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"A LOST GENERATION": THE BATTLE FOR PRIVATE ENFORCEMENT OF THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980

*Barbara L. Atwell**

[This] is a case about thousands of children who, due to family financial problems, psychological problems, and substance abuse problems, among other things, rely on the [government] to provide them with food, shelter, and day-to-day care. . . . It is about the failures of an ineptly managed child welfare system . . . and the resultant tragedies for . . . children relegated to entire childhoods spent in foster care drift. Unfortunately, it is about a lost generation of children whose tragic plight is being repeated every day.¹

INTRODUCTION

Children are perhaps the most helpless segment of our society, and today they face numerous problems. For example, one out of five children lives in poverty;² many poor children, in particular, receive substandard health care;³ the teenage pregnancy statistics are

* B.A. Smith College, J.D. Columbia University I would like to thank the following individuals for their assistance: Professors Donald L. Doernberg, Michael B. Mushlin, and Merrill Sobie, Associate Dean Norman Lichtenstein, and my research assistants Shelley Howard Grant and Anita Matthews.

1. *LaShawn A. v. Dixon*, 762 F. Supp. 959, 960, 998 (D.D.C. 1991) (holding that District of Columbia Department of Human Services had deprived foster care children of their constitutional and statutory rights).

2. NATIONAL COMMISSION ON CHILDREN, *BEYOND RHETORIC, A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES* 82 (1991). See also *id.* at 80 ("Today, children are the poorest Americans.").

3. Infant mortality rates in the United States, for example, are embarrassing given the current level of medical technology and the fact that the mortality rates could be substantially reduced if all women had access to prenatal care. NATIONAL COMMISSION ON CHILDREN, *supra* note 2, at 119-22. "Each year, nearly 40,000 babies born in the

astounding;⁴ the quality of public education has been seriously questioned;⁵ and the list goes on.⁶ In addition, funding for children's programs is often the first item to be cut from federal, state, and local spending budgets.⁷ The many thousands of children⁸ living in foster care⁹ are especially vulnerable.¹⁰ They are often children of drug addicts, children who have been physically and mentally abused, or children who have been simply neglected. These children have been described as a "tragic class of people."¹¹

United States die before their first birthdays. . . . This nation's infant mortality rate is higher than those of 21 other industrialized countries." *Id.* at 119. In addition, much recent attention has been focused on the failure to immunize children. See Robert Pear, *Bush Defers an Emergency Plan to Provide Vaccines for Children*, N.Y. TIMES, June 23, 1991, at A1. "The failure to immunize youngsters is 'a warning flag' that signals the deterioration of basic health-care services for many children." *Id.* at A16.

4. Each year, over a million girls under age 20 become pregnant. NATIONAL COMMISSION ON CHILDREN, *supra* note 2, at 223.

5. See NATIONAL COMMISSION ON CHILDREN, *supra* note 2, at 186 ("More than a dozen blue-ribbon commissions and task forces over the past decade have warned of the inadequacy of America's educational system and urged reform."); Susan Chira, *For Freshman Teacher Corps, a Sobering Year*, N.Y. TIMES, June 26, 1991, at A1 (reviewing first year of "Teach for America" program, which "seeks to revive public education").

6. See NATIONAL COMMISSION ON CHILDREN, *supra* note 2, at 80.

7. Funding for childhood immunization programs is but one recent example of this phenomenon. See Pear, *supra* note 3, at A1, A16 (discussing White House decision to defer implementation of emergency plan to buy and distribute vaccines that would cost \$91 million, even though "[i]n some inner-city neighborhoods, only about half the children have had the measles vaccine."). The cuts in funding are arguably due to children's lack of political clout.

8. In 1988, there were more than 340,000 children estimated to be living in foster care in the United States. HOUSE SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, 101ST CONG., 1ST SESS., NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA 5 (Comm. Print 1989) [hereinafter NO PLACE TO CALL HOME]. Some predict that this number will jump to 550,000 by 1995. *Id.* at 19.

9. Foster care means "24-hour care where the child has been transferred outside his parents' home and into the child welfare system as a result of either court order or voluntary placement." Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 423 n.3 (1983).

10. Marcia Lowry, *Derring-Do in the 1980's: Child Welfare Impact Litigation After the Warren Years*, 20 FAM. L.Q. 255, 257 (1986)("[Foster] children . . . are the most vulnerable in this country; almost all are poor and members of minority groups are disproportionately overrepresented.").

11. Artist M. v. Johnson, 917 F.2d 980, 996 (7th Cir. 1990) (Manion, J., dissenting) ("We are confronted with a tragic class of people — children of alcohol and drug addicts, children victimized by severe domestic violence, children who are abused in unimaginable ways, children who are malnourished, sick and neglected."), *cert. granted sub nom. Suter v. Artist M.*, 111 S. Ct. 2008 (1991). See also NO PLACE TO CALL HOME, *supra* note 8, at 2:

Mounting child poverty and rapid increases in child abuse reports are major contributors to the dramatic increase in placement of children outside their families. It is also impossible to ignore the devastating impact that drug and alcohol abuse are having on families, propelling children into out-of-home care at an escalating rate.

Moreover, all too often, the foster care systems designed to help these children further damages them.¹² The plight of the many thousands of children living in foster care in the United States is well-documented.¹³ Foster children have historically found themselves in an interminable state of foster care drift — being moved from location to location with little hope of permanent placement.¹⁴

12. See, e.g., John J. Musewicz, *The Failure of Foster Care: Federal Statutory Reform and the Child's Right to Permanence*, 54 S. CAL. L. REV. 633, 637-47 (1981); see also Lowry, *supra* note 10, at 257:

[Foster care] systems take these children of the poor and, in many instances, complete what poverty and discrimination have begun, destroying salvageable human beings and producing yet another generation of the economically dependent and socially and psychologically unfit. Grown up, these former foster children fill our mental hospitals, our jails and our welfare rolls. One study found that 50 percent of the homeless youth on our streets are young people who were raised in foster care.

13. See, e.g., FOSTER CHILDREN IN THE COURTS (Mark Hardin ed., 1983) (describing problems in current foster care system); Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1749 (1987) (discussing minimum intervention theory); Lowry, *supra* note 10, at 257 (explaining that there are thousands of children in state-funded foster care systems that "inflict additional harm on already damaged children"); Musewicz, *supra* note 12, at 642 (explaining that too little is done to keep children out of foster care, or to reunite children with their parents); Michel B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L.L. REV. 199, 201 (1988) (assessing constitutional rights of foster children); Laura Oren, *Deshaney's Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C. L. REV. 113, 120 (1990) (stating that voluntariness distinction is artificial and should not form basis of child's constitutional right to safety); Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 224 (1990) (summarizing statutory, regulatory, judicial, and programmatic steps taken to implement reasonable efforts in child welfare system); J.C. Barden, *Foster Care System Reeling, Despite Law Meant to Help*, N.Y. TIMES, Sept. 21, 1990, at A1 ("[F]oster care has grown into a multi-billion dollar system of confusion and misdirection."); Jerry Cheslow, *Foster Care in State Is Facing a Crisis*, N.Y. TIMES, Aug. 13, 1989, at 12NJ, 1 (stating that New Jersey foster-care system was facing shortage of foster parents); Kenneth J. Garcia, *Health Alarm for Foster Care*, L.A. TIMES, Nov. 30, 1989, at A3. (stating that children in foster care are ten times more likely to suffer illness and inadequate care than other children).

14. See, e.g., *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 835-36 (1977) ("[C]hildren often stay in 'temporary' foster care for much longer than contemplated. . . . The District Court found . . . that the median time spent in foster care in New York was over four years. Indeed, many children apparently remain in this 'limbo' indefinitely."); H.R. REP. NO. 136, 96th Cong., 1st Sess. 46, 49-50 (1979); Lowry, *supra* note 10, at 259 (explaining that many children are moved from foster home to foster home); Musewicz, *supra* note 12, at 636 (1981) (stating that children in foster care "are often ignored by child welfare agencies, which are content to allow temporary removal from the parental home to evolve into a de facto long term placement, rather than providing the initiative and services necessary either to return the child home or to free the child for permanent placement").

The Adoption Assistance and Child Welfare Act of 1980¹⁵ (Child Welfare Act) constitutes a congressional effort to protect children in foster care and to help alleviate foster care drift by creating a comprehensive structure for foster care.¹⁶ The Act has three major goals: first, to provide sufficient preplacement services to families to prevent the need for children to enter the foster care system; second, to protect and provide proper care to children while they remain in foster care; and third, to move children through the foster care system and back home or into adoptive placements as quickly as possible.¹⁷ To achieve these goals, the Act provides federal financial assistance to states that structure and implement a foster care systems in accordance with the Act's requirements.¹⁸ Conversely, the Act provides for the withdrawal or reduction of financial assistance from states that do not adhere to the federal requirements.¹⁹

Aside from the potential elimination or reduction of federal financial assistance, the Act includes little in terms of remedies for a state's failure to comply.²⁰ It is silent as to whether children living

15. Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.). The sections discussed will be §§ 620-28, and 670-79.

16. For a critical analysis of some of the shortcomings of the Act, see Musewicz, *supra* note 12 at 709-38; Shotton, *supra* note 13, at 227.

17. See 42 U.S.C. § 625(a)(1) (1988). See also S. REP. NO. 336, 96th Cong., 2d Sess. 12 (1980), reprinted in 1980 U.S.C.C.A.N. 1450, 1461 ("[I]t would be appropriate and desirable at this time to modify the law in a way which will deemphasize the use of foster care and encourage greater efforts to place children in permanent homes."). Once a child is in foster care there are generally five possible placement goals. LaShawn A. v. Dixon, 762 F. Supp. 959, 973 (D.D.C. 1991). First, the goal may be to return the child to his or her biological parents. *Id.* Second, the child may be placed with a relative or other person. *Id.* Third, placing the child for adoption may be the placement goal. *Id.* Fourth, the long term plan may simply be long term foster care. *Id.* This goal is generally considered appropriate only when the child is at least 13 years old and other permanent options have been ruled out. *Id.* Finally, if the child is approaching the age of majority and other options have been ruled out, the child may be declared independent. *Id.*

18. 42 U.S.C. §§ 621, 623, 674 (1988). For a detailed analysis of the Act's funding provisions, see Mary Lee Allen, *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, in FOSTER CHILDREN IN THE COURTS, *supra* note 13, at 575; Musewicz, *supra* note 12, at 710-17.

19. 42 U.S.C.A. § 671(b) (West Supp. 1991).

20. *Id.* The Child Welfare Act provides that:

[I]n any case in which the Secretary finds, after reasonable notice and opportunity for a hearing, that a State [Foster Care P]lan . . . no longer complies with the provisions of subsection (a) . . . or that in the administration of the plan there is a substantial failure to comply with the provisions of the plan, the Secretary shall notify the State that further payments will not be made to the State under this part, or that such payments will be made to the State but reduced by an amount which the Secretary determines appropriate, until the Secretary is satisfied that

in foster care can privately enforce the Act. Under 42 U.S.C. § 1983, however, a person who has been deprived of a federal statutory right can, under appropriate circumstances, sue state officials responsible for the deprivation of that right.²¹ In several cases, plaintiffs have used section 1983 in an effort to privately enforce the Child Welfare Act.²² Although many courts have permitted section 1983 claims based on the Act's provisions, some courts have not.²³ Moreover, most courts that recognize a section 1983 claim suggest that its scope is quite limited;²⁴ they agree that an enforceable right is created in only one isolated section of the Child Welfare Act. With respect to the Act's many other provisions, no consensus exists. In addition, when courts find enforceable rights, they often tailor injunctive relief very narrowly and deny plaintiffs damages.²⁵

This article suggests that the scope of enforceable section 1983 rights is broader than most courts have recognized. The Act creates comprehensive rights to 1) preplacement preventive services,²⁶ 2)

there is no longer any such failure to comply, and until he is so satisfied he shall make no further payments to the State, or shall reduce such payments by the amount specified in his notification to the State.

Id. For further discussion of this provision, see *infra* note 112 and accompanying text.

21. 42 U.S.C. § 1983 (1988). The use of § 1983 to enforce The Child Welfare Act is discussed in section II, *infra*.

22. See *infra* notes 167-94 and accompanying text. The claims asserted under the Child Welfare Act are generally accompanied by constitutional substantive due process claims. *see, e.g.*, *Deshaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1006-07 (1989) ("[T]he State had no constitutional duty to protect . . . [a child] against his father's violence. Even its failure to do so . . . simply does not constitute a violation of the Due Process Clause."); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990) ("[T]he state removed a child from the custody of her parents; and having done so, it could no more place her in a position of danger deliberately and without justification, without thereby violating her rights under the due process clause of the Fourteenth Amendment than it could deliberately and without justification place a criminal defendant in a jail or prison in which his health or safety would be endangered, without violating his rights either under the cruel and unusual punishment clause of the Eighth Amendment . . . or the due process clause."); *Taylor v. Ledbetter*, 818 F.2d 791, 794-98 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989) ("We hold that a child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a child confined in a mental health facility that the foster child may bring a section 1983 action for violation of fourteenth amendment rights."); *Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134, 141-47 (2d Cir. 1981) (holding that child in foster care had constitutional right to be safeguarded from abuse), *cert. denied*, 464 U.S. 864 (1983); *see also* *Mushlin*, *supra* note 13, at 217-33 (discussing constitutional right to safety); *Oren*, *supra* note 13, at 155 (stating that foster care is form of state custody to which due process clause applies and state's failure to protect children in its custody is violation of § 1983). This article is limited to a discussion of § 1983 claims based on the Child Welfare Act.

23. See *infra* notes 167-295 and accompanying text.

24. See *infra* notes 273-95 and accompanying text.

25. See *infra* notes 273-95 and accompanying text.

26. See *infra* notes 52-62 and accompanying text.

proper care while children are in state custody,²⁷ and 3) permanency planning services.²⁸ Courts must be more willing to recognize these rights and to take a more creative role in structuring injunctive relief when these rights have been violated. Part I is an overview of the Act. Part II analyzes the appropriateness of section 1983 claims under the Act. Finally, Part III analyzes the proper scope of section 1983 claims. The article concludes that private enforcement of the Act is essential if the goals of the Act are to be achieved. As the introductory quote illustrates,²⁹ the passage of the Act has not, in itself, brought about the necessary changes in foster care.³⁰ A private right of action for the children and families that the Act is designed to protect has helped, and can further help, to achieve those goals.³¹

I. THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980

Prior to the enactment of the Child Welfare Act, Title IV-A of the Social Security Act,³² provided federal financial assistance for children in foster care who would qualify for Aid to Families with Dependent Children (AFDC) but for their removal from their homes.³³ This AFDC foster care program was of limited benefit, however, because financial assistance was given to states only for foster care, to the total exclusion of adoption.³⁴ Because of this financial disincen-

27. See *infra* notes 63-85 and accompanying text.

28. See *infra* notes 85-105 and accompanying text.

29. See *supra* note 1 and accompanying text.

30. Although the number of foster children dropped during the first five years after Congress enacted the Child Welfare Act, from approximately 300,000 to 275,000, the number has grown steadily since 1985. No PLACE TO CALL HOME, *supra* note 8, at 19; Barden, *supra* note 13, at A1. The increase in drug and alcohol abuse appears to be one of the primary reasons for the increase. NATIONAL COMMISSION ON CHILDREN, *supra* note 2, at 289.

31. See *infra* notes 273-336 and accompanying text.

32. 42 U.S.C.A. §§ 601-17 (West 1988 & Supp. 1991). Title IV-A sets forth requirements for Aid to Families with Dependent Children.

33. S. REP. NO. 336, 96th Cong., 2d Sess. 10 (1980), reprinted in 1980 U.S.C.C.A.N. 1450, 1459.

34. See *id.* at 10-11, reprinted in 1980 U.S.C.C.A.N. 1450, 1460-61; Bussiere, *Federal Adoption Assistance for Children with Special Needs*, 19 CLEARINGHOUSE REV. 587, 587 (1985).

Federal reimbursement was available under Titles IV-A and IV-B of the Social Security Act for foster care payments and services, but no federal participation was available for state adoption assistance programs. Therefore, the state and local share of cost was greater for children in subsidized adoptive homes than for children in federally reimbursed foster care. [The Act] removes this disincentive by providing federal reimbursement for payments made on behalf of eligible children.

Id.

In addition, federal financial assistance was only available for court-ordered placements to the exclusion of voluntary placements. *Id.* at 1459. Since voluntary place-

tive for states to take children out of foster care and place them for adoption, children often lingered in foster care for unduly long periods of time.³⁵

The federal funding scheme was also limited because it provided AFDC foster care reimbursement only for out of home care. No federal funding was provided for preventive services designed to keep families together.³⁶ Thus, until the child was removed from his or her home, no federal financial assistance was available. While these limitations in the federal foster care law did not account for the complex host of problems that caused foster care to malfunction in this country, they did contribute to the problem.³⁷

ments constitute "as much as half" of the total foster care population, this was a major limitation. Garrison, *supra* note 13, at 1748.

35. A 1977 study, *The National Study of Social Services to Children and Their Families*, concluded that the median length of stay in foster care was two and one-half years. See S. REP. NO. 336, 96th Cong., 2d Sess. 11 (1980), reprinted in 1980 U.S.C.C.A.N. 1450, 1460. A later study concluded that 14% of foster children remain in foster care five years or more. TOSHIO TATARA, AMERICAN PUBLIC WELFARE ASSOCIATION, CHARACTERISTICS OF CHILDREN IN SUBSTITUTE AND ADOPTIVE CARE: A STATISTICAL SUMMARY OF THE VCIS NATIONAL CHILD WELFARE DATA BASE 46 (1990). Senator Cranston, who introduced the Senate version of the bill, remarked:

One of the prime weaknesses of our existing foster care system is that, once a child enters the system and remains in it for even a few months, the child is likely to become 'lost' in the system. . . . Foster care, with a few exceptions, should be a temporary placement; unfortunately, under our existing system, temporary foster care becomes a permanent solution for far too many children.

