36377-8

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COURT OF APPEALS FOR THE STATE OF WASHINGTON

Division I

WASHINGTON STATE COALITION FOR THE HOMELESS; ANITA ELLIOTT and her minor child, JUSTIN; et al; and other persons similarly situated; Respondents, Cross-Appellants, vs. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al, Appellants, Cross-Respondents.	)	Division I No. 36377-8-I

BRIEF OF APPELLANTS AND CROSS-RESPONDENTS

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I. THE LEGISLATURE DIRECTED THE DEPARTMENT TO DEVELOP A CHILD WELFARE PLAN FOR CHILDREN IN THE STATE OF WASHINGTON.

The primary purpose of statutory interpretation is to discover and implement the intent of the legislature. The plaintiffs' case is predicated on the fact that the word "homeless" appears in the statute, that it refers to children and, ipso facto, the agency must devise a comprehensive and coordinated housing plan for homeless children and their parents.

This interpretation ignores the fact that the statute's purpose is to provide child welfare services in order to protect children who are at risk; it ignores the statutory definition of child welfare services which does not include housing; it ignores the context of RCW 74.13.031 and the remainder of the statute; and it ignores the administrative interpretation of the statute.

The trial court interpretation ignores the fact that the Department has no statutory authority to finance, build or develop any type of housing in the state. It fails to harmonize the general language of RCW 74.13.031 with the legislature's

explicit delegation of authority to The Department of Community, Trade and Economic Development (CTED) to develop housing plans for all families in the state within the framework of state and local comprehensive community and economic development strategies. The trial court's interpretation provides the Department with an administrative burden the legislature never intended: planning housing for homeless children and their parents. This is an important mission but one that has been delegated to another state agency.

The trial court's decision will divert Departmental resources from its statutory mission to provide a coordinated and comprehensive child welfare service plan to protect children in the State of Washington. It will also have a chilling effect on the Department's efforts to effectively plan for child welfare services because it will encourage future lawsuits by plaintiffs who think the Department should provide other services.

A. The Trial Court Improperly Infringed on the Departments Exercise of Discretion.

Despite the plaintiffs' repeated assertions that the trial court did "nothing more" than order

the Department to "develop a plan", the Findings of Fact, Conclusions of Law, and Order demonstrate otherwise. The trial court mandated that the Department have a separate housing plan for homeless children. The court also made it clear that the Department would need to go through a series of steps before the court would find any plan to be "adequate." CP 1251. For example, the court found that "the necessary steps" to develop an effective plan would include the following: a) recognition and acknowledgement by the Department of its role; b) coordination within the Department; c) coordination by the Department with other state and federal agencies; d) coordination by the Department with shelter providers and social service providers; e) consultation with experts and "others"; data collection and analysis; and g) a process for on-going evaluation. Findings of Fact No. 6, CP 1248. The court also found that an effective plan would need to include prevention services, adequate emergency programs, and programs

to assist families to obtain affordable housing.[1] Finding of Fact No. 7, CP 1248.

The court ordered further hearings to be held, and possible submission of additional material in the event the court felt it was warranted to determine whether the plan is adequate. The court even expressed its intent to remain involved even after the creation of the plan for "monitoring" purposes. CP 1251.

The statute does not address any of the standards or criteria set forth by the trial court, nor is there language in the statute which allows a court to establish standards based on expert testimony. The trial court has substituted specific directives for a housing plan for homeless children and their parents in place of the legislature's general policy language regarding a child welfare plan.

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[1] The court ignored the complexity of the problem of homelessness by only addressing housing. The solutions to homelessness involve jobs, wages, health care, public assistance, housing and other areas. See Governor's Task Force on Homelessness, S.J. Ex. K, Tr. Ex. 10.

B. RCW 74.13 Was Intended to Address Planning for Child Welfare Services and Does Not Mention Housing.

1. The Broad, Policy Language of RCW 74.13.031 Regarding Child Welfare Services Was Not Intended to Require a Housing Plan for Homeless Children.

The Supreme Court has held that broad policy language does not create individually enforceable rights. Aripa v. Social and Health Services, 91 Wn.2d 135, 588 P.2d 185 (1978), Melville v. State, 115 Wn.2d 34, 37-38, 793 P.2d 952, 954-55 (1990).

