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Fostering a Right to Maintenance Payments: The Privately Enforceable Right of Foster Care Families and Providers to Remedy Under Section 1983

Alexa Iannelli

I. Introduction

Before the Child Welfare Act was introduced in 1980, Senator Cranston stated:

“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.”¹ The history of the foster care system in the United States before the federal Child Welfare Act was implemented did not provide an incentive for states to help children exit the system and enter permanent homes. The federal funding that was granted was limited, and children therefore suffered the consequences of a system that was not fully developed. With the implementation of the Child Welfare Act in 1980, Congress made an effort to provide a comprehensive scheme that would incentivize states to create plans regarding how this federal funding was to be best utilized to benefit the children within the foster care system.²

The program that is established within the Act provides the states with funding from the federal government, conditioned upon a plan approved by the Department of Health and Human Services.³ States are able to choose to comply with the Act's conditions and requirements, or forgo federal funding.⁴ The Child Welfare Act requires participating states to reimburse foster

¹ 125 CONG. REC. S22,684 (1979); "A Lost Generation": The Battle for Private Enforcement of the Adoption Assistance and Child Welfare Act of 1980, 60 U. Cin. L. Rev. 593, 597 n. 22.

² "A Lost Generation": The Battle for Private Enforcement of the Adoption Assistance and Child Welfare Act of 1980, 60 U. Cin. L. Rev. 593, 610.

³ Cal. State Foster Parent Ass'n v. Wagner, 624 F.3d 974, 978.

⁴ D.O.v. Glisson, 847 F.3d 374, 376.

parents for a list of enumerated costs using the federal funding.⁵ Under 42 U.S.C. section 672(a), “each State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home or a relative...”⁶ The plan’s approval by the Secretary of Health and Human Services is dependent on whether it satisfies thirty-five criteria, and if it is unable to pass muster under the requirements, the Secretary can give the state an opportunity to remedy its plan to meet the criterion.⁷

However, an issue with the Act is the remedy that it provides. When the providers and foster care families are not receiving the benefits that they are entitled to under the provisions of the Child Welfare Act, they have no recourse available to them. Raising a child is expensive, due to the cost of basic essentials like food, clothing, and shelter, without factoring in the even more costly payments associated with education, and everyday care and supervision. Under the current structure of the Child Welfare Act, the remedy when states do not comply with the Act’s requirement of distribution of maintenance payments to individual providers is for the federal assistance to the state to be refused or eliminated.⁸ Therefore, providers are stripped of their funding and the ability to take care of the foster children within their homes. A more effective measure would enable individual providers to sue the state for maintenance payments. For this to occur, the court should find an individual private right to foster care maintenance payments that is enforceable under section 1983. This comment analyzes whether Congress did intend to confer a new individual right within the Child Welfare Act, and whether that right could be protected by a section 1983 cause of action.

⁵ *Cal. State Foster Parent Ass’n*, 624 F.3d at 978.

⁶ 42 U.S.C. § 672(a)(1).

⁷ *Glisson*, 847 F.3d at 376.

⁸ "A Lost Generation": The Battle for Private Enforcement of the Adoption Assistance and Child Welfare Act of 1980, 60 U. Cin. L. Rev. 593, 611.

In 2012, Kentucky’s Health and Family Services commenced a proceeding against the mother of two young boys, who had stipulated that she had neglected her children.⁹ When the boys were placed in foster care, the mother’s aunt, R.O., sought custody so that the boys were not subjected to the foster care system.¹⁰ After the state conducted a home evaluation and criminal background check on R.O., the boys were placed into her home by Court Order.¹¹ R.O. was granted joint custody by the family court to both the mother and the aunt in 2014, but the boys continued living with the aunt.¹² R.O. filed a motion with the court seeking foster care maintenance payments.¹³ After the family court declined to rule on whether she could collect foster care maintenance payments, R.O. sued the Secretary for Kentucky’s Cabinet for Health and Family Services in state court for payments.¹⁴ She argued that “the federal Child Welfare Act required the state to provide maintenance payments, and that the failure to make payments violated the Constitution’s Equal Protection and Due Process Clauses.”¹⁵ The Cabinet removed the case to federal court and filed a motion to dismiss.¹⁶ The district court granted the Cabinet’s motion, and in their decision reasoned that because the Child Welfare Act did not provide any privately enforceable right, the court did not believe that R.O. was entitled to foster care maintenance payments.¹⁷

On appeal, the Sixth Circuit in *D.O. v. Glisson* ruled that the Child Welfare Act conferred upon foster families a private right to these maintenance payments, and that the right was

⁹ *Glisson*, 847 F.3d at 376.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *D.O.v. Glisson*, 847 F.3d 374, 376.

¹⁶ *Id.*

¹⁷ *Id.*

enforceable under 42 U.S.C. section 1983.¹⁸ The court's decision created a circuit split with the Eighth Circuit, which had previously held in *Midwest Foster Care & Adoption Association v. Kincade*, that foster care providers did not have a privately enforceable right of action to recover maintenance payments under the Child Welfare Act.¹⁹ The Sixth Circuit found that there was a private right of action that was enforceable under section 1983.²⁰ The Sixth Circuit was correct in ruling, and this comment will analyze the importance of conferring such an individual private right enforceable under section 1983 to individual foster families and providers.

Part II describes the History of the Child Welfare Act as well as 42 U.S.C. §1983. It discusses the *Blessing* test that is applied by the courts to determine whether there is an individual right intended by Congress. Part III demonstrates the differing interpretations of the Child Welfare Act by the Eighth Circuit versus the Sixth Circuit which created the circuit split. Part IV analyzes whether the Child Welfare Act creates an individually enforceable right to foster care maintenance payments. In doing so, Part IV argues that there is a Section 1983 cause of action against the states when providers do not receive appropriate funding. Part V concludes that an individually enforceable right is created and that providers have a Section 1983 cause of action against the states.