125 CONG. REC. S22,684 (1979).

36. Although Title IV-B of the Social Security Act theoretically provided federal financial assistance for a range of services, including preventive services, in practice the limited funds available under Title IV-B — prior to 1980, Congress never appropriated more than \$56.5 million to Title IV-B, although \$266 million was authorized — were used by the states primarily for foster children not eligible under the AFDC foster care program. Allen, *supra* note 18, at 577. In order to encourage states to use Title IV-B funds for preventive and reunification services, the Act disallows the use of any increase in appropriations over \$56.5 million for foster care maintenance payments. 42 U.S.C. § 623(c)(1) (1988).

37. In addition to any legislative shortcomings, the sheer increase in the number of foster children, due in large part to increased drug and alcohol abuse, and poverty, has strained states' resources. See Barden, *supra* note 13, at A18.

[I]n New York City last year, 3,000 infants entered foster care from hospitals, testifying to the devastating effects of their mothers' drug use. . . . [Moreover,] the presiding judge of the Juvenile Courts in Los Angeles said that about 90 percent of the 20,000 children who would come before his courts this year would be there because of parental drug or alcohol abuse. [Even without these substance abuse problems], some children 'would still enter [foster] care due to a lack of affordable housing for low-income families.'

Id.; see also NATIONAL COMMISSION ON CHILDREN, *supra* note 2, at 284 ("[A] recent analysis of the factors that place children at risk of maltreatment suggests that only family income is consistently related to all categories of abuse and neglect.").

After identifying the foster care problems, Congress created Titles IV-B and IV-E of the Child Welfare Act.³⁸ Title IV-E provides for partial reimbursement by the federal government of "foster care maintenance payments"³⁹ made by the states.⁴⁰ It also provides federal financial assistance for qualified adoption programs.⁴¹ Title IV-B applies to the provision of child welfare services in general.⁴² Together, Titles IV-B and IV-E require that states create three separate plans in order to receive federal financial assistance. First, Title IV-B requires a general plan for the provision of child welfare services (Child Welfare Plan).⁴³ In addition, Title IV-E requires that

38. 42 U.S.C.A. §§ 620-29, 670-79 (West 1988 & Supp. 1991).

39. "Foster care maintenance payments" are defined as:

Payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. In the case of institutional care, such term shall include the reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence.

§ 675(4)(A).

40. § 674. Title IV-E, like the former Title IV-A applies to children who would be eligible for AFDC. § 674(b)(5)(D). Although state participation in the general AFDC program is voluntary, *Rosado v. Wyman*, 397 U.S. 397, 408 (1970); *McCoog v. Hegstrom*, 690 F.2d 1280, 1284 (9th Cir. 1982), participation must include the foster care component, H.R. CONF. REP. NO. 900, 96th Cong., 2d Sess. 43-44 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1561, 1564.

The Act covers both the voluntary placement of children in foster care and placement as the result of judicial determinations, § 672(a)(1)-(3), although there are certain funding restrictions for children who have been placed voluntarily, see § 672(d)-(g); 45 C.F.R. § 1356.30 (1990), such as a judicial determination within 180 days of placement that the placement is in the best interests of the child, § 672(e); 45 C.F.R. § 1356.30(b). Moreover, states must fulfill all the requirements of § 627(b) for voluntarily placed children in order to receive federal funds. § 672(d).

The Act covers both foster family homes and other child care institutions, public and private, that have been approved by the state. § 672(a)(3), (b)-(c). An approved "child-care institution" may not have more than 25 children and must not be an institution "operated primarily for the detention of children who are determined to be delinquent." § 672(c).

41. § 673. The federal reimbursement for adoption applies to children with special needs, such as handicapped children, older children, and members of certain racial groups. *Id.* This article addresses issues related to children while in foster care and does not address that portion of the Act related to adoption assistance.

42. § 625(a)(1). States comply with Title IV-B on a voluntary basis. S. REP. NO. 336, 96th Cong., 2d Sess. 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1450, 1461. Unlike Title IV-E, which applies to children who would be eligible for AFDC but for their placement in foster care, *see supra* note 40 and accompanying text, Title IV-B applies to all children in state supervised care, *see* § 625(a)(1).

43. § 622(a). It provides that, "In order to be eligible for payment under this part, a State must have a plan for child welfare services which . . . meets the requirements of § 622 subsection (b)." *Id.*; *see also* 45 C.F.R. §§ 1355.21, 1356.20(a) (1990) (setting requirements for contents, submission, and inspection of State plans).

states adopt a plan for the overall operation of their foster care systems (Foster Care Plan).⁴⁴ Moreover, individualized case plans for each child in foster care (Case Plan) are required.⁴⁵ Also, under Title IV-E, the states must create a case review system to periodically review the status of each child in foster care (Case Review System).⁴⁶ The three plans and the Case Review System are designed to address the needs of children and their families from the time the children are reported to be at risk of removal from their homes until they are permanently placed back home or with an adoptive family.

The requirements for the Child Welfare Plan are largely administrative. § 622. The Child Welfare Plan must provide for a single organizational unit to furnish child welfare services, § 622(b)(1)(B), and must coordinate the provision of child welfare services with other social services, § 622(b)(2). It must also provide for the "training and effective use of paid paraprofessional staff," § 622(b)(4), and "emphasi[ze] . . . the full-time or part-time employment of persons of low income, as community service aides, in the administration of the plan, and . . . the use of nonpaid or partially paid volunteers in providing services and in assisting any advisory committees established by the State agency." *Id.* The Child Welfare Plan must also provide for the "utilization of . . . facilities and experience of voluntary agencies" to render services, contain a description of available services, and specify the geographic areas where such services will be available." § 622(b)(5),(7); see 45 C.F.R. §§ 1357.15(b)-(c) (1990). The Child Welfare Plan must also provide for meeting reporting requirements established by the Act. § 622(b)(8); see also § 676(b) (describing specific plan requirements).

44. § 671(a) ("In order for a State to be eligible for payments under this part, it shall have a [Foster Care Plan approved by the Secretary.]; 45 C.F.R. §§ 1356.20(a), 1356.21(a) (1990). Like the Child Welfare Plan, the Foster Care Plan must include a variety of administrative provisions, § 671(a), such as a procedure for maintaining the confidentiality, to the extent possible, of the individuals assisted by the plan, § 671(a)(8), and a procedure for making foster care maintenance payments, § 671(a)(1). In addition, the Foster Care Plan must provide an opportunity for a fair hearing to any individual who has been denied benefits or whose claim has not been acted upon in a timely manner. § 671(a)(12).

45. § 671(a)(16). The Foster Care Plan requires the creation of the Case Plan. *Id.* The Case Plan is geared specifically toward the individual child rather than to the foster care system as a whole, § 675(1), and must be created within 60 days of the child's placement in the state foster care system. 45 C.F.R. § 1356.21(d)(2) (1990). "In requiring the development of written case plans for individual children in care, Congress recognized that too frequently there is little documentation of an agency's plans for a particular child and no specific goals or timetables against which a child's progress can be measured." Allen, *supra* note 18, at 582. Prior to 1980, Title IV-A included very generalized provisions for case plans and periodic reviews. The Child Welfare Act sets forth in greater detail, what the substance of the plans and the periodic reviews should entail. 126 CONG. REC. 514,767 (1980) (statement of Sen. Cranston); 125 CONG. REC. 529,939 (1979) (statement of Sen. Cranston) ("The legislation . . . would strengthen the provisions in existing law by describing exactly what factors should be covered in the case plan.").

Each of the three plans required by Titles IV-B and IV-E must be in writing and must be approved by the Department of Health and Human Services, the federal agency charged with overseeing compliance with the Act. 45 C.F.R. §§ 1356.20(c), 1356.21(d)(1), 1357.15.

46. §§ 671(a)(16), 675(5)(B); for further discussion of the Case Review system, see *infra* notes 67-71, 95-103 and accompanying text.

In order to sufficiently serve families from the time the state agency becomes aware of a problem until there is a permanent resolution, the Act requires that states address three key areas:⁴⁷ first, states must provide preplacement preventive services to help reduce the need for foster care;⁴⁸ second, states must insure proper care for children in foster care;⁴⁹ and third, states must provide permanency planning services.⁵⁰

A. Preventive Services

One of the primary purposes of the Act is to prevent the need for a child's removal from his or her home.⁵¹ In order to achieve this goal, states are only entitled to reimbursement⁵² for foster care maintenance payments under Title IV-E as long as certain requirements are met.⁵³ First, the Foster Care Plan requires that states make "reasonable efforts . . . prior to placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home."⁵⁴ As previously discussed, states were only entitled to federal financial assistance for out-of-home care before the passage of the Child Welfare Act. Congress recognized that the funding scheme encouraged rather than discouraged the breakup of families.⁵⁵ Congress, therefore, made prevention of a child's removal a key purpose of the Act in order to reduce the number of children entering foster care by requiring that reasonable efforts be made to help families in need prior to the child's removal.⁵⁶ As Senator Cranston explained:

47. § 625(a)(1).

48. § 671(a)(15).

49. § 671(a)(10).

50. § 625(a)(1)(D)-(E).

51. § 625(a)(1).

52. For a detailed account of the federal-state reimbursement provisions, see Allen, *supra* note 18, at 578-81; Musewicz, *supra* note 12, at 711-15.

53. § 671(a).

54. § 671(a)(15). This provision took effect on October 1, 1983. *Id.* Consistent with the reasonable efforts required by the Foster Care Plan, the Case Plan must also include a description of preventive services that were offered to the child and his or her family. 45 C.F.R. § 1356.21(d)(4) (1990). The Child Welfare Plan required by Title IV-B must contain a description of the steps states will take to provide child welfare services, including "(A) covering additional political subdivisions, (B) reaching additional children in need of services, and (C) expanding and strengthening the range of existing services and developing new types of services." § 622(b)(6). The definition of child welfare services includes preventive services. § 625 (a)(1)(B) (quoted *infra* note 59 and accompanying text).

55. 126 CONG. REC. 14,767 (1980).

56. *Id.*

[S]tates must make reasonable efforts to prevent the removal of children from their homes. In the past, foster care has often been the first option selected when a family is in trouble: the new provisions will require States to examine alternatives and provide, wherever feasible, home-based services that will help keep families together, or help reunite families. . . . Far too many children and families have been broken apart when they could have been preserved with a little effort. Foster care ought to be a last resort rather than the first.⁵⁷

Although the Child Welfare Act requires that the states make reasonable efforts to help families before removing a child, the Act does not define reasonable efforts. The regulations, however, suggest that reasonable efforts may include some of the same services as those defined in Title IV-B as "child welfare services":⁵⁸ services aimed at "preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family where the prevention of child removal is desirable and possible."⁵⁹ In addition, the regulations promulgated under the Act set forth some specific examples of child welfare services that may also satisfy the reasonable efforts requirement. Such services include:

57. *Id.* It is somewhat ironic, with its emphasis on reasonable efforts to eliminate the need for foster care, that Title IV-E's funding scheme does not go as far as it could to encourage in home services over out-of-home care. Title IV-E reimburses states for foster care maintenance payments made on behalf of eligible children, thereby subsidizing a percentage of the states' costs. § 674. Although eligible children include only those placed in foster care as a result of a judicial determination that the reasonable efforts requirement has been met and that continuation in the home would be contrary to the child's welfare, § 672(a)(1), (or those voluntarily placed in care), *id.*, foster care maintenance payments kick in only after the child has been placed in foster care, §§ 674, 675(4). In other words, Title IV-E reimburses states for payments covering out-of-home care. *Id.* Accordingly, while Title IV-E requires that states make reasonable efforts to eliminate the need for foster care, it does not directly finance such efforts. On the other hand, § 671(a), provides that "[i]n order for a State to be eligible for payments under this part," the Foster Care Plan must provide that "in each case, reasonable efforts will be made." § 671(a)(15). Without such reasonable efforts, the states arguably are not entitled to any Title IV-E funding.

58. 45 C.F.R. § 1356.21(b).

59. § 625 (a)(1)(C). The Child Welfare Act further defines "child welfare services" as:

public social services which are directed toward the accomplishment of the following purposes: (A) protecting and promoting the welfare of all children, including handicapped, homeless, dependent, or neglected children; (B) preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children."

§ 625(a)(1).

procedures and arrangements for access to available emergency financial assistance; arrangements for the provision of temporary child care to provide respite to the family for a brief period, as part of a plan for preventing children's removal from home; . . . home-based family services, self-help groups, services to unmarried parents, provision of or arrangements for mental health, drug and alcohol abuse counseling, vocational counseling or vocational rehabilitation.⁶⁰

The requirement to use reasonable efforts to prevent the need for foster care is one of the most important requirements of the Act for reducing the number of children who enter the foster care system. Reasonable efforts, however, will not always be successful. Situations may exist, such as those that place a child in imminent physical danger, which require the removal of the child from the home.⁶¹ Studies have shown, though, that where preventive services are available, many children can be spared the trauma of being removed from their homes.⁶² Both the reasonable efforts required by the Foster Care Plan and the provision of child welfare and other services pursuant to the Title IV-B dictate that the state provide sufficient preventive services to reduce the need for foster care.

B. Proper Care

In addition to providing for preventive services, a second purpose of the Act is to ensure that children in foster care are safe.⁶³ Although it is primarily the Case Plan that addresses this goal on an individualized basis, the Foster Care Plan and the Case Review System also establish a number of general requirements to ensure proper care. For example, the Foster Care Plan requires that states establish and maintain foster care standards that "are reasonably in accord with recommended standards of national organizations."⁶⁴ In addition, every foster family home or other child-care institution, must meet state licensing requirements.⁶⁵ If the state has reason to

60. 45 C.F.R. § 1357.15(e)(2).

61. H.R. REP. NO. 136, 96th Cong., 1st Sess. 47 (1979) ("[T]he Committee recognizes that the preventive service requirement would be inappropriate in certain . . . circumstances."); 126 CONG. REC. 14,767 (1980) (statement of Sen. Cranston) ("Of course, state child protective agencies will continue to have authority to remove immediately children from dangerous situations."); Allen, *supra* note 18, at 589-90.

62. Celia W. Dugger, *New York City Bets Millions on Preserving Families*, N.Y. TIMES, July 19, 1991, at A1. Not all the experts agree that preventive services have been effective. *Id.* at B4.

63. § 671(a)(10).

64. *Id.* The standards must be reviewed periodically. § 671(a)(11); 45 C.F.R. § 1356.21(g).

65. § 672(c).

believe that the foster care setting is "unsuitable for the child because of . . . neglect, abuse, or exploitation," it must take affirmative steps to inform the proper authorities.⁶⁶ The Case Review System must also establish a procedure to determine the appropriateness of the placement.⁶⁷ It requires states to review the educational and health records of the child and to update them as needed.⁶⁸ In addition, any available health and educational information should be made available to the foster parents or foster care providers to help them better care for the children.⁶⁹

Although the Foster Care Plan and the Case Review System establish requirements for proper care of the children, the Case Plan is the primary method to ensure that each child receive proper care while in state custody.⁷⁰ Although the Act does not expressly define everything that is encompassed by the term "proper care," it requires that the Case Plan include "[a] description of the type of home or institution in which a child is to be placed, including a discussion of the appropriateness of the placement."⁷¹ The Act suggests that proper care begins with "placement in the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interests and special needs of the child."⁷² Proper care also requires providing for the physical safety of the child,⁷³ including such basic items as adequate food, clothing and shelter.⁷⁴ In addition, proper care requires review of the child's health and education records.⁷⁵ To that end, the Case Plan must include health and educational information, such as the child's grade in school, his school record, and a record of any known medical problems.⁷⁶ Furthermore, the Case Plan must include "assurances that the child's placement . . . takes into account proximity to the school in which the child is enrolled at the time of place-

66. § 671(a)(9).

67. § 675(5)(B).

68. § 675(5)(D).

69. *Id.*

70. § 675(1)(B) (defining Case Plan, in part, as, "a plan for assuring that the child receives proper care."). Similarly, child welfare services are defined to include services to assure "adequate care of children away from their homes." § 625(a)(1)(F).

71. § 675(1).

72. § 675(5)(A). The Case Plan should include a discussion of how the plan was designed to achieve this goal. § 675(1); 45 C.F.R. § 1356.21 (d)(3).

73. § 671(a)(10). The national standards that states must maintain include standards related to "safety." *Id.*

74. § 675(4)(A).

75. § 675 (5)(D).

76. § 675(1)(C).

ment.”⁷⁷ In order to monitor the child, proper care should include the prompt assignment to each child of a caseworker and regular visits by the caseworker to the child’s placement.⁷⁸ Most importantly, perhaps, proper care requires that states provide sufficient services to the children and foster care parents to ensure the child’s well-being while he or she is in custody.⁷⁹

Although Title IV-B applies to the provision of child welfare services in general,⁸⁰ it also provides that in addition to the federal financial assistance a state receives for the provision of child welfare services, a state may be entitled to additional payments (Additional Payments Program)⁸¹ specifically for foster care services if it, among other things, implements “a statewide information system” capable of tracking each child who has been in the foster care system within the past twelve months.⁸² Without an information system, children

77. *Id.* Proper care should also include protection of the child’s emotional well-being and protection of the child’s “civil rights.” § 671(a)(10).

78. For a discussion of some of the problems commonly associated with the caseworker requirement, see *infra* notes 273-83 and accompanying text.

79. § 675(1)(B). The Case Plan is defined, in part, as “a plan for assuring . . . that services are provided to address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.” *Id.*

80. See §§ 620-29. Such services are defined in part as services for “assuring adequate care of children away from their homes, in cases where the child cannot be returned home or cannot be placed for adoption.” § 625(a)(1)(F).

81. § 627(a). Whether the state is entitled to additional funds depends, in part, on the amount of funds appropriated under § 620. *Id.* Only if Congress appropriates more than \$141 million can a state receive additional funds. *Id.* Prior to the Act, the appropriation never exceeded \$56.5 million even though Title IV-B authorized appropriations of up to \$266 million. S. REP. NO. 336, 96th Cong., 2d Sess. 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1450, 1460. Between 1977 and 1989, Congress kept the Title IV-B authorization level at \$266 million. In 1989 Congress increased the authorization to \$325 million for fiscal year 1991. NATIONAL COMMISSION ON CHILDREN, *supra* note 2, at 290.