Washington law is identical to the principles enunciated by the United States Supreme Court in deciding whether federal law creates judicially enforceable rights: a court must determine if the statute was intended to benefit the putative class, whether the statute is mandatory or precatory, and, if it is mandatory, the court must proceed to determine if the standards set out are too vague and amorphous to be enforced by the judiciary. See discussion infra at 33-38. In the case at bar, there are no objective standards set out by the legislature in RCW 74.13.031 and the legislature did not intend to create judicially enforceable

rights.

Plaintiffs claim that the cases the Department cites are distinguishable because the word "shall" appears in RCW 74.13.031. In Aripa, however, the petitioners who claimed a "statutory right" to comprehensive individualized alcohol treatment also relied on a statute which contained the word "shall".[2]

Despite the mandatory word "shall", the court held that the statutes relied upon lacked specificity and did not create enforceable rights. Id. at 138. The court also looked at RCW 70.96A.080(3) which states that the agency "shall provide for adequate and appropriate treatment for alcoholics. . ." Id. at 139. Despite the word "shall" the court held that the legislature granted the Department the discretion to design the treatment programs. Id. at 140. See also Melville v. State, 115 Wn.2d at 37, fn.1. (No enforceable rights even though the statutes relied upon

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[2] "[T]he department shall . . . (3) Cooperate . . . in establishing and conducting programs to provide treatment for alcoholics . . ." Aripa, 91 Wn.2d at 137.

contained the word "shall".) Thus the general nature of the legislative directive does not create judicially enforceable rights for individuals.

This case is identical to Aripa because there are no specific standards which establish enforceable rights. The legislature has provided only a general description of the children for whom the Department is to plan and a general definition of child welfare services. The trial court in this case, however, ignored the overall context of the statute and focused solely on the word "shall" not only to conclude that the statute is privately enforceable, but also to conclude that it contains a privately enforceable right to a plan for housing assistance.

This court has already held that the statutory language at issue in this case, even though it contains the word shall, was general policy language and the legislature did not intend to create privately enforceable rights. See Department's Brief at 16.

When the legislature desires to set standards for government agencies involved in planning it has

shown itself capable of doing so. See RCW 36.70A.070 (Supp. 1996) (In Growth Management Act the legislature described in detail the mandatory elements of a comprehensive growth management plan); RCW 74.14C.030(2), RCW 74.14C.050, and RCW 74.14C.080 (Supp. 1996) (Department directed to consult with an expert, create an implementation and evaluation plan and to collect certain data in Family Preservation Act).

The legislature has examined and amended RCW 74.13 numerous times and has reviewed reports concerning the Department's delivery of child welfare services without establishing standards for a housing component in the child welfare plan or granting the Department statutory authority over housing programs. See Department's Brief at 25-7.

The legislature did not provide specific standards for the Child Welfare plan in RCW 74.13.031(1) because it did not intend that statute to impose obligations beyond which are required by federal law and federal regulations. See Department's Brief at 27-34, infra at 9-10.

2. The Legislature Intended the State Child Welfare Plan to Comply with the Federal Child Welfare Law.

When the state participates in cooperative federal-state programs the state must comply with federal statutory requirements. See Department's Brief at 27-9.

The state and federal child welfare statutes contain almost identical language. The federal statute, in relevant part, states:

> . . . the term '**child welfare services**' means 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 . . . " (emphasis added) 42 U.S.C. § 625(a)(1).

The statute addresses adoption and foster care issues in a general manner.[3] The only federal court to interpret this language held that the

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[3] The statute does not address housing programs or plans for housing. Congress, like our legislature, recognized that the child welfare laws were not aimed at providing housing for homeless families despite the existence of the word "homeless" in the statute; that is why Congress passed the McKinney Homeless Assistance Act in 1987, See 42 U.S.C. §§ 11301 et. seq. and both Congress and the state legislature required housing plans which address homeless families. See Department's Brief at 40-3.

terms in this definitional section did not create any substantive rights on behalf of any children. See B.H. v. Johnson, 715 F.Supp. 1387 (N.D. Ill. 1989). The federal statute and regulations describe the standards a state child welfare plan must meet. See Department's Brief at 29-30.

