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THE HONORABLE DAVID A. NICHOLS

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SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY

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

Plaintiffs,

v.

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

Defendants.

No. 98-2-01570-1

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FEDERAL STATUTORY CLAIMS

I. INTRODUCTION'

In response to defendants' Motion To Dismiss, the plaintiffs have filed a 48 page brief that is

The parties have stipulated that defendants may file this reply brief in support of their Motion To Dismiss, and a stipulation and order to this effect has been presented to the Court.

1 more noticeable for what it does not focus on than for what it does. Tucked away in the last few **pages**
2 of the plaintiffs' Response To Motion To Dismiss ("Plaintiffs' Response") is an attempt to distinguish
3 the controlling authority on the issues before this Court. *Washington State Coalition For The*
4 *Homeless v. Department **Of** Social And Health Services*, 133 Wn.2d 894 (1997), was a class action
5 which found no private cause of action under 42 U.S.C. § 671(a)(16) and 675(1), the very statutes
6 relied upon by plaintiffs in this case. *Coalition For The Homeless* expressly rejected the claim that
7 these federal statutes required the state to implement case plans providing housing assistance for the
8 class of foster children because:
9

10 While the provisions of any individual case plan may be specific enough to be enforced
11 judicially, the notion that case plans in general are to be implemented is too vague and
12 amorphous to be enforced. Any enforcement would have to await a particular case
13 plan.

13 *Id.* at 929.

14 In the instant case, there is no dispute that defendants have generally implemented case plans
15 and case review systems. Nor are plaintiffs seeking to enforce their individual case plans or case
16 review systems - this would be inconsistent with their request for a class action. Rather, the dispute is
17 about the required content of case plans and case review systems in this state. Plaintiffs assert that the
18 text of 42 U.S.C. § 671(a)(16) and 675(1) requires: (1) that all case plans must be revised after every
19 change in placement (though such a "requirement" is not found in the statute); and (2) that case
20 review systems must generally contain required "procedural safeguards" (though what these
21 safeguards are is not identified in the statute). Contrary to plaintiffs' claims, the specific relief that
22 they request is materially indistinguishable from the relief sought by the *Coalition For The Homeless*
23 plaintiffs. The Supreme Court's reasoning that these same federal statutes were too vague and
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1 **A. 42 U.S.C. § 671(a)(16) And 675 Are Too Vague And Amorphous To Require Generally**
2 **That Case Plans Must Be Revised After Every Change In Placement.**

3 **1. The Washington Supreme Court’s *Coalition For The Homeless* Opinion Applies**
4 **To Plaintiffs’ Claims.**

5 Plaintiffs do not claim that defendants have generally failed to provide case plans and case
6 review systems, but instead assert that the content of these plans and systems is inadequate under the
7 Adoption Act: “defendants’ failure to revise a child’s case plan to take into account the new
8 i -placement after a child is moved from one home or facility to another violates 42 U.S.C. §671
9 (a)(16) & 675 (l).” Class Action Motion at p. 5. It is important to note that plaintiffs are not seeking
10 to enforce specific case plans of individual foster children. Such a claim would be impossible in the
11 context of the class relief sought by plaintiffs, because it would require this Court to examine each
12 case plan of every single foster child in the system to determine what its requirements are, and
13 whether these requirements are being followed in each particular case. Plaintiffs seek a ruling from
14 this Court that 42 U.S.C. § 671(a)(16) *generally* mandates that case plans are required to be revised
15 “to take into account the new placement after a child is moved from one home or facility to another.”
16 *Id.* Such a claim is untenable in the face of *Coalition For The Homeless*.

