUPPLEMENTAL REPORT TO THE COST OF PROTECTING VULNERABLE CHILDREN** (April 1999), at 99.

¹⁸ P.L. 105-89 (Nov. 19, 1997)

¹⁹ P.L. 106-169 (Dec. 14, 1999)

1 :requirements¹⁸ while others defined new terms” or refined the definition of provisions already
2 ncluded in the federal mandates.²⁰

3 The section of the law at issue here, 42 U.S.C. §671(a)(16), was part of the original bill
4 :nacted in 1980.²¹ In the intervening two decades, Congress not only has retained the
5 requirements that there shall be a case plan and case review system for each child, it also has
6 expanded that mandate. The original definition of ‘case plan’ was expanded from a single
7 paragraph to its present version of five subsections specifying the minimum requirements for
8 each case plan. Similarly, the case extent and frequency of case reviews has been modified with
9 changes to the specific timelines for hearings and requiring other actions on behalf of foster
10 children and the foster parents with whom they are placed. A more complete discussion of the
11 legislative history of the case review and case plan definitions follows.

12
13 **B. The Case Plan and Case Review Provisions Are the Congressional Response to**
14 **Foster Care Drift and Multiple Placements**

15 In Wilder, the Supreme Court began its analysis of a similar \$1983 claim with a review
16 of the history of the statute upon which the plaintiffs’ claims rested noting that “[I]n order to
17 determine whether [the provision] is enforceable under 1983, it is useful first to consider the
18 history of the [provision],” Wilder, 496 U.S., at 505. A review of the legislative history leading
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21 *1Q., P.L. 104-193 sec. 505(3)adding \$19 to 42 U.S.C. §671(a) (requiring state to consider giving preference to
22 adult relative when determining foster child’s placement); P.L 105-89 sec. 106 adding \$20 to 42 U.S.C.
23 §671(a)(requiring criminal background checks for prospective foster and adoptive parents); P.L. 105-89, sec. 306
24 adding 921 to 42 U.S.C. §671(a)(requiring health insurance coverage for a child with special needs); P.L. 106-169
25 sec. 112 adding \$23 to 42 U.S.C. §67 1(a) (requiring that before child placed in home, foster parents trained with
26 knowledge and skills to meet the child’s needs).

1⁹ &., P.L. 105-89 sec. 101(defming ‘legal guardianship’)

*¹ 1&., P.L. 105-89 sec. 103 (adding to definition of ‘case review system’)

1 ip to passage of the Adoption Assistance and Child Welfare Act, reveals why the case plan
2 and case review provisions were a key part of the reforms Congress mandated in the Act.

3 Concern about repeated changes in placement of children in foster care was one of the
4 earliest problems Congress identified in the hearings leading up to passage of AACWA.²² In
5 June of the first of a series of Congressional hearings over several years, Representative
6 Brademas emphasized that “[i]nstead of returning to their natural parents or going to a stable
7 adoptive home, many children face repeated placements in a series of foster homes.”²³ David
8 Evans, President of the National Foster Parent Association, told the joint committee that “[o]ne
9 If my biggest concerns in foster care is the bouncing of children from home to home.”²⁴ Dr.
10 Albert J. Solnit, Director of the Child Study Center at Yale University, probably gave the most
11 eloquent description of the harm, telling the Congress that :

12
13 “For a large number of children in foster care, the first placement has also
14 become the beginning of an unsettling and corrosive life experience which
15 destroys their potential for the full unfolding of their social, emotional, and
16 intellectual capacities. In many instances those children live out their childhood
17 in multiple -foster homes and become the transmitters of the toll of social,
18 emotional, and intellectual deprivation from one generation to the next as they
19 are likely to become the unstable and damaged parents of the next generation.
20 at p.10.

21 *’ P.L. 96-272, Sec. 101 (June 17, 1980). A more complete discussion of the legislative history of this section
22 follows.

23 ** The hearings leading up to passage of the AACWA began as far back as 1975. See, Statement of Sen. Cranston
24 reviewing the history of the development of this legislation. Congressional Record Aug. 3, 1979 22679-22683

25 ” Joint Hearing Before the Subcommittee on Children and Youth of the Committee on Labor and Public Welfare
U.S. Senate and the Subcommittee on Select Education of the Committee on Education and Labor, U.S. House of
Representatives, Foster Care Problems and Issues : Examination of Problems Which Profoundly Affect the
Development of Children in the Foster Care System (December 1, 1975) (hereinafter, 1975 **JOINT HEARING**), at 3
24 **1975 JOINT HEARING**, at 8

25 **1975 JOINT HEARING**, at 10

1 3r.Solnit later in his testimony warned that “the most tragic consequences follow upon a child
2 iving out his or her life in a series of foster homes or in a combination of foster homes and
3 nstitutions.” He went on to quote from his colleague, Joseph Goldstein’s recent statement that
4 ‘through multiple placements for a single child, foster care has come to be employed to keep a
5 :hild “familyless for the duration of his or her childhood.”²⁶ Later at this same hearing, Rep.
6 Miller asked what is it “that causes children to be moved either to another foster home . . .”, and
7 :xpressed concern that “They can simply keep moving children around a little like musical
8 :hairs.”²⁷ Testimony from a former caseworker also stressed the problem of multiple
9 :acements. Ms. Cm-tin had studied the rate of replacement for foster children in Baltimore
10 city, Md. She told the Committee, “[blow many times can a social worker successfully say to
11 a foster child, this is your new mommy and daddy?” Quoting from some of her conversations
12 with children who had been moved from foster home to foster home, she explained that as they
13 suffered rejection over and over again, these children learned that they were the ones who were
14 “bad” and “mean.” The rejection that accompanies a child’s move ‘colors the child’s sense of
15 self-worth, competence, and loveableness.” In closing her remarks, she asked, “[blow right is
16 it for a social services agency to fail to provide stability, security, and predictability in a child’s
17 living arrangement?” 28

20 Several years later, Senator Cranston, speaking about children left to languish in foster
21 care, told his colleagues :

23 **26 1975 JOINT HEARING**, at 11- 12
24 *’ **1975JOINT HEARING**, at 15- 17
25 *’ **1975 JOINT HEARING**, at 53-54

1 In many cases, the fault lies with the responsible public agencies that fail to
2 comply with even the minimal requirements in existing law for case planning
3 and reviews. The 1977 GAO study of foster care placements found that only one
4 third of the children surveyed had received the statutorily required case reviews.
The GAO also found a widespread failure to include vital information in the case
plans - required under existing law - developed for foster children.²⁹

5 [t was against this backdrop of legislative hearings and numerous government and other studies
6 that the AACWA, including the case plan and case review mandates, was passed.

7
8 **[V.A Long Line of Cases Both Preceding and Following *Suter v. Artist M* Have Upheld
the Private Enforceability of the AACWA**

9 Privately enforceable rights under 671 (a).were widely recognized by the courts prior to
10 the United States Supreme Court's decision in *Suter v. Artist*. In *Lynch v. Dukukis*, 719 F.2d
11 504 (1st Cir. 1983) one of the first cases decided under the AACWCA, the Court of Appeals
12 for the First Circuit held that the case plan and case review provisions of Title IV-E were
13 enforceable in a section 1983 action brought on behalf of a class of children in foster care in
14 Massachusetts. *Lynch* was followed by the Fourth Circuit's decision in *L.J. v. Mussinga*, 838
15 F.2d 118, 123 (4th Cir. 1988), cert denied 488 U.S. 1018 (1989); *Timmy 5' v. Stumbo*, 916 F.2d
16 3 12 (6th Cir. 1990)(foster parents entitled to enforce right to fair hearing granted by 42 U.S.C.
17 §671(a)(12); and *LaShawn A v. Dixon*, 762 F. Supp. 959, 987-89 (D.D.C. 1991), aff d in part
18 on other grounds, 990 F.2d 1319 (D.C. Cir. 1993) cert denied 510 U.S. 1044 (1994). See also,
19 *Joseph A. v. New Mexico Department of Human Services*, 575 F.Supp. 346, 353
20
21
22

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24 29 Statement of Sen. Cranston, HEARING BEFORE THE SUBCOMMITTEE ON PUBLIC ASSISTANCE OF THE
25 COMMITTEE ON FINANCE, 96* Congress, 1st Session (September 24, 1979), at 56.