Plaintiffs maintain that the federal child welfare laws are irrelevant and the legislature's specific instructions to interpret state child welfare law to comply with federal requirements are irrelevant. The statutory language, the legislative history and the context of the statutes cannot be ignored. The legislature intended the statute to comply with federal law and enable the Department to receive federal funding available for child welfare services. Federal law and the state statutory construction rules are irrelevant only if this court ignores the quintessential goal of statutory construction: implementing the intent of the state legislature.

3. The Statute Requires a Child Welfare Services Plan for Children.

a. There is nothing in the statute to indicate that child welfare services must include housing.

Courts in Washington have long recognized that the spirit and intent of a statute prevails over the inept wording of a statute. Wichert v. Cardwell, 117 Wn.2d 148, 151, 812 P.2d 858 (1991). RCW 74.13 does not mention a housing program or housing in any section of the statute.[4] The purpose of RCW 74.13 is to provide services that protect children who are at risk. Its purpose is not to provide a remedy for all social ills. While housing programs, financial assistance programs, or education programs are all programs that may benefit children, they do not necessarily protect them from abusive or neglectful parents.

Courts should attempt to harmonize statutes that appear to be inconsistent. Ropo, Inc. v. Seattle, 67 Wn.2d 574, 578, 409 P.2d 148 (1965). Yet, the trial court's interpretation of the

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[4] The Department is a creature of statute. There is no language in Title 74 which provides the Department with authority or responsibility in developing shelters or housing. The Department does, through its Division of Income Assistance, administer the Aid to Families with Dependent Children (AFDC) program. See RCW 74.12.010. The Department also has emergency assistance programs for providing grants to families. See RCW 74.04.660, WAC 388-255 et seq.

statute results in the absurd consequence of placing a single division within the Department at the center of housing planning in the state even though it has no legal authority or funding to subsidize, build, develop or finance any type of housing.[5] The court ignored the fact that the Department has no statutory authority to operate the housing shelters and affordable housing it was ordered to devise a plan for.[6]

Respondent's misconstrue the Department's position[7] by stating that the Department asserts RCW 74.13 has by implication been repealed. That is not true. The Department's position is that the child welfare statutes were never intended to require the development of a housing plan as part of its plan for child welfare services because that

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[5] This authority has been delegated by the legislature to the Department of Community, Trade and Economic Development. See Department's Brief at 37-43.

[6] Plaintiffs stipulated that the legislature has not provided funding for housing for homeless families to the Department. CP 664 at #4.

[7] This is one of many examples where the respondents misstate either the department's arguments or the holding of the trial court.

obligation was intentionally delegated to another state agency. This legislative intent is demonstrated through the language of the statutes at issue, the legislature's failure to appropriate funds for housing for the Department, and the legislative acquiescence in the Departments interpretation of its obligations under the child welfare statutes.[8] See Department's Brief at 21-7.

The trial court's interpretation does not attempt to discern legislative intent, or to harmonize the statutes. Instead it creates conflict.

The purpose of RCW 74.13 is to protect children who are at risk because of the absence of, neglect of, or abuse by their family unit. See Department's Brief at 8-12, 21-27. The statute defines child welfare services and the Department is required to coordinate the social services

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[8] The services and responsibilities that are codified in RCW 74.13 are coordinated by the Department in its Child Welfare Plans. The bulk of each plan is devoted to precisely those services that are described by the legislature in the statute: day care, foster care and CPS intervention in families to protect and promote the welfare of children.

delineated in the statute for children. RCW 74.13.020 and RCW 74.13.031(1). The statutory definition of child welfare services precludes the court from interpreting it as including housing. See State v. Roadhs, 71 Wn.2d 705, 707, 430 P.2d 586 (1967) [when a statute defines a term there is an inference that omissions were intended by the legislature], Seattle v. Koh, 26 Wn. App. 708, 710-11, 614 P.2d 665 (1980) [when the legislature defines a term, that definition must be used], State v. Leek, 26 Wn. App. 651, 655-56, 614 P.2d 209 (1980) [a statutory definition of a term excludes other meanings of the term].[9]