17 *Coalition For The Homeless* was a class action for injunctive and declaratory relief which
18 addressed “whether the Department of Social and Health Services has an enforceable duty, under ’
19 RCW 74.13.03 1 (l), to develop and implement a comprehensive and coordinated plan for providing
20 services to this state’s homeless children.” *Coalition For The Homeless*, 133 Wn.2d at 900. In
21 addition to these state law claims, plaintiffs alleged that 42 U.S.C. § 671(a)(16) required the
22 implementation of “case plans” for the class members that included “housing assistance where
23 necessary to prevent or shorten the need for foster care placement of homeless children.” *Id.* at 925.
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The Supreme Court found that the plaintiffs had enforceable rights under the state statute, RCW 13.34. *Id.*

Turning to the plaintiffs' claims under the federal statutes, the Supreme Court surveyed and analyzed the applicable statutory and case law in the context of the specific relief sought by plaintiffs,

The Court noted that after the U.S. Supreme Court's decision in *Suter v. Artist M.*, 503 U.S. 347 (1992), Congress amended the Social Security Act to overturn *Suter* insofar as it found a statutory section did not provide a private cause of action-ereiyb~eeanse&e:-section was included in a "state plan," but did not otherwise affect *the* law in this area. *Coalition For The Homeless*, 133 Wn.2d at 927-28, citing 42 U.S.C. § 1320a-2.³ The Court then cited the three-part test of *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), cited in *Suter* and reaffirmed in *Blessing v. Freestone*, 520 U.S. 329 (1997), which determines whether 42 U.S.C. § 671 (a)(16) may be enforced by plaintiffs.⁴

Addressing the plaintiffs' claim that the specific relief they requested was required under section 671(a)(16), the Supreme Court found:

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

³ See also *infra* 5 I.C. 1. (noting that defendants do not rely on *Suter* insofar as it was affected by section 1320a-2).

⁴ "That test requires consideration of the following three questions:

- (1) Was the provision in question intended to benefit the plaintiffs?
- (2) Does the statutory provision in question create binding obligations on the state, rather than merely expressing a congressional preference?
- (3) Is the interest plaintiffs assert specific enough to be enforced judicially, rather than being vague and amorphous?"

Coalition For The Homeless, 133 Wn.2d at 928, citing *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990) and *Wright v. Roanoke Redevelop. & Hous. Auth.*, 479 U.S. 418 (1987) *inter alia*.

1 In the context of the relief requested by plaintiffs [that 67 1 (a)(16) generally
2 required the implementation of “case plans” for the class members that included
3 “housing assistance where necessary to prevent or shorten the need for foster care
4 ‘placement of homeless children”], the statutory language here is too amorphous and
5 vague to be enforced.

6 *Id.* at 929.

7 The Supreme Court’s holding in *Coalition For The Homeless* applies to the plaintiffs’ claims
8 in this case as well. In both cases, plaintiffs seek injunctive relief that would generally apply to a class
9 of children, rather than the enforcement of individual case plans. Both sets of plaintiffs make their
10 claims under 42 U.S.C. 9 671(a)(16), relating to case plans and case review systems. Both the
11 *Coalition For The Homeless* plaintiffs and the plaintiffs here claim that the statutes require the state to
12 implement plans, each containing the particular requirements sought by the respective plaintiffs. In
13 *Coalition For The Homeless*, plaintiffs sought general implementation of case plans for the class
14 members that included a particular feature: a requirement of “housing assistance.” In this case,
15 plaintiffs seek general implementation of case plans that include a different particular feature: a
16 requirement that all case plans be amended each time a placement is changed. Because the only
17 difference between the claims in *Coalition For The Homeless* and this case is the specific feature
18 which the plaintiffs assert is found in the statutory language, the *Coalition For The Homeless* holding
19 controls this case.

20 Just as plaintiffs in *Coalition For The Homeless* could point to no language supporting their
21 claim that case plans in general required “housing assistance,” plaintiffs here have pointed to no
22 language in the statute that requires that all case plans be amended each time a placement is changed.
23 The best that plaintiffs can do here is baldly assert that the portion of the statutory case plan definition
24 requiring “A description of the type of home or institution in which a child is to be placed” “a
25

1 fortiori” means that all case plans must be amended each time a placement is changed. Plaintiffs’
2 Response at p. 18. Plaintiffs have not cited to any case law or legislative history that contains such a
3 requirement, and defendants are aware of none. This attempt to construct concrete requirements out
4 of amorphous and general statutory language is precisely what the *Coalition For The Homeless Court*
5 rejected.’