(D.N.M. 1982) (private litigants may obtain declaratory and injunctive relief for violations of Title IV).³⁰

Then, in 1992, the Supreme Court held that section 671(a)(15), the “reasonable efforts” provision of the AACWA, was not enforceable in a section 1983 action. *Suter v. Artist MI*, 503 U.S. 347 (1992). Underlying the court’s decision were two concerns. First of all, although not ostensibly applying the three part test, *Suter* noted that the ‘reasonable efforts’ provision in AACWA was distinguishable from the ‘reasonable and adequate rates’ provision the Court found enforceable in *Wilder*. While “the statute and regulations set forth in some detail the factors to be considered in determining the methods for calculating rates” in *Wilder*, the Court observed that “[n]o statutory guidance is found as to how reasonable efforts are to be measured.” *Suter* 503 U.S. at 359-360. Secondly, the majority in *Suter* concluded that all that is required of the States by the Act was that the states have a plan approved by the Secretary which contained each of the 16 features listed as elements for the State plan. *Suter*, 503 U.S. at 358. In a footnote, the Court reiterated this point, noting as to plaintiffs’ claims under another subsection of 42 U.S.C. 671 (a) that : “As this subsection is merely another feature which the state plan must include to be approved by the Secretary, it does not afford a cause of action to the respondents anymore than does the reasonable efforts clause of 671 (a)(15).” *Suter*, 503

³⁰ Most of the pre-*Suter* cases finding that there was no violation of the AACWA, involved cases in which plaintiffs sought damages - *Leshner v. Lavrich*, 784 F.2d 193, 197-198 (6th Cir. 1986); *Harpole v. Arkansas Dep’t of Human Sews.* 820 F.2d 923 (8th Cir. 1987)(grandmother of child who died after social services returned him to mother had no 1983 action for damages under AACWA); *Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1989)(pre-adoptive parents not entitled to damages for violation of 42 U.S.C. 671 (a)12) when no allegation that they were denied adoption assistance payments)*Hidahl v. Gilpin Co Dept. of Sot. Servs.*, 938 F.2d 1150 (10th Cir. 1991)(defendants entitled to qualified immunity where parents complaint for damages alleged defendants

1 U.S. at 359 n.10. This latter concern was picked up by some of the lower courts and it
2 thereafter controlled the decisions about enforceability of the AACWA.

3 Congress responded immediately to the holding in *Suter*, reversing that part of the case
4 which suggested that all that was required of the States by AAACWA was that they have a plan
5 approved by the Secretary which contained each of the 16 features listed as elements for the
6 State plan. Congress amended the Social Security Act with the stated intent of overruling that
7 holding in *Suter* and correcting the broader implications for section 1983 litigation attributed to
8 *Suter* by decisions following it.³ It is an explicit rule of statutory interpretation enacted by
9 Congress to be applied to Social Security Act programs including Title IV-E. The amendment
10 states:
11

12 In an action brought to enforce a provision of this chapter, such provision is not
13 to be deemed unenforceable because of its inclusion in a section of this chapter
14 requiring a State plan or specifying the required contents of a State plan. This
15 section is not intended to limit or expand the grounds for determining the
16 availability of private actions to enforce State plan requirements other than by
17 overturning any such grounds applied in *Suter v. Artist M.* but not applied in
18 prior Supreme Court decisions respecting such enforceability; provided,
19 however, that this section is not intended to alter the holding in *Suter v. Artist M.*
20 that section 671(a)(15) of this title is not enforceable in a private right of action.
21 42 U.S.C. 1320a-2

22 The amendment directs courts to apply pre-*Suter* case law when determining the
23 enforceability of provisions of the AACWA. *Marisol v. Giuliani*, 929 F. Supp. 662, 682

24 improperly conducted child abuse investigation, filed dependency action and removed children from parents
25 custody in violation of unspecified rights under 42 USC 67 1 and 672).

26 3. Congress' intent in enacting the amendment was to "assure that individuals who have been injured by a State's
failure to comply with the Federal mandates of the State Plan titles of the Social Security Act are able to seek
redress in the federal courts to the extent they were able to prior to the decision in *Suter v. Artist M.* HR Rep. No.
6, 140 Cong. Rec. H10250 (Sept. 28, 1994).

1 (S.D.N.Y.1996). *Jeanine B ex rel Blondis v. Thompson*, 877 F. Supp. 1268, 1283 (E.D. Wise.
2 1995) (Furthermore, “[t]he amendment overrules the general theory in *Suter*, [adopted in cases
3 such as *Eric L. . .* / that the only private right of action available under a statute requiring a state
4 plan is an action against the state for not having that plan.”). *See also, Stanberry v. Sherman*,
5 75 F.3d 581, 583-584 (10th Cir. 1996)(holding that “the Congress disavowed *Suter*’s approach,
6 while not purporting to change the decision). *Visiting Nurses Association of North Shore v.*
7 *Bullen*, 93 F.3d 997, 1002, n.5 (1st, Cir. 1996) “Congress intended that 1320a-2 serve to
8 resurrect the *Wilder* test, with no *Suter* overlay.”; *Harris v. James*, 127 F.3d 993, 1003 (11th
9 Cir. 1997); *Lewis v. New Mexico Dept of Health*, 94 F. Supp2d 1217, 1235 n.4 (D. N.M.
10 Cir. 1997); *Lewis v. New Mexico Dept of Health*, 94 F. Supp2d 1217, 1235 n.4 (D. N.M.
11 Cir. 1997)(“Congress repudiated *Suter* by amending the Social Security Act to provide that a
12 private right of action to enforce some provision of the Act should not be deemed
13 unenforceable because the Act requires the state to submit a plan.”); *Davis v. McCluran*, 909
14 F.Supp2d 412, 416 n.4 (Term. 1995) (declining to follow *Suter* based on Congress’s express
15 “disavow[al] of the restrictive analysis employed in *Suter*”)

16
17 Following enactment of the SSA Amendment, those courts which, as required by the
18 Amendment, returned to the three factor analysis affirmed in *Blessing*, have upheld the
19 enforceability of the AACWA provisions upon which plaintiffs rely. For example, in *Marisol*
20 *v. Guiliani*, 929 F. Supp. 662, 682 (S.D.N.Y. 1996), the plaintiff putative class of children
21 sought declaratory and injunctive relief enforcing the case plan and case review provisions of
22 the Act. Following a review of *Suter* and the *Wright/Wilder* line of cases which preceded it as
23 well as considering the Social Security Act Amendment of 1994, the court concluded that the
24

1 case plan and case review provisions of 42 U.S.C. §671(a)(16) “are clear and not beyond the
2 power of the Court to enforce.” *Marisol* 929 F. Supp. at 683. *Jeanine 3 ex rel Blondis v.*
3 *Thompson*, 877 F. Supp. 1268,1283 (E.D. Wise. 1995).
4

5 **V. The Case Plan and Case Review Provisions of the Adoption Assistance and Child**
6 **Welfare Act Satisfy the Test Under *Blessing v. Freese* for Establishing Rights That**
7 **Are Enforceable Under 42 U.S.C. §1983**

8 Plaintiffs bring this action pursuant to 42 U.S.C. §1983 to enforce rights granted to
9 them under the Adoption Assistance and Child Welfare Act of 1980 as recently amended by the
10 Adoption and Safe Families Act of 1997.³² Section 1983 of Title 42 provides in pertinent part:

11 Every person who, under color of any statute, ordinance, regulation, custom, or
12 usage, or any State.. . subjects or causes to be subjected any citizen of the United
13 States or other person within the jurisdiction thereof to the deprivation of any
14 rights, privileges, or immunities secured by the Constitution or laws, shall be
15 liable to the party injured.. .”

16 In order to prevail in such an action, a plaintiff must show that Defendants deprived him of a
17 right secured by the Constitution or laws and that in so doing defendants acted under color of
18 law. *West v. Atkins*, 487 U.S.42,49 (1988); *Jensen v. Lane County*, ___ F.3d -, **2000 WL**
19 **1191041** (Sth Cir. g/23/00). Defendants do not contest that the challenged policies and practices
20 involve state actors. See e.g., *Morinaga v. Vue & DSHS*, 85 Wn. App.822, rev. denied 133
21 Wn2d 1012 (1997). Their challenge goes only to the issue of whether or not plaintiffs have a
22 right which arises out of the federal statute.

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25 ” Plaintiffs other federal constitutional and state law claims are not at issue in this motion.

1 Section 1983 provides a cause of action for violations of federal statutory rights as well
2 as constitutional guarantees. *Maine v. Thiboutot*, 448 U.S. 1,4 (1980)(“suits in federal courts
3 under 1983 are proper to secure compliance with the provisions of the Social Security Act on
4 the part of participating states”) . However, 3 1983 relief is available only if the statute creates
5 enforceable rights and if Congress has not foreclosed such enforcement in the statute itself.
6 *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 508, (1990). In order to determine whether a
7 particular statute creates rights enforceable in a 3 1983 suit, the terms of the statute are
8 examined under a three part test. A statute creates a right enforceable under 5 1983 if: (1) the
9 statute was intended to benefit the plaintiffs; (2) the statute imposes a binding obligation on the
10 government unit rather than merely expressing a Congressional preference for a certain kind of
11 conduct, and; (3) the interest asserted by the plaintiff is not so vague or amorphous that it is
12 beyond the competence of the judiciary to enforce. *Wild&-*, 496 U.S. at 509; *Blessing* , at 340-
13 341. This analysis requires examination of particular statutory provisions rather than a
14 consideration of the statute and purported rights on a more general level. *Legal Services of*
15 *Northern California v. Amett*, 114 F.3d 135, (9th Cir. 1997) citing *Blessing v. Freestone*, 520
16 *J.S.* 329, ---- - ----, 117 S.Ct. 1353, 1360-61 (1997); See &Q, *Yvonne L. v. New Mexico*
17 *Department of Human Services*, 959 F.2d 883, 889 (10th Cir. 1992)(holding “that individual
18 causes of action may be appropriate [under AACWA], depending upon the particular section or
19 violation involved.”)