II. History of the Child Welfare Act and 42 U.S.C. § 1983

Part II will address the enactment of the Child Welfare Act. This section will address the qualifications that must be met by the states and providers to receive foster care maintenance payments. Additionally, Section II discusses a private right of action under section 1983 and how court's have interpreted whether a private individual may enforce the remedies available.

¹⁸ *Id.* at 377.

¹⁹ Julianne Tobin Wojay, *Federal Circuits Split Over Foster Parent Funding*, THE UNITED STATES LAW WEEK, Feb. 9, 2017, at 1, BLOOMBERG BNA, 85 U.S.L.W. 1051.

²⁰ *Glisson*, 847 F.3d at 376.

A. The Child Welfare Act

Before the 1980 when the Child Welfare Act was enacted, Title IV-A of the Social Security was the main provider of federal financial assistance for children in foster care.²¹ The Child Welfare Act was legislation created through the Spending Clause to create a program that allowed for cooperation between the state and federal government to fund foster care and adoption programs.²² Typically, when a statute is enacted under the spending power, the typical remedy taken by the Federal Government is to terminate funds to the State.²³ Under the Child Welfare Act, the federally funded programs included Part B of Title IV of the Social Security Act, colloquially known the Child Welfare Services Program.²⁴ Additionally, Title IV-E of the Social Security Act, known as the Foster Care Maintenance Payments Program was also created.²⁵ The funds that a state expends within the constraints set in the Act are eligible for partial reimbursement by the federal government.²⁶ The program that is established within the Act whereby the federal government provides the states with funding, conditioned upon a plan approved by the Department of Health and Human Services.²⁷ States are able to choose to comply with the Act's conditions and requirements, or forgo federal funding.²⁸ The Child Welfare Act requires participating states to reimburse foster parents for a list of enumerated costs using the federal funding.²⁹

²¹ Julianne Tobin Wojay, *Federal Circuits Split Over Foster Parent Funding*, THE UNITED STATES LAW WEEK, Feb. 9, 2017, at 1, BLOOMBERG BNA, 85 U.S.L.W. 1051.

²² *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1194 (8th Cir.); *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 978.

²³ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280.

²⁴ *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. Pub. Int. L.J. 259, 267.

²⁵ *Id.*

²⁶ *Midwest Foster Care*, 712 F.3d at 1194.

²⁷ *Cal. State Foster Parent Ass'n*, 624 F.3d at 978.

²⁸ *D.O.v. Glisson*, 847 F.3d 374, 376.

²⁹ *Cal. State Foster Parent Ass'n*, 624 F.3d at 978.

Under 42 U.S.C. section 672(a), “each State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home or a relative...”³⁰ The plan’s approval by the Secretary of Health and Human Services is dependent on whether it satisfies thirty-five criteria, and if it is unable to pass muster under the requirements, the Secretary can give the state an opportunity to remedy its plan to meet the criterion.³¹ If the plan still fails to “substantially conform,”³² the federal government will not provide funding for the program.³³ Within section 671(a)(1), a requirement of each plan is that it “provide for foster care maintenance payments in accordance with section 672.”³⁴ Foster care maintenance payments are defined in section 675(4)(A) as meaning “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, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement.”³⁵ The payments are made only “on behalf of a child” that is eligible under the standard of section 672(a), which requires that the removal and foster care placement requirements are met and the child would have qualified for assistance under the Aid to Families with Dependent Children program.³⁶

The Act additionally sets out other qualifications in section 672(b) that further limit who is eligible to receive these payments, specifying that a child must be either in a foster family home of an individual or in a private or public child-care institution.³⁷ In defining those terms

³⁰ 42 U.S.C. § 672(a)(1).

³¹ *Glisson*, 847 F.3d at 376.

³² *Id.*

³³ *Id.*

³⁴ *Midwest Foster Care & Adoption Ass’n v. Kincade*, 712 F.3d 1190, 1194 (8th Cir.)

³⁵ 42 U.S.C. § 675(4)(A).

³⁶ *Midwest Foster Care*, 712 F.3d at 1194-95.

³⁷ 42 U.S.C. § 672(b).

for purposes of the Act, section 672(c) defines a “foster family home” as licensed by the State or approved to have met the requirements by the State agency with authority to license.³⁸ Further, “child-care institution” is regarded as a public or private institution with a maximum of twenty-five children, that is also licensed by the State or approved to have met the standard of such an institution by the State agency with authority to license.³⁹

Under U.S.C. 674(a)(1), the State is then entitled to partial matching reimbursement from the federal government after paying out maintenance payments.⁴⁰ Within the statute, it provides that “each State which has a plan approved under this part shall be entitled to a payment equal to the sum of... an amount equal to the Federal medical assistance percentage... of the total number expended during such quarter as foster care maintenance payments under section 672 of this title for children in foster family homes or child-care institutions.”⁴¹ The Child Welfare Act grants or denies foster care maintenance payments to States based on whether their plan qualifies under the Act.

B. 42 U.S.C. Section 1983

42 U.S.C. Section 1983 is relevant to determine whether an individual foster care provider has a private right of action against the state under the Child Welfare Act. If a federal right has been created by the Act, then Section 1983 would allow individuals to enforce their right to maintenance payments.

Section 1983 states “every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges or immunities secured by the Constitution and

³⁸ 42 U.S.C. § 672(c).

³⁹ *Id.*

⁴⁰ *D.O. v. Glisson*, 847 F.3d 374, 377; *Midwest Foster Care*, 712 F.3d at 1195.