There is no evidence that the statute intended

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[9] Further evidence of the legislature's intent that the Department coordinate social services is found in the decision to establish a Children's Services Advisory Committee with a third of the members from child care providers and at least one from the adoption community. RCW 74.13.031(9) (Supp 1996). There is no position for emergency shelter or housing providers. This is a clear indication that the legislature did not contemplate the Department being involved in planning for housing. Cf. RCW 43.185B.020 (Supp 1996) which establishes the Affordable Housing Advisory Board and requires that the Governor appoint a representative from the homeless shelters, low-income persons, non-profit housing development and public housing authorities.

to require planning and coordination of every service that might benefit children and their parents. Plaintiffs' argument assumes that housing is a necessary component of protecting children from risk. The facts of the named plaintiffs, however, demonstrate that is not always the case.

Two of the named plaintiffs, the Hills and the Elliotts, had housing difficulties. Their children however, were never at risk of abuse, neglect, or abandonment. The other two named plaintiffs, Coughlin and Sanders, had no housing difficulties when the Department first became involved, yet their children were abused and neglected. Mrs. Coughlin was unable to protect and care for her children because of her severe alcohol and drug abuse. She ultimately relinquished her parental rights to her children. The Department became involved in the Sanders family, not because the family was homeless, but because the father raped one child, and in response Mrs. Sanders absconded with both the children and her husband to California. She in fact rejected efforts on the part of the Department social worker to arrange

placement of her and the children in a shelter. Any delay that resulted in ultimately returning the children to Mrs. Sanders was caused by her lifestyle choices, not by a lack of housing assistance. CP 482-90, 937-39.[10]

The Department has recognized that housing may be a component of protecting children. The risk factor matrix is a tool used by the Department to assess children's saftey and it considers the children's housing situation. The legislature has authorized the use of Home Based Services funding to provide assistance to those families whose children are at risk of out-of-home placement. The legislature has also created the Family Preservation Services Act which has a housing component. These services are included in the Child Welfare Service Plans. Department's Brief at 8-12, 44-46.

The plaintiffs, however, would have this court impose an obligation on the part of the Department

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[10] At Summary Judgment the facts of the named plaintiffs were unrebutted by the plaintiffs and the Department's citation is to the facts cited in its Memorandum in Support of Summary Judgment.

to plan and coordinate housing services to families irrespective of their level of risk. Under their rational, all of the states working poor would qualify for housing assistance from the Department. This type of reasoning could be used in future lawsuits to direct the Department to address such things as education, comprehensive health care, job development, etc. even though the Department has no legal authority in these areas or limited authority.

b. The definition of the word "homeless" does not change the statute's requirements regarding child welfare services.

The Department demonstrated in its opening brief that the term "homeless children" was never intended to refer to children and their parents who lack a physical dwelling.[11] This interpretation is supported by both the text of the statutes at issue and their legislative history. See Department's Brief at 18-20, 30-33.

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[11] Plaintiffs argue that the term homeless children in RCW 74.13.031 should be given its "plain" meaning. The plain meaning of the term "children" however does not include the parents of those children.

However, regardless of whether this court agrees with the Department's analysis, defining the word "homeless" does not resolve the issue of whether housing must be a part of a "child welfare services" plan. This would make the definitional section of the statute and the remainder of RCW 74.13, which discusses services, superfluous.

It is unrebutted that the Department's services are available to all children. All children, and their families, including homeless children, must meet the eligibility criteria of each service to qualify for the service. None of the services are entitlement programs for any group of children.[12] There is nothing in the statute that states that children without housing receive preferential treatment or have separate eligibility criteria from other children for any service.[13]

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[12] CPS workers do refer families to numerous services including entitlement programs such as the Aid to Families with Dependent Children (AFDC) financial assistance program. See RCW 74.12.

[13] The plaintiffs stipulated that the legislature has never "appropriated any funds for service programs that have homelessness as an eligibility requirement to be administered by DSHS except for the homeless day care programs". CP 664.

See Department's Brief at 8-12.