20 Defendants agree that the appropriate test to apply in determining whether or not the
21 statutory provision gives rise to an enforceable federal right is set forth in *Blessing*.
22

1 DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FEDERAL STATUTORY CLAIMS, at 5)
2 Blessing³³ requires that the plaintiff clearly define the parameters of the alleged right and
3 identify the specific statutory section from which it emanates. 520 U.S. at 342. See, *Jordan v.*
4 *City of Philadelphia*, 66 F. Supp.2d 638, 647-648 (E.D. Pa. 1999)(dismissing AACWA claims
5 due to "plaintiffs failure to identify the specific statutory provisions" but granting leave to
6 amend "in order to identify the relevant provisions of the AACWA under which relief is
7 sought."). Once those preliminary inquiries are satisfied the analyzing court must conduct a
8 "methodical inquiry" that asks whether each particular claim and its corresponding statutory
9 provision satisfies the three- part test set forth in *Wilder. Blessing*, 520 U.S. at 343

11 Plaintiffs in the present case satisfy both of these preliminary inquiries. First of all,
12 plaintiffs very narrowly and precisely define the rights they seek to enforce. They assert that
13 Pursuant to 42 U.S.C. §671(a)(16), every child in foster care is entitled to a case plan which
14 includes each of the statutorily mandated elements set forth at 42 U.S.C. 675(l) including "a
15 discussion of the safety and appropriateness of the [home or institution]" in which defendants
16 have placed him and certain information regarding the child's health and education status. This
17 right, *a fortiori*, includes a requirement that whenever the child's placement is changed, that
18 section of the plan discussing the safety and appropriateness must be modified to reflect the
19 new placement and the health and education records must be reviewed and updated. Pursuant
20 to 42 U.S.C. §671(a)(16) each child also is entitled to case review which includes, among other
21 protections, the provision of procedural safeguards. 42 U.S.C §675 (5). More precisely.

24 ³³ Blessing, though decided 8 months before the Washington Supreme Court's decision in Washington State

1 plaintiffs allege they are entitled to procedural safeguards whenever the defendants change their
2 placement or curtail their visitation with their parents. Each of these rights arises directly from
3 the plain language of 42 U.S.C. §§671(a)(16), as defined in 675 (1) and 5(C). Plaintiffs
4 therefore satisfy the *Blessing* requirement that they identify with particularity the specific rights
5 they are claiming and the particular provision of the statute at issue supporting each claimed
6 right.

7
8 The rights that plaintiffs seek to enforce are different both in their nature and extent
9 from the rights which the *Court* in *Blessing* found unenforceable in a section 1983 action.
10 Plaintiffs do not ask the court to compel DSHS to come into “substantial compliance” with the
11 overall foster care scheme set forth in Title IV-E. They do not allege that every provision in
12 42 U.S.C. §671(a) satisfies the *Blessing* test. Nor do they ask the court to rule that “[Title IV-
13 E] as an undifferentiated whole, gives rise to undefined ‘rights.’ ” *Blessing*, 520 U.S. at 342.
14 The decision in *Blessing* rejected a “blanket approach” to determining whether a Social
15 Security Act program creates rights. That is not the approach plaintiffs urge here. Rather their
16 claims rest upon a section of the AACWA which was first enacted in 1980, reaffirmed as a
17 critical mandate since then, and whose terms were defined explicitly by Congress.³⁴

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23 Coalition of the Homeless, is not mentioned in the Supreme Court’s opinion.

1 **A. The Case Plan and Case Review Provisions of AACWA Are Clearly Intended**
2 **to Benefit Children in Foster Care**

3 The very title of the federal law makes it clear that the statute is intended for the welfare
4 of children. More importantly, the plain language of the case plan and case review sections at
5 issue here confirms that these provisions are meant to benefit each child the state places in
6 foster care. At the beginning of 671 (a)(16) the statute emphasizes that a case plan must be
7 developed for each child . At the end of the same section, the statute again makes it clear that
8 case reviews must be carried out with respect to each such child. No group of foster children is
9 to be excluded from the protections afforded under section 671 (a)(16).
10

11 Furthermore, the federal agency charged with implementation of AACWA, confirms
12 that the statute is meant to benefit children. See. e.g., 63 Fed. Reg. 67484 (December 7, 1998)
13 (“Congress authorized the title IV-E program with the intent that it would benefit children who
14 were subjected to abuse and/or neglect in their homes.”)

15 Defendants cite no case holding that the AACWA and its case plan and case review
16 provisions were not specifically enacted for the benefit of children in state foster care. One of
17 the cases cited by defendants acknowledges that these children are the intended beneficiaries of
18 the Act. & *Procopio v. Johnson*, 994 F.2d 325, 331(7th Cir. 1993) (finding that case review
19 system and “procedural safeguards” language of 42 U.S.C.675 (5)(C) “indicates a clear intent
20 to benefit children.”) and *Procopio* ,at 33 1 n.10 (finding that “there is no doubt that Congress
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24 34 While ruling that plaintiffs had no right to “substantial compliance” with all the requirements of Title IV-D,
25 Blessing explicitly left open the possibility that some provisions of Title IV-D ‘may give rise to some individually
26 enforceable rights.’ **Blessing**, 520 U.S. at 346

intended” [case plan provision] operates to advance children’s best interests). See also, *Suter v.*

Artist M., 503 U.S. 347,357 (1992)(referring to “the child beneficiaries of the Act.. .“)

The importance of case planning to children in foster care is emphasized throughout the child welfare literature. 35 Composing the written case plan required by 671 (a)(16) compels certain analyses and consideration of issues critical to the child’s health and safety. Clearly the child is the beneficiary of such a provision. The legislative history of AACWA also emphasizes the key role of case planning in the welfare of foster children.³⁶

Similarly, the case reviews are meant to benefit children by assuring that they are not lost in the system, that there are periodic assessments of their progress, and that procedural protections are afforded them in order to safeguard their interests in family integrity, stability, and contact with their families.

35 Judith S. Rycus & Ronald C. Hughes, **FIELD GUIDE TO CHILD WELFARE, VOLUME TWO: CASE PLANNING AND FAMILY CENTERED CASEWORK** (1998), National Association of Public Child Welfare Administrators, Guidelines for a Model System of Protective Services for Abused and Neglected Children and Their Families, identifying case planning as a “core service” and advising that ‘case plans should drive the ..services to be provided.. .“, pp. 23-24 (1999); Child Welfare League of America, Standards for Foster Family Service, Standard 3.2, “Services should be given on the basis of an individualized plan for each child so that he may receive the care and treatment that meet his particular needs, promote his healthy development, and result in a permanent plan for his care.” (p.37)(1975)

36 a, u, “I think legislation should focus on the problem of drift of children in foster care, that it should emphasize systematic case planning so that children can be released from the scourge of not having a permanent home.” Testimony of Dr. Fanshel from Joint Hearing Before the Subcommittee on Children and Youth, Foster Care Problems and Issues (December 1, 1975) at 75. In reporting the results of its study on foster care, the Comptroller General also emphasized the importance of the case plan. It observed that “[w]ithout case plans, the agency may not establish timeframes and specific service goals which may result in the child remaining in an inappropriate setting or in foster care longer than necessary. **REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES, CHILDREN IN FOSTER CARE INSTITUTIONS - STEPS GOVERNMENT CAN TAKE TO IMPROVE THEIR CARE**, (Feb. 22, 1977), at 8.

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period of four hours per week for the family, preferably at a location other than the agency offices, unless otherwise in appropriate.” Winston, at 1387.

See, e.g. *Scrivner v. AnCEYew.s*, 816 F.2d 261 (6th Cir. 1987) (distinguishing *Lynch v. Dukukis*, 719 F.2d 504 (1st Cir. 1983) and holding that the AACWA neither explicitly or implicitly creates federal statutory right to “meaningful visitation”).

Finally, Defendants’ claim that decision in *Coalition for the Homeless* supports their notion to dismiss the case review claims is based upon a misstatement of the court’s decision. By deleting part of the sentence and inserting, in brackets, a citation to the case review section, the defendants attempt to convert the court’s opinion into holding unsupported by the court’s earlier discussion (Defendants Motion, at p. 9). As the language immediately preceding the partial quote defendants cite indicates, the court’s holding applies solely to the case plan provision “[I]n the context of the relief requested by plaintiffs.” *Coalition for the Homeless*, at 929.

VIII. Conclusion

Plaintiffs seek declaratory and injunctive relief enforcing the plain, clear, and unequivocal language of 671(a)(16) as defined by 675. Under these provisions, each time they are moved to a new placement, they are entitled to have their written case plan promptly amended so that it satisfies the Congressionally mandated requirements and includes, among other things, a discussion of the appropriateness of the new placement. Each time they are moved, they are entitled to procedural safeguards, which at a minimum require notice and an opportunity to be heard. They do not ask the court to order implementation of individual case plans, or to engage in determining what the right plan is for individual children. Nor do they ask this court to engage in a case by case analysis of which placement is the appropriate one for

1 L child. Congress' emphasis upon the case plan and case review mandates of AACWA,
2 ncluding its recent amendments in Adoption and Safe Families Act of 1997, evidences a clear
3 ntent that these provisions are critical to the well being of each child in foster care. To render
4 hem a dead letter by denying the private enforceability by the child beneficiaries of the Act,
5 ould thwart the clear intent of Congress in enacting such provisions.