If a state fails to implement the requirements of the Additional Payments Program, by the time the federal funds appropriated for two consecutive fiscal years is equal to \$266 million, its allotment of federal funds will be reduced to an amount equal to the state’s 1979 allotment. § 627(b)(2); 45 C.F.R. § 1357.25(c) (1990). Should the appropriation reach this level, Title IV-B would also require that the state implement “a preplacement preventive service program designed to help children remain with their families.” § 627(b)(3).

82. § 627(a)(2)(A); see also 45 C.F.R. § 1357.25(b) (1990) (requiring that tracking system includes children under care of State title IV-B or IV-E state agencies). The information system must include, at a minimum, “the status, demographic characteristics, location and goals for placement.” § 627(a)(2)(A). The statewide information system, like the other requirements of the Additional Payments Program, encompasses both the proper care and permanency planning goals. See *infra* notes 84-85, 104-05 and accompanying text. For example, while the information system will help states provide proper care, requiring that the information system list placement goals

can and do literally get lost in the system.⁸³ Thus, it is essential that a state have immediate access to critical information concerning each child, including where they have been placed, what school they are attending, what special health care needs they may have, and what their placement goals are. In order to qualify for the Additional Payments Program under Title IV-B, states must also conduct an inventory of all children who have been in the state foster care system for the past six months to determine the appropriateness of their current placement,⁸⁴ to review their placement goals, and to determine what services are needed to achieve those goals.⁸⁵

C. Permanency Planning

In addition to ensuring the safety of children while they are in foster care, the Act requires that all of the required plans and the Case Review System include a permanency planning component.⁸⁶ The provision of child welfare services under the Child Welfare Plan, for example, includes services for "restoring to their families children who have been removed, by the provision of services to the child and the families [,] . . . [and] placing children in suitable adoptive homes, in cases where restoration to the biological family is not possible or appropriate."⁸⁷ Similarly, the Case Plan is defined, in part, as a plan to "facilitate return of the child to his own home or the permanent placement of the child,"⁸⁸ and must provide for the

will also help with permanency planning. The Additional Payments Program also includes a preventive service requirement. *See supra* note 81.

83. *LaShawn A. v. Dixon*, 762 F. Supp. 959, 976 (D.D.C. 1991); *Lynch v. King*, 550 F. Supp. 325, 345 (D. Mass. 1982), *aff'd sub nom. Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983). As the court in *LaShawn* noted:

The current information system . . . is unable to accurately identify the physical location of all of the children in foster care. . . . [S]ocial workers track information on thousands of three-by-five inch index cards. . . . The Court can only wonder how an agency that cannot track the location of the children in its custody can possibly comply with the remaining requirements of federal . . . law, much less with reasonable professional standards.

762 F. Supp. at 976-77.

84. § 627(a)(1); 45 C.F.R. § 1357.25(b) (1990). In order to take advantage of the Additional Payments Program, states must also implement a case review system "for each child receiving foster care under the supervision of the State," § 627(b)(2)(B), regardless of whether the child is eligible under Title IV-E for federal reimbursement.

85. § 627(a)(1). The inventory system should help determine "whether the child can be or should be returned to his parents or should be freed for adoption, and the services necessary to facilitate either the return of the child or the placement of the child for adoption or legal guardianship." *Id.*

86. § 627(a)(2)(C).

87. § 625(a)(1)(D)-(E).

88. § 675(1)(B).

rendering of necessary services to the child, foster parents, and biological parents in order to achieve this goal.⁸⁹ The Case Plan must also "include a description of the services offered and the services provided to prevent removal of the child from the home and to reunify the family."⁹⁰

In addition, the Foster Care Plan specifically requires that the foregoing services constitute "reasonable efforts" to return children to their homes.⁹¹ As noted above, the Act does not define reasonable efforts, and what constitutes reasonable efforts will vary from case to case. Reasonable efforts to return the child home will, in some cases, require the provision of the same services described above to help prevent the need for placement.⁹² For example, if the biological parents need drug counseling, the state's provision of such counseling may prevent the need for the child's removal from the home. On the other hand, a severe drug abuse problem may require the child's removal with ongoing drug counseling for the parents in an attempt to allow for the child's return home. The legislative history suggests that reunification services include "transportation services, family and individual therapy, psychiatric counseling, homemaker and housekeeper services, day care, consumer education, respite care, information and referral services and various transition and follow-up services."⁹³ Reasonable efforts to return the child home will include a variety of other services, such as

89. *Id.* A Case Plan is defined, in part, as "a plan for assuring that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own home or the permanent placement of the child." *Id.* When it appears that the family situation will not allow the child to return home, the state should attempt to terminate parental rights in order to enable the child to be placed for adoption. Parental rights can be terminated voluntarily or involuntarily. See Garrison, *supra* note 13, at 424-25. All too often, such efforts are never made. See *infra* note 305.

90. 45 C.F.R. § 1356.21(d)(4).

91. § 671(a)(15) ("In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . provides that, in each case, reasonable efforts will be made . . . to make it possible for the child to return to his home.").

The language used in this provision does not include reasonable efforts to place the child for adoption if the return home is not feasible. The substantial equivalent of such a requirement, however, is found in other provisions of the Act. See, e.g., §§ 625(a)(1), 675(1)(B).

The Foster Care Plan must also set "specific goals . . . as to the maximum number of children . . . who . . . will remain in foster care after having been in such care for a period in excess of twenty-four months" to help achieve the goal of minimizing the length of time spent in foster care. § 671(a)(14). In addition, the state must set forth the steps it will take to achieve these goals. *Id.* Finally, the goals must be "incorporated into State law by statute or administrative regulation." 45 C.F.R. § 1356.21(h).

92. See *supra* note 59 and accompanying text.

93. H.R. REP. NO. 136, 96th Cong., 1st Sess. 49 (1979).

adequate visitation between the child and his or her parents while the child is in foster care.⁹⁴

To achieve its ultimate goal of returning the child to his or her biological parents or of placing the child for adoption, the Case Review System provides for a two-tiered review. First, there is a review, conducted by either a court or an administrative agency,⁹⁵ which is to take place at least once every six months.⁹⁶ This review must evaluate the need for and appropriateness of the child's current placement,⁹⁷ and assess the progress being made toward returning the child home or releasing the child for adoption.⁹⁸ The six month review must also "project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship."⁹⁹ Second, the Case Review System must establish a procedure for a formal dispositional court or administrative hearing to determine the future status of the child.¹⁰⁰ This dispositional hearing must take place within eighteen months of the original placement.¹⁰¹ Unlike the six-month review, the dispositional hearing must be held by a court or court-approved body.¹⁰² The Case Re-

94. Foster care maintenance payments expressly include payments for "reasonable travel to the child's home for visitation." Congress also intended that the Case Review System would include procedural safeguards concerning, among other things, visitation rights. S. REP. NO. 336, 96th Cong., 2d Sess. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1450, 1453.

95. § 675(5)(B). An administrative review is "a review open to the participation of the parents of the child, conducted by a panel of appropriate persons at least one of whom is not responsible for the case management of, or the delivery of services to, either the child or the parents who are the subject of the review." § 675(6).

96. § 675(5)(B).

97. § 675(5)(A)-(B).

98. § 675(5)(B).

99. *Id.*

100. § 675(5)(C); *see* 45 C.F.R. § 1356.21(e). An exception to the requirement for dispositional hearings is allowed when the child is already free for adoption, has been placed in the adoptive home and is simply awaiting finalization of the adoption. 45 C.F.R. § 1356.21(e). The future status of the child includes, but is not limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis and, in the case of a child who has attained age 16, the services needed to assist the child to make the transition from foster care to independent living.

§ 675(5)(C).

101. § 675(5)(C). A dispositional hearing must take place periodically thereafter during the continuation of foster care. *Id.* "Original foster care placement means the date of the child's most recent removal from his home and placement into foster care under the care and responsibility of the State agency." 45 C.F.R. § 1356.21(f).

102. § 675(5)(C):

[W]ith respect to each . . . child, procedural safeguards will be applied, among other things, to assure each child in foster care under the

view System continues for as long as the child remains in foster care.¹⁰³

Finally, the Additional Payments Program requires that states implement a "service program" designed to place the child back in a permanent family setting.¹⁰⁴ Because the provision of adequate services is the cornerstone of a good foster care system, the creation of a service program that will force the states to analyze the kinds of services they need to meet the goals of the Act is critical.¹⁰⁵

In sum, the Child Welfare Act is a comprehensive Congressional effort to improve foster care conditions in the United States. Complying states are those that adopt and implement a Child Welfare Plan, a Foster Care Plan, a Case Plan and a Case Review System as described above.¹⁰⁶ Each plan and the Case Review System have requirements that overlap the Act's goals of preventing the need for foster care, providing proper care to children in foster care and permanency planning.¹⁰⁷ It is the provision of sufficient services to children and their families that will help to achieve these goals. The biological parents need services designed to help them overcome the problems which initially led to the removal of the child.¹⁰⁸ Common problems include drug abuse, mental health problems, and financial instability.¹⁰⁹ Accordingly, the biological parents may need financial assistance, drug counseling, mental health care, or other services to prevent the need for foster care, or to help them regain

supervision of the State of a dispositional hearing to be held, in a family or juvenile court or another court . . . of competent jurisdiction, or by an administrative body appointed or approved by the court.

See also Allen, *supra* note 18, at 583 ("A review by a body external to the agency increases the likelihood of careful case planning and requires the agency to account for the child's well-being."). For a detailed comparison of the 6 and 18 month reviews, see Musewicz, *supra* note 12, at 732-33.

103. § 675(5). The Case Review System also requires "procedural safeguards . . . with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents." § 675(5)(C).

104. § 627(a)(2)(C). A state shall not be entitled to additional payments unless it "has implemented and is operating to the satisfaction of the Secretary . . . a service program designed to help children, where appropriate, return to families from which they have been removed or be placed for adoption or legal guardianship." *Id.*

105. In fact, the regulations that have been promulgated pursuant to the Act expressly provide that the state must set forth with specificity in its Child Welfare Plan "which preplacement preventive and reunification services are available to children and families in need." 45 C.F.R. § 1357.15(e)(1).

106. See *supra* notes 43-105 and accompanying text.

107. See *supra* notes 51-105 and accompanying text.

108. See *supra* note 59 and accompanying text.

109. See *supra* text accompanying note 92.

custody after the child has been placed in temporary foster care.¹¹⁰ In addition, the foster parents may need a variety of services depending on the age, and physical and mental well-being of the child. The services needed by the children will vary on a case by case basis, but will often include psychological counseling to help them cope emotionally with the problems that lead to government action.¹¹¹

For states that do not comply with the Act, however, federal financial assistance will be reduced or eliminated.¹¹² No other remedy is explicitly provided for in the Act. While the Act is a major step in the right direction in terms of trying to achieve foster care reform, it is clear from the statistics¹¹³ that additional measures are necessary. Permitting section 1983 claims can and does go a long way toward making the Act a more effective tool for achieving foster care reform. Part II of this article analyzes the cases that have considered section 1983 claims under the Act.

II. PRIVATE EFFORTS TO ENFORCE THE ACT

Section 1983¹¹⁴ permits a cause of action against any person who acts under color of state law,¹¹⁵ if that person deprives the plaintiff "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States.¹¹⁶ These claims are permitted for rights created by federal statutes, as well as those created by the Constitution,¹¹⁷ and allow private persons who were intended beneficiaries of federal legislation to enforce it unless one of two circumstances exist. First, if "the statute [does] not create enforceable

110. See *supra* notes 59-61 and accompanying text.

111. See *infra* note 243 and accompanying text.

112. § 671(b). A state may be in compliance with Title IV-B and receive federal financial participation for child welfare services generally, while not in compliance with Title IV-E. Alternatively, a state may be in compliance with some but not all of Title IV-E, in which case they may receive some federal financial assistance, but not as much as they would if they were in total compliance with the Act. For the text of § 671(b), see *supra* note 20.

113. See *supra* note 8 and accompanying text.

114. § 1983 provides, in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

115. *Id.* Municipalities and local government officials can also be sued under § 1983. *Monell v. Department of Social Servs.*, 436 U.S. 658, 690 (1978).

116. § 1983.

117. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

rights, privileges, or immunities within the meaning of section 1983" the claim will not be allowed.¹¹⁸ Second, Congress may, in the statute itself, "foreclose enforcement" under section 1983.¹¹⁹ The following subsections analyze these exceptions to section 1983 claims in relation to the Child Welfare Act.¹²⁰

118. *Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2516-17 n.9 (1990); *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 448 (1989); *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423 (1987); see generally Henry P. Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233 (1991) (explaining importance of Court's opinion in *Golden State Transit*, 110 S. Ct. 444, which emphasized broad reach of § 1983 and importance of underlying fundamental right).

119. *Wilder*, 110 S. Ct. at 2517; *Golden State Transit*, 110 S. Ct. at 448-49; *Wright*, 479 U.S. at 423. As the Court in *Golden State* explained:

In all cases, the availability of the § 1983 remedy turns on whether the statute, by its terms or as interpreted, creates obligations "sufficiently specific and definite" to be within "the competence of the judiciary to enforce," is intended to benefit the putative plaintiff, and is not foreclosed "by express provision or other specific evidence from the statute itself."

110 S. Ct. at 449 (citations omitted).

While it is easy to articulate the principles governing § 1983 claims, the division among Supreme Court justices in recent cases illustrates the difficulty in applying the principles. See, e.g., *Wilder*, 110 S. Ct. at 2525 (5-4 decision); *Golden State Transit*, 110 S. Ct. at 447 (6-3 decision); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 5, 32, 33 (1981) (5-1-3 decision); *Thiboutot*, 448 U.S. at 2, 11 (6-3 decision).

120. While this section discusses whether the Act gives rise to a cause of action under § 1983, several courts have analyzed both the applicability of a § 1983 claim and whether the Act itself creates an implied private right of action. See *Artist M. v. Johnson*, 917 F.2d 980, 987 (7th Cir. 1990), cert. granted sub nom. *Suter v. Artist M.*, 111 S. Ct. 2008 (1991); *B.H. v. Johnson*, 715 F. Supp. 1387, 1404-05 (N.D. Ill. 1989). Unlike § 1983, which constitutes explicit congressional authority to sue state officials for violations of federal rights under appropriate circumstances, an implied right of action exists when a court concludes that despite its silence, Congress intended to create a private right of action directly under the applicable statute. The ultimate question in implied right cases is "whether Congress intended to create a private cause of action." *Karahalios v. National Fed'n of Fed. Employees Local 1263*, 489 U.S. 527, 532 (1989) (quoting *California v. Sierra Club*, 451 U.S. 287, 293 (1981)); *Transamerica Mortgage Advisers v. Lewis*, 444 U.S. 11, 15-16 (1979); cf. *Cort v. Ash*, 422 U.S. 66, 78 (1975) (setting forth four prong test to determine whether implied right of action exists). See also *Thompson v. Thompson*, 484 U.S. 174, 179 (1988) ("[C]ongressional intent can be inferred from the language of the statute, the statutory structure, or some other source."). If the statute already provides a remedy for violations, courts are less likely to find that Congress intended to create an implied private right of action. *Karahalios*, 489 U.S. at 532-33.

The courts in *Artist* and *B.H.* concluded that a private right of action is implicit under the Child Welfare Act. 917 F.2d at 987; 715 F. Supp. at 1402. The court in *B.H.* reasoned that the analysis of implied rights of action is similar to the congressional foreclosure analysis under § 1983. 715 F. Supp. at 1404; see *infra* notes 121-138 and accompanying text. Because the court held that there was no congressional foreclosure under § 1983, it found an implied right of action under the Act. 715 F. Supp. at 1404-05. Similarly, the court in *Artist* found an implied private right of action noting that the "inquiry closely resembles the analysis courts use to determine whether a Section 1983

A. Congressional Foreclosure

Although a plaintiff may possess a right created by a federal statute, Congress may foreclose enforcement of that right. A section 1983 plaintiff must specify the provision of a statute that creates a federal right, but the burden of proof is on the defendant to show that Congress foreclosed enforcement of that right.¹²¹ Although the argument has been made in cases that have arisen under the Child Welfare Act that Congress foreclosed section 1983 causes of action, the courts have easily rejected that argument.¹²² Congress did not explicitly foreclose section 1983 suits in the Act.¹²³ In the absence of such an express statement, the Supreme Court has indicated that section 1983 claims may be foreclosed when the remedial scheme is "sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983."¹²⁴

The Child Welfare Act's remedial scheme is anything but comprehensive. The Act's focus is on the establishment of a framework for the smooth operation of state foster care systems, rather than on remedies for state failures to comply with the Act. The primary remedy provided for by the Act is the termination or reduction of federal financial assistance for states that no longer comply with its

cause of action exists." 917 F.2d at 989. Arguably, congressional silence about private enforcement favors a finding of § 1983 rights. Congress may have been silent because it believed it was unnecessary, in light of § 1983, to explicitly establish private enforcement provisions.

121. *Wilder*, 110 S. Ct. at 2523 ("The burden is on the State to show 'by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement.'") (quoting *Wright*, 479 U.S. at 423); *Golden State Transit*, 110 S. Ct. at 448-49; *Wright*, 479 U.S. at 423-24 ("We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy 'for the deprivation of a federally secured right.'") (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)).

122. See, e.g., *Artist*, 917 F.2d at 988-89 ("In light of the limited nature of the review provisions under the [Child Welfare] Act and the lack of any comprehensive remedial scheme, Congress did not intend to foreclose resort to Section 1983 as a cause of action under the [Act]."); *Lynch v. Dukakis*, 719 F.2d 504, 509-10 (1st Cir. 1983) (affirming district court holding that plaintiffs could enforce various provisions of Title IV-E of Social Security Act with § 1983); *Lashawn A. v. Dixon*, 762 F. Supp. 959, 989 (D.D.C. 1991) (holding that Child Welfare Act "creates obligations 'sufficiently specific and definite' to be within 'the competence of the judiciary to enforce' . . . and is not foreclosed 'by express provision or other specific evidence from the statute itself.'") (quoting *Golden State Transit*, 110 S. Ct. at 449); *B.H.*, 715 F. Supp. at 1403-04 (holding that existence of administrative remedies did not foreclose resort to § 1983 remedy).