The precise definition of homeless or dependent or neglected children makes no difference in the Department's evaluation of eligibility for a service.[14] For example, in order to receive Child Protective Services, children are evaluated in a comprehensive assessment process developed at the direction of the legislature to determine the seriousness of their situation and determine an appropriate social service response. See Department's Brief at 8-12, 24, 44-46.

Each family goes through the same evaluation process including a "homeless" family, whether the children are without housing or without parents. Plaintiffs are under the mistaken assumption that every family without parents receives services. This is untrue. If two children have their parents killed in a car accident, they may end up in the CPS or foster care system - but only if they do not have relatives to care for them. If they have

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[14] Children in a family with housing problems will have a much greater chance of receiving Home Based Services or housing assistance through the Family Preservation Act.

competent relatives, there will never be a referral or a need for intervention. If their relatives choose not to become involved or are incapacitated, e.g. because of drugs or mental health problems, etc., then their situation will be evaluated by a CPS worker. Similarly, as the Department has explained, a family or children without housing will go through the same evaluation. If housing is their only problem, they will receive referrals. If there are other problems, they will be addressed.

The trial court failed to recognize that children with housing problems may also need other child welfare services.

4. The Legislature Knows that Another Agency Has The Responsibility of Planning for Housing in the State of Washington.

Plaintiffs maintain that the legislature is unaware of the Department's administrative interpretation of the statute. This is wrong. The Department has never, since the codification of the statute, had a separate housing plan for homeless children and their parents. The Department has referred to several legislative reports that

examined the child welfare system in detail and those reports never once mentioned housing programs or housing plans. See Department's Brief at 26-7. The Department has promulgated regulations regarding the child welfare services in the statute, and they do not refer to housing. See WAC 388-70 et seq.

It is axiomatic that "legislative bodies . . . are presumed to have full knowledge of existing statutes affecting the matter upon which they are legislating." Louthan v. King County, 94 Wn.2d 422, 429, 617 P.2d 977 (1980). The legislature delegated authority to the Department of Community, Trade and Economic Development to develop housing plans for all families because it knew that RCW 74.13.031 did not require a housing plan. See Department's Brief at 37-43.

Plaintiffs maintain that the Department's duty is to those children who are "unserved" by other federal and state legislation which provides resources for shelters and housing. There is nothing in the statute to support that proposition. There is no evidence the legislature intended the

Department to be the "backup" housing agency for the Department of Community, Trade and Economic Development.

5. The Legislature Did Not Intend Homeless Children to Possess a Cause of Action for a Housing Plan Pursuant to the Child Welfare Statutes.

After examining the language of the statute, the context of the statute, legislative history and the unrebutted administrative interpretation of the statute it is clear that the statute was intended to provide child welfare services for children. There is no mention of housing anywhere in the statute. The statute is also intended to comply with federal law and to allow the state to receive federal funds for child welfare services.

II. THE FEDERAL AND THE STATE CONSTITUTION DO NOT PROVIDE THE PLAINTIFFS WITH A RIGHT TO HOUSING ASSISTANCE.

In its Motion for Judgment on the pleadings, the Department moved to dismiss plaintiffs' claim for housing assistance based upon the due process clauses of the Washington and United States Constitutions. The trial court held that:

2.2 The plaintiffs have no federal or state constitutional right to housing

> assistance. Neither the federal nor the state constitution confers a right, express or implied, to affirmative assistance from the defendants to maintain family integrity.

Order on Defendants' Motion for Judgment on the Pleadings, paragraph 2.2, CP 360. This decision is correct and should be affirmed.[15]

The plaintiffs seek to compel the Department to provide housing assistance in order to ensure a given type of family life.[16] The right to family integrity is not the right to assistance from the government, it is the right to non-interference by the government. The history of the Bill of Rights makes it clear that the drafters were concerned "not that government might do too little for the people but that it might do too much for them". Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th

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[15] The trial court ruled that RCW 74.13 and 74.14A did not create a procedural due process entitlement to housing. CP 982 at #4. The plaintiffs have abandoned this cross-appeal by not addressing it in their memorandum. Park Hill Corp. v. Don Sharp, Inc, 60 Wn. App. 283, 287 fn. 4, 803 P.2d 326 rev. denied, 117 Wn.2d 1005, 815 P.2d 265 (1991).