6 Dated this 14^h day of September, 2000.

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8
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1 **B. The Case Plan and Case Review Provisions Impose Binding Obligations on**
2 **Defendants**

3 A review of the language of the particular section on which plaintiffs base their rights to
4 a case plan and case review, as well as additional provisions in the Act, establish that Congress
5 intended to impose a binding obligation on the States. Section 671 (a) provides that :

6 “In order for a State to be eligible for payments under this part, it shall have a
7 plan approved by the Secretary which . . . (16) provides for the development of
8 a case plan (as defined in section 475(1))for each child receiving foster care
9 maintenance payments under the State plan and provides for a case review
system which meets the requirements described in section 475(S)(B) with
respect to each such child.

10 The language Congress used in 42 U.S.C. §671 (a)(16) makes it clear that it intended to impose
11 an obligation upon the states and not merely advise or suggest that case plans and case reviews
12 were a desirable component of their foster care system. *Mursisol v. Guiliani*, 929 F. Supp. 662,
13 682 (SD. N.Y. 1996); *Jeanine B. v. Thompson*, 877 F. Supp. 1268, 1283 (E.D. Wise. 1995).
14 Case plans and case reviews are conditions precedent to an approvable State Plan. In *Wilder*
15 the Supreme Court held that the “reasonable and adequate rates” provision of the Medicaid
16 state plan requirements imposed “a binding obligation on States participating in the Medicaid
17 program,” because Congress clearly express “its intent to impose conditions on the grant of
18 federal funds.” *Wilder*, 496 U.S. at 511-512. The state plan provision upon which plaintiffs
19 rely here also similarly imposes a binding obligation on the state of Washington.

20 An examination of other provisions of the Act provides additional evidence of the
21 binding nature of both the case plan and case review provisions. For example, in an effort to
22 encourage the development of new strategies for improving services to children in foster care,
23
24

1 Congress authorized the Secretary of U.S. Department of Health & Human Services ('HHS') to
2 approve and fund demonstration projects. With the enactment of ASFA in 1997, the
3 Secretary's authority was expanded allowing her to approve up to ten new demonstration
4 projects each year between FY 1998 and 2002." At the same time, concerned that adherence
5 to every requirement of Title IV-E might hamper the states' ability to experiment with new
6 approaches, Congress permitted the Secretary to waive compliance with certain mandates of
7 the Act.³⁸ However, Congress placed strict and unequivocal restrictions upon the Secretary's
8 authority to waive the mandates of Title IV-E. The Secretary was explicitly barred from
9 waiving "any provision of such part E, to the extent that the waiver would impair the
10 entitlement of any qualified child or family to benefits under a State plan approved under such
11 part E." HHS has concluded that this Congressional mandate bars the Secretary from waiving
12 either case plan or case review requirements. Specifically included among these non-waivable
13 provisions are "protection for the family such as procedural safeguards to assure that parental
14 rights are respected, [and] requirements that certain information be contained in the child's case
15 plan.. ."³⁹
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19 37 P.L. 105-89 Sec. 301

20 38 The Secretary may waive compliance with any requirement of part B or E of subchapter IV of this chapter
21 which (if applied) would prevent a State from carrying out a demonstration project under this section or prevent
22 the State from effectively achieving the purpose of such a project, except that the

Secretary may not waive--

22 (1) any provision of section 627 of this title (as in effect before April 1, 1996), section 622(b)(9) of this
23 title (as in effect after such date), or section 679 of this title; or (2) any provision of such part E, to the extent that
the waiver would impair the entitlement of any qualified child or family to benefits under a State plan approved
under such part E.

24 39 See also, ACYF-CB-IM-98-01 (Feb. 13, 1998) ACYF-CB-IM-99-03 (Jan 21, 1999) and ACYF-CB-IM-2000-
25 OI(February 4,2000) Information Memoranda Re: Demonstration Projects.

1 Other policy directives from HHS confirm the binding nature of the case plan
2 provisions of the federal statute. For example, in 1990, Congress amended the definition of
3 'case plan' to require that a foster child's case plan must include certain information about his
4 educational and health status. In responding to a state's query about whether this case plan
5 requirement could be phased in, HHS responded that "gradual implementation [of the case plan
6 requirement] is not permissible."⁴⁰

8 Further review of the statute as a whole, indicates that when Congress does not intend a
9 provision to be binding on the states it uses different language than that used in 42 U.S.C.
10 §671(a). For example, Congress determined that chronically ill parents should be able to
11 designate a standby guardian without surrendering parental rights. But this provision was not
12 incorporated into the list of mandates in 671(a). Instead, Congress merely provided that "it is
13 the sense of Congress that States should have in effect laws and procedures' for the benefit of
14 such parents. 4. &, &Q P.L. 105-89, Sec. 406 (Sense of Congress that equipment purchased
15 with funds under AACWA should be American made); and P.L. 106-169, Sec. 1 10(e)(Sense of
16 Congress that states should provide medical assistance to 18-21 year olds who have been
17 emancipated ti-om foster care).

19 Defendants' own POLICY MANUALLY contains an explicit acknowledgment that the
20 sections of AACWA upon which plaintiffs rely, require a case plan and that each child's case
21 plan contain the federally mandated content. Section 4210 of the POLICY MANUAL first of all
22

23 ⁴⁰ USDHHS, ACYF, Policy Interpretation Question 90-03 (Dec. 6, 1990)
24 ⁴ P.L. 105-89, Sec. 403.

1 -requires that the case plan shall be in writing. Section 4213 lists the content of a foster child's
2 :ase plan and after each subsection specifies the statutory basis for the provision. It requires
3 hat:

4 If removal of the child from the home has occurred, additionally the case plan shall
5 include:

- 6 A. A description of the type of home or institution in which the child is placed. 42
7 U.S.C. 675, Sec. 475.
8 B. A discussion of the safety and appropriateness of the placement 42 U.S.C. 675.. .
9 C. A description of how the agency will attempt to ensure the child receives safe and
10 proper care. 42 U.S.C. 675.

11 Caseworkers in Washington do not have the discretion to ignore some provisions of the POLICY
12 MANUAL and to comply with others. As the introduction to the POLICY MANUAL makes clear :
13 'policy drives what the agency and its staff must do and is grounded in the revised Code of
14 Washington (RCW) and federal laws, regulations and policy interpretations.. ."⁴³

15 Recent correspondence authored by the Assistant Secretary for the Children's
16 Administration also acknowledges the binding nature of the federal regulations related to the
17 :ase plan mandate. The federal regulations provide in part that:

18 The case plan for each child must : . . .(2) be developed within a reasonable
19 period, to be established by the State, but in no event later than 60 days from the
20 child's removal from the home . . .⁴⁴

21 [n a letter responding to Senator Hat-grove's request for a report on DSHS' compliance with
22 legislative mandates, Assistant Secretary Oreskovich wrote to him explaining that Washington

23 " Children's Administration, Department of Social and Health Services, **CASE SERVICES POLICY MANUAL**,
24 'September 1, 1995)(hereinafter, '**POLICY MANUAL**)
25 **I³ POLICYMANUAL**, Section 1100

1 now calls the child's case plan, the Individual Service and Safety Plan (ISSP). She then
2 informed Senator Hargrove that "[w]e have been completing the ISSP within the federally
3 mandated timeframe of 60 days."⁴⁵

4 The plain language of the statute, other provisions of the same program, the regulations
5 and other policy directives of the federal agency responsible for oversight of the IV-E program,
6 and the defendant's own documents or statements all establish the binding nature of the case
7 plan and case review provisions in 42 U.S.C. §671(a)(16).
8

9 **C. The Terms of the Case Plan and Case Review Provisions Are Sufficiently**
10 **Specific So As To Be Capable of Enforcement By The Courts**

11 As discussed above, the AACWA was aimed at ending the "drift" of children through
12 endless years of foster care and at curtailing state child welfare agency practices which led to
13 children bouncing from home to home. By compelling agencies to consider the
14 appropriateness of the placement and mandating procedural safeguards whenever the agency
15 decided to change the child's placement, Congress hoped to put an end to those practices. The
16 case plan is not simply a meaningless form to be filled out. Complying with the case plan
17 mandate requires that whenever the child's placement is to be changed, the worker must go
18 through the analysis, documented in writing, of how the new placement is appropriate for and
19 meet the needs of the child. If this is done for each child, as Congress requires, more
20 thoughtful and specific planning will go into the selection of placements and Congress'
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23 ⁴⁴ 42 C.F.R. §1356.21 (g)

24 ⁴⁵ Letter of Rosalyn Oreskovich to the Honorable James Hargrove (February 15, 2000), p.2. Attached as Exhibit
2. See also, Letter of Secretary Jule M. Sugarman to the Honorable Jean Marie Brough (Nov. 18, 1988) stating

1 ultimate objective of stability and permanence will be realized for a greater number of children
2 in care.

3 As another means to reducing the indiscriminate shuttling of children from one home to
4 another, Congress mandated that procedural safeguards must be provided whenever the child is
5 to be moved from one placement to another. In requiring the state's to provide procedural
6 safeguards, Congress did not intend to bar the agency from ever moving children when that is
7 dictated by the child's needs for health and safety. The procedural safeguards here create a
8 procedural hurdle which the agency must overcome in order to move the child. Congress heard
9 ample testimony about the harm inflicted when foster children are moved around to justify such
10 a provision. But the hurdle is not insurmountable. At minimum, there must be a notice of the
11 impending change and an opportunity to be heard on the necessity for the change. Ultimately
12 then, these procedural protections in conjunction with the case plan and other periodic reviews
13 and permanency hearings required by the case review sections of AACWA, are intended to
14 improve the decision-making for children. With more considerate planning and the prospect of
15 someone else reviewing the decision to move a child, Congress hoped to improve the well-
16 being of children whose care it was paying for with billions of federal dollars.