⁴¹ 42 U.S.C.S. § 674(a)(1).

laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...”⁴² This section allows private individuals to establish a cause of action if they were intended beneficiaries of federal legislation.⁴³ Section 1983 simply provides a procedure to enforce these individual rights, not the rights themselves.⁴⁴ Section 1983 does not speak in terms of violations of federal law, but rather the deprivation of rights, privileges or immunities guaranteed by the Constitution, and therefore, a federal right must be created by the statute in question.⁴⁵ The understanding of section 1983 is specifically to enforce rights, and not the broader understanding of possible “benefits” or “interests” that an individual may assert.⁴⁶ Private citizens are able to enforce these remedies, unless one of two circumstances exists.⁴⁷ If “the statute [does] not create enforceable rights, privileges, or immunities within the meaning of section 1983,” then the remedies of section 1983 are not enforceable.⁴⁸ Therefore, the creation of a private right within the statute is crucial.

Additionally, private individuals may not enforce these remedies if within the statute itself, Congress has “foreclosed enforcement” under section 1983.⁴⁹ Congress has the ability to either expressly forbid an individual’s recourse under section 1983, or may do so implicitly.⁵⁰ If the statute contains a remedial scheme that is “sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of 1983,” then Congress has implicitly foreclosed enforcement under 1983.⁵¹ The difficult showing must be made that the scheme that

⁴² 42 U.S.C.S. § 1983.

⁴³ “A Lost Generation”: The Battle for Private Enforcement of the Adoption Assistance and Child Welfare Act of 1980, 60 U. Cin. L. Rev. 593, 611.

⁴⁴ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284.

⁴⁵ *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 511.

⁴⁶ *Gonzaga*, 536 U.S. at 283.

⁴⁷ *Id.*

⁴⁸ “A Lost Generation” at 611-12 (citing *Wilder v. Virginia Hosp. Ass’n* at 508).

⁴⁹ *Id.*

⁵⁰ *Blessing v. Freestone*, 520 U.S. 329, 341.

⁵¹ *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 521.

Congress has implemented within the statute would be inconsistent with allowing a section 1983 action.⁵² Where Congress has foreclosed, a dismissal of the case would be appropriate.⁵³

The inquiry of whether a remedy is available under section 1983 begins with whether a private right was intended by Congress upon creation of the statute. When determining whether a particular statutory provision gives right to a federal right, the Court has looked at three factors established in *Blessing v. Freestone*.⁵⁴ Before beginning the analysis through the three-part test of *Blessing*, the Court requires that the specific provision that creates individual rights be identified, rather analyzing the Act in its entirety.⁵⁵ The first factor to be considered is “whether Congress intended that the provision in question benefit the plaintiff.”⁵⁶ In this inquiry, the Court looks to the determine whether the statute has an “individual entitlement” that is “unambiguously conferred” but the use of “rights-creating language.”⁵⁷ Specifically, the language of the statute must be “phrased in terms of the persons benefitted.”⁵⁸ Second, it must be demonstrated by plaintiff that the asserted right is not so “vague and amorphous that its enforcement would strain judicial competence.”⁵⁹ Finally, the statute in question “must unambiguously impose a binding obligation on the States.”⁶⁰ This final element has been interpreted as meaning that the statute in question must contain “mandatory rather than precatory terms.”⁶¹

⁵² *Blessing*, 520 U.S. at 346.

⁵³ *Wilder*, 496 U.S. at 521.

⁵⁴ *Blessing*, 520 U.S. at 340.

⁵⁵ *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 979.

⁵⁶ *Blessing*, 520 U.S. at 340.

⁵⁷ *Harris v. Olszewski*, 442 F.3d 456, 461.

⁵⁸ *Id.*

⁵⁹ *Blessing*, 520 U.S. at 340.

⁶⁰ *Id.* at 341.

⁶¹ *Id.*

Under this analysis, the courts have made it abundantly clear that Congress's intent must be unambiguous within the statute to confer individual rights.⁶² Due to the court's emphasis on congressional intent, if a plaintiff can demonstrate that the statute creates an individually enforceable right under section 1983, there is only a rebuttable presumption created.⁶³ In ascertaining congressional intent, evidence may be drawn directly from the statute itself or "inferred from the statute's creation of a comprehensive enforcement scheme that is incompatible with individual enforcement under [section] 1983."⁶⁴ In sum, the courts apply the *Blessing* test to determine whether there is a private right of action conferred upon individuals under Section 1983.

III. The Interpretation of the Child Welfare Act Created a Circuit Split Between the Eighth and Sixth Circuits

A. The Eighth Circuit Rules that there is No Congressional Intent of a Privately Enforceable Right Within the Child Welfare Act.

Courts have struggled with the question of whether there is Congressional intent to confer foster care maintenance payments under the Child Welfare Act. The Eighth Circuit has concluded that Congress did not intend to create a privately enforceable right to foster care maintenance payments within the Child Welfare Act. In *Midwest Foster Care & Adoption Ass'n v. Kincade*, a case was brought by six individual foster care providers and two organizations representing Missouri foster care providers against Missouri state officials who implement the foster care program within the state.⁶⁵ The collective group of providers claimed in their complaint that the Child Welfare Act of 1980 gave them a privately enforceable right under 42 U.S.C. § 1983 to receive foster care maintenance payments enumerated in the Child Welfare

⁶² *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280.

⁶³ *Blessing*, 520 U.S. at 341; *see also* *Harris v. Olszewski*, 442 F.3d 456, 461.

⁶⁴ *D.O. v. Glisson*, 847 F.3d 372, 380.

⁶⁵ *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1193-94.