123. See *supra* notes 15-120 and accompanying text.

124. *Wilder*, 110 S. Ct. at 2523 (quoting *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n.*, 453 U.S. 1, 20 (1981)); see also *Golden State Transit*, 110 S. Ct. at 448-49 ("[T]he statutory framework must be such that 'allowing a plaintiff' to bring a § 1983 action 'would be inconsistent with Congress' carefully tailored scheme.'") (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)).

provisions.¹²⁵ The Act also gives individuals who have been denied benefits the right to a hearing.¹²⁶ Finally, the Child Welfare Act requires the state to conduct a dispositional hearing within eighteen months after the child's original placement in foster care to determine the future plans for the child.¹²⁷

The Supreme Court has clearly rejected the argument that the ability to reduce or terminate funds is sufficient to find Congressional foreclosure.¹²⁸ Nor has it found the right to a hearing sufficient to constitute congressional foreclosure of section 1983 claims.¹²⁹ In only two cases has the Supreme Court found remedial schemes sufficiently comprehensive to constitute congressional foreclosure of section 1983 claims.¹³⁰ In both cases, the remedial schemes were much more comprehensive than the remedies provided in the Child Welfare Act.

125. See *supra* notes 20 & 112 and accompanying text. Defendants in *Lynch*, 719 F.2d at 511, contended that Congress intended the reduction or termination of funds to be the sole remedy under the Act and that § 1983 suits were, therefore, foreclosed. *Id.* at 510.

126. § 671(a)(12); see *supra* note 44. As the court in *Lynch* observed, the right to a hearing "is not really responsive to cases such as this one . . . where a class alleges systemic malfeasance. Such problems are treated inefficiently if they must be pursued individually." 719 F.2d at 512.

127. § 675(5)(C); see *supra* notes 100-02 and accompanying text.

128. *Rosado v. Wyman*, 397 U.S. 397, 420 (1970):

We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements.

See also *Wilder*, 110 S. Ct. at 2519 (explaining that Boren Amendment created right to reasonable rent and utility rates that can be enforced by federal courts under § 1983); *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423-24 (1987) (holding that authority of HUD to enforce benefits for housing project tenants did not exclude private enforcement in the courts under § 1983).

129. See *Wilder*, 110 S. Ct. at 2524 ("We . . . reject petitioners' argument that the existence of administrative procedures . . . evidences an intent to foreclose a private remedy in the federal courts."); *Wright*, 479 U.S. at 426-27; *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982). In fact, in cases arising under the Social Security Act, the Court traditionally has allowed § 1983 claims, see, e.g., *Maine v. Thiboutot*, 448 U.S. 1, 9 (1980); *Miller v. Youakim*, 440 U.S. 125, 131 (1979); *Quern v. Mandley*, 436 U.S. 725, 729-30 n.3 (1978); *Townsend v. Swank*, 404 U.S. 282, 284 n.2 (1971); *Rosado*, 397 U.S. at 401; *King v. Smith*, 392 U.S. 309, 311 (1968), and has required an express statement of intent to foreclose claims. See, e.g., *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975) (construing 42 U.S.C. § 405(h), which provides that suit is only permissible by way of judicial review provisions set forth in statute).

130. *Smith v. Robinson*, 468 U.S. 992, 1011 (1984) (discussing remedies of Education of Handicapped Act); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n.*, 453 U.S. 1, 20 (1981) (discussing remedies of Federal Research and Sanctuaries Act).

In the first foreclosure case, *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,¹³¹ the Court found that the comprehensive enforcement mechanism under the Federal Water Pollution Control Act (FWPCA) and the Maine Protection, Research and Sanctuaries Act (MPRSA) indicated that Congress intended to foreclose section 1983 claims.¹³² The FWPCA and the MPRSA, unlike the Child Welfare Act, provided that any interested person could seek judicial review in the United States courts of appeals of various actions taken by the Environmental Protection Agency Administrator.¹³³ In addition, both Acts included citizen-suit provisions that "authorize[d] private persons to sue for injunctions to enforce these statutes."¹³⁴

Similarly, in *Smith v. Robinson*,¹³⁵ the statute at issue, the Education of the Handicapped Act (EHA), provided for private judicial enforcement of its provisions.¹³⁶ The Court in *Smith* held that Congress foreclosed section 1983 to assert constitutional equal protection claims, finding that such claims were virtually identical to those permitted under the EHA, and that the EHA was "intended . . . to be the exclusive avenue through which a plaintiff may assert . . . equal protection claim[s]."¹³⁷

Unlike the FWPCA, MPRSA, and EHA, the Child Welfare Act has no such provision for private judicial enforcement of its requirements.¹³⁸ That is precisely why section 1983 claims are needed. Since each court that has addressed the issue of congressional foreclosure under the Child Welfare Act has rejected it, the remainder of the discussion will focus on whether the Act creates enforceable "rights" for purposes of section 1983.

B. Enforceable Rights Within the Meaning of Section 1983

In order to determine whether there is an enforceable right within the meaning of section 1983, a court must assess whether the federal statutory provision "was intend[ed] to benefit the putative

131. 453 U.S. 1 (1981).

132. *Id.* at 20-21.

133. *Id.* at 13-14.

134. *Id.* at 14. The FWPCA and MPRSA also provided for enforcement by government officials who were empowered to sue for violations of the Acts and to seek civil or criminal penalties. *Id.* at 13.

135. 468 U.S. 992 (1984).

136. *Id.* at 1010.

137. *Id.* at 1009-12.

138. See *Artist M. v. Johnson*, 917 F.2d 980, 988-89 (7th Cir. 1990) ("The Act does not provide for private citizen suits directly or the right to judicial review or a comprehensive system of procedures and guarantees."), *cert. granted sub nom. Suter v. Artist M.*, 111 S. Ct. 2008 (1991).

plaintiff.”¹³⁹ If it was so intended, he or she should have a cause of action under section 1983 unless: 1) the statute merely sets forth a “congressional preference” rather than creating a binding obligation on the governmental unit;¹⁴⁰ or 2) the statute is “too vague and amorphous” so that it is “beyond the competence of the judiciary to enforce.”¹⁴¹

With these rules as a guide, it is clear that the Child Welfare Act creates enforceable rights. First, the Act was enacted for the benefit of children in foster care, children at risk of entering the foster care system, and their biological and foster parents or other caretakers. As Part I of this article explains, the Act requires states to provide, for children and their families: 1) preventive services to help reduce the need for foster care, 2) proper care to children in foster care, and 3) permanency planning services.¹⁴² The Act creates a foster care framework within which states should be able to provide these services. It is difficult to imagine whom this framework was intended to benefit if not the children and their caretakers.¹⁴³

Second, Congress created rights in the Child Welfare Act that are enforceable in a section 1983 action. The argument to the contrary is that the Child Welfare Act simply provides federal financial assistance to states that wish to comply with its provisions, but that states are free to forego such assistance rather than comply with the Act. Therefore, the argument continues, the Act is nothing more than a statement of congressional preference.

In light of recent Supreme Court decisions, that argument must be rejected.¹⁴⁴ In *Wilder v. Virginia Hospital Ass’n*,¹⁴⁵ the Court up-

139. *Wilder v. Virginia Hosp. Ass’n*, 110 S. Ct. 2510, 2517 (1990) (quoting *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 448 (1989)).

140. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19 (1981).

141. *Wilder*, 110 S. Ct. at 2517; *Golden State Transit*, 110 S. Ct. at 448; *Wright v. City of Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 431 (1987).

142. See *supra* notes 52-111 and accompanying text.

143. *Artist M. v. Johnson*, 917 F.2d, 980, 987 (7th Cir. 1990) (“That Congress enacted the [Act] to benefit children such as those in the plaintiff classes cannot be seriously disputed.”), *cert. granted sub nom.* *Suter v. Artist M.*, 111 S. Ct. 2008 (1991); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 989 (D.D.C. 1991); *Norman v. Johnson*, 739 F. Supp. 1182, 1188 (N.D. Ill. 1990) (“[B]oth the child and the parents are beneficiaries. . .”).

144. The Supreme Court has found enforceable rights under funding statutes that provided federal financial assistance to states that voluntarily chose to participate in the federal scheme. See, e.g., *Wilder*, 110 S. Ct. at 2513, 2520; *Harris v. McRae*, 448 U.S. 297, 326 (1980); *Rosado v. Wyman*, 397 U.S. 397, 401 (1970); *King v. Smith*, 392 U.S. 309, 316-17, 333 (1968). But see *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19 (1981) (holding that Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010, did not create substantive rights; it only reflected a “congressional preference for certain kinds of treatment.”).

145. 110 S. Ct. 2510 (1990).

held a section 1983 claim under the Boren Amendment, which provided federal financial assistance to states that complied with its requirements regarding medicaid, although participation in the program was voluntary.¹⁴⁶ The Court reasoned that because compliance with the federal statute was a condition precedent to the receipt of federal assistance, the statute set forth more than a congressional preference.¹⁴⁷ As the Court explained:

[The] provision of federal funds is expressly conditioned on compliance with the [Boren] Amendment and the Secretary is authorized to withhold funds for noncompliance. . . . "The [Boren Amendment's] language succinctly sets forth a congressional command, which is wholly uncharacteristic of a mere suggestion or nudge."¹⁴⁸

Because the Boren Amendment set forth a "congressional command" or *duty* with which participating states had to comply, the plaintiffs had a *right* to enforce that duty.¹⁴⁹

In upholding the section 1983 claim, the *Wilder* Court distinguished an earlier case, *Pennhurst State School & Hospital v. Halderman*,¹⁵⁰ which also involved a federal funding statute.¹⁵¹ In *Pennhurst*, the plaintiffs asserted a section 1983 claim, alleging that the state violated their right to "minimally adequate habitation in the least restrictive environment,"¹⁵² under 42 U.S.C. § 6010, part of the Developmentally Disabled Assistance and Bill of Rights Act.¹⁵³ The Court held that section 6010 did not create enforceable section 1983 rights because it was simply a provision of congressional findings; it was not one of the provisions that set forth conditions for the receipt of federal funds.¹⁵⁴ As the Court observed, "Noticeably absent from § 6010 is any language suggesting that § 6010 is a 'condition' for the receipt of federal funding under the

146. *Id.* at 2525. For a more detailed discussion of *Wilder*, see *infra* notes 178-91 and accompanying text.

147. *Id.* at 2519.

148. *Id.* at 2525 (citations omitted) (quoting *West Virginia Univ. Hosps. v. Casey*, 885 F.2d 11, 20 (3d Cir. 1989)), *aff'd*, 111 S. Ct. 1138 (1991).

149. See Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 717 (1917); Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 31 (1913) (stating that under Hohfeldian terminology terms "right" and "duty" are jural correlatives).

150. 451 U.S. 1 (1981).

151. *Id.* at 11-14.

152. *Id.* at 6.

153. *Id.* at 13.

154. *Id.* at 19.

Act."¹⁵⁵ Thus, the Court held that the findings in section 6010 simply set forth congressional preferences.¹⁵⁶

Unlike section 6010, the requirements of the Child Welfare Act are conditions to the federal government's agreement to provide financial assistance to states. States must create the Child Welfare Plan, Foster Care Plan, Case Plan, and Case Review System and render the services required pursuant thereto in order to receive federal funds.¹⁵⁷ Thus, the Child Welfare Act, like the Boren Amendment in *Wilder*, sets forth more than a congressional preference; the Act creates binding obligations on states that accept federal funds.

Nevertheless, several courts have held that the Act does not create enforceable rights. In *Spielman v. Hildebrand*,¹⁵⁸ for example, plaintiffs alleged that officials of the Kansas Department of Social and Rehabilitation Services removed their foster child from their home without affording them the opportunity of a pre-removal hearing in violation of the Act.¹⁵⁹ The Court of Appeals for the Tenth Circuit not only held that there was no enforceable right to a pre-removal hearing under section 671(a)(12) of the Act, but also stated, "There is considerable doubt whether the [Act] confers any substantive rights that can be the subject of an action for damages under section 1983."¹⁶⁰ The court suggested that the Act essentially sets forth congressional preferences rather than mandating specific conduct.¹⁶¹ While other courts have limited the scope of enforceable rights for purposes of section 1983, the United States Court of Appeals for the Tenth Circuit is one of the few courts to suggest that the Act, in its entirety, creates no enforceable rights.¹⁶²

155. *Id.* at 13.

156. *Id.* at 19.

157. *See supra* notes 43-111 and accompanying text.

158. 873 F.2d 1377 (10th Cir. 1989).

159. *Id.* at 1381; *see* § 671(a)(12).

160. *Spielman*, 873 F.2d at 1386. The court relied, at least partially, on *Pennhurst*, which, as pointed out earlier, is distinguishable from claims brought under the Child Welfare Act. *See supra* notes 150-57 and accompanying text; *see also* *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1012 (N.D. Ill. 1989) ("[A]ny rights contained in [the Child Welfare Act] may not be enforced through a § 1983 action.").

161. *Spielman*, 873 F.2d at 1386. The court also held that the plaintiffs were not denied benefits under the Act. *Id.*

162. There are state court opinions that reach the same conclusion as the Court of Appeals for the Tenth Circuit. *See In re Cynthia A.*, 514 A.2d 360, 365 (Conn. App. Ct. 1986) ("The [A]ct . . . is an appropriations act and does not apply to individual actions . . . but merely sets forth general guidelines for a state's continued eligibility to receive funds for foster care maintenance."); *In re C.B.C.* 810 S.W.2d 671, 674 (Mo. Ct. App. 1991) (holding that Child Welfare Act is funding statute that "has no applicability to individual actions.").

Two provisions have been the subject of most of the litigation surrounding the Child Welfare Act. These provisions require states to: 1) create a Case Plan and Case Review System;¹⁶³ and 2) use reasonable efforts to prevent removal of the child or to facilitate the child's return to home.¹⁶⁴ The courts agree that the first provision is specific enough to create an enforceable right for purposes of section 1983, but there is less consensus about the latter,¹⁶⁵ because some courts find the reasonable efforts requirement too vague and amorphous to create enforceable rights.¹⁶⁶ Attempts to enforce various other provisions of the Act have been largely unsuccessful.

1. Case Plan and Case Review System Requirements

The provision of the Child Welfare Act that has most frequently been used to assert the creation of a section 1983 right is section 671(a)(16), which requires that the state create a Case Plan and Case Review System.¹⁶⁷ Because the Act provides in mandatory terms that states create a Case Plan and Case Review System to qualify for federal financial assistance, and because the requirements of the Case Plan and Case Review System are set forth with specificity, the courts have uniformly found that section 671(a)(16) creates enforceable rights under section 1983.¹⁶⁸ As the court in *Lynch v.*

163. § 671(a)(16).

164. § 671(a)(15).

165. See *infra* notes 167-73 and accompanying text.

166. See sources cited *infra* note 209.

167. § 671(a)(16). See, e.g., *Artist M. v. Johnson*, 917 F.2d 980, 985 (7th Cir. 1990) (noting that § 671(a)(16) mandated that state provide for case plan and case review system), *cert. granted sub nom.* *Suter v. Artist M.*, 111 S. Ct. 2008 (1991); *Del A. v. Edwards*, 855 F.2d 1148, 1152 (5th Cir.) (holding that established rights of children to development of case plan and review system barred defense of qualified immunity in § 1983 claim), *reh'g granted*, 862 F.2d 1107 (5th Cir. 1988), *appeal dismissed*, 867 F.2d 842 (5th Cir. 1989); *Darr ex rel. L.J. v. Massinga*, 838 F.2d 118, 123 (4th Cir. 1988) (holding that statute created standard of conduct and rights in plaintiff children), *cert. denied*, 488 U.S. 1018 (1989); *Lynch v. Dukakis*, 719 F.2d 504, 508-09 (1st Cir. 1983) (holding that, in order for state to receive funding, state must create case plan and review requirements and that individuals can enforce through § 1983); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 962 (D.D.C. 1991) (noting requirement that district social workers prepare written case plans); *B.H. v. Johnson*, 715 F. Supp. 1387, 1402 (N.D. Ill. 1989) (holding that Child Welfare Act created "an enforceable right to an individualized 'case plan' and 'case review system'").

168. See, e.g., *Edwards*, 855 F.2d at 1154 (holding that inaction on part of state officials was unreasonable and fell below standard of conduct set forth by Child Welfare Act, creating cause of action under § 1983); *Lynch*, 719 F.2d at 509 (holding that Title IV-E entitled plaintiff to rights enforceable in § 1983 cause of action); *B.H.*, 715 F. Supp. at 1402 (holding that provisions of Child Welfare Act imposed affirmative obligation on state that was enforceable in § 1983 cause of action); cf. *Artist*, 917 F.2d at 988 (holding that, although Act related primarily to appropriations, it created privately enforceable rights under § 1983); *Massinga*, 838 F.2d at 123 (holding that violations of Child Welfare

*Dukakis*¹⁶⁹ explained, section 675(1), unlike the former plan requirement in Title IV-A, "provide[s] . . . an explicit definition of a plan."¹⁷⁰ The Case Plan, for example, must include specific information and provide for ensuring that every child in foster care receive "proper care," which is defined to include both the physical and emotional well-being of the child.¹⁷¹ In addition, the Case Review System requires that each child's status be reviewed at stated intervals and sets forth both procedural and substantive guidelines for the manner in which the reviews are to be conducted.¹⁷² Because the requirements of the Case Plan and the Case Review System are clearly defined in the Act, courts are in agreement that section 671(a)(16) gives rise to a section 1983 right.¹⁷³

2. Reasonable Efforts

The reasonable efforts requirement,¹⁷⁴ unlike the Case Plan and Case Review System, is not defined in the Act.¹⁷⁵ Accordingly, it is arguably too vague and amorphous to enforce under section 1983. This important requirement of the Act, however, is specific enough to create section 1983 rights for several reasons. First, the United States Constitution uses reasonableness as a standard of behavior. The Fourth Amendment requires that searches and seizures be reasonable.¹⁷⁶ Courts regularly determine, on a case by case basis,

Act were privately enforceable under § 1983); *LaShawn*, 762 F. Supp. at 989 (holding that § 1983 was available to enforce rights conferred by Adoption Assistance Act); *In re Ashley K.*, 571 N.E.2d 905, 917-19 (Ill. App. Ct. 1991) (holding that five years and four months between foster placement and final disposition was not reasonable time).

169. 719 F.2d 504 (1st Cir. 1983).

170. *Id.* at 507.