6
7 **2. Congress’ Later Actions Indicate That Plaintiffs Have No Private Cause Of**
8 **Action Under 42 U.S.C. 8 671(a)(16).**

9 Following the U.S. Supreme Court’s decision in *Suter* and Congress’ passage of section
10 1320a-2, in 1996 Congress amended the Adoption Act by adding subsection (d) to 42 U.S.C. 0 674.
11 This subsection provides that “any individual who is aggrieved by a violation of Section 67 l(a)(18) bq
12 a State or other entity may bring an action seeking relief from the State or other entity.” 42 U.S.C. \$
13 674(d)(3); *Charlie H. v. Whitman*, 83 F.Supp.2d 476,489 (D.N.J. 2000). The *Charlie H.* court noted:

14 that Congress recently chose to amend 42 U.S.C. 674 to include a private right of
15 action under § 1983 for a state or other entity’s failure to comply with 42 U.S.C. \$
16 671(a)(18), but did not include the other various elements enumerated in 42 U.S.C. 5
17 671(a) and relied upon by Plaintiffs, is strong evidence that Congress did not intend
18 these other various State plan elements in 42 U.S.C. 6 671(a) to confer rights
19 enforceable pursuant to 5 1983.

20 *Id.*, citing *Wright*, 479 U.S. at 423. The fact that in 1994 Congress passed 42 U.S.C. 5 1320a-2
21 confirming that there was no private right to enforce the “reasonable efforts” requirement of 42 U.’s.C
22 5 671(a)(15) shows that it was cognizant of the issue of whether the Adoption Act conferred private

23 _____
24 Plaintiffs’ suggestion that *Coalition For The Homeless* is wrongly decided because it did not cite
25 *Blessing* is incorrect. *Coalition For The Homeless* cited and relied upon the three-part test set forth in *Wilder*
and *Wright v. Roanoke Hous. & Redevelop. Auth.*, 479 U.S. 418 (1987). *Coalition For The Homeless*, 133
Wn.2d at 929; see *supra* note 4. In *tum*, *Blessing* specifically relied upon this same three-part test, citing
Wilder and *Wright. Blessing*, 520 U.S. at 340 - 41. Thus, *Coalition For The Homeless* in fact relied on the
Blessing test, though it did not specifically cite that case. See generally *Harris*, 127 F.3d at 997-1005
(surveying Supreme Court case law from *Harris* through *Blessing*).

1 rights, and knew how to provide direction as to whether a particular section would be enforceable in a
2 private action. That it did not provide such a right to enforce the “case plan” requirements of section
3 671(a)(16) when it amended 42 U.S.C. 3 674 in 1996 counsels against doing so now.

4
5 Plaintiffs claim that the *Charlie H.* court’s decision was wrong because section 671(a)(18) is
6 allegedly the only portion of the case plan requirements that applies to private entities, and thus
7 Congress needed to provide a private right of action to avoid the “state action” requirement of § 1983.
8 Plaintiffs’ Response at pp. 36-38. Plaintiffs cite no cases or legislative history in support of this
9 claim. Moreover, the language of the statute does not support plaintiffs’ argument. If subsection
10 674(d) were aimed only at private entities so as to avoid the state action requirement, Congress would
11 not have needed to provide a right of action to any person aggrieved by “the State.” See 42 U.S.C. 6
12 674(d)(3). Moreover, the language of the remainder of section 671(a) does not support plaintiffs’
13 claim that only subsection (18) applies to private entities, and indeed, many of the provisions would
14 apply to private entities that receive federal kids as well. See, e.g., 42 U.S.C. §671(a)(8) (requiring
15 “safeguards restricting the use or disclosure of information concerning individuals assisted under the
16 State plan”); 5 671(a)(15) (requiring that “reasonable efforts” shall be made to reunify families, but
17 not specifying that only the State must make such efforts); 0 67 1 (a)(16) (requiring development of a
18 “case plan”); compare, e.g., § 671 (a)(13) (specifying “the State shall arrange for a periodic and
19 independently conducted audit of the programs assisted under [the Act]”).⁶ The far more likely reason
20 that Congress added subsection (d) to section 674 is that it had reviewed the cases and determined that
21 private individuals should have a cause of action only under section 67 1 (a)(18).