19 **1. The Statutory Definition of Case Plan is Comprehensive and Specific**

20 Since it was first enacted as part of AACWA in 1980, the statutory definition of 'case
21 plan' has been expanded by Congress from one paragraph to five subsections. The original
22 definition was retained at the same time Congress added further mandatory elements to the case
23

24 that "we are obliged to follow the AACWA which requires DSHS to review placement options for children in out
25

1 plan required for each child. Some of these definitional additions are applicable to all children
2 n foster care (e.g, health & educational records) while others apply to a subclass of
3 :older)children in care. A similar elaboration as well as some additions have been made to the
4 definition of 'case review.'

5 The original definition of 'case plan' read⁴⁶:

6 The term 'case plan' means a written document which includes at least the following:
7

8 A description of the type of home or institution in which the child is to be
9 placed, including a discussion of the appropriateness of the placement and how
10 the agency which is responsible for the child plans to carry out the judicial
11 determination made with respect to the child in accordance with section 472(a);
12 and a plan for assuring that the child receives proper care and that services are
13 provided to the parents, child and foster parents in order to improve the
14 conditions in the parents' home, facilitate return of the child to his own home or
15 the permanent placement of the child, and address the needs of the child while in
16 foster care, including a discussion of the appropriateness of the services that
17 have been provided to the child under the plan.

18 In 1986, in order to ensure that states addressed the special needs of older children in
19 foster care, Congress added another requirement to the case plan definition. It provided:

20 Where appropriate, for a child age 16 or over, the case plan must also include a
21 written description of the programs and services which help such child prepare
22 for the transition from foster care to independent living.⁴⁷

23 The case plan definition was again amended in 1990 with the addition of subparagraph
24 :C). It provided that the case plan include:
25

26 If home care . . . systematic and periodic review is required by federal and state legislation."
" Since 1961, federal law made funds available to the states for foster care under Title IV-A provided that the state
had a case plan for each child and conducted a periodic review of the necessity for the child's being in a foster
family home or child care institution. The earlier statute did not define case plan and did not even require that it be
a separate written document. 3 U.S. Code and Admin. News 96 Congress 2nd Session at 1566.
" P.L. 99-272,612307(b) (1986)

To the extent available and accessible, the health and education records of the child, including -

- (i) the names and addresses of the child’s health and educational providers;
- (ii) the child’s grade level performance;
- (iii) the child’s school record;
- (iv) assurances that the child’s placement in foster care takes into account proximity of 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 agency⁴⁸

At the same time the case plan definition was amended, Congress added to the definition of case review system a new subparagraph (D), which complemented the case plan amendment relating to the health and education records of the child. New subsection D required that :

[A] child’s health and education record is reviewed and updated, and supplied to the foster parent or foster care provider with whom the child is placed, at the time of each placement of the child in foster care

Several years later, the case review definition was revised again. Section 475(5)(A) added a requirement applicable to children placed in foster care out of State or a substantial distance from home. It provided that

- (i) if the child has been placed in a foster family home or child-care institution a substantial distance from the home of the parents of the child, or in a State different from the State in which such home is located, sets forth the reasons why such placement is in the best interests of the child, and
- (ii) if the child has been placed in foster care outside the State in which the

⁴⁸ P.L. 101-239,

1 home of the parents of the child is located, requires that, periodically, but
2 not less frequently than every 12 months, a caseworker on the staff of the
3 State agency of the State in which the home of the parents of the child is
4 located, or of the State in which the child has been placed, visit such child in
such home or institution and submit a report on such visit to the State
agency of the State in which the home of the parents of the child is located 49

5 With enactment of the Adoption and Safe Families Act of 1997, Congress once again
6 revised both the case plan and case review definitions. Consistent with the Act's requirement
7 that health and safety of a child is the paramount concern, the case plan's description of the
8 type of home or institution in which the child is placed, must include a discussion of the "safety
9 and appropriateness of the placement" In addition, an entire new section was added applicable
10 to children for whom reunification with their natural parents was no longer the permanent plan.
11 subsection E now requires that the case plan also include

13 (E) In the case of a child with respect to whom the permanency plan is
14 adoption or placement in another permanent home, documentation of the
15 steps the agency is taking to find an adoptive family or other permanent
16 living arrangement for the child, to place the child with an adoptive family, a
17 fit and willing relative, a legal guardian, or in another planned permanent
living arrangement, and to finalize the adoption or legal guardianship. At a
minimum, such documentation shall include child specific recruitment
efforts such as the use of State, regional, and national adoption exchanges
including electronic exchange systems

18 At the same time Congress also added a lengthy new section to the definition of case
19 review. 51

22 " P.L. 103-432, As part of the same legislation, Section 475(5)(C) of the Act was amended to clarify that a
23 dispositional hearing had to be conducted "not less frequently than every 12 months" and requiring that for
children placed out of State, the dispositional hearing had to determine " whether the out-of-State placement
24 continues to be appropriate and in the best interests of the child,"
j" P.L. 105-89 section 102 (2) amending 42 U.S.C. 675 (1).

1 No other provision of the AACWA has been the subject of more Congressional
2 attention than the provision at issue in this case. With each revision, Congress provided more
3 detail, greater specificity of what each case plan must include and the nature of the case
4 reviews. These lengthy and comprehensive provisions provide sufficient detail to guide
5 judicial enforcement and therefore satisfy the third part of the *Blessing* test.

6
7 **2. Enforcement of the Procedural Safeguards Mandate for Case Reviews Is Clearly
8 Within the Competence of the Judiciary⁵²**

9 The case review requirements of 42 U.S.C. §671(a)(16), as defined at §675(5), include
10 several types of judicial or administrative reviews of the case plan and/or child's status. They
11 §110 mandate that the for "each such child" procedural safeguards will be applied. The
12 particular provision upon which plaintiffs rely states:

13 . . .procedural safeguards shall also be applied with respect to parental rights
14 pertaining to the removal of the child from the home of his parents, to a change
15 in the child's placement, and to any determination affecting visitation
16 privileges. . .⁵³

17 Plaintiffs seek declaratory and injunctive relief requiring defendants to provide procedural
18 protections for each child in their custody who is in out of home placement.

19 The third part of the *Blessing* test requires that the provision be stated with sufficient
20 specificity so that "its enforcement would not strain judicial competence" *Blessing*, 520 U.S. at

21 ⁵² 42 U.S.C. 675 (5)(E)

22 ⁵³ Decisions affirming the enforceability of the case review system required by 67 1 (a)16 go
23 lack to some of the earliest cases brought under AACWA. *L.J. v. Mussinga*, 838 F.2d 118, 123
24 14th Cir. 1988) (Title IV creates an enforceable right to a properly implemented and operated
25 case review system for foster children); *Lynch v. Duhkis*, 719 F.2d 504, 509-12 (1st Cir.1983)
26 (children under jurisdiction of foster care program have substantive right in case review
system).

1 40. The test does not require that the statute eliminate all discretion on the part of the state.
2 ly its very terms, the test permits some vagueness as long as enforcement of the statute is not
3 beyond the competence of the judiciary. In assessing the enforceability of the “reasonable
4 rates” provision of the Medicaid statute in *Wilder*, the Supreme Court held

5 “that the Amendment gives the States substantial discretion in choosing among
6 reasonable methods of calculating rates may affect the standard under which the
7 court reviews whether the rates comply with the Amendment, but it does not
-render the Amendment unenforceable by a court.” *Wilder*, at 519-520.

8 Determining the procedural safeguards to which plaintiffs are entitled is not beyond the
9 competence of the courts. Courts regularly are asked to determine what procedural protections
10 are required, whether existing procedures are adequate, and if post deprivation procedures are
11 sufficient. The first step in such an inquiry is whether the actions of defendant have infringed
12 on plaintiffs right or interests. *Smith v. Organization of Foster Families for Equality and*
13 *Reform*, 431 U.S. 816 (1977). Once the affected interest is identified, then the court can
14 determine whether or not an appropriate level of process was afforded the plaintiff. *Hennigh v.*
15 *City of Shawnee*, 155 F.3d 1249, 1253 (10th Cir. 1998).

16
17 In 42 U.S.C. §675(5)(c) Congress specified three areas in which agency actions have a
18 profound affect upon children and their constitutionally protected rights - removal from the
19 Parents’ home, a change in placement, or the frequency and/or extent of visitation. It is these
20 interests to which Congress attaches the procedural safeguards. Any one of them triggers
21 procedural protections.

22
23
24 53 Children in the state’s foster care system are placed in many different types of (public or private) placements,
25 including relative’s homes, foster homes, therapeutic foster homes, group homes, residential treatment facilities,
and other institutional settings.

1 Existing state law provides comprehensive procedural protections when the child is
2 being removed from their home. RCW 13.34.060. Plaintiffs do not challenge the adequacy of
3 [these procedures. Nor do plaintiffs suggest that the same procedures must be employed when
4 there is a change in placement or a restriction or termination of visitation between parent and
5 child.