171. § 675(5)(A). For a detailed discussion of the Case Plan requirements, see *supra* note 63-94 and accompanying text.

172. § 675(5)(B). For a detailed discussion of the Case Review System requirements, see *supra* note 95-013 and accompanying text.

173. That the Case Plan and Case Review System requirements are tailored to individual cases also supports the idea of individual remedies.

174. See Shotton, *supra* note 13, at 225-26.

175. Reasonable efforts must be made prior to placement to prevent or eliminate the need for foster care placement. § 671(a)(15). In addition, reasonable efforts must be made, for children in foster care, to return them to their homes. *Id.*; see *supra* note 91 and accompanying text. Given the importance of the reasonable efforts provision, Congress' failure to define reasonable efforts is unfortunate. Some states have been more elaborate in defining child welfare services. See, e.g., *N.Y. Soc. Serv. Law* § 409 (McKinney Supp. 1991). Congress should consider amending the Act to clarify it. Nonetheless, the Act's present language is sufficiently specific to create an enforceable right.

176. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.").

whether that standard of reasonableness has been satisfied.¹⁷⁷ Second, the Supreme Court has, in other federal funding cases, found the standard of reasonableness enforceable for purposes of section 1983. *Wilder v. Virginia Hospital Ass'n*,¹⁷⁸ for example, involved a challenge under the Boren Amendment to the Medicaid Act.¹⁷⁹ The amendment required participating states to reimburse health care providers for medical services rendered to the needy.¹⁸⁰ Federal financial assistance was then provided to states that complied with the requirements of the Boren Amendment, although participation in the program was voluntary.¹⁸¹ In order to receive federal financial assistance the state had to have a "plan for medical assistance"¹⁸² that, among other things, provided for reimbursing health care providers.¹⁸³ The amendment further required that the reimbursement rates be "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities."¹⁸⁴

In *Wilder*, a health care provider sued the state for failing to set reasonable and adequate reimbursement rates.¹⁸⁵ The state argued that the Medicaid Act did not create an enforceable right, in part, because it was too vague and amorphous.¹⁸⁶ Despite the fact that the Act did not define reasonable and adequate, the court found that the plaintiff had a valid section 1983 claim.¹⁸⁷ The Court reasoned that the "reasonable and adequate" standard was specific enough to enforce, in part, because the statute and regulations promulgated pursuant to the Boren Amendment set forth factors for the states to consider in adopting its rates.¹⁸⁸ In addition, the

177. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 7-12 (1985) (holding that use of deadly force against fleeing, unarmed, nondangerous suspect was unconstitutional unless suspect posed serious threat); *Welsh v. Wisconsin*, 466 U.S. 740, 748-53 (1984) (holding that presumption of unreasonableness attached to all warrantless home entries).

178. 110 S. Ct. 2510 (1990).

179. *Id.* at 2513.

180. *Id.*

181. *Id.* at 2510.

182. *Id.*

183. *Id.*

184. *Id.* at 2514. It also required "reasonable access" to eligible participants. *Id.* at 2512.

185. *Id.*

186. *Id.* at 2522.

187. *Id.* at 2522-23.

188. *Id.* at 2522. These factors included:

(1) the unique situation (financial and otherwise) of a hospital that serves a disproportionate number of low income patients, (2) the statutory requirements for adequate care in a nursing home, and (3) the special situation of hospitals providing inpatient care when long term care at a nursing home would be sufficient but is unavailable.

reasonableness of the rates were to be measured against the "objective benchmark of an efficiently and economically operated facility."¹⁸⁹ Thus, although the states had considerable flexibility in establishing rates, including the ability to use various methods to calculate them, their discretion was not unlimited.¹⁹⁰ As the Court explained:

While there may be a range of reasonable rates, there certainly are *some* rates outside that range that no State could ever find to be reasonable and adequate under the Act. Although some knowledge of the hospital industry might be required to evaluate a State's findings with respect to the reasonableness of its rates, such an inquiry is well within the competence of the judiciary.¹⁹¹

In addition to its opinion in *Wilder*, the Supreme Court held, in *Wright v. City of Roanoke Redevelopment & Housing Authority*,¹⁹² that the use of the term "reasonable" as a standard of conduct was not too vague and amorphous to create an enforceable right.¹⁹³ In *Wright*, the Court upheld a section 1983 claim based on the Brooke Amendment to the Housing Act of 1937, which limited the amount of rent that could be charged to a public housing tenant.¹⁹⁴ The Brooke Amendment required the inclusion of a reasonable allowance in the rent for utilities.¹⁹⁵ Petitioners in *Wright* were low income public housing tenants who alleged that they had been charged too much — an unreasonable amount — for utilities, in violation of the Brooke Amendment.¹⁹⁶ The Court rejected the argument that the provision for reasonable utilities was too vague and amorphous, concluding that the regulations included sufficient guidelines to create an enforceable right.¹⁹⁷ The Court's reliance in *Wilder* and

Id.

189. *Id.* at 2523.

190. *Id.*

191. *Id.* (footnote omitted).

192. 479 U.S. 418 (1987).

193. *Id.* at 432.

194. *Id.* at 429-30.

195. *Id.* at 431.

196. *Id.* at 421. Specifically, the plaintiffs argued that a surcharge for excess utility consumption that should have been part of their rent had been improperly imposed by the defendants. *Id.* The amount of rent was generally limited to a percentage of the family income. *Id.* at 420 n.2.

197. *Id.* at 431-32. The regulations

require housing authorities . . . to . . . [calculate] their utility allowances on the basis of current data, to set the allowances in such a fashion so that 90 percent of a particular authority's dwelling units do not pay surcharges, and to review tenant surcharges quarterly and consider revision of the allowances if more than 25 percent of any category of units are being surcharged.

Wright on the regulations promulgated by the overseeing federal agencies, or some other objective benchmark in order to measure compliance with federal laws, suggests that the Court is looking for some limitation on the discretion of a state agency when the statutory language is broad, in order to find sufficient specificity for a section 1983 right.

The regulations promulgated under the Child Welfare Act provide an objective benchmark that suggest specific services which may satisfy the reasonable efforts requirement. The regulation that reiterates the reasonable efforts requirement¹⁹⁸ cross references the regulation setting forth specific types of child welfare services,¹⁹⁹ which suggests that the provision of the same or similar services will satisfy the reasonable efforts requirement. These specific examples of reasonable services give states as much guidance as the regulations in *Wilder* and *Wright*. Although the states have flexibility to assess each family situation and determine what services are needed to satisfy the reasonable efforts requirement in a given case,²⁰⁰ the specific examples illustrated in the regulations give states sufficient guidance to enable them to understand the meaning of the requirement.²⁰¹

In addition to the regulations, the language of the Act is sufficiently specific to render the reasonable efforts requirement enforceable for purposes of section 1983. Because the Act clearly sets

Id. at 421-22 n.4.

198. 45 C.F.R. § 1356.21(b).

199. 45 C.F.R. § 1357.15(e).

200. In *Norman v. Johnson*, 739 F. Supp. 1182, 1187 (N.D. Ill. 1990), the court rejected the defendant's argument that "permitting enforcement [would] unduly deprive the state of flexibility and discretion in providing child welfare services." As the court explained, "[a] standard of 'reasonable efforts' is a flexible standard that leaves much to the discretion of the states." *Id.*

201. In addition to the regulations, the National Council of Juvenile and Family Court Judges, the Child Welfare League of America, the Youth Law Center, and the National Center for Youth Law have produced reasonable efforts guidelines. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES ET AL., EDNA McCONNELL CLARK FOUNDATION, MAKING REASONABLE EFFORTS: STEPS FOR KEEPING FAMILIES TOGETHER 59 (no publication date) [hereinafter MAKING REASONABLE EFFORTS]. It has been suggested that states follow a three-step process to determine what efforts are reasonable in any given case:

The steps include: (1) identifying the exact danger that puts the child at risk of placement and that justifies state intervention; (2) determining how the family problems are causing or contributing to this danger to the child; and 3) designing and providing services for the family that alleviate or diminish the danger to the child.

Shotton, *supra* note 13, at 226. Reasonable efforts do not require "unreasonable efforts." *In re Kenny F.*, 786 P.2d 699, 703 (N.M. Ct. App. 1990) ("When it becomes clear that preserving the family is not compatible with protecting the child, further efforts at preservation are not required.").

forth the goals of the reasonable efforts requirements — to prevent the need for removal of the child from his or her home and, for those children who have been removed, to return them home — the reasonable efforts requirement is not too open ended for trained professionals to decipher.²⁰²

In addition to the Supreme Court's decisions suggesting that the term "reasonable" is sufficiently specific to give rise to enforceable rights, basic common law principles support the same conclusion. Virtually every first year law student learns that the requirement of reasonableness is used throughout the law to enforce rights. One of the basic principles of negligence law, for example, is that each individual must act as a reasonable person of ordinary prudence under the same or similar circumstances.²⁰³ What is "reasonable" is almost completely undefined²⁰⁴ and is determined by the fact finder on a case by case basis. Nevertheless, we all have a right to expect that others will exercise their duty to use reasonable care and if we are injured as a result of their failure to use such care, we have a cause of action in negligence.²⁰⁵

The standard of reasonableness is used not only in tort law, but in contract law. For example, a promisor may have a duty to use best or reasonable efforts.²⁰⁶ Other references to reasonableness as an enforceable standard are not uncommon in contracts law.²⁰⁷ Thus,

202. For example, if a child is at risk of being removed from the home because the parents have run out of money and cannot afford to feed him, the reasonable efforts requirement may include a cash payment to the parents or the purchase of food for the family. See Carol R. Golubuck, *Cash Assistance to Families: An Essential Component of Reasonable Efforts to Prevent and Eliminate Foster Care Placement of Their Children*, 19 CLEARINGHOUSE REV. 1393, 1398 (1986).

203. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984). This assumes the existence of a duty. *Id.*

204. *Id.* at § 31. The finder of fact must weigh the risk versus the utility of the conduct along with the burden involved in acting in a safer manner. *Id.*

205. *Id.* at § 30. This assumes the existence of a duty and proximate cause. *Id.* The reasonable efforts requirement is analogous to the common law duty to use reasonable care in the sense that reasonable efforts requires an assessment of a family's problem on a case by case basis, and a determination of what conduct would be reasonable under the circumstances.

206. See, e.g., *Bloor v. Falstaff Brewing*, 454 F. Supp. 258, 266-67 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 609 (2d Cir. 1979); *Wood v. Lucy Lady Duff Gordon*, 118 N.E. 214, 215 (N.Y. 1917). The duty to use reasonable efforts may be based on an express provision in the contract. *Bloor*, 454 F. Supp. at 260. Alternatively, a court may infer a duty to use reasonable efforts when the promisee is completely, or in large part, dependent on the efforts of the promisor to receive the benefit of the bargain. *Wood*, 118 N.E. at 214.

207. It is well-settled, for example, that if an offer is silent with respect to how long it will remain effective, it will lapse after a "reasonable" time. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.19 (2d ed. 1990). It is up to the court to determine, given a specific set of circumstances, what is reasonable in a given situation. Article 2 of the Uniform Commercial Code also uses "reasonableness" as a standard in various

reference to contract and tort law suggests that the duty to use reasonable efforts under the Child Welfare Act is not too vague and amorphous for courts to enforce.

Given the well-settled use of reasonableness as a standard in the United States Constitution, tort and contract law, and the foregoing decisions of the Supreme Court,²⁰⁸ it is not surprising that several courts have upheld section 1983 claims based upon the reasonable efforts requirement.²⁰⁹ In *Artist M. v. John-*

circumstances. See, e.g., U.C.C. § 2-201 (1990) (establishing that satisfaction of statute of frauds in case between merchants depends on whether written confirmation is received within reasonable time by party asserting statute of frauds defense); U.C.C. § 2-207 (1990) (establishing definite and seasonable expression of acceptance of written confirmation sent within reasonable time will generally constitute an acceptance even if it is not mirror image of offer); U.C.C. § 2-306 (1990) (establishing that no unreasonable quantity is permissible in output or requirements contracts).

208. See, e.g., *Wilder v. Virginia Hospital Ass'n*, 110 S. Ct. 2510 (1990); *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987).

209. See *Artist M. v. Johnson*, 917 F.2d 980, 989 (7th Cir. 1990), *cert. granted sub nom. Suter v. Artist M.*, 111 S. Ct. 2008 (1991); cf. *Del A. v. Edwards*, 855 F.2d 1148, 1154 (5th Cir.) (holding that reasonable person would have known that inaction was unlawful), *reh'g granted*, 862 F.2d 1107 (5th Cir. 1988), *appeal dismissed*, 867 F.2d 842 (5th Cir. 1989); *Darr ex rel. L.J. v. Massinga*, 838 F.2d 118, 122 (4th Cir. 1988) (finding that official could reasonably be expected to know that failure to comply with statute would violate constitutional rights of children), *cert. denied*, 488 U.S. 1018 (1989); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 970, 986 (D.D.C. 1991) (holding that District of Columbia Child and Family Services Division failed to use reasonable efforts to protect children); *Norman v. Johnson*, 739 F. Supp. 1182, 1185-87 (N.D. Ill. 1990) (finding reasonable efforts requirement to be flexible standard that leaves much to discretion of states). But see *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1012 (N.D. Ill. 1989) (holding that rights created by Child Welfare Act were too amorphous to be enforceable); *B.H. v. Johnson*, 715 F. Supp. 1387, 1402 (N.D. Ill. 1989).

A number of state court cases have also suggested that "reasonable efforts" created an enforceable right. See, e.g., *In re Amy M.*, 283 Cal. Rptr. 788, 791-92 (Cal. Ct. App. 1991) (holding that reasonable efforts were made prior to child's removal from home); *In re Burns*, 519 A.2d 638, 648-49 (Del. 1986) (holding that state failed to provide reasonable efforts to prevent need for placement or to reunify family when mother needed housing); *In re M.H.*, 444 N.W.2d 110, 111-13 (Iowa Ct. App. 1989) (explaining that transportation for medical care and additional clothing would have been reasonable efforts to keep child at home); *In re Kenny F.*, 786 P.2d 699, 703-04 (N.M. Ct. App. 1990) (finding that reasonable efforts were made prior to termination of parental rights when mother made no effort to maintain contact with child and approved plan for state to seek termination of her parental rights); *In re S.A.D.*, 555 A.2d 123, 125 (Pa. Super. Ct. 1989) (discussing Monroe County Children and Youth Services failed to use reasonable efforts to eliminate need for placement when it advised mother, who had no money and no home, that "her only alternative was to . . . place her child in custody . . . until she could find a place to stay."). But see *In re Cynthia A.*, 514 A.2d 360, 366 (Conn. App. Ct. 1986) (holding that reasonable efforts requirement was not privately enforceable). Not infrequently, however, the state court decisions are based on compatible state statutes rather than on the Child Welfare Act. See, e.g., *In re M.A.*, 408 N.W.2d 227, 235-36 (Minn. Ct. App. 1987) (stating that reasonable efforts were based on MINN. STAT. § 260.221(b)(5) (1986)).

son,²¹⁰ the plaintiffs alleged that the Illinois Department of Children and Family Services (DCFS)²¹¹ failed to use reasonable efforts to eliminate the need for foster care and that they failed to use reasonable efforts to return those who were in foster care back home.²¹² The court rejected the state's argument that this provision was too vague and amorphous to enforce,²¹³ finding *Wilder* and *Wright* controlling.²¹⁴ By enforcing the reasonable efforts requirement, the United States Court of Appeals for the Seventh Circuit effectively overruled two earlier Illinois district court cases that found the provision too vague and amorphous to enforce,²¹⁵ while agreeing with yet a third Illinois district court opinion that had upheld a section 1983 claim based upon the reasonable efforts requirement.²¹⁶ The Supreme Court's grant of certiorari in *Artist*, however, renders the private enforceability of the reasonable efforts provision uncertain.

In the most recent federal case to address the reasonable efforts requirement, *LaShawn A. v. Dixon*,²¹⁷ the defendants, District of Columbia officials, conceded that they had insufficient resources to satisfy the reasonable efforts requirement.²¹⁸ Consistent with this admission, the court found that the reasonable efforts requirement

210. 917 F.2d 980 (7th Cir. 1990), *cert. granted sub nom.* Suter v. Artist M., 111 S. Ct. 2008 (1991).

211. Officials of the Illinois DCFS have been the defendants in several § 1983 suits arising under the Act. *See, e.g., B.H.*, 715 F.2d at 1389; *Norman*, 739 F. Supp. at 1184 (ordering DCFS to make reasonable efforts aimed at returning children to homes); *Aristotle*, 721 F.Supp. at 1004 (discussing children who were wards of court and who sued officials of DCFS alleging violations of due process and associational rights).

212. *Artist*, 917 F.2d at 983. Plaintiffs also alleged violations of § 671(a)(9), (16). *Id.* The court found that these combined provisions created enforceable rights. *Id.* at 988. The court's discussion, however, focused on the reasonable efforts requirement, and the court explicitly found it specific enough to enforce. *Id.* at 987.

213. *Id.* at 986. The state also argued that the Act did not create binding obligations and that the reasonable efforts provision was not intended to benefit the plaintiff class of children. *Id.*

214. *Id.* at 987. The court concluded that the state chose to meet the reasonable efforts requirement through the use of caseworkers and that without caseworkers little if any effort would be made to comply with the requirement. *Id.* Therefore, it ordered the timely assignment of caseworkers. *Id.*; *see infra* notes 273-75 and accompanying text.

215. *See, e.g. Aristotle*, 721 F.Supp. at 1012 (" '[R]easonable efforts to reunify families' [is] amorphous and not subject to precise definition. "); *B.H.*, 715 F. Supp. at 1401 (" [W]e do not believe Congress intended to create an enforceable individual right of placement in the least restrictive (most family-like) setting or of 'reasonable efforts' to eliminate the necessity of removing the child from the home or to return to a child home. ").

216. *See Norman v. Johnson*, 739 F. Supp. 1182, 1185 (N.D. Ill. 1990). The court in *Norman* upheld a § 1983 claim when impoverished parents alleged that the Illinois DCFS failed to use reasonable efforts to eliminate the need for foster care by removing children from the parents home without first attempting to help the parents find adequate housing or providing emergency food, cash, or other necessary services.