22
23
24 ⁶ Similarly misplaced is the plaintiffs’ claim that the reasoning in *Charlie H.* renders section 1320a-2 s
25 “dead letter.” Plaintiffs’ Response at p. 38. As explained more fully below, section 1320a-2 overturned only
that portion of *Suter* relying on a provision’s inclusion in a state plan, and in fact expressly left intact the
holding that there is no private right of action under section 67 l(a)(15). See *infra*, 9 KC. 1.

1 **B. 42 U.S.C. § 671(a)(16) And 675(5)(C) Are Too Vague And Amorphous To Require That**
2 **“Case Review Systems” Must Generally Contain Undefined “Procedural Safeguards.”^{Y9}**

3 The remaining claim at issue in this Motion is plaintiffs’ assertion that defendants’ alleged
4 failure to provide notice and an opportunity to be heard to the plaintiff children and/or their guardians
5 prior to changing their placement violates the children’s rights under 42 U.S.C. 4 675(5)(C). This
6 claim also derives from the statutory language set out at 42 U.S.C. 4 671(a)(16) which requires that a
7 state plan provide for “a case review system which meets the requirements described in [42 U.S.C. 5
8 675(5)(B)] with respect to each such child. . . .” Section 675(5)(C) relevantly defines the term “case
9 review system:”

10
11 (5) The term “case review system” means a procedure for assuring that-

12 ***

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

16 42 U.S.C. § 675(5)(C). Because the source of this putative right to a case review system is 42 U.S.C.
17 5 671(a)(16) the Coalition *For The Homeless* holding applies here as well. The notion that “case
18 review systems” must be provided with “procedural safeguards” is too “vague and amorphous” to be
19 enforced judicially, in a context where plaintiffs are seeking to have such a requirement apply to class
20 plaintiffs generally, rather than in the context of enforcement of an individual case review system. Set
21 *supra* 5 11.A. 1.; *Charlie H.*, 83 F.Supp.2d at 490.

22
23 In addition, the phrase “procedural safeguards” itself is simply too vague and amorphous to
24 lead to enforceable rights. The plaintiffs’ suggestion that this Court can look to standards of due
25 process to define “procedural safeguards” under the Adoption Act confuses their federal statutory

claims with their constitutional claims. Plaintiffs' complaint alleges that defendants' failure to provide notice and a hearing violates the Due Process Clause of the 14th Amendment, and *also* violates the Adoption Act. Plaintiffs may not attempt to bootstrap their statutory claims onto their constitutional claims by claiming that "procedural safeguards" is just Congress' shorthand for procedural due process under the Constitution.

Even considered apart from its mooring in 42 U.S.C. 5 671(a)(16), there is no private right of action under 42 U.S.C. §-675(5)(C). Section 675(5)(C) is a definitional section of the statute, and standing by itself grants no substantive rights. *See B.H. v. Johnson*, 715 F.Supp. 1387, 1401 (N.D.11. 1989) (finding that 42 U.S.C. 5 625, defining "child welfare services," does not create a private right of action because "[i]t would be strange for Congress to create enforceable rights in the definitional section of a statute"); *Eric L. v. Bird*, 848 F.Supp. 303, 312 (D.N.H. 1994) ("Plaintiffs' complaint also refers to § 625 and 675. These sections are merely definitional and cannot supply a firm basis for describing rights privately enforceable under section 1983."); *cf: Charlie H.*, 83 F.Supp.2d at 490.

C. Recent Cases From Other Jurisdictions Support Defendants' Argument That The Adoption Act Provides No Private Cause Of Action For The Specific Relief Sought By Plaintiffs, Whereas Plaintiffs Have Cited No Case Directly On Point.