6
7 . . The procedural safeguards here must, however, satisfy the fundamental requirement of
8 due process - the opportunity to be heard "at a meaningful time and in a meaningful manner."
9 *Matthews v. Eldridge*, 424 U.S. 319,333 (1976) citing *Armstrong v. Manzo*, 380 U.S. 545, 552,
10 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). "Due process, unlike some legal rules, is not a
11 technical conception with a fixed content unrelated to time, place, and circumstances.. . Due
12 process is flexible and calls for such procedural protections as the particular situation demands.
13 *Matthews*, 424 U.S. at 334 citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Courts are
14 frequently called upon to resolve the issue of what procedures are constitutionally sufficient. In
15 conducting this determination there are several factors which the court generally must consider:

16
17 First, the private interest that will be affected by the official action; second the
18 risk of an erroneous deprivation of of such interest through the procedures used,
19 and the probable value, if any, of additional or substitute procedural safeguards;
20 and finally, the Government's interest, including the function involved and the
21 fiscal and administrative burdens that the additional or substitute procedural
22 requirement would entail. *Matthews*, 424 U.S. at 335.

23 But for purposes of resolving this motion, the court need not engage in such an analysis
24 now for Defendants do not suggest that they currently provide some procedural protections and
25 that these safeguards are sufficient to satisfy the requirement of 671(a)(16) and 675(C). Rather,
26 they suggest that because Congress has allowed the states some flexibility in meeting this

1 mandate, it is therefore meaningless and unenforceable. But as noted above, flexibility does
2 not mean the provision is so vague as to be beyond the competence of the judiciary. As the
3 Eleventh Circuit held in *Doe v. Chiles*, 136 F.3d 709, at 717, “While there may be a range of
4 reasonable [time periods for provision of assistance] there certainly are some [time periods]
5 outside that range that no state could ever find to be [‘reasonably prompt’]. . . under the
6 Medicaid Act.” (quoting *Wilder*, 496 U.S. at 519-520); *Miller*, JLF.3d.at13 1.9. Similarly,
7 while there may be a range of procedural safeguards permissible under the section, the failure
8 to provide any protections to parents or children when the placement is changed or visitation
9 curtailed is outside the range. Given the clear analytical framework set forth by the Supreme
10 Court for determining the type and extent of procedural protections that are required once the
11 interest affected is identified, the courts are clearly competent to determine the procedural
12 protections which must be afforded the plaintiff class.

D. The Remedial Scheme Available Under AACWA Does Not Foreclose Private Enforcement of 671 (a)(16)

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Once plaintiffs demonstrate that the three factors of the *Wright/Wilder/Blessing* analysis have been met, section 1983 provides a remedial cause of action unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement. The burden of proof on this issue is upon the defendants. *Wilder* 496 U.S. 498, 520-521 citing *Wright* 479 U.S. at 423-24. This question was left unresolved in *Suter*. *Suter*, 520 U.S. at 360-361 n. 11.

In *Wilder*, the Court found little merit” in defendants’ argument that the remedial scheme under the Medicaid Act foreclosed private enforcement of Act. It emphasized that

1 “[o]n only two occasions have we found a remedial scheme established by Congress
2 sufficient to displace the remedy provided in 6 1983. *Wilder*, 496 U.S. at 521.

3 After considering the powers which the Medicaid statute grants to the Secretary of HHS,
4 including the authority to withhold approval of state plans or to curtail federal funds to States
5 whose plans are not in compliance with the Act, the Court concluded that “this administrative
6 scheme cannot be considered sufficiently comprehensive to demonstrate a congressional intent
7 to withdraw the private remedy of 61983.” *Wilder*, 496 U.S. at 522.

8 Defendants in *Blessing* argued that the availability of similar administrative
9 mechanisms under Title IV-D, the child support enforcement act, cut off any private
10 enforcement under 61983. Following the holding in *Wilder*, the Court concluded that the
11 Secretary’s oversight and the “administrative arsenal” available to the Secretary did not
12 compare to the comprehensive enforcement schemes, which the Court had set as the threshold
13 in its earlier cases. *Blessing*, 520 U.S. at 347-349.

14 The same sort of administrative enforcement scheme provided for in the Medicaid Act
15 reviewed in *Wilder* and the child support enforcement act analyzed in *Blessing*, is found in the
16 Adoption Assistance and Child Welfare Act. If anything, the scheme in the AACWA is less
17 comprehensive than what plaintiff providers had access to in *Wilder*. There, the state had
18 adopted a three-tiered administrative scheme to the which providers could appeal their
19 individual reimbursement rates. Under *Wilder* and *Blessing*, therefore, the Secretary’s
20 authority to withhold federal funds or reject a state’s plan does not foreclose private
21 enforcement of the AACWA through 6 1983.
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1 Furthermore, recent Congressional amendments to AACWA provide direct evidence
2 hat Congress was aware of lawsuits brought to enforce provisions of the AACWA and
3 anticipated that in the future other similar lawsuits might be brought. As part of ASFA,
4 Congress expanded the Secretary's authority to approve additional demonstration projects.
5 However, Congress required that

6
7 tD-conduct.a-demonstrationproject under this section that has been submitted by
8 a State in which there is in effect a court order determining that the State's child
9 welfare program has failed to comply with the provisions of part B or E of Title
10 IV, or with the Constitution of the United States, the Secretary shall take into
11 consideration the effect of approving the proposed project on the terms and
12 conditions of the court order related to the failure to comply.⁵⁴

13 Having explicitly acknowledged the court's enforcement of AACWA, if Congress meant to
14 foreclose future private enforcement of AACWA provisions, it would have spoken clearly and
15 not terminated all private enforceability of 67 1 (a) by implication.

16 Defendants make much of the federal district court's determination in *Charlie H. v.*
17 *Whitman* that Congress foreclosed private enforceability of all other sections of 671(a) by
18 providing a cause of action for one section. (Defendants' Motion, at 9).⁵⁵ In reaching that
19 conclusion, however, the *Whitman* court ignores a crucial distinction between that section of
20 671 (a) and all the other sections. While the other provisions impose obligations only on the

21 54 P.L. 105-89, Section 301 (a)(5)

22 " Defendants attempts to prevent private enforcement of the case plan provisions by asserting that the Secretary's
23 authority to withhold or reduce federal funding is the sole remedy for violations of Title IV-E requirements go
24 back to the earliest cases brought under the AACWA. In *Lynch*, supra, the First Circuit, citing a line of U.S.
25 Supreme Court cases going back to *Rosado v. Wyman*, 397 U.S. 397 (1970), holding that section 1983 provides a
cause of action for violations of the Social Security Act and requiring express statutory language for the SSA
remedies to preclude other remedies, held that "nothing in the structure of Title IV-E suggests that Congress
meant 671(b) to be an exclusive remedy." *Lynch*, at 512.

1 itate agencies, section 671 (a)(18) applies to certain discriminatory practices of private agencies
2 and other entities. Secondly, 671 (a)(18) applies to those agencies who receive any federal
3 funds not just to agencies that receive funds under AACWA..

4 Since there is no “express provision” in the AACWA foreclosing an action under
5 section 1983, the Court must find “other specific evidence from the statute itself that Congress
6 intended to foreclose such private enforcement.” *Wilder*, 496 U.S. at 520-521 citing *Wright*
7 479 U.S. at 423. The “specific evidence” required is a remedial scheme within the statute itself
8 that is “sufficiently comprehensive . . . to demonstrate congressional intent to preclude the
9 remedy of suits under 1983.” *Wilder*, 496 U.S. at 521 citing *Middlesex County Sewerage*
10 *Authority v. National Sea Clammers Assn*, 453 U.S. 1, 20 (1981). *Livadas v. Bradshaw*, 512
11 U.S. 107, 133 (1994).

12
13 The provision in the Multiethnic Placement Act (MEPA) upon which the *Whitman court*
14 relies is not the kind of “specific evidence” required. It falls far short of the type of
15 comprehensive remedial scheme which the Court found sufficient in *Middlesex CounQ*
16 *Sewerage Authority v. National Sea Clammers Assn* and *Smith v. Robinson*, 468 U.S. 992
17 (1984).

18
19 The *Whitman court* incorrectly assumes that those suffering the discriminatory conduct
20 that Congress prohibited in MEPA could obtain relief through a private action brought under
21 section 1983. As discussed above, the prerequisites to an action under section 1983 include a
22 violation of rights secured by the Constitution or laws by a state actor. Unlike the other
23 provisions of 671(a) which apply only to the state receiving AACWA funds, the action
24

1 prohibited by MEPA include not only the state but, in addition, “any other entity in the State
2 that receives funds from the Federal Government.”⁵⁶ Since more than the receipt of Federal
3 funds is usually required to establish state action for section 1983 purposes, without the explicit
4 cause of action in 674 (d), these other entities (e.g., private child welfare agencies) could
5 continue discriminatory practices with impunity.⁵⁷ *Malachowski v. City of Keene*, 787 F.2d 704
6 (1st Cir. 1986) cert. denied 479 U.S. 828 (court found that child care and placement is not
7 traditionally the exclusive prerogative of the state” and therefore under color of law
8 requirement not satisfied); *Milburn v. Department of SocServs*, 871 F.2d 474 (4th Cir.) cert
9 denied 110 S.Ct. 148 (1989). Thus, Congress had to specially create a cause of action in order
10 to provide foster parents and children with access to the courts for violations of their rights by
11 private agencies. In construing this one provision as ample evidence that Congress meant to
12 foreclose the enforcement of all other rights under 671(a), the Whitman court ignores the plain
13 language of MEPA and the scope of the forbidden conduct.
14
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16 Additionally, Congress neither amended nor repealed 42 USC. 1320a-2 when it
17 enacted the provision which Whitman considers ample evidence of Congress’ intent to
18 foreclose enforcement of all other AACWA provisions. Under the Whitman court’s holding,
19 however, this section would be a dead letter.