217. 762 F. Supp. 959 (D.D.C. 1991).

218. *Id.* at 970.

had not been satisfied.²¹⁹ The court's discussion appeared to assume that the reasonable efforts requirement was privately enforceable without explicitly saying so. Instead, the court in *LaShawn* indicated that the Act as a whole created enforceable rights.²²⁰ With the many thousands of children straining state child welfare agency resources, it is ironic that state agencies in many cases must be compelled by the courts to satisfy the reasonable efforts requirement to prevent placement since prevention is less costly than placement.²²¹

3. Combined Provisions

At least one federal case, *Darr ex rel. L.J. v. Massinga*,²²² has addressed both the Case Plan and Case Review System, and the reasonable efforts requirements of the Child Welfare Act. The court was faced with broad allegations that the foster care system was mismanaged, and that as a result, the children "were victims of physical and sexual abuse as well as medical neglect."²²³ The plaintiffs alleged that the state violated their right to proper care, failed to maintain foster care standards that were "reasonably in accord with recommended standards of national organizations," and failed to comply with the requirements of the Case Plan and Case Review System and the duty to report when it had reason to believe that a foster home or institution was unsuitable.²²⁴ The expert testimony supported the claim that there were "systemic deficiencies" in the foster care system.²²⁵ Rather than finding that an isolated provision of the Act gave rise to a section 1983 claim, the court found that section 671(a)(9), (10), and (16) "taken together, . . . spell[ed] out a standard of conduct, and as a corollary rights in plaintiffs."²²⁶

Like *Massinga*, the court in *LaShawn A. v. Dixon*²²⁷ was faced with systemic deficiencies in a foster care system.²²⁸ The court found that "[i]n almost every area of the federal law, the District's child welfare system was deficient,"²²⁹ and found that numerous provi-

219. *Id.* at 986.

220. *Id.* at 989; see *infra* note 232-33 and accompanying text.

221. See *infra* notes 333-36 and accompanying text.

222. 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989).

223. *Id.* at 119.

224. *Id.* at 123. Accordingly, plaintiffs alleged violations of §§ 671(a)(9)-(10), (16). *Id.*

225. *Id.* at 121 (emphasis added).

226. *Id.* at 123.

227. 762 F. Supp. 959 (D.D.C. 1991).

228. *Id.* at 989.

229. *Id.*

sions of the Act had been violated.²³⁰ The court in *LaShawn*, relying in part on *Massinga*, did not specify, section by section, which provisions of the Child Welfare Act created enforceable rights. Instead, the court concluded, as a general matter, that the Act created enforceable rights.²³¹ These provisions are extraordinarily specific, spelling out exactly what a state must do for children in its care in order to receive funding under the Act.²³² The court in *LaShawn* appeared to recognize that the Act created a comprehensive scheme with which the District of Columbia failed to comply.²³³

4. Other Provisions

Several other provisions of the Child Welfare Act have been addressed by the courts and found not to create enforceable rights. For example, in *Scrivner v. Andrews*,²³⁴ and *Winston v. Delaware County Children & Youth Services*,²³⁵ the plaintiffs, who were the biological parents, alleged that the state agencies responsible for administering the foster care systems deprived them of the right to meaningful visitation, in violation of the Act.²³⁶ In both cases, the plaintiffs were allowed visitation privileges for only one hour every two weeks.²³⁷ Finding no statutory provision that explicitly or implicitly

230. *Id.* at 986-87. The court found, for example, that the District of Columbia Children and Family Services Division (CFSD) had "consistently failed to use 'reasonable efforts' to prevent the removal of children from their homes or to provide the services necessary to reunite them with their families when removal cannot be avoided." *Id.* at 986. This violated § 671(a)(15). The court also found, among other things, that the CFSD consistently failed to: 1) "place children in the least restrictive placements in close proximity to their families"; 2) "provide services once children are . . . placed in foster care"; 3) "prepare written case plans"; and 4) "ensure that the children in . . . custody receive timely . . . reviews." *LaShawn*, 762 F. Supp. at 986; see §§ 627(a)(2)(C), 671(a)(16), 675(1)(B), 675(5)(A),(B). The court in *LaShawn* also found that the CFSD's information system was woefully inadequate. 762 F. Supp. at 986. The court further noted that the CFSD failed "to investigate reports of abuse and neglect in a timely manner; . . . to provide services to children and families; . . . to make appropriate foster care placements; and . . . to assure a permanent home for the children in its care, among other things." *Id.* at 989.

231. *LaShawn*, 762 F. Supp. at 989.

232. *Id.*; see also *Wolfe ex rel. Joseph A. v. New Mexico Dep't of Human Servs.*, 575 F. Supp. 346, 353 (D.N.M. 1983) ("It is clear that the plaintiffs may obtain injunctive and declaratory relief for violations of Title IV.").

233. *LaShawn*, 762 F. Supp. at 989.

234. 816 F.2d 261 (6th Cir. 1987).

235. 748 F. Supp. 1128 (E.D. Pa. 1990).

236. *Scrivner*, 816 F.2d at 262; *Winston*, 748 F. Supp. at 1130.

237. *Scrivner*, 816 F.2d at 262; *Winston*, 748 F. Supp. at 1131. The plaintiffs in *Winston* urged that the court establish four hours per week as the minimum visitation period. 748 F. Supp. at 1130.

required the states to provide for meaningful visitation, the courts concluded that there was no such statutory right.²³⁸

In fact, however, the Act can be construed to create an enforceable right to meaningful visitation. First, Title IV-E provides federal reimbursement to states for foster care maintenance payments.²³⁹ "Foster care maintenance payments" are defined, in part, as payments to cover the cost of "reasonable travel to the child's home for visitation."²⁴⁰ Furthermore, parents are entitled to procedural safeguards for "any determination affecting visitation privileges."²⁴¹ Thus, the Act explicitly contemplates visitation between the child and his or her parents. Certainly, Congress would not go through the trouble of explicitly acknowledging the right to visitation unless it contemplated that such visitation be meaningful.²⁴²

Complementing these explicit references to visitation is the implicit underlying theme of the Act, permanency planning for children who have entered the foster care system to enable them to be reunited with their families or released for adoption. When the placement goal is reunification, meaningful visitation is essential.²⁴³ Moreover, one purpose of the Act is to shorten the average length of stay in foster care.²⁴⁴ Thus, one aspect of the reasonable efforts requirement discussed above, is the "reasonable effort . . . to make it possible for the child to return to his home."²⁴⁵ Such reasonable

238. *Scrivner*, 816 F.2d at 264; *Winston*, 748 F. Supp. at 1133. In *B.H. v. Johnson*, 715 F. Supp. 1387 (N.D. Ill. 1989), the court rejected a similar claim to meaningful sibling visitation, stressing that plaintiffs' entitlement to an individualized case plan and case review system did not mean plaintiffs have rights of meaningful visitation between siblings. *Id.* at 1402.

239. § 675(4)(A); see *supra* notes 39-40 and accompanying text.

240. § 675(4)(A).

241. § 675(5)(C).

242. The term "meaningful," like the term "reasonable," may be incapable of precise definition, but that does not render it too vague to be enforceable for purposes of § 1983. Cf. *Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2523 (1990) (stating that judiciary is competent to inquire into reasonableness). One of the rules of statutory construction is that a statute should be construed, if possible, to give meaning to each provision. If the reference to visitation is meaningless, Congress would have omitted it.

243. As the court in *LaShawn* recognized, "For children in foster care, regular visits with their . . . parents and siblings are crucial if there is to be any chance of reunification." 762 F. Supp. 959, 985-86 (D.D.C. 1991). Even when reunification is not the goal, meaningful visitation may be required to help the child work through the problems that initially led to his or her removal from the home. See Leon A. Rosenberg, *Psychological Factors in Separation and Reunification: The Needs of the Child and of the Family*, CHILDREN'S LEGAL RTS. J., Winter 1991, at 19, 20.

244. See *supra* note 35 and accompanying text.

245. § 671(a)(15). Similarly, the Case Plan is a plan for assuring that sufficient services are provided to the parents, child and foster parents to "facilitate return of the child to his own home or the permanent placement of the child." § 675(1)(B); see *supra* text accompanying note 88.

efforts, it seems, must include meaningful visitation.²⁴⁶ Although every case is unique,²⁴⁷ reasonable efforts may require more than allowing a child to visit his or her biological parents for one hour every two weeks.²⁴⁸ Reasonable efforts were certainly not made in cases like *LaShawn*, when "[s]eventy percent of [the] children had no parent-child visiting schedules in their records."²⁴⁹

Another basis on which a right of meaningful visitation could be found is the requirement that each child in the foster system receive "proper care."²⁵⁰ Proper care includes placement "in close proximity to the parents' home, consistent with the best interests and special needs of the child."²⁵¹ Certainly, at least one reason for requiring that an effort be made to place the child close to home is to maintain contact between the parents and the child.²⁵² Thus, the Act both explicitly and implicitly suggests that meaningful visitation is an enforceable right.

246. The court in *Winston* acknowledged that "[t]he plaintiffs' best argument that visitation is . . . essential is the claim that it is fundamental to the 'reasonable efforts' . . . to reunify families. . . . The plaintiffs have presented evidence indicating that frequent visits between parent and child are helpful in leading to the eventual reunification of the family." 748 F. Supp. 1128, 1133 (E.D. Pa. 1990).

247. Many factors must be considered to determine what an appropriate visitation schedule should be in any given case, and whether the visits should be supervised or unsupervised. Rosenberg, *supra* note 243, at 21-22.

248. *Scrivner v. Andrews*, 816 F.2d 261, 262 (6th Cir. 1987); *Winston*, 748 F. Supp. at 1131. After the original visitation schedule in *Scrivner* was contested, it was modified to allow visitation "for three hours on two days of each week." 816 F.2d at 262. In *Winston*, the father's visitation rights were increased to a minimum of two hours per week only after initial requests for increased visitation rights were refused and he obtained counsel. 748 F. Supp. at 1131. The fact that the original visitation schedules in *Winston* and *Scrivner* were identical leads one to wonder whether state agencies routinely adopt identical, across-the-board visitation rights for all children. Many factors exist, including, most importantly perhaps, the physical and emotional well-being of the child that require visitation schedules to be individually tailored. Rosenberg, *supra* note 243, at 21-22. For example, studies suggest that even children who have been physically abused or neglected tend to blame themselves, and when there is insufficient contact with the abusive parent, many children tend to remember the good things about the parent and blame themselves for driving the parent away. *Id.* at 20. Thus, visitation may be necessary to remind the child that the parent is "a real person, not just . . . a hazy memory . . . of a perfect [parent]." *Id.*

249. 762 F.Supp. 959, 973 (D.D.C. 1991). In *LaShawn*, the court did not directly address the issue of whether meaningful visitation is an enforceable right under the Act.

250. See *supra* note 70 and accompanying text.

251. 42 U.S.C.A. § 675(5)(A) (West Supp. 1991).

252. H.R. REP. NO. 136, 96th Cong., 1st Sess. 48-49 (1979) ("A child's chances of being reunited with his family are usually reduced when he is placed at great distances from his family and home community. Studies have shown that parent-child contact is often the only significant indicator of the potential for a child's being returned home once in care."). Other reasons for preferring placement in close proximity to the parents presumably include minimizing the disruption of the child's life so that he or she can continue to attend the same school, see friends and perhaps other extended family.

The court in *Winston*, however, refused to find an enforceable right based on the reasonable efforts requirement, explaining that it would not "create additional requirements not mentioned in the statute but merely 'consistent with [its] purpose.'"²⁵³ The court further reasoned that to dictate a specific minimum number of visitation hours that must be allowed each week would unduly interfere with the state's flexibility to satisfy the Act's requirements in a variety of ways.²⁵⁴

Neither of these concerns is persuasive. First, the Supreme Court rejected the notion that section 1983 rights can only be found in the explicit language of a federal statute in *Golden State Transit Corp. v. City of Los Angeles*.²⁵⁵ The Court explained that a section 1983 claim "turns on whether the statute, by its terms or as interpreted, creates obligations" specific enough to enforce.²⁵⁶ Second, finding a right to meaningful visitation would not unduly interfere with states' flexibility. States would retain the flexibility to determine where and when during each week the visits would take place, whether the visits should be supervised or unsupervised, and other details. Although requiring, for example, that visitation rights be individually tailored to the circumstances of each case may somewhat restrict the states' flexibility and prevent them from standardizing visitation rights, it would be no more of an intrusion than other court orders that have been issued.²⁵⁷ In addition, any restriction of the states' flexibility would be outweighed by the potential benefits to the children and their families. It is unfortunate that the courts in *Scrivner* and *Winston* were unwilling to break new ground and find an en-

253. 748 F. Supp. 1128, 1132 (E.D. Pa. 1990) (alteration in original) (quoting *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1012 (N.D. Ill. 1989)).

254. *Id.* at 1133.

255. 110 S. Ct. 444, 452 (1989).

256. *Id.* at 449 (emphasis added). The Court further elaborated on this principle noting:

The city's . . . argument that the [National Labor Relations Act] does not secure rights against the State because the duties of the State are not expressly set forth in the text of the statute, is not persuasive. We have held, based on the language, structure, and history of the NLRA, that the Act protects certain rights. . . . While [those rights are] not set forth in the specific text of an enumerated section of the NLRA, that might well also be said with respect to any number of rights or obligations that we have found implicit in a statute's language.

Id. at 451.

257. The state could, for example, do research sufficient to indicate the number of visitation hours per week that would normally meet the statutory requirement and then create a rebuttable presumption that anything less than that number is inadequate. The research would have to determine whether a rebuttable presumption would be workable because there are individual factors to consider. See *supra* note 248.

forceable right to meaningful visitation under the Child Welfare Act.²⁵⁸

Another provision that has been unsuccessfully asserted as creating an enforceable right is the provision requiring that states place children "in the least restrictive (most family like) setting available."²⁵⁹ One federal district court in two cases found that this standard was too amorphous to enforce in a section 1983 claim.²⁶⁰ The court in *B.H. v. Johnson* explained, "It is difficult to know what is meant by . . . 'least restrictive setting.'"²⁶¹ While the language, "least restrictive," leaves room for interpretation, this provision seems no more vague and amorphous than the reasonable efforts requirement. The very least restrictive setting would be a single family home in most cases. A group home would generally be more restrictive because there would be more children to supervise. The Act itself sets forth guidelines on what types of placements may be considered least restrictive.²⁶² Aside from placement in a foster

258. Perhaps the problem in *Scrivner* was with the allegations. Rather than allege a direct violation of the reasonable efforts provision, or the inadequacy of the Case Plan, the plaintiff simply alleged that she was deprived of the right to meaningful visitation. 816 F.2d 261, 262 (6th Cir. 1987). In *Winston*, however, these arguments were made and the court still failed to find an enforceable right. 748 F. Supp. at 1133.

Although *Scrivner* suggests an unwillingness on the part of the Court of Appeals for the Sixth Circuit to privately enforce the Child Welfare Act, in *Timmy S. v. Stumbo*, 916 F.2d 312 (6th Cir. 1990), the court held that foster parents could not be excluded from the administrative hearing provided for in § 671(a)(12), stressing that the right to a hearing applied to "any individual whose claim for benefits . . . is denied or is not acted upon with reasonable promptness." *Id.* at 315 (quoting *Timmy S. v. Stumbo*, No. 80-24, slip op. at 4 (E.D. Ky. Sept. 7, 1989)). The Court of Appeals for the Sixth Circuit has also noted that the Act may confer enforceable rights on children and parents in general, *Leshner v. Lavrich*, 784 F.2d 193, 197 (6th Cir. 1986), but held that no such enforceable right was asserted in an action for damages and retrospective relief attempting to set aside a state court decision finding the biological mother guilty of neglect. *Id.* at 197-98; see also *In re Scott County Master Docket*, 672 F. Supp. 1152, 1204 (D. Minn. 1987) ("[W]hatever rights the [Child Welfare] Act might confer . . . , relief nullifying a prior state court judgment . . . or awarding damages in connection therewith, would not be available." (quoting *Leshner*, 784 F.2d at 197-98)), *aff'd on other grounds sub nom. Myers v. Scott County*, 868 F.2d 1017 (8th Cir. 1989); see *infra* note 331 for a discussion of damages.

259. § 675(5)(A).

260. See *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1012 (N.D. Ill. 1989); *B.H. v. Johnson*, 715 F. Supp. 1387, 1401 (N.D. Ill. 1989).

261. *B.H.*, 715 F. Supp. at 1401 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)). The holding in *B.H.* is particularly curious since the court found a § 1983 right to a Case Plan and a Case Review System under § 671(a)(16). See *id.* at 1402. Because the right to placement in "the least restrictive" setting is part of the Case Review System requirements, the court in *B.H.* appears to conclude that while there is a procedural right to a Case Review System, the substance of the Case Review System need not be complied with. See *infra* notes 319-20 and accompanying text.

262. § 672.

family home,²⁶³ foster children may be placed in a child-care institution.²⁶⁴ Such institutions are defined, among other things, as institutions that accommodate no more than twenty-five children, and expressly excludes "detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of children who are determined to be delinquent."²⁶⁵ The legislative history also gives some guidance on the least restrictive setting requirement:

A continuum of placements ranging from least restrictive to most restrictive would include at a minimum the following: foster family homes; group homes and community residences; residential treatment centers and child care institutions.²⁶⁶

Thus, the Act's definitions of foster family home and child care institution along with the legislative history provide the objective benchmark needed to find an enforceable right to placement in the least restrictive setting. It is, therefore, difficult to understand a statement like that recognized by the court in *B.H.* that "it is unlikely that a State would have accepted federal funds had it known that it would be bound to provide such treatment."²⁶⁷ Placement in

263. A foster family home is defined as "a foster family home for children which is licensed by the State . . . or has been approved, by the agency of such State having responsibility for licensing homes. . . as meeting the standards established for such licensing." § 672(c)(1).

264. § 672(a)(3).

265. § 672(c)(2). In addition, the institution must be licensed by the state or be approved by the state agency responsible for licensing, as meeting the standards for licensing. *Id.*

266. H.R. REP. NO. 136, 96th Cong. 1st Sess. 48 (1979). The legislative history also suggests that to achieve the least restrictive setting goal, Congress anticipated that states would create new placements such as group homes. *Id.* at 48.