Because of the controlling Washington Supreme Court decision in *Coalition For The Homeless*, defendants' extensive discussion of the *Suter* case and 42 U.S.C. 9 1320a-2 and the cases interpreting section 1320a-2 has no direct bearing on the issue before this Court. Even in the absence of the *Coalition For The Homeless* case, however, this discussion would remain beside the point. Defendants' Motion To Dismiss does not rely on the portion of *Suter* that was "overruled" by 42 U.S.C. 5 1320a-2, and the cases from other jurisdictions cited by defendants do not turn on this portion of *Suter* either. Defendants do not claim that plaintiffs have no cause of action because the

1 relief sought arguably comprises elements of a state plan. Rather, defendants assert that the statutory
2 language relied upon by plaintiffs is too vague and amorphous to be enforced by the Court to provide
3 plaintiffs' requested relief. This is in accord with the framework set out by the U.S. Supreme Court in
4 *Wilder* and *Blessing*, which the plaintiffs agree should be applied by this Court in deciding this
5 Motion To Dismiss.
6

7 **1. The Federal Cases Cited By Defendants Remain Good Law, As 42 U.S.C. 0 1320a-**
8 **2 Only Affected The Portion Of Suter Relating To Inclusion In A State Plan.**

9 The plaintiffs rely heavily on the fact that Congress passed 42 U.S.C. 6 1320~12 in response to
10 the U.S. Supreme Court's decision in *Suter*, claiming that this effectively overturned the non-
11 Washington case authority cited by defendants. Such reliance is misplaced, however, because Section
12 1320a-2 only addresses a narrow portion of the *Suter* holding, if at all:

13 4 1320a-2. Effect of failure to carry out State plan

14 In an action brought to enforce a provision of the Social Security Act, such provision is
15 not to be deemed unenforceable because of its inclusion in a section of the Act
16 requiring a State plan or specifying the required contents of a State plan. *This section is*
17 *not intended to limit or expand the grounds for determining the availability of private*
18 *z. -actions to enforce State plan requirements other than by overturning any such grounds*
19 *applied in Suter v. Artist M., 112 S. Ct. 1360 (1992), but not applied in prior Supreme*
20 *Court decisions respecting such enforceability;* provided, however, that this section is
21 not intended to alter the holding in *Suter v. Artist M.* that section 47 1 (a)(15) of the Act
22 [42 U.S.C. 8 671(a)(15)] is not enforceable in a private right of action.

23 42 U.S.C. 9 1320a-2 (emphasis added). The title of the section ("Effect of failure to carry out State
24 plan"), as well as the emphasized language in the quotation above, makes it clear that this language
25 does not "overrule" *Suter* except as to one specific ground - the inclusion of a provision in a section
requiring a state plan. Courts such as the Seventh Circuit Court of Appeals have emphasized this:

There has been some suggestion that this statute "overrules" *Suter* entirely and that we
should determine the "federal rights" question only according to the *pre-Suter*

1 precedents. See *Jeanine B. by Blondis v. Thompson*, 877 F. Supp. 1268, 1283
2 (E.D.Wis. 1995) (“The court must ‘rewind the clock’ and look to cases prior to *Sutel-* to
3 determine the enforceability of other provisions under the Adoption Assistance Act
4 [beyond the specific one involved in *Suter* I.”). We reject this argument on the basis of
5 the plain language of the statute. Section 1320a-2 does not purport to reject any and all
6 grounds relied upon in *Suter*; it purports only to overrule certain grounds - *i.e.*, that a
7 provision is unenforceable simply because of its inclusion in a section requiring a state
8 plan or specifying the contents of such a plan.

9 ***

10 [W]e think it safe to summarize a few principles derived from the above discussion.
11 First, the holdings of *Wright*, *Wilder*, and *Suter* all remain good law. Second, the
12 three-prong “enforceable rights” test developed in *Wright* and *Wilder* remains good
13 law. Finally, the Supreme Court’s admonitions in *Suter* which fall short of proposing
14 that State-plan statutes *are a fortiori* unenforceable under 5 1983 remain good law.