[16] In their memorandum, plaintiffs do not describe the housing assistance they seek. In their complaint, it is defined as "help that provides necessary emergency shelter and transitional or permanent housing." CP 116.

Cir. 1983). When the government does interfere in family life, due process requires the state to have compelling reasons. See In re Sumey, 94 Wn.2d 757, 621 P.2d 1108 (1980); In re A.V.D., 62 Wn. App. 562, 815 P.2d 277 (1991).

The United States Supreme Court has ruled that the due process and equal protection clauses of the Constitution do not provide a claim for a right to housing. Lindsey v. Normet, 405 U.S. 56, 31 L.Ed.2d 36, 92 S. Ct. 862 (1972). In its majority opinion the court held:

> We do not denigrate the importance of decent, safe and sanitary housing, But the constitution does not provide judicial remedies for every social and economic ill.

31 L.Ed.2d at 50-1.

The Washington Supreme Court reached the same conclusion when it held that:

> While the constitution respects the realm of the family, it does not guarantee family unity at state expense. (citation omitted).

Bedford v. Sugarman, 112 Wn.2d 500, 516, 772 P.2d 486 (1989).[17]

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[17] These decisions regarding housing are supported by numerous Supreme Court decisions that consistently hold that the due process clause does not confer a right to governmental aid even when it

This court has explicitly held that "the constitution does not guarantee family unity at state expense," and refused to provide "housing assistance" to a family threatened with foster care. In re the Welfare of J.H., 75 Wn. App. 887, 892, 880 P.2d 1030 (1994) rev. denied, 126 Wn.2d 1024 (1995).

Other jurisdictions have also refused to find a constitutional right to government aid to promote family integrity. In Black v. Beame, 550 F.2d 815 (2nd Cir. 1977), a mother of nine children argued that the state violated the constitution by failing to provide housing and other services sufficient to reunite her with her children who were in foster care. She proposed a plan which she alleged would cost less than what the state was expending to maintain the children in foster care. The court rejected her constitutional argument and held that the Fourteenth Amendment did not provide a basis for relief. 550 F.2d at 817. The court relied on

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is necessary to secure fundamental rights of which the government may not deprive the individual. See e.g., Rust v. Sullivan, 500 U.S. 173, 114 L.Ed.2d 233, 111 S. Ct. 1759 (1991).

Dandridge v. Williams, 397 U.S. 471, 25 L.Ed.2d 491, 90 S.Ct. 1153 (1970), which held that "the constitution does not empower this court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." Id. at 487. See also Joseph A. By Wolfe v. New Mexico Dept. of Human Services, 575 F. Supp. 346 (1983) (no interest in family integrity would entitle children to a constitutional right to an adoptive home nor is there any constitutional right to placement in the least restrictive setting); Winston v. Delaware City Children and Youth Services, 748 F. Supp. 1128 (E.D. Pa 1990) (no substantive due process liberty interest in visitation and due process clause does not require substantial efforts to reunify family once child has been lawfully removed); B.H. v. Johnson, 715 F. Supp. 1387 (N.D. Ill. 1989) (no constitutional obligation to make efforts to reunify a family if they have been legitimately separated).

The cases plaintiffs cite have nothing to do with family integrity. In Dunn v. Blumstein, 405

U.S. 330, 92 S. Ct. 995, 31 L.Ed.2d 274 (1972), the court struck down a residency requirement pursuant to an equal protection challenge because the state was unable to show a compelling state interest for infringing upon the fundamental right to vote, and Shelton v. Tucker, 364 U.S. 479, 81 S. Ct. 247, 5 L.Ed.2d 231 (1960), involved a state statute that was found unconstitutional because it infringed on freedom of speech and association.

The trial court's ruling dismissing the plaintiff's due process claims regarding housing assistance should be affirmed.