267. 715 F. Supp. 1387, 1401 (N.D. Ill. 1989) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24-25 (1981)). The Court in *Pennhurst* noted that:

legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can . . . be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.

451 U.S. at 17 (citations omitted). Because 42 U.S.C. § 6010 was simply a statement of findings, *see supra* note 150-55 and accompanying text, the Court reasoned that a state would not understand that it had an obligation to place those protected by the statute in the least restrictive setting. *Id.* at 18. Section 6010 "is simply a general statement of 'findings' and, as such, is too thin a reed to support the rights and obligations read into it by the court below." *Id.* at 19. Although the Court also said that it would be "difficult to know what is meant by 'providing appropriate' treatment in the 'least restrictive' setting," the basis of its decision was that § 6010 lacked any language to suggest to states that they were obligated to comply with its terms. *Id.* at 24-25.

the least restrictive setting is an explicit prerequisite to the receipt of federal funds as any responsible state official should recognize.

In conclusion, aside from the Case Plan and Case Review System requirements, the courts do not agree on the scope of enforceable rights under the Child Welfare Act. *Artist M. v. Johnson*²⁶⁸ and several other courts found that the reasonable efforts requirement also created an enforceable right,²⁶⁹ but the Supreme Court's grant of certiorari to hear the issue of the private enforcement of the reasonable efforts requirement leaves its status in doubt.²⁷⁰ Other courts have found that several provisions taken together create enforceable rights within the meaning of section 1983.²⁷¹ Even the courts that have found enforceable rights under the Act have narrowly tailored the relief they ordered.²⁷²

C. The Court Orders

While most courts that have found enforceable rights under the Act have ordered the states to implement specific changes to ensure compliance with the Act, the scope of those orders has been limited. In *Artist*, the court concluded that assigning a caseworker to each child was the basic means of satisfying the reasonable efforts requirement.²⁷³ There were often substantial delays between the time a child entered the Illinois foster care system and the time that he or she was assigned a caseworker.²⁷⁴ In addition, if a caseworker resigned or was otherwise removed from the case, there were often significant time lags before a new caseworker would be assigned.²⁷⁵ Thus, the court ordered that caseworkers be assigned within three

The requirements of the Child Welfare Plan, the Foster Care Plan, the Case Plan and the Case Review System are explicit conditions for federal funding, *see supra* notes 43-45 and accompanying text, and the right to be placed in the "least restrictive setting" is one of the requirements of the Case Review System. *See supra* note 72 and accompanying text. Because the right to be placed in the least restrictive setting is a condition of federal funding, *Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2518 (1990), and *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 424-25 (1987), are closer to the facts at issue under the Child Welfare Act than *Pennhurst*. *See supra* notes 144, 150-57 and accompanying text.

268. 917 F.2d 980, 987 (7th Cir. 1990), *cert. granted sub nom.* *Suter v. Artist M.*, 111 S. Ct. 2008 (1991).

269. *See supra* notes 210-21 and accompanying text.

270. *Suter v. Artist M.*, 111 S. Ct. 2008 (1991).

271. *See supra* notes 222-33 and accompanying text.

272. *See infra* notes 273-95 and accompanying text.

273. 917 F.2d 980, 987 (7th Cir. 1990), *cert. granted sub nom.* *Suter v. Artist M.*, 111 S. Ct. 2008 (1991).

274. *Id.* at 991.

275. *Id.* at 984. "[T]he total number of unassigned cases jumped from 232 on June 30, 1989, to 404 by year's end and the number of cases unassigned for over 30 days doubled over the same period of time." *Id.* at 984 n.8.

days of the time that the child entered state supervision, and that if a caseworker was removed from the child's case, a new caseworker be reassigned within three days.²⁷⁶

Similarly, the court in *Lynch v. Dukakis*²⁷⁷ affirmed the district court order that the Massachusetts Department of Social Services assign each child to a caseworker within twenty-four hours of its receipt of the case,²⁷⁸ noting that "when a case is not assigned to a social worker directly responsible for servicing the case, the case planning and periodic review mandated by Title IV-E will not be provided."²⁷⁹ The injunction in *Lynch* went a step further than that in *Artist*, though, because it restricted the number of cases any one caseworker could be assigned to the number that he or she was "able to carry and simultaneously fulfill [his or her] obligations [under Title IV-E.]"²⁸⁰ The court upheld the district court's finding, as a rebuttable presumption, that caseworkers could carry out their responsibilities of creating case plans and conducting case reviews with a caseload of twenty "generic" cases.²⁸¹ Also, in *Norman v. Johnson*,²⁸² when children were removed from their homes because of their parents' poverty and inability to locate adequate housing, the court not only ordered that a caseworker be assigned to meet with the plaintiff families within a specified time, but also that the caseworkers prepare a written case plan that would identify the housing obstacles and the resources available to help overcome them.²⁸³

While the defendants in *Lynch* and *Artist* argued that the court ordered injunctive relief would unduly interfere with their operations and was inconsistent with principles of federalism,²⁸⁴ the court or-

276. *Id.* at 984.

277. 719 F.2d 504 (1st Cir. 1983).

278. *Id.* at 508, 514.

279. *Id.* at 514. The court recognized enforceable rights not only in the children but in "all members of the children's natural and foster families." *Id.* at 506.

280. *Id.* at 508.

281. *Id.* at 512.

282. 739 F. Supp. 1182 (N.D. Ill. 1990).

283. *Id.* at 1192. This is consistent with the analysis suggested by Shotton, *supra* note 201.

284. See *Artist M. v. Johnson*, 917 F.2d 980, 990 (7th Cir. 1990), *cert. granted sub nom. Suter v. Artist M.*, 111 S. Ct. 2008 (1991); *Lynch*, 719 F.2d at 513. In *Rosado v. Wyman*, 397 U.S. 397 (1970), the Court said:

While we view with concern the escalating involvement of federal courts in this highly complicated area of welfare [AFDC] benefits . . . we find not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field. . . . It is . . . peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to

ders were narrowly limited to the prompt assignment of caseworkers.²⁸⁵ The courts did not dictate the manner in which the caseworkers should carry out their duties.²⁸⁶ Nor did they mandate that specific services be provided.²⁸⁷ They simply ordered that caseworkers be assigned in a timely manner.²⁸⁸

In *Darr ex rel. L.J. Massinga*,²⁸⁹ on the other hand, when the court found that the foster care system as a whole was mismanaged, it upheld the district court's grant of a preliminary injunction which ordered defendants

to submit a plan for the review of foster homes about which a report of maltreatment has been made, to monitor child placements in foster homes at least monthly and in some instances weekly, to expand its medical services to foster children including the keeping of medical records, and to provide prompt written reports of maltreatment of foster children to their attorneys and the juvenile court, including the action taken thereon.²⁹⁰

The order in *Massinga* is broader than the orders in *Artist* or *Lynch* that required caseworkers assigned to each child within a specified time.²⁹¹ One of the most progressive things about *Massinga* is that the court specifically ordered the state to expand its medical services.²⁹² Most courts have been unwilling to dictate that states adopt specific services. While the court in *LaShawn A. v. Dixon*²⁹³ deferred

whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use.

Id. at 422-23.

285. 917 F.2d at 990; 719 F.2d at 514.

286. *Artist*, 917 F.2d at 990; *Lynch*, 719 F.2d at 514. As the court in *Artist* explained, the "injunctive relief does not dictate a method of assigning caseworkers or interfere with the ability of caseworkers to exercise their own professional judgment on the job." 917 F.2d at 990.

287. *Id.*; *Lynch*, 719 F.2d at 514.

288. *Artist*, 917 F.2d at 990; *Lynch*, 719 F.2d at 514. The court in *Artist* amended its order to include a reporting mechanism so that it could monitor compliance with the order. 917 F.2d at 984. While there may be several methods by which the states could have satisfied the Act's requirements, they should not be heard to complain that the court is restricting their flexibility when they have failed to adhere to those requirements and denied children and their families the rights to which they were entitled.

289. 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989).

290. *Id.* at 120.

291. The plaintiffs in *Artist*, while alleging violations of various provisions of the Act, said that those provisions were violated specifically because of the failure to timely assign caseworkers. 917 F.2d at 983. Thus, it is not surprising that the court's order was essentially limited to ordering that caseworkers be assigned within a specific time frame. The court also ordered the state to report weekly to show its compliance with the order. *Id.* at 984.

292. *Massinga*, 838 F.2d at 120.

293. 762 F. Supp. 959 (D.D.C. 1991).

issuing injunctive relief pending further briefing and arguments by the parties,²⁹⁴ the court seemed to recognize that the Act created an overall right to preventive services, proper foster care, and permanency planning. It is this acknowledgement that the Act creates comprehensive rights that will lead to an acknowledgement of the need for system-wide relief. This will, in turn, make the Act most effective as a tool for foster care reform.

What may, in the end, be even more effective than broad based injunctive relief is the impetus that court decisions like *Massinga* and *Lashawn* give the parties to settle. In both cases, the courts' decisions created the impetus for the defendants to reassess their positions and to settle with the plaintiffs.²⁹⁵ Without the Child Welfare Act and section 1983, the progress that has been made in foster care reform would almost certainly not have occurred. Thus, the existence of the Child Welfare Act, along with section 1983, has far-reaching potential.

III. MAKING THE CHILD WELFARE ACT A MORE EFFECTIVE TOOL FOR FOSTER CARE REFORM

The Child Welfare Act is a comprehensive effort on the part of Congress to achieve foster care reform. Unfortunately, its enactment has not, in itself, brought about all the necessary changes.²⁹⁶ Private enforcement of the Act is necessary for several reasons. First, without private enforcement of the Act's provisions, the only remedy provided for by the Act is the reduction or termination of

294. *Id.* at 961.

295. *See id.* at 989; *Darr ex rel L.J. v. Massinga*, 699 F. Supp. 508, 518 (D. Md. 1988); *see also* Tracy Thompson, *Foster Care Compromise is Reached*, WASHINGTON POST, July 11, 1991, at C1 (discussing settlement reached between American Civil Liberties Union and city). Under the agreement, the number of caseworkers will reportedly double over the next three years in order to limit each caseworkers caseload to "no more than 20 children for each worker dealing with children in foster homes . . . and no more than 15 children for each worker assigned to recruit adoptive parents," *id.*, and an "outside monitor" will control key decisions by the Department of Human Services. *Id.*; *cf. Shull ex rel. G.L. v. Zumwalt*, 564 F. Supp. 1030, 1031-43 (W.D. Mo. 1983) (setting forth terms of consent decree between children and Missouri Division of Family Services). Among other things, the consent decree included, detailed requirements for the licensing of foster care homes, *id.* at 1031-32, training of foster care parents, *id.* at 1033, and supervision of the foster home, *id.* at 1034-35. The consent decree also included provisions for the training of social workers, *id.* at 1036-37, and for limiting the caseloads of the social workers, *id.* at 1036. Furthermore, it included provisions designed to ensure that each child in foster care receive adequate medical and dental care, such as requiring that each child be enrolled in a health maintenance organization or a pre-paid health plan. *Id.* at 1037-38. The consent decree also included specifics regarding permanency planning, visitation, and other essential services. *Id.* at 1038-40.

296. *See supra* notes 8-27 and accompanying text.

funds, a remedy that will leave children in a worse position than before, because there will be less money for the states to operate their foster care systems.²⁹⁷ Second, it has been suggested that federal oversight of state foster care systems is lax.²⁹⁸ Therefore, children are likely to suffer further harm while awaiting action by the Department of Health and Human Services (HHS) to remedy a state's failure to comply. Thus, HHS's oversight authority needs to be supplemented with private enforcement. One case illustration of the problems associated with the lack of adequate enforcement of the Act and the resulting lack of appropriate services is *LaShawn A. v. Dixon*.²⁹⁹ The court in *LaShawn* found a substantial failure on the part of the District of Columbia government to comply with the Child Welfare Act,³⁰⁰ including the failure to provide preventive services,³⁰¹ the consistent failure to provide services once children were placed in foster care,³⁰² inappropriate placements,³⁰³ lack of

297. Compatible state statutes have been enacted which should help enforce the requirements of the Act. EDNA MCCONNELL CLARK FOUNDATION, KEEPING FAMILIES TOGETHER: THE CASE FOR FAMILY PRESERVATION 16 (1985) [hereinafter KEEPING FAMILIES TOGETHER].

298. See NO PLACE TO CALL HOME, *supra* note 8, at 11.

Weak federal monitoring and oversight have undermined implementation of protections and services under [the Act]. The Department of Health and Human Services (DHHS) fails to monitor the requirement to make "reasonable efforts" to prevent the need for placement and to make it possible for a child to return home, and fails to assess whether states' Title IV-B child welfare services programs are adequate to meet the needs of the children and families served.

Id.

299. 762 F. Supp. 959 (D.D.C. 1991).

300. *Id.* at 989. The expert testimony found that "the District's foster care system was operating in much the same way as other jurisdictions had operated prior to the passage of the [Child Welfare Act]: as a holding system for children." *Id.* at 966.

301. *Id.* at 970. The court found that there were no drug treatment services, no housing or employment assistance, or other services to help prevent the need for foster care placement. *Id.* Thus, the court found that the reasonable efforts requirement to prevent the need for foster care was not satisfied. *Id.* The named plaintiff, LaShawn A., for example, was placed in voluntary care by her mother who was homeless and suffering from emotional problems. *Id.* at 983. No preventive services were offered that might enable LaShawn A. to remain at home, and she had no contact with her biological family for at least two years after she entered the foster care system. *Id.*

302. *Id.* at 986.

303. *Id.* at 971-72. A psychiatric evaluation suggested that one girl was placed in a home where there was an "overuse of physical punishment and perhaps even sexual abuse." *Id.* at 983. In another case, an 11 year old boy who spent virtually his entire life in foster care, had been in 11 different placements, "including foster homes, group homes, residential treatment facilities, and hospitals." *Id.* at 985. This boy told the hospital staff that "he hated himself and he climbed into a trash can and asked to be thrown away." *Id.* In addition, although the boy's primary placement goal was adoption, his case had never been referred to the adoption branch of the District of Columbia Child and Family Services Division. *Id.*

case plans and timely case reviews,³⁰⁴ and improper goals when they existed.³⁰⁵ As a result of this ineptly managed system, the average stay for children in the District of Columbia foster care system was 4.8 years.³⁰⁶

To date, there have been encouraging opinions by some courts, such as *LaShawn*, that have recognized that the Child Welfare Act created enforceable rights. Nevertheless, the opinions do not go far enough for two reasons. First, most courts recognize only very limited section 1983 rights under the Act.³⁰⁷ Second, even for those rights that are recognized, injunctive relief has been narrowly tailored and damage claims have often been denied.³⁰⁸

The only provision of the Act that uncontroversially creates section 1983 rights is section 671(a)(16), which requires the creation of a Case Plan and a Case Review System. The reasonable efforts requirement, the only other provision that has been the subject of relatively frequent litigation, has been found to be too vague and amorphous by some courts to create an enforceable right. Moreover, although other courts have found that the reasonable efforts requirement creates an enforceable right for purposes of section 1983, the Supreme Court's grant of certiorari in *Artist v. Johnson* renders the enforceability of the reasonable efforts requirement uncertain.³⁰⁹

304. *Id.* at 972-74. According to the expert testimony, 62 percent of foster children in the District of Columbia did not have written case plans. *Id.* at 966.

305. *Id.* at 973. In one instance, a two-and-a-half month old boy was placed in foster care when his mother was admitted to a psychiatric facility. *Id.* at 983-84. Although the caseworkers almost immediately determined that the boy should be a candidate for adoption, his stated placement goal was to return home. *Id.* at 984. In fact, the boy was returned home periodically over a 5 year period only to be repeatedly sent back to foster care because of the mother's psychiatric condition. *Id.* In another case, the goal in 1987 of a foster child was adoption. *Id.* Despite the biological mother's signing of an agreement to relinquish her parental rights, the agreement was never processed because it was lost and a year later the child's placement goal was "inexplicably listed [as] family reunification, a goal that, not surprisingly, never came to pass." *Id.*

306. *Id.* at 968.

307. See *supra* notes 158-268 and accompanying text.

308. See *supra* notes 273-95 and accompany text.

309. 917 F.2d 980 (7th Cir. 1990), *cert. granted sub nom.* *Suter v. Artist M.*, 111 S.Ct. 2008 (1991). In addition, the Supreme Court will determine whether children living at home who are not in foster care have enforceable rights under Title IV-E. The defendants claim that since there is no Title IV-E funding for children who are not in foster care they have no right to enforce the reasonable efforts requirement. For a discussion of the Title IV-E funding scheme, see *supra* note 57. Allen, *supra* note 18, at 590, specifically rejected the argument on which the defendant in *Artist* relied:

An argument can be made that a right to preventive and reunification services is reserved only for children in federally reimbursed care who are covered under the IV-E program. Such an argument arises from the fact that IV-B specifically requires that states develop preventive and

Other asserted rights, such as the right to meaningful visitation and placement in the least restrictive setting, have been denied. The decisions in *Artist, Darr ex rel. L.J. v. Massinga*,³¹⁰ and *LaShawn* are encouraging in their recognition that the Act requires states to comply with its overall statutory framework, and in finding that several provisions together give rise to section 1983 claims.³¹¹ Most courts, however, have found enforceable section 1983 rights based on isolated statutory provisions. Courts must view the Act more comprehensively to determine whether enforceable rights have been created. Congress, in enacting the Child Welfare Act, intended for states to provide sufficient services to children and their families, from the time the states become aware of the risk of family separation until the child is permanently placed in a stable environment. In order to accomplish Congress' intent, services are needed in three different areas: first, preventive services to attempt to keep families together; second, services to properly care for children in foster care; and third, permanency planning services.