20 In *Sea Clammers*, supra, a panoply of enforcement options, including noncompliance
21 orders, civil suits, criminal penalties and which included two citizen suit provisions evidenced a

22
23 56 “MEPA applies to all agencies and entities receiving federal assistance directly or as a sub-recipient from
24 another entity.” Joan Heifetz Hollinger, *A Guide to the Multiethnic Placement Act of 1994 As Amended by the
25 Interethnic Adoption Provisions of 1996*, Chap. 3 (1998).

1 Congressional intent to foreclose reliance on 61983. Neither the Secretary's authority to curtail
2 federal funds nor the MEPA enforcement provision relied upon in *Whitman* approach the type
3 of this type of comprehensive enforcement scheme. Therefore, section 1983 actions may be
4 brought by child beneficiaries of the AACWA to enforce their rights under the Act.

5
6 **VI. The Lower Federal Court Decisions Upon Which Defendants Rely Are No Longer**
7 **Persuasive Authority As They Were Decided Before The Congressional Reversal of**
8 **Suter.**

9 Defendants rely on two post-Suter decisions - *Eric L. v. Bird*, 848 F. Supp. 303 (D.N.H.
10 1994) and *Procopio v. Johnson*, 994 F.2d 325 (7th Cir. 1993). See Defendants' Motion, at pp. 8-
11 9." These cases have no persuasive authority because both were decided before the
12 Congressional amendment overturning the broad holding of *Suter* which was the basis for their
13 decisions. More importantly, while defendants cite *Procopio* in support of their vagueness
14 argument (Defendants' Motion, at p.9), they misstate the court's holding. In fact, the court in
15 *Procopio* states "we note tangentially that the interest the *Procopio*'s assert is not so vague and
16 amorphous that it is beyond the competence of the judiciary to enforce. *Procopio*, at 332, n.
17 13. 59

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20 " Section 674 (d)(3)(B) also establishes a 2 year statute of limitations. Without such a provision, state law would
21 control the time within which plaintiffs had to file suit.
22 58 Several other lower courts denied the enforceability of sections of 671(a) based their holdings on the same broad
23 reading of Suter. *Baby Neal v. Casey*, 821 F.Supp. 320,328 (E.D.Pa. 1993), rev'd on other grounds, 43 F.3d 48
24 (3d Cir.1994) (holding unenforceable as a private action plaintiffs claims under § 627(a)(2)(A), (B), and (C),
25 627(b)(3), and 671(a)(15)); *Thomas v. New York City*, 814 F.Supp. 1139, 1152 (E.D.N.Y.1993) (ruling that there is
26 "no private right of action under the Federal Adoption Assistance and Child Welfare Act")
59 Defendants also misstate the holding of *Homeless*. Contrary to their assertion, it did not specifically address any
subsection of 675 (5), including subsection C which is at issue here

1 *Procopio*, was an action brought in federal court by foster parents seeking to have the
2 Federal court return a child to them whom the state juvenile court had ordered be returned to his
3 natural parents. They contended that they had a liberty interest in their family relationship with
4 Ashley, their former foster child, that the state could not deprive them of without due process.
5 They alleged that their liberty interest derived from the statutory scheme under the AACWA.
6 The provision they argued bestowed this liberty interest upon them was 42 U.S.C. §675 (5) C
7 which assures each foster child under state supervision requiring “ a dispositional hearing to be
8 held . . . no later than eighteen months after the original placement.. ” In rejecting the foster
9 parents 1983 claim, the *Procopio* court first finds that “it is difficult to conclude that Congress
10 intended section 675(5)(c) to benefit foster parents.” *Procopio*, at 331. But the court’s
11 decision rests upon an earlier case decided in the same circuit, *Clifton v. Schafer*, 969 F.2d 278
12 7th Cir. 1992). *Clifton*, held that a provision of the state plan statute (Title IV-A) was not
13 privately enforceable because *Suter* “requires only that the state adopt a plan.” *Clifton*, 969
14 F.2d at 284.

15
16
17 *Eric L.*, like *Procopio* was decided after *Suter* but before the Congressional amendment
18 overturning *Suter*. *Eric L.*, plaintiffs (a class of children in care) sought to enforce numerous
19 sections of the AACWA - 42 U.S.C. §671 (a) (9), (10), (11), (14) and (16), at 312. Considering
20 the sections as a group, the district court held that private enforceability of those and any
21 other sections which are part of a state plan requirement “are foreclosed by the decision in
22 *Suter v. Artist M.* . . . ” *Eric L.* at 312. Indeed, the court determined that “the Golden State/Wilder
23 framework has since been called into question (if not abandoned) by the Supreme Court [in
24

1 Suter] and that “*Wilder’s* epitaph was indeed chiseled and planted by the *Suter* court in 1992.”

2 At 3 11. The *Eric L.* decision turned / relied exclusively upon a reading of *Suter* holding that if
3 the rights sought to be enforced were “merely another feature which the state plan must include
4 to be approved by the Secretary” they were not rights enforceable in a 1983 action. Judge
5 McAuliffe’s decision was not based upon a determination a section by section analysis of the
6 statute. Nor did the court apply the three-pronged test of *Golden State/Wilder/Blessing* line of
7 cases which defendants concede is required in any analysis of 671(a). Of particular
8 significance to the holding in *Eric L* was the court’s observation that “[t]he tension between
9 *Suter* and the *WiZder* line of cases has, of course, not gone unnoticed by Congress. In the fall of
10 1992, both Houses passed legislation to reverse so much of *Suter* as held that the only privately
11 enforceable requirement of a federal funding statute is that a state have an approved plan. The
12 bill was vetoed by President Bush.” *Eric L.* at 311. Several months after the decision in *Eric L.*,
13 Congress legislatively overturned *Suter*.
14
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16 Other than relying upon these post *Suter* cases, the basis if not the holding of which do
17 not survive the Congressional reversal of *Suter* in 1994, defendants support their argument that
18 plaintiffs have no right to case plan or case review with citations to the decision of an
19 intermediate appellate state court and a single federal district cot~rt.~~ Although these latter two
20 cases were decided after passage of the Social Security Amendment, the courts either ignore or
21 disregard its impact on the analysis of claims brought under the AACWA. Their persuasive
22 authority is also undercut by their reliance upon cases decided before the applicable
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1 Amendment. Finally, the district court decision cited by defendants, misapplies Supreme court
2 precedent establishing the type of evidence defendants must show to prove Congress intended
3 to foreclose a 1983 cause of action to enforce a federal statute.

4 The plaintiffs in *Mark G* were four families who alleged that their children had been
5 victimized by the city's foster care system. They did not seek class certification nor any
6 injunctive relief. Their sole request was for monetary damages.

7
8 The *court* in *Mark G*. initially views the "principal issue" in broad terms as "the effect
9 of Federal funding statutes on State social services programs and whether acceptance by the
10 States of such funding creates an individual right enforceable pursuant to the Civil Rights Act
11 of 1882 as codified in 42 U.S.C. 1983 for parties aggrieved by failures in such state programs."
12 *Mark G*, 677 N.Y.S.2d at 294. While mentioning the 1994 amendment to the Social Security
13 Act, which applies to "federal funding statutes," including the AAACWA, the *Mark G. court*
14 inexplicably ignores the statute. Though the Amendment explicitly overturned certain aspects
15 of *Suter*, the *Mark G*. court relies upon a series of post *Suter*, pre-amendment cases to support
16 its holding that 671 (a)(16) does not create a federal enforceable right.