Act.⁶⁶ The State of Missouri argued that the provision of the Child Welfare Act should be interpreted to constrain who is to receive the funding and provide an enumerated list of types of expenses that the government should have to provide matching funding for.⁶⁷ In opposition, the providers argue that the correct understanding of section 672(a) grants eligible foster care entities with an individually enforceable right through section 1983 to payments sufficient to cover the enumerated list in section 675(4)(A) defining foster care maintenance payments.⁶⁸

In its decision, the Court noted that under the first prong of the test established in *Blessing*, Congress must have intended the statutory provision at issue to specifically benefit the plaintiff.⁶⁹ The Court clarified that in analyzing the provision under the first prong of the test, there must be an “unambiguously conferred right to support a cause of action under section 1983.”⁷⁰ The Court reviewed the existence of a federally enforceable right by looking to the three factors considered in *Gonzaga* under the first prong of the *Blessing* test. The Court looked for rights-creating language in terms of the individual persons benefitted, manifestation of an individual focus rather than an aggregate one, and whether Congress provided a federal review mechanism within the statute.⁷¹

Under the first factor, the Court determined that there was no rights creating language within the statute.⁷² As a finding, the Court determined that “where the statutory language primarily concerns itself with commanding how states are to function within a federal program,

⁶⁶ *Id.* at 1193.

⁶⁷ *Id.* at 1195.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1196-97.

⁷² *Id.* at 1197.

the statute is less likely to have created an individually enforceable right.”⁷³ The Court reasoned that the focus was a limitation on the expenditures of the state that would be matched, rather than on the interests of the providers.⁷⁴ The Child Welfare Act was interpreted by the Court to regard the states as “regulated participants in the CWA” and was not phrased in terms of the states as beneficiaries of the Act.⁷⁵ In finding that the language of the statute was not “phrased in terms of the persons benefitted”, the Court stated that the language was necessary so that section 1983 enforcement was only available to alleged violations of federal rights, rather than simply violations of federal law.⁷⁶ The finding of a connection between section 1983 plaintiffs and a benefit by the statute is necessary, but not sufficient to create a private right.⁷⁷

In considering the second prong of the *Blessing* test, the Court looked to whether the statute had an individual focus, thus giving rise to individual rights.⁷⁸ An aggregate focus within the statute does not give rise to individual rights.⁷⁹ The Court stated that “when a statute links funding to substantial compliance with its conditions—including forming and adhering to a state plan with specified features—this counsels against the creation of individually enforceable rights.”⁸⁰ This is because in creating a compliance scheme within a statute, even when the state complies with its responsibilities to receive federal funding, individual beneficiaries may still not receive the full spectrum of benefits offered within the statute.⁸¹ Here, the Court focused on the

⁷³ *Id.* at 1199.

⁷⁴ *Id.* at 1197.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1199.

⁷⁸ *Id.* at 1197.

⁷⁹ *Id.* at 1199.

⁸⁰ *Id.* at 1197.

⁸¹ *Id.* at 1200-01.

substantial compliance element within the statute, and determined that the statute was not concerned with whether the needs of one particular foster care facility were satisfied.⁸²

Additionally, the Court stated that another indication that the statute was not individually focused where “each.... reference to [the asserted individual right] is in the context of describing the type of [action] that triggers a funding prohibition.”⁸³ In the language of the Child Welfare Act, if the state fails to meet the enumerated requirements when creating their plan regarding foster care maintenance payments, they are denied funding by the federal government.⁸⁴ Although the funding prohibition is not explicitly stated, the effect of not complying with the Act’s requirements is just that: a funding prohibition.⁸⁵ The court notes that it has never found individually enforceable rights where the statute has referenced a restriction of funding.⁸⁶

Finally, the Court looked to the final prong of the *Blessing* test, which establishes that where the statute provides for a “federal review mechanism” within the statute , its existence cuts against the inference that Congress intended to create an individual right enforceable under section 1983.⁸⁷ Under the Child Welfare Act, oversight regarding the funding restrictions is provided by the Secretary of Health and Human Services for states that choose to participate in the program.⁸⁸ But even with this procedure in place, the Court stated that a direct federal review of the claims of statutory violations made by individual providers does not exist within

⁸² *Id.* at 1201.

⁸³ *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1201 (quoting *Gonzaga*, 536 U.S. at 288-89).

⁸⁴ *Id.* at 1202.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1201.

⁸⁷ *Id.* at 1202.

⁸⁸ *Id.*

the Act.⁸⁹ Instead, the claims are delegated to the individual states to deal with and federal review is explicitly limited.⁹⁰

In its conclusion, the Court reasoned that although there was no federal reviewing mechanism for individuals, the other factors considered under the first prong of the *Blessing* test swayed towards there being no congressional intent to create an individually enforceable right under the Child Welfare Act.⁹¹ Rejecting the argument that it was sufficient to overcome the other factors due to the finding that there was no federal review instrument in place, the court reasoned that it did not need to analyze the remaining prongs of the *Blessing* test since it could not be established that there was unambiguous congressional intent.⁹² The court held that Congress did not confer such a right, and therefore affirmed the trial court's dismissal of the complaint for failure to state a claim.⁹³

B. The Sixth Circuit -- the CWA Confers a Privately Enforceable Right Under Section 1983.

Nevertheless, not all Circuits have been persuaded by the Eighth's Circuit's ruling that Congress did not intend to create a private right of action. In contrast, in the Sixth Circuit, the aunt of two boys placed in foster care sued the Secretary for Kentucky's Cabinet for Health and Family Services for foster care maintenance payments.⁹⁴ She argued that the federal Child Welfare Act created an enforceable private right to these payments, and failure of the state to make them violated Equal Protection and Due Process of the United States Constitution.⁹⁵ The

⁸⁹ *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1202.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *D.O. v. Glisson*, 847 F.3d 374, 376.