There are three requirements of the Act, in addition to the Case Plan and Case Review System requirements, that if found to create enforceable rights for purposes of section 1983, would go a long way toward ensuring that the necessary services are provided. The three requirements are: 1) states use "reasonable efforts . . . prior to the placement of a child . . . to prevent or eliminate the need for" the child's removal from his or her home,³¹² 2) states provide proper care to children who have entered the foster care system,³¹³ and 3) states use "reasonable efforts . . . to make it possible for the child to return to his home."³¹⁴ These three provisions together encompass the goals of the Act and can be construed to afford a variety of rights to children and their families. As noted above, for example, the reasonable efforts requirement to return the child

reunification service programs, but does not say directly that reasonable efforts must be made to provide these services in each child's case. . . . [T]he provisions in IV-B and IV-E were not intended to result in two separate systems of care, one for federally financed and one for solely state financed children. . . . Congress carefully tied the two programs together and in doing so intended comprehensive reform of state child welfare systems, not just changes that would benefit children under federal care.

Id.

310. 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989).

311. See *supra* notes 210-32 and accompanying text.

312. § 671(a)(15); see *supra* notes 54-62 and accompanying text.

313. § 675(1)(B).

314. § 671(a)(15). In addition, there is a right to a "fair hearing to any individual whose claim for benefits . . . is denied or is not acted upon with reasonable promptness." § 671(a)(12).

home should include the right to meaningful visitation.³¹⁵ Also, proper care includes the right to be placed in the least restrictive setting.³¹⁶ These three provisions are broad enough to allow courts to effectively enforce the Act as a whole and, where necessary, to invalidate system-wide failures in foster care.

Even the recognition of these three requirements as rights for purposes of section 1983, however, will be of limited use unless the courts are also willing to order broad-based relief for deprivations of those rights.³¹⁷ The key to ensuring compliance with the Act and to achieving its goals is the provision of services. Courts must, therefore, be willing to order the provision of specific services, where appropriate, to enable children and their families to secure their rights.³¹⁸ One impediment to granting broad-based relief is the failure to recognize that the rights created by the Act are both substantive and procedural in nature. In *B.H. v. Johnson*,³¹⁹ for example, despite finding an enforceable right to a Case Plan and Case Review System, the court refused to give substance to the right, and, therefore, refused to order the Illinois DCFS to provide specific services:

[P]laintiff's entitlement to a case review system and an individualized case plan does not give rise to . . . rights . . . such as the right to an adequate number of case workers, family reunification services, services to 'troubled families,' or rights of meaningful visitation between siblings. The case review system and individualized case plans are procedures intended only to monitor the progress and well-being of children in state and foster care.³²⁰

315. See *supra* notes 245-49 and accompanying text.

316. See *supra* note 72 and accompanying text.

317. Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 665 (1987) ("The principle that legal rights must have remedies is fundamental to democratic government. In a democracy, legal rights define social relations and promote human well-being in the broadest sense. Justice requires their enforcement. The principle is so obviously correct that assent to it is instinctive.") (footnote omitted).

318. One program noted for its success, Homebuilders, focuses specifically on the provision of preventive services. KEEPING FAMILIES TOGETHER, *supra* note 297, at 13. Each caseworker is typically assigned to only two families and works intensively with each family over a five to six week period. *Id.*

319. 715 F. Supp. 1387 (N.D. Ill. 1989).

320. *Id.* at 1402. By viewing the scope of the right so narrowly, what the court gave in one breath, it effectively took away in the next. The court's limited view of plaintiffs' rights is particularly disturbing in light of some of the facts pleaded. One child who was in foster care, for example, allegedly was placed in a setting so inappropriate that he faked a suicide attempt in order to be moved. *Id.* at 1390. Another child had been in the foster care system for less than six months and had already had five placements. *Id.*

In *Wilder v. Virginia Hospital Ass'n*,³²¹ the Supreme Court was confronted with a similar substance-procedure argument.³²² The State of Virginia argued that its only obligation was to adhere to the procedural funding prerequisite of finding that its medicaid reimbursement rates were reasonable and adequate, and making assurances to that effect to the Secretary.³²³ It denied any obligation to assure that the rates were in fact reasonable and adequate as a substantive matter.³²⁴ In rejecting the argument that the state's only duty was to go through the motion of making assurances rather than to substantively make sure that the rates were reasonable and adequate in fact, the Court explained that the state's argument "would render the statutory requirements of findings and assurances, and thus the entire reimbursement provision, essentially meaningless. . . . We decline to adopt an interpretation . . . that would render [the Act] a dead letter."³²⁵

The Child Welfare Act is explicit in requiring substantive as well as procedural reform. The Act specifically allows for the termination or reduction of federal financial assistance not only if the state's Foster Care Plan is not approved, but also if "a State plan which has been approved . . . no longer complies with the provisions of subsection (a) . . . or that in the administration of the plan there is a substantial failure to comply with the provisions of the plan."³²⁶

Other courts that have recognized both the substantive and procedural requirements of the Act, nevertheless, have narrowly tailored injunctive relief. Requiring the prompt assignment of caseworkers, as the courts in *Lynch v. Dukakis*³²⁷ and *Artist* did, is a good start and a necessary first step, but does not, in itself, ensure compliance with the Act.³²⁸ The courts in these cases, for example,

Virtually none of the children had regular contact with their caseworkers. *Id.* at 1390-91.

321. 110 S. Ct. 2510 (1990). For a factual description of this case, see *supra* notes 178-91 and accompanying text.

322. 110 S. Ct. at 2517.

323. *Id.* at 2519.

324. *Id.*

325. *Id.* at 2519-20.

326. § 671(b). Because the Foster Care Plan must provide for the creation of the Case Plan and Case Review System, § 671(a)(16), all three must be complied with both in form and in substance.

327. 719 F.2d 504 (1st Cir. 1983).

328. It may be that in *Lynch* and *Artist*, caseworkers were the key to compliance, but often state failures are widespread and cannot be remedied with a single fix. See, e.g., *Darr ex rel. L.J. v. Massinga*, 838 F.2d 118, 123 (4th Cir. 1988) (holding that officials could not claim immunity from liability when they could reasonably be expected to know that inaction would result in constitutional violations), *cert. denied*, 488 U.S. 1018 (1989); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 998 (D.D.C. 1991) (ordering status conference

could have gone a step further and ordered the caseworkers to undertake specific duties to rectify some of the state's failures. In *Massinga*, when there were systemic deficiencies in the foster care system,³²⁹ the court went further than the courts in *Artist* and *Lynch*, and ordered broad based injunctive relief, which required the state, *inter alia*, to monitor child placements at least monthly, and in some cases weekly, and to expand its medical services to foster children.³³⁰ The court in *LaShawn* deferred the issuance of an injunction because the parties entered into a tentative settlement. The tenor of the court's opinion suggests, however, that had the parties not settled, broad based relief would have been granted. Because the courts often find system-wide failures, they should be willing to order system-wide relief.³³¹ There is "no justification in principle

to discuss appropriate relief and parties to prepare joint proposed schedule for establishing appropriate relief).

329. 838 F.2d 118, 121 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989); *see supra* notes 222-25 and accompanying text.

330. *See supra* notes 289-92 and accompanying text.

331. Damages, as well as broader injunctive relief, should generally be available. As a general rule, both damages and injunctive relief are available to remedy violations of legal rights. *See* *Guardians Ass'n. v. Civil Serv. Comm'n*, 463 U.S. 582, 595 (1983). Because serious questions would arise under the Eleventh Amendment if federal courts required states to pay money damages, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 29-30, (1981), damage actions against state officials sued in their official capacity are prohibited. *Hans v. Louisiana*, 134 U.S. 1, 10, 20 (1890). The Eleventh Amendment, however, does not protect state officials from personal damage liability. *Guardians*, 463 U.S. at 633 (Marshall, J., dissenting); *Edelman v. Jordan*, 415 U.S. 651, 675-78 (1974). To protect state officials "from undue interference with their [discretionary] duties and from potentially disabling threats of liability," state officials are given a qualified immunity from damage suits. *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). To overcome a claim of qualified immunity, the plaintiff must show that the official's conduct violated a clearly established constitutional or statutory right of the plaintiff that a reasonable person would have known was being violated. *Id.* at 818. *See also* *Anderson v. Creighton*, 483 U.S. 635, 640 (1987):

A clearly established right is one whereby: a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. (citation omitted). The Child Welfare Act does create clearly established rights. At the very least, the rights to a Case Plan and Case Review System are clearly established. Not only are they explicitly required by the Act, but they are specifically defined, making compliance or noncompliance apparent. Therefore, in cases like *LaShawn*, where the court found that 62% of the children in foster care did not have written case plans, 762 F. Supp. at 966, the officials in charge must have understood that their conduct violated the children's rights. *See* *Del A. v. Edwards*, 855 F.2d 1148, 1153-54 (5th Cir.) ("Any reasonable person would know . . . when to develop a plan, when to review the plan . . . [and] what elements to include in the case plans."), *reh'g granted*, 862 F.2d 1107 (5th Cir. 1988), *appeal dismissed*, 867 F.2d 842 (5th Cir. 1989). In addition, the reasonable efforts requirement creates a clearly established right, although, in a given case the official may or may not "understand that what he is doing violates that right." *Id.* Certainly, there

for drawing a distinction between invalidating a single nonconforming provision or an entire program. In both circumstances federal funds are being allocated and paid in a manner contrary to that intended by Congress."³³²

It is somewhat ironic that states have been so resistant to complying with the Act because foster care is essentially an area where doing less costs more. As the court in *Norman v. Johnson*³³³ noted, "viewed purely in fiscal terms, it is often cheaper to provide initial payments for rent, security deposits, utilities, and other items than to instead incur the much greater expense of placement outside the family."³³⁴ In *LaShawn*, the court found that the District of Columbia was "losing millions of dollars in available federal funds because

are some cases in which the unlawfulness of the conduct would be apparent. If, for example, no preventive services are provided to a family in need of financial assistance and the parents are told that their only option is to place their child in foster care, the unlawfulness of the officials' conduct should be apparent. Once the asserted rights go beyond the language of the statute, it may be more difficult to argue that the rights are clearly established for purposes of a damage claim.

To date, damage claims have received mixed responses from the courts. Some have indicated that damages may be awarded if the foregoing standards are met. See e.g., *Massinga*, 838 F.2d at 123 (holding that Supreme Court "did not distinguish between prospective equitable relief and an action for money damages in regard to the right to enforce privately"); *Wolfe ex rel. Joseph A. v. New Mexico Dep't of Human Servs.*, 575 F. Supp. 346, 353 (D.N.M. 1983) (stating that if plaintiffs have been denied rights granted by Social Security Act then damages may be awarded). Others have found no clearly established right. See *Hidahl v. Gilpin County Dep't of Soc. Serv.*, 938 F.2d 1150, 1155 (10th Cir. 1991). Other courts, however, have denied damages under the Child Welfare Act regardless of the right being asserted. See e.g., *Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923, 928 (8th Cir. 1987) (suggesting that Act as funding statute may not create any enforceable rights). The reason for this most restrictive view of damage claims is that damages are not available in an action to enforce legislation enacted pursuant to the Spending Clause. See *Scrivner v. Andrews*, 816 F.2d 261, 264 (6th Cir. 1987). In *Guardians*, Justice White, writing the plurality opinion for the Court, which was joined only by Justice Rhenquist, stated that monetary relief is not ordinarily available in private actions seeking relief under a statute passed by Congress pursuant to the Spending Clause. 463 U.S. at 596. "This is because the receipt of federal funds under typical Spending Cause legislation is a consensual matter." *Id.* Thus, the state can simply choose not to participate in the program rather than comply with the legislation. Injunctive relief is, therefore, appropriate because "the recipient has the option of withdrawing and hence terminating the prospective force of the injunction." *Id.* Justice White's analysis was sharply criticized by the dissent as being incorrect and dicta. See *id.* at 636-38 (Stevens, J., dissenting).

332. *Rosado v. Wyman*, 397 U.S. 397, 421 (1970) (concluding that New York's Social Services law was incompatible with AFDC program of Social Security Act).

333. 739 F. Supp. 1182 (N.D. Ill. 1990).

334. *Id.* at 1186; see also *In re S.A.D.*, 555 A.2d 123, 128 (Pa. Super. Ct. 1989) (emphasizing "high financial . . . cost of maintaining a child in out-of-home care compared to the minimal cost of paying the family's initial rent, security deposit or utility bill." (quoting MAKING REASONABLE EFFORTS, *supra* note 201, at 59); *In re M.H.*, 444 N.W.2d 110, 112 (Iowa Ct. App. 1989) ("Foster care is expensive and costs considerably more per month than the best in-home programs.").

of its serious management and systemic deficiencies.”³³⁵ Thus, the court was less than sympathetic to the district’s arguments that it was under severe budgetary restraints. “The Court finds it disingenuous for the District to blame its inadequacies on a lack of funding when it has failed to obtain the generous funding that is readily available to it.”³³⁶

CONCLUSION

Through the Adoption Assistance and Child Welfare Act of 1980, Congress enacted comprehensive requirements for foster care reform. The Act created a framework for state foster care systems with which states must comply in order to receive federal financial assistance. When states fail to comply, private enforcement of the Act is both appropriate and necessary to protect children and their families. To date, courts have found limited rights under the Act for purposes of section 1983. They need, however, to go further. Courts need to recognize broad-based rights under the Act and display a greater willingness to order broad-based relief when those rights are violated.

335. 762 F. Supp. at 980, 981 (“The District is currently losing approximately \$14 million a year in potential funding under the [Child Welfare] Act.”). As the court explained:

Federal reimbursements under the Adoption Assistance Act are ‘open ended.’ That is, there is no cap on the amount of money a state agency may receive for certain eligible activities or services provided to eligible children. States and the District of Columbia are reimbursed according to an established ‘Federal Financial Participation’ rate, which is 50 percent for most eligible activities and 75 percent for eligible training activities. To receive federal reimbursements under the Act, the claimant must establish not only the eligibility of the activity, but the eligibility of the child benefitting from that activity. Eligibility for reimbursements under the Act is tied to eligibility for [AFDC]. At least 75 percent of children in the District’s foster care are AFDC eligible, yet the CFSD had established eligibility under the [Child Welfare] Act for only 24 percent in July 1987 and 22.6 percent in July 1988. This compares to eligibility rates of 72 percent in New York City [and] 56 percent in Philadelphia.

Id. at 980.

The court pointed out that some other states had received enormous increases in federal financial assistance after complying with the Act. *Id.* at 981. For example, Ohio received only \$5.8 million under the Act in 1984, but after improving its compliance record, it received \$52 million in 1990. *Id.* Pennsylvania’s federal assistance went from \$43 million to \$97 million over the same time period. *Id.*

336. *Id.*

EDITORIAL COMMENT

This article was in its final editing phase when the United States Supreme Court decided *Suter v. Artist*.³³⁷ The Court held that the reasonable efforts provision of the Child Welfare Act did not create a privately enforceable section 1983 right.³³⁸ While this article's foregoing analysis of the reasonable efforts provision describes why the author disagrees with the Court's conclusion,³³⁹ a few specific observations about the Court's opinion are warranted. First, the Court, without explanation or acknowledgement of any inconsistency with *Wilder*, stated that neither the Act or regulations "places any requirement for state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary."³⁴⁰ In other words, as long as the states comply with the procedure of filing the necessary plans with the Secretary, they need not comply with the reasonable efforts requirement in substance.³⁴¹ In *Wilder*, the Court rejected a similar procedure over substance argument.³⁴² Without directly confronting this inconsistency, the Court in *Suter*, suggested that the regulations under the Child Welfare Act did not provide sufficient guidance to the states, as did the regulations at issue in *Wilder*.³⁴³ Nevertheless, the Court set forth in a footnote, without explanation, the regulation that specified the kinds of services that may satisfy the reasonable efforts requirement.³⁴⁴ While providing the text of the regulation, the Court virtually ignored it.

Second, the Court's dicta about Congressional foreclosure is disturbing. It suggested that the remedies provided for in the Child Welfare Act, might constitute a congressional foreclosure problem. The Court found it unnecessary to decide the foreclosure issue in the light of its holding that there was no enforceable right under section 671(a)(15).³⁴⁵ The court, however, noted that the Secre-

337. 60 U.S.L.W. 4251 (March 25, 1992).

338. *Id.* at 2456.

339. See *supra* notes 174-221 and accompanying text.

340. 60 U.S.L.W. at 4255.

341. *Id.* ("[T]he regulations are not specific, and do not provide notice to the States that failure to do anything other than submit a plan with the requisite features, to be approved by the Secretary, is a further condition on the receipt of funds from the Federal Government.").

342. 110 S. Ct. 2510, 2519-20 (1990). See *supra* notes 323-25 and accompanying text. The Court in *Wilder* held that the states could not simply provide assurances that its reimbursement rates were reasonable. *Id.* They had to be reasonable in fact. *Id.*

343. 60 U.S.L.W. at 4255. The Court focused on the states' broad discretion to decide how to satisfy the reasonable efforts requirement. *Id.*

344. *Id.* at 4255 n.14 (quoting 45 C.F.R. § 1357(e)(2) (1990)).

345. *Id.* at n.11.

tary's ability to reduce or terminate funding to noncompliant states provided plaintiffs some remedy.³⁴⁶ Therefore, the "absence of a remedy to private plaintiffs under section 1983 does not make the reasonable efforts clause a dead letter."³⁴⁷ The Court did not state that this "dead letter" standard is a new test for the availability of section 1983, and in fact, it gave lip service to the traditional test for congressional foreclosure.³⁴⁸ It is disturbing, though, that the Court seems satisfied that section 1983 is not necessary as long as its absence does not render the statute a dead letter. While the lack of a section 1983 claim may not make the reasonable efforts provision a dead letter, it may terminally weaken it. As the dissent concluded:

[The Majority] has changed the rules of the game without offering even minimal justification, and it has failed even to acknowledge that it is doing anything more extraordinary than 'interpret[ing]' the Adoption Act 'by its own terms.' Readers of the Court's opinion will not be misled by this hollow assurance. And, after all, we are dealing here with children.³⁴⁹

346. *Id.* at 4255. Of course, to the extent that state funds are reduced or terminated, the children who fall under the Child Welfare Act are likely to be in an even worse predicament.

347. *Id.*

348. *Id.* The Court acknowledged that congressional foreclosure is normally found only where the statute provided a comprehensive remedial scheme. *Id.* at 4255 n.11. It also recognized that the Child Welfare Act "may . . . not provide a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose remedies under 1983." *Id.* at 4255.

349. *Id.* at 4259 (Blackmun, J. dissenting) (citation omitted).