17
18 The *Mark G*. court bases its decision on the conclusion that the "AACWA simply
19 requires that, in return for their acceptance of the Federal funds provided, the participating
20 States must have a plan approved by the Secretary which meets the standards set forth in 17
21 paragraphs. . ." *Mark G*. at 298. In holding that 671 (a)(16) is not privately enforceable, the
22 *Mark G*. court relies on two decisions which follow *Suter* but predate the enactment of 42
23

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25 60 Defendants' reliance upon Washington SCt deciision is discussed infra, at

1 U.S.C. 1320a-2. Relying on those cases, it concludes that since 671(a)16) is “merely another
2 feature which the state plan must include to be approved by the Secretary and does not create
3 an enforceable right. *Mark G*, at 299. It cites with approval the district court’s holding in *Baby*
4 *Neal* that “the language of *Suter* is clear. Plaintiffs may not bring an action under the Adoption
5 Act itself or 42 U.S.C. 1983 for alleged failures of the Commonwealth to implement *any*
6 feature of its plan which has been approved by the Secretary” *Mark G* at 298 (emphasis in
7 original).
8

9 But this is precisely the interpretation of Social Security program statutes Congress
10 foreclosed when it enacted 42 U.S.C. 1320a-2 shortly after the decisions upon which the *Mark*
11 *G.* court relies. *Harris v. James*, 127 F.3d 993, 1004 (noting that *Suter*’s admonition that state
12 plan statutes are a fortiori unenforceable under 1983 does not survive enactment of 42 U.S.C.
13 1320a-2.) Furthermore, it violates *Blessing*’s rule against sweeping, unmethodical
14 determinations concerning the enforceable rights in a Social Security Act state plan statute. The
15 federal district court’s decision in *Whitman*, also cited by Defendants, similarly relies entirely
16 upon post *Suter* pre-amendment cases, the rationale for which does not survive the
17 Congressional amendment.⁶¹
18

19 The *Mark G.* court also describes the “determinative question” as “whether an
20 aggrieved plaintiff is intended to be a direct or indirect beneficiary of such funding.” *Mark G.*
21 677 N.Y.S.2d at 294. This question appears to emanate from a refinement of the three-pronged
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23 61 *Whitman*’s holding is also unpersuasive because it is based upon a conclusion that Congress’s
24 enactment of the Multi-ethnic Placement Act foreclosed private enforcement of all but one section of 42 U.S.C.
25 671(a). *Whitman*, 83 F. Supp. 2d 476,489. See *infra*, part-, for further discussion of this issue

1 test set forth in *Wilder* that the court finds in *Blessing*. However, while purporting to follow the
2 new analytical method compelled by *Blessing*, the court fails to apply this analysis when
3 rejecting the private enforceability of 42 U.S.C. 671(a)(16). Clearly, the case plan and case
4 review section at issue here is the type of provision intended to directly benefit each child in
5 care. It is distinctly different from the data processing system and staffing levels provisions
6 which *Blessing* held did not give rise to individualized rights.
7

8 **VII. The Decision in *Washington State Coalition for the Homeless* Does Not Support**
9 **Defendants' Claim That the Case Plan Provision Is Unenforceable As to These**
10 **Plaintiffs and Does Not Address The Enforceability of Case Review**

11 The parameters of the right to a case plan which the plaintiffs in in *Washington State*
12 *Coalition for the Homeless v. Department of Soc. and Health Sews.*, 133 Wn.2d 894 (1997)
13 urged upon the Supreme Court are much more expansive than the right which plaintiffs in the
14 instant case allege arise from the statute. There, the plaintiffs asserted that “the Department’s
15 alleged failure to provide housing assistance where necessary to prevent or shorten the need for
16 foster care placement of homeless children” violated the child’s right to a case plan under 42
17 U.S.C. §671(a)(16). *Coalition for the Homeless* 133 Wn.2d at 925. With the intervening
18 decision in *Suter*,⁶² plaintiffs tried to save their federal statutory claims by piggy backing it onto
19 another provision. One of two major emphases of *Suter* was the absence of definition of
20 reasonable efforts either in the statute or regulations. They attempted to convert their
21 reasonable efforts argument into a right to a case plan argument, and to fit it into a provision
22

1 where there was a statutory definition. The Washington Supreme Court saw through this
2 strategy and correctly concluded that “*In the context of the relief requested by plaintiffs*, the
3 statutory language here is too vague and amorphous to be enforced.” *Coalition for the*
4 *Homeless* 133 Wn.2d at 929 (emphasis added).⁶³

5 Plaintiffs, following the dictates of *Blessing*, here seek to enforce the right to a case plan
6 as justified by the plain language of the statute. They do not ask the court to compel the state to
7 provide a particular service - e.g., housing assistance - or to implement a specific plan.
8 Plaintiffs simply argue that each child has a right to a case plan, which addresses each of the
9 elements Congressionally mandated. Similarly, they do not maintain that the case review
10 provision requires the court to order a particular type of placement.

11
12 Other courts have held that the case plan provisions establish privately enforceable
13 rights but have construed the right much more narrowly than the plaintiffs in *Coalition for the*
14 *Homeless* suggested. For example, in *B.H. v. Johnson*, 715 F. Supp. 1387, 1402 (N.D. Ill.
15 1989), Chief Judge Grady held that 42 U.S.C. §671 (a)(16) bestows rights to a case plan and
16 case review on plaintiff class of children in foster care that are private and enforceable under 42
17 U.S.C. §1983. However, the court clarified that those sections of the federal statute “does not
18 give rise to the sweeping rights asserted by plaintiffs, such as the right to an adequate number
19 of case workers, family reunification services, services to “troubled families,” or rights of
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21

22
23 6. The complaint in Washington State Coalition of the Homeless was filed in 1991. Suter was not decided until the
24 following year.

25 63 Though *Blessing v. Freestone* was decided 8 months before the decision in *Homeless Coalition*, it is not
26 mentioned by the Washington Supreme Court.

1 meaningful visitation between siblings.” Id. For a similar distinction, see *Division of Family*
2 *Services v. Cheryl B*, 750 A.2d 540 (Del. Fam. Ct. 1998),

3 Courts have held that other sections of the AACWA create enforceable rights but
4 similarly refused to construe the right as broadly as plaintiffs proposed. In *Timmy S. v. Stumbo*,
5 316 F.2d 312 (6th Cir. 1990) foster parents alleged that they had an enforceable right to an
6 administrative hearing under 42 U.S.C. §671(a)(12) which requires that the state:

7
8 . . .provides for granting an opportunity for a fair hearing before the State agency
9 to any individual whose claim for benefits available pursuant to this part is
denied or is not acted upon with reasonable promptness.⁶⁴

10 While holding that this statutory provision did create a right to a hearing whenever a foster care
11 payments were cut off or denied and that such right was enforceable by the affected foster
12 parent, the court refused to “construe the Act to guarantee benefits such as the pleasure derived
13 from helping troubled children “work through their problems so that they can return home or be
14 adopted” [citing plaintiffs’ brief]. *Timmy S.* 916 F.2d at 315. Other attempts to pull from the
15 Act rights which are not contained within the plain language of the statute have similarly been
16 rebuffed. In *Winston v. Children and Youth Services of Delaware County*, 948 F.2d 1380 (3rd
17 Cir. 1991) the court rejected plaintiffs argument :

18
19 that [the court] should construe the agency’s statutory duty to make ‘reasonable
20 efforts’ to return children to their parents as encompassing a minimum visitation

21
22 54 With only minor changes, this same provision is also included as a state plan requirement under the Medicaid
23 statute, 42 U.S.C. §1396a(a)(3). Courts have overwhelmingly held that this section establishes enforceable rights.
24 *Sobky v. Smoley*, 855 F. Supp. 1123 (E.D. Cal. 1994); *Cramer v. Chiles*, 33 F. Supp.2d 1342 (S.D. Fla.1999);
25 *Daniels v. Wadley*, 926 F. Supp. 1305 (M.D. Temr.1996); *Meachem v. Wing*, 77 F. Supp.Zd431 (S.D.N.Y. 1999)
(focusing on fair hearing regulations, 42 C.F.R. §5 431.205,43 1.242,431.244); *Blanchard v. Forrest*, 1994 U.S.
Dist. LEXIS 12697 (E.D.La., Sept. 6, 1994) affd, 71 F.3d 1163 (5th Cir. 1996) cert. denied, 518 U.S. 1013
(1996)

1 period of four hours per week for the family, preferably at a location other than
2 the agency offices, unless otherwise in appropriate.” Winsmz, at 1383.

3 **&g, gg. *Scrivner v. Andrews*, 816 F.2d 261 (6* Cir. 1987) (distinguishing *Lynch v. Dukalds*,**
4 **r19 F.2d 501 (1” Cir. 1983) and holding that the AACWA neither explicitly or implicitly**
5 **xeates federal statutory right to “meaningful visitation”).**

6 Finally, Defendants’ claim that decision in Coalition fir the Homeless supports their
7 notion to dismiss the case review claims is based upon a misstatement of the court’s decision.
8 jly deleting part of the sentence and inserting, in brackets, a citation 10 the case review section,
9 5 defendants attempt to convert the court’s opinion into holding unsupported by tie court’s
10 arlier discussion (Defendants Motion, at p. 9). As the language immediately preceding rhe
11 arr.ial quote defendants cite indicates, the court’s holding applies solely to the case plan
12 brovision “[In the context of the relief requested by plaintiffs.” *Coalition for the Homeless*, at
13 *129*.


14 m. Conclusioa

15
16 Plaintiffs seek declaratory and injunctive relief enforcing the plain, clear, and
17 unequivocal language’ of 671(a)(16) as defined by 675. Under these provisions, each time they
18 re moved to a new placement, they are entitled to have their written case plan promptly
19 mended so that it satisfies the Congressionally mandated requirements and includes, among
20 ther things, a discussion of the appropriateness of the new placement Each time they are
21 loved, they are entitled to procedural safeguards, which at a minimum require notice and an
22 pportunity to be heard. They do not ask the court to order implementation of individual case
23 lans, or to engage in detennining what the right plan is for individual children. Nor do they
24 sk this court to engage in a case by case analysis of which placement is the appropriate one for

1 a child. Congress' emphasis upon the case plan and case review -dates of AACWA,
2 including its recent amendments in Adoption and Safe Families Act of 1997, **evidences** a clear
3 intent that these provisions are critical to the well being of each child in foster care. To render
4 them a dead letter by denying the private enforceability by the child beneficiaries of the Act,
5 **would** thwart the clear intent of Congress in enacting such provisions.

6 Dated this 14' day of September, 2000.

7 BRETT & DAUGERT, PLLC

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