⁹⁵ *Id.*

district court dismissed the case, and reasoned that Act did not provide any privately enforceable rights that could be enforced by section 1983.⁹⁶

On appeal, the Sixth Circuit looked to three relevant sections of the Child Welfare Act to determine whether there was a privately enforceable right.⁹⁷ First, the court looked at section 671(a), which provides that a state must submit a plan to the Secretary to be eligible for federal funding. Next, the Court stated that the plan must conform to the requirements within section 672 of the Act, stating that “[e]ach State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative... into foster care.”⁹⁸ Foster care maintenance payments are defined in an enumerated list in section 675(4)(A) of the Act, and cover the cost of shelter, food, and clothing, in addition to other crucial costs accrued.⁹⁹ The final provision of the Act considered in the case at hand was regarding when states may seek reimbursement from the federal government for maintenance payments made to foster families.¹⁰⁰ Section 674(a)(1) states that states are eligible for an “amount equal to the Federal medical assistance percentage... of the total amount expended during such quarter as foster care maintenance payments under section 672” for children under the care of foster homes or child-care institutions as defined by the statute.¹⁰¹

The Court considered the same factors established in the *Blessing* test to find whether there was an individually enforceable right.¹⁰² First, the Court found that the Act’s language mandating payments “on behalf of each child” focused on the benefits to individual recipients,

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 370.

⁹⁹ *Id.* at 377.

¹⁰⁰ *D.O. v. Glisson*, 847 F.3d 374, 377.

¹⁰¹ *Id.*

¹⁰² *Id.* at 376.

rather than simply speaking to the implementation of the policy on the state.¹⁰³ Under the first prong of the *Blessing* test, the Court reasoned that the Act requiring individual payments focused on the needs of the individual children within the foster care system, rather than an aggregate focus, which would not give rise to an individually enforceable right.¹⁰⁴

In addition, section 675(4)(A) of the Act has a specific list of expenses that the maintenance payments must cover, and therefore the Court determined that there were no “vague and amorphous” terms that would strain the judiciary’s interpretation.¹⁰⁵ The State argues that because the specific amounts that the State is required to pay are not quantified within the statute, the Child Welfare Act is not specific enough and therefore is not enforceable under section 1983.¹⁰⁶ But the Court provides that because there is a reasonable methodology that the State has established in calculating foster care maintenance payments, the statute is not deemed to be unenforceable for being indefinite.¹⁰⁷ Giving the state’s discretion in establishing what the rates were does not mean that there is no recognizable private right to a monetary benefits under the Act.¹⁰⁸

Under the final prong of the *Blessing* test, the Court found that the language of section 672(a)(1) stating that the state “shall make foster care maintenance payments” imposed an obligation on the states because it was phrased in mandatory terms.¹⁰⁹ The Court notes that if Congress had wanted the Act to “serve as a roadmap for the conditions a state must fulfill in order for its expenditure to be eligible for federal matching funds” like the State argued, it would

¹⁰³ *Id.* at 378.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *D.O. v. Glisson*, 847 F.3d 374, 379.

¹⁰⁷ *Id.* at 379-80.

¹⁰⁸ *Id.* at 379.

¹⁰⁹ *Id.* at 378.

not have chosen to frame the statute in mandatory terms.¹¹⁰ Simply put, the Court stated that payment by the states under the Child Welfare Act “isn’t optional.”¹¹¹ The State argued that the Act speaks to the states as participants within the construct of the Act by referring to the state as the subject.¹¹² Rejecting the State’s argument, the Court concluded that the Supreme Court and the Sixth Circuit have both affirmed that laws phrased in the active voice where the state is the subject have previously been found to confer individual rights, like in *Harris* and *Wilder*.¹¹³ Noting that under the third prong of the *Blessing* test, Congress must “impose a binding obligation on the States” with the language of the statute, the court concluded that the Child Welfare Act requires a mandatory action on the part of the states.¹¹⁴ In conclusion, the Court established that under the *Blessing* test, section 672(a) of the Child Welfare Act conferred an individual enforceable right to foster care maintenance payments.¹¹⁵

Under the analysis of *Blessing*, the creation of a private right only establishes a rebuttable presumption that the right can be enforced under section 1983, and therefore the court had to determine whether Congress intended for the statute to create such a private right.¹¹⁶ To determine whether the congressional intent exists, the court can look directly to the provision of the statute, or it can also be inferred from Congress’s creation of an enforcement scheme within the statute that would be inconsistent with an individual’s right to enforce under section 1983.¹¹⁷ Here, the Court found that the enforcement mechanisms were not sufficient to foreclose an

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *D.O. v. Glisson*, 847 F.3d 374, 379.

¹¹³ *Id.*; *see also Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 502-03; *see e.g. Harris v. Olszewski*, 442 F.3d 456, 461-62.

¹¹⁴ *D.O. v. Glisson*, 847 F.3d 374, 379.

¹¹⁵ *Id.* at 380.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

individual's access to section 1983 remedies.¹¹⁸ Specifically, the Act requires that a state establish a plan, but there is no process established within the Act that a foster care provider could use to ensure compliance with the provisions of the Child Welfare Act if the state completely neglects to pay foster care maintenance payments.¹¹⁹ The Court concluded that the Child Welfare Act did not include any private federal review mechanism that a foster family could employ when they were denied payments required under the Act.¹²⁰ Therefore, the Court held that the Child Welfare Act did confer upon foster families and providers an individual right to maintenance payments that was enforceable under section 1983.¹²¹

To recap, the Eighth Circuit and the Sixth Circuit have analyzed the same question regarding whether the Child Welfare Act confers a private right of action but have reached opposite conclusions. Part IV examines the policy implications of these decisions and demonstrates that the Sixth Circuit's interpretation of the Child Welfare Act is not only correct as a matter of interpretation, but also to further foster children's interests throughout the United States.