15 *Harris v. James*, 127 F.3d 993, 1002-03 and 1004 (1st Cir. 1997) (first bracketed language original);
16 *accord, e.g., White v. Chambliss*, 112 F.3d 731, 739 (4th Cir. 1997) (section 1320a-2 “does not alter
17 our view” that plaintiffs have no private right of action under 42 U.S.C. 5 671(a)(IO) because, *inter*
18 *alia*, “*Suter* itself was not a novel holding, but rather rested upon settled legal principles with regard to
19 private rights of action in the context of the” Adoption Act); *Charlie H.*, 83 F.Supp.2d at 484 (section
20 1320a-2 “did not overrule *Suter*”); *Cherry v. Tompkins*, 1995 U.S. Dist. Lexis 21990 at *22 (S.D. Oh.
21 March 3 1, 1995) (similar).

22 As the *Harris* opinion more fully explains in portions which are not quoted above, “it may
23 well be that the grounds Congress ‘overruled’ were never relied upon by the *Suter Court*.” *Harris*,
24 127 F.3d at 1003, *citing LaShawn A. v. Barry*, 69 F.3d 556, 569 (D.C. Cir. 1995) (section 1320a-2
25 essentially meaningless because *Suter* opinion did not turn on grounds set out in statute), *superseded*
by decision en banc, 87 F.3d 1389 (D.C. Cir. 1996) (not addressing *Suter* issue), *cert. denied*, 520
U.S. 1264 (1997); *see also Wood v. Tompkins*, 33 F.3d 600, 606 (6th Cir. 1994) (“The key to *Suter* ‘s
holding was that the statute’s ‘reasonable efforts’ requirement was simply too vague, and left too

1 much to the discretion of participating states, to create an enforceable right. Thus, the requirement
2 could not pass muster under the third prong of the *Wilder* test.”) (internal citations omitted). This
3 Court need not determine the exact relationship between *Suter* and section 1320a-2, however, because
4 defendants do not rely on the “inclusion in a state plan” grounds in this Motion. Furthermore, the
5 plaintiffs’ assertion that the non-Washington cases relied upon by defendants have been superseded is
6 incorrect, because as shown below, these cases also do not rely on the “inclusion in a state plan”
7 grounds. *See CharZie H.*, 83 F.Supp.2d at 492-93 (rejecting-p&aintXk’ claim that “decisions relied
8 upon by Defendants are ‘no longer good’ law for various reasons, including *Suter* and [section 1320a-
9 21;” finding that right to “adequate information system” unenforceable because, *inter alia*, statutory
10 language too vague and amorphous to be judicially enforced).

11
12
13 **2. This Result In Coalition For The Homeless Is Supported By Cases Such As *Charlie H. and Del A.***

14 *CharZie H.*, decided earlier this year, is a recent and comprehensive examination of the
15 availability of private causes of action under the Adoption Act for claims that are very similar to those
16 asserted by plaintiffs here. *In Charlie H.*, plaintiffs filed a class action alleging a systemic failure of
17 New Jersey’s child welfare system in violation of the Adoption Act, among other statutes. On
18 defendants’ motion to dismiss, the court indicated that the relevant standard for finding a private right
19 of action was that set out in the line of cases including *Blessing v. Freestone*. The court also analyzed
20 the effect of section 1320a-2 on *Suter*, and noted “this amendment did not overrule *Suter*. The
21 amendment only forecloses the refusal to find a federal right enforceable under 0 1983 because the
22 statutory provision may be included in a section requiring a State plan or specifying the contents of
23 such a plan.” *Ii.* at 483-84.
24
25

1 The Charlie H. plaintiffs made very similar claims to those made by the plaintiffs here. For
2 example, the *Charlie H.* plaintiffs alleged that the Adoption Act required that “defendants shall take
3 steps necessary to ensure that each foster child is provided with a written case plan, containing
4 specified elements, that is reviewed and updated at specified intervals. . . .” *Id.* at 485. With regard to
5 each right asserted, the *Charlie H.* defendants argued “under the *Blessing* framework, the Adoption
6 Assistance Act provisions at issue are not so clear and unambiguous so as to create rights enforceable
7 under 4 1983.” *Id.* at 484.

9 After carefully reviewing plaintiffs’ claims and 42 U.S.C. § 671(a)(16) and 675(l), the
10 statutes relied upon by plaintiffs, the *Charlie H.* court found:

11 [R]egardless of the detailed nature of the definitions of “case plan” and “case review
12 system,” the statutory provisions relied upon by Plaintiffs in support of their alleged
13 right “to timely written case plans that contain mandate elements and to the
14 implementation and review of these plans” are not so unambiguous as to confer upon
15 Plaintiffs a right enforceable under 5 1983.

16 *Id.* at 488-89; *see also Baby Neal v. Ridge*, 1995 U.S. Dist. Lexis 18431 at *17 (E.D. Pa. Dec. 7, 1995)
17 (denying motion to reconsider prior ruling in light of recent passage of section 1320a-2, “this Court
18 determined that the language was too vague and ambiguous to create enforceable rights under 42
19 U.S.C. § 1983”).⁷

20 The court arrived at a similar result in *A. Roemer*, 777 F. Supp. 1297 (E.D. La. 1991).⁷ In
21 *Del A.*, a class action seeking injunctive relief, plaintiffs made similar claims to those asserted here.
22 Specifically, plaintiffs alleged that the Adoption Act, including 42 U.S.C. § 671(a)(16), gave them

24 ⁷ *Baby Neal*, a post-section 1320a-2 case, *did* not rely on the grounds that the statute at issue was
“included in a state plan.” *Baby Neal*, 1995 U.S. Dist. Lexis 18431 at * 14.

25 ⁷ Though this case predated section 1320a-2, it did not rely on the grounds that the statute at issue was
“included in a state plan.” *Id.* at 1309.

1 rights to “a case plan that tracks the child’s placement and receipt of services. . . [and] to a review of
2 the case plan every six months. . .,” *inter alia*. *Id.* at 1304 (citing 42 U.S.C. 4 671(a)(16)). Relying on
3 the three-part test of *Wilder*, the court rejected plaintiffs’ claim that they had a private right of action
4 for their claimed relief:

5
6 [T]he statutory provisions relating to the case plans and case reviews do not provide an
7 objective benchmark against which compliance can be measured. Rather, case plan
8 and case review requirements are couched in broad, goal-oriented terms. The statutory
9 definition of case plan refers to “proper care,” “facilitating return of the child to his
10 - : -home-or the permanent placement of the child,” and “discussing the appropriateness of
11 the services that have been provided to the child.” Likewise, the regulations speak in
12 broad terms, such as “the best interest and special needs of the child.” There is no
13 objective benchmark against which compliance with this provision can be measured.
14 Whether a child has a plan satisfying this provision is as individual as each child.
15 Unlike *Wilder*, where the efficiently operated facility functioned as the norm against
16 which compliance could be measured, there is no way to measure the normal or
17 average needs of a child in foster care. Accordingly, I find that the provisions requiring
18 a case plan and case review system are so vague and amorphous as to evade judicial
19 enforcement.

20 *Id.* at 1309 (footnote omitted).

21 These cases all affirm the essential holding of the controlling *Coalition For The Homeless*
22 case, which is that in the context of the rights sought by plaintiffs, 42 U.S.C. § 671(a)(16) and 675
23 are too vague and amorphous to provide a private cause of action. The plaintiffs’ citation to *Marisol*
24 *v. Giuliani*, 929 F.Supp. 662 (S.D.N.Y. 1996) and *Jeanine B. v. Thompson*, 877 F.Supp. 1268
25 (E.D.Wisc. 1995), is inconsistent with the Washington Supreme Court’s decision in *Coalition For The Homeless*, and this Court should decline to follow these cases.

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III. CONCLUSION

The *Coalition For The Homeless* case requires that this Court find that plaintiffs have no cause of action for the specific relief they seek, and this result is supported by persuasive case law from other jurisdictions. For the reasons set forth above, defendants respectfully request that this Court dismiss plaintiffs' claims for relief under the Adoption Act, 42 U.S.C. § 671 (a)(16), 675 (1) and 675(5)(C).

RESPECTFULLY SUBMITTED this 19th day of September, 2000.

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