IV. The Child Welfare Act and Section 1983 Create an Individually

A. The Court Has Established a Private Right in Act's with Similar Language.

Where an Act has contained similar language to that of the Child Welfare Act, the courts have found that an individually enforceable right has been created. Throughout the United States, courts have applied the *Blessing* test to determine what creates an individually enforceable right. The court looks first to whether the provision of the statute benefits the plaintiff.¹²² In *Harris*,

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *D.O. v. Glisson*, 847 F.3d 374, 381.

¹²¹ *Id.*

¹²² *Blessing v. Freestone*, 520 U.S. 329, 340.

the court found that using the phrase “any individual eligible for medical assistance” within the statute used terminology that was individually focused enough to “unambiguously confer an individual entitlement.”¹²³ The court concluded that the provision was intended specifically with its beneficiaries in mind, and therefore the plaintiff was intended to benefit from the Medicaid provision at issue.¹²⁴

In juxtaposition, the language at issue in *Gonzaga* states: “No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein...) of students without the written consent of their parents to any individual, agency or organization.”¹²⁵ The court held in this case that the statute did not grant any individual right because of the lack of rights-creating language within the statute that would have given rise to Congress’s intent to create new rights.¹²⁶ Rather than speaking in terms of an individual right of the students, the Act spoke in terms of the institution that the Act sought to govern. The language of the statute clearly does not speak in terms of any individual to be benefitted, and focused rather on the “institutional policy and practice” that is to be regulated by the statute.¹²⁷

In section 672(a), the Child Welfare Act specifically focuses on the individual foster care providers that are intended to be protected by the statute. By stating that the state makes foster care payments “on behalf of each child,” the statute is focused on payment to the providers, who in turn are benefitting the children protected by the Act. The statute is not focused on the

¹²³ *Harris v. Olszewski*, 442 F.3d 456, 461 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287).

¹²⁴ *Id.* at 461-62.

¹²⁵ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279 (quoting 20 U.S.C. § 1232g(b)(1)).

¹²⁶ *D.O. v. Glisson*, 847 F.3d 374, 378.

¹²⁷ *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 980 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 288).

institutions regulated, but rather the actual individuals that are meant to be protected by requiring distribution of foster care maintenance payments. Distinct from the statute in *Gonzaga*, there is no aggregate focus on the institution as a whole here. Instead, Congress was focused on the situations of the individual providers.¹²⁸ Additionally, the inclusion of the term “each” emphasizes an individual focus on the specific children within the system. The statute designates that the foster care providers are to receive these maintenance payments “on behalf of *each* child”, and this specific language is directed at providers and is to be interpreted by the court to benefit the individual foster parents and providers.

Second, it must be demonstrated by the plaintiff that the right protected within the statute is not so “vague and amorphous” that enforcing it would “strain judicial competence.”¹²⁹ Where the statute is not definitive and specific, the Court can declare that it would not qualify under section 1983 enforcement. It cannot be understood that Congress would have intended to confer a right where it would be too difficult for the judiciary to enforce. But, the court has declared that a statute cannot be declared to be unenforceable in “the absence of a uniform federal methodology for setting rates.”¹³⁰

Under section 675(4)(A), the specific definition of what constitutes a “foster care maintenance payment” is enumerated with an itemized list of what that state is required to cover under the Act.¹³¹ Congress specifically listed certain necessities that it deemed were necessary to be covered by the foster care maintenance payments, including “food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, reasonable travel to the child’s home for visitation, and reasonable travel for the child to

¹²⁸ *Gonzaga*, 536 U.S. at 279.

¹²⁹ *Blessing v. Freestone*, 520 U.S. 329, 340-41.

¹³⁰ *Cal. State Foster Parent Ass’n*, 624 F.3d at 981 (quoting *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 518-19).

¹³¹ Reply Br. for Pet. at 5, *Glisson v. D.O.*, 847 F.3d 374 (2017) (No. 17-17).

remain in the school in which the child is enrolled at the time of placement.”¹³² With this extremely explicit list recited within the statute, there is no way that the provision at issue could be interpreted as ambiguous in regards to what payments are to be made on behalf of each child. Additionally, there is discretion allotted for the states to choose the reasonable method of how to calculate the rates of the maintenance payments.¹³³ Simply because the amounts paid out to foster parents is not specifically stated within the Act does not threaten enforcement by the judiciary.¹³⁴ As long as the state has a plan that fits the requirements of the Act, the court is still able to implement a standard to assess whether the state is in compliance with the statute. As a result, there is no way that the enforcement of the identified right would strain the Court’s ability to enforce the right under section 1983.

Finally, the *Blessing* analysis requires that the statute unambiguously create a binding obligation on the States with mandatory language.¹³⁵ Within the statute at issue in *Harris*, it stated that “[a] State plan... must... provide.”¹³⁶ The court deemed that this language established Congress’s intent to phrase the statute in terms of binding language, rather than simply advising the states of their obligations under the statute.¹³⁷ Additionally, in *Price*, the court deemed an almost completely analogous provision to contain mandatory language that satisfied the final prong of the test. Both provisions within the statute require that the grantee states of the federal funding make payments to individuals who were intended to benefit from the

¹³² 42 U.S.C. § 675(4)(A).

¹³³ *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 519.

¹³⁴ *D.O. v. Glisson*, 847 F.3d 374, 379.

¹³⁵ *Blessing v. Freestone*, 520 U.S. 329, 341.

¹³⁶ *Harris v. Olszewski*, 442 F.3d 456, 461.

¹³⁷ *Id.* at 462.

Act.¹³⁸ As the court stated in *D.O.*, if Congress had intended for the statute to simply be a “roadmap” that the states could follow, then it would not have used mandatory terminology to dictate what the states must do in order to receive funding.¹³⁹ Congress in its creation of laws and legislation knows how to frame a statute in non-binding terms. If reading the statute in the manner that Congress intended, it must be interpreted as a mandatory obligation placed upon the states. In stating that “[e]ach State with a plan approved... shall make foster care maintenance payments...” Congress used mandatory language by using “shall” to describe the state’s obligation under the Act in regards to payments.¹⁴⁰ Congress also intentionally used the active voice in describing what the state must do to receive funding to make the obligation obviously mandatory on the States.

In conclusion, it must be interpreted that the Child Welfare Act was meant to be confer an individually enforceable right to providers and individual foster families.

B. Congress Did Intend an Individual Right Enforceable under Section 1983.

When interpreting the Child Welfare Act, a private individual right must be conferred. When it is established that there is a privately enforceable individual right in the statute, the analysis is not concluded. Because the focus within the provision is on the congressional intent to determine whether it produces a federal right, there is only a rebuttable presumption that the right is enforceable under section 1983.¹⁴¹ Evidence of congressional intent can be drawn directly from the language of the statute that created the right.¹⁴² In the case of *Gonzaga*, the

¹³⁸ *Price v. City of Stockton*, 390 F.3d 1105, 1114 (9th Cir. 2004); compare 42 U.S.C. § 672(a) (“[e]ach State with a plan approved under this part shall make foster care maintenance payments”) with 42 U.S.C. § 5304(k) ([e]ach grantee [State] shall provide for reasonable benefits”).

¹³⁹ *D.O. v. Glisson*, 847 F.3d 374, 378-79 (quoting *Midwest Foster Care & Adoption Ass’n v. Kincade*, 712 F.3d 1190, 1198 (8th Cir.)).

¹⁴⁰ 42 U.S.C. § 672(a)(1).

¹⁴¹ *Blessing v. Freestone*, 520 U.S. 329, 341.

¹⁴² *Glisson*, 847 F.3d at 380.

State found that Congress expressly stated that the Secretary of Education was to “deal with violations” of the Act, and provided an explicit framework.¹⁴³ The court found that the statute established a mechanism that Congress provided to remedy violations of the Act.¹⁴⁴ Therefore, enforcement under section 1983 was not necessary for an individual to remedy their situation.¹⁴⁵ In contrast, Within the language of the Child Welfare Act, there is no explicit statement of Congress’s intent to expressly foreclose an individual’s access to a section 1983 cause of action. No language exists to determine what action is to be taken by an individual if the state does not abide by its plan in compliance with the Child Welfare Act.

Where the remedy is not explicitly renounced, congressional intent can still be inferred.¹⁴⁶ If the statute creates a scheme that is “sufficiently comprehensive”, the Court has concluded that it is sufficient to infer Congress’s intent to disallow a remedy under section 1983.¹⁴⁷ The Supreme Court has rejected the argument that having a provision establishing an ability to reduce or terminate funding when states do not comply with the statute is sufficient to find that Congress has foreclosed access to a section 1983 remedy.¹⁴⁸

A showing must be made that enforcement of an action under section 1983 would be wholly inconsistent with the scheme that Congress has implemented within the statute.¹⁴⁹ As of the case of *Blessing v. Freestone*, the Court had only find two schemes sufficiently comprehensive to oust enforcement under section 1983.¹⁵⁰ Where the Court found that a federal

¹⁴³ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 289.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Blessing v. Freestone*, 520 U.S. 329, 346.

¹⁴⁷ *Id.*

¹⁴⁸ *Harris v. Olszewski*, 442 F.3d 456, 463 (stating “That the Federal Government may withhold federal funds to non-complying States is not inconsistent with private enforcement); *see also* *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 521-22; *see e.g.*, “A Lost Generation”: The Battle for Private Enforcement of the Adoption Assistance and Child Welfare Act of 1980, 60 U. Cin. L. Rev. 593, 614.

¹⁴⁹ *Blessing*, 520 U.S. at 346.

¹⁵⁰ *Id.* at 347.

statute had the congressional intent to foreclose, the remedial scheme was much more comprehensive than the one established in the Child Welfare Act.¹⁵¹ Here, the Act does not establish any private judicial enforcement within its provisions that would allow an individual to enforce the right to foster care maintenance payments. The Child Welfare Act provides no administrative means that would allow a provider to ask the state to make payments that they have not been granted.¹⁵² Therefore, the Act should not be viewed as foreclosing access to section 1983 enforcement.

Within the Child Welfare Act, there is no remedial scheme that would be inconsistent with section 1983 enforcement. Section 1983 is intended to allow private individuals to establish a cause of action if they were intended to be beneficiaries of federal legislation.¹⁵³ There is no remedy that is afforded to foster parents and institutions intended to benefit from the Act that would allow for them to ensure foster maintenance payments are made. The Secretary only reviews the states plans for compliance with the Act, but they do not have the authority to actually make sure that the states provide the individual foster caretakers with the benefits guaranteed by the Act.¹⁵⁴ In essence, the states could implement a plan that conforms to the federal requirements and be approved by the Secretary, and yet never make payments to foster care providers.¹⁵⁵

Therefore, the court must interpret Congress's intent to provide an individually enforceable right under section 1983.

C. Policy Implications Call for the Child Welfare Act to Confer an Individual Right to Foster Care Maintenance Payments Enforceable under Section 1983.

¹⁵¹ "A Lost Generation": The Battle for Private Enforcement of the Adoption Assistance and Child Welfare Act of 1980, 60 U. Cin. L. Rev. 593, 614.

¹⁵² Cal. State Foster Parent Ass'n v. Wagner, 624 F.3d 974, 982.

¹⁵³ "A Lost Generation": The Battle for Private Enforcement of the Adoption Assistance and Child Welfare Act of 1980, 60 U. Cin. L. Rev. 593, 611.

¹⁵⁴ D.O. v. Glisson, 847 F.3d 374, 380.

¹⁵⁵ *Id.*

The Child Welfare Act is a huge move forward in the reform of the foster care system. Prior to the implementation of the Act, foster families caring for children were only granted financial assistance if they qualified for Aid to Families with Dependent Children (AFDC), which stringently limited which children were eligible for federal funding.¹⁵⁶ For example, federal assistance was given to states strictly for foster care, and not for adoption, which removed the incentive for states to place children into adoptive homes because of the risk of a loss of funding.¹⁵⁷ As a result, the children within the system were forced to stay in foster homes for much longer periods than anticipated, which would result in a greater likelihood that the child would be “lost” within the system.¹⁵⁸ Before 1980 when the Act was passed, the Social Security Act provided funding for a larger range of services than what was actually used in practice.¹⁵⁹ In practice, Congress devoted a maximum of \$56.6 million, although around \$266 million was authorized for Title IV-B use.¹⁶⁰

With the establishment of the Child Welfare Act in 1980, states are given the incentive of receiving federal funding for their compliance with the Act. This motivation to create plans that comply with the Act in turn enables states to fund foster care and adoption assistance services.¹⁶¹ By implementing these plans, the foster care systems throughout the states are much more comprehensive than they were prior to the Act’s implementation in 1980. As a result of state funding being conditioned upon established plans that must be approved by the Department of

¹⁵⁶ "A Lost Generation," 60 U. Cin. L. Rev. at 598.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 598-99.

¹⁵⁹ *Id.* at 599 n. 36.

¹⁶⁰ *Id.*

¹⁶¹ *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 977.

Health and Human Services, the Child Welfare Act is clearly a comprehensive endeavor by Congress to improve the foster care system.¹⁶²

But, the system created within the Act is not without its flaws, particularly if the Court does not find that there is a privately enforceable right to maintenance payments under section 1983. When states do not comply with the Act, their federal funding will be either reduced or eliminated.¹⁶³ Under section 1320a-2a, the Secretary is granted the right to determine whether the states plan “substantially conforms” with the federal requirements.¹⁶⁴ If the plan is determined to not conform, then the Secretary is not simply given the power, but is required to withhold federal funding.¹⁶⁵ Within the language of the Act, there is no other recourse available to remedy the situation for individuals.¹⁶⁶ As a result, when the states do not comply with the requirements within the Act, the individual foster families and child care providers suffer the loss of federal funding without any ability to remedy their situations. The individuals that are intended to be benefitted by the maintenance payments are therefore hurt by the cutting off of federal assistance. By permitting the use of a section 1983 claim of action for maintenance payments, the children within the foster care system and the individuals who cares for them are not deprived of the ability to purchase basic necessities, such as clothing and food.

V. Conclusion

In conclusion, the correct interpretation of the Child Welfare Act of 1980 is the Sixth Circuit’s understanding in *D.O. v. Glisson*. The Act does create an individually enforceable right to foster care maintenance payments for an individual foster care family and foster care provider

¹⁶² "A Lost Generation": The Battle for Private Enforcement of the Adoption Assistance and Child Welfare Act of 1980, 60 U. Cin. L. Rev. 593, 610.

¹⁶³ *Id.* at 611.

¹⁶⁴ *Midwest Foster Care & Adoption Ass’n v. Kincade*, 712 F.3d 1190, 1194 (8th Cir.); *Cal. State Foster Parent Ass’n v. Wagner*, 624 F.3d 974, 979

¹⁶⁵ *Foster Children v. Bush*, 329 F.3d 1255, 1270; *see also* 42 USCS § 1320a-2a(b)(4).

¹⁶⁶ "A Lost Generation," 60 U. Cin. L. Rev. at 611.

as defined under the statute. The language of the Child Welfare Act created by Congress confers a right due to its mandatory language within the statute, as well as the binding obligation imposed on the states, who are granted reasonable deference in establishing the exact rate at which these payments are distributed.

Due to the Child Welfare Act conferring a right to individuals, the next step in the analysis is considering whether enforcement under section 1983 is appropriate. Once a plaintiff demonstrates that a statute creates a privately enforceable right, there is only a rebuttable presumption that the right is therefore enforceable under section 1983. Evidence of congressional intent is important to show that Congress either did or did not intend access to a section 1983 remedy upon creation of the new right within the statute. Evidence can be found either explicitly within the statute itself, or it can be inferred from the creation of a sufficiently comprehensive scheme that would make enforcement under section 1983 incompatible with the statute.

In the Child Welfare Act, there is no explicit access to a remedy for non-payment of foster care maintenance payments. Individual providers and foster care families do not have any explicit right within the statute to remedy a situation where they do not receive funds that they are entitled to under the Act.

Additionally, the scheme within the statute does not sufficiently preclude an individual from seeking enforcement through section 1983. There is no explicit process through which individuals are able to seek benefits that they are not provided for. Providers are not given any framework that they are able to follow to seek monetary relief from the state when maintenance payments are not distributed to enable them to cover the costs of the children placed within their home or institution. The Child Welfare Act's mechanisms to enforce the right to these foster

care maintenance payments do not sufficiently foreclose an individual's access to section 1983 remedies.

Although the foster care system has taken steps forward since the implementation of the Child Welfare Act in 1980, there still must be a remedy available for those that are not granted federally funded payments by their state. In conclusion, the Sixth Circuit's holding that Congress intended to confer a private right to foster care maintenance payments specifically enumerated within the Child Welfare Act that is enforceable under section 1983 is correct. Therefore, the Court needs to protect those intended to be benefitted, and interpret the Act as establishing a right for foster care institutions and foster families to entitlement of the payments that they are owed.