III. THE FEDERAL STATUTORY CLAIMS WERE PROPERLY DISMISSED BY THE TRIAL COURT.

Plaintiffs maintain that certain sections of the federal Child Welfare Act provide judicially enforceable rights to housing assistance. The trial court dismissed the federal claims based on the U.S. Supreme Court's decision in Suter v. Artist M., 503 U.S. ___, 118 L.Ed.2d 1, 112 S.Ct. ___ (1992), that the federal rights claimed were vague and amorphous and could not be judicially enforced. CP 460.

In 1995, Congress passed an amendment to the

Social Security Act that limited some of the broad language of Suter v. Artist M. but did not reverse the court's holding in that case. When the Child Welfare Act, the holding in Suter v. Artist M. and the amendment are analyzed, it is clear that the trial court's decision to dismiss the federal claims was correct and should be affirmed.

A. The Adoption Assistance Act of 1980.

Congress enacted the Adoption Assistance and Child Welfare Act of 1980, (AACWA) 42 U.S.C. §§ 620-28, 670-79a, a federal-state cooperative funding statute, which, under Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-79a, provides federal reimbursement to the States for certain costs of maintaining a child in foster care. In return for federal funds, the States agree to file a plan with the Secretary of Health and Human Services meeting certain requirements, including providing that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his

home." 42 U.S.C. § 671(a)(15). No further definition or explanation of what constitutes "reasonable efforts" is provided anywhere in the statute.

The plan must also provide for the development of a "case plan" for each child that documents, among other things, the child's circumstances, the foster care arrangements, and the services to be provided to facilitate family reunification or permanent placement, and a "case review system" establishing procedures for assuring that children are afforded a case plan and periodic review to evaluate and resolve the child's status. 42 U.S.C. §§ 671(a)(16), 675(1) and (5)(B).

The regulations provide that, in implementing the foster care provisions of a state plan, a State's "case plan" prepared for each child should be written and "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." 45 C.F.R. 1356.21(d)(1)-(4). The regulations also include examples of services, without mandating that a State provide any

particular service. See 45 C.F.R. 1356.21(b), 1357.15(e)(2).

The Act does not provide for any private causes of action. Instead, it directs the Secretary to discontinue or reduce a State's funding upon a determination that an approved plan no longer complies with Section 671(a), or that "in the administration of the plan there is a substantial failure to comply" with the plan's provisions. 42 U.S.C. 671(b). Payments under Title IV-E shall resume when the Secretary is satisfied that the State is in compliance. Id.

B. The Social Security Amendment Does Not Require Reversal of the Trial Court Dismissal of Federal Claims.

In Suter v. Artist M., 503 U.S. ____, 118 L.Ed.2d 1, 112 S. Ct. ___ (1992), the plaintiffs claimed that they had an enforceable right under the Adoption Assistance and Child Welfare Act to injunctive relief to require the state to make "reasonable efforts" to prevent removal of children from their homes and facilitate reunification. The Supreme Court, after examining the statute, legislative history and prior case law, held that

the "reasonable efforts" language did not unambiguously confer an enforceable right upon the plaintiffs. 118 L.Ed.2d at 16. The court went on to state that the federal requirement "only goes so far as to ensure that the states have a plan approved by the Secretary which contains the 16 listed features." Id. at 13.

Several federal courts stated that Suter established a new standard regarding enforceability of federal claims:

> But, as the Court of Appeals recognized in Stowell, the Suter holding depended only partly on the finding that "reasonable efforts" described a standard too vague, discretionary, and amorphous to be enforced against a state; Suter also held that the "reasonable efforts" requirement was unenforceable because it was merely a feature to be included in the state's required plan and, therefore, that "feature" imposed no privately enforceable obligation on the state. (Cites Omitted)

Eric L. By and Through Schierberl v. Bird, 848 F. Supp. 303, 310 (D.N.H. 1994).

The Social Security Amendment that the plaintiffs cite was narrowly drawn to address the Suter holding that seemed to state that if a requirement was included in a state plan it was not judicially enforceable. The amendment did not

reverse the Court's holding that the "reasonable efforts" language was unenforceable.

The amendment states that a provision of a State Plan is not unenforceable by virtue of its "inclusion in a section of the Act requiring a State Plan ..." 42 U.S.C. § 1320a-2 (App. A). The House Report on this amendment makes it clear that the limited intention of Congress was to allow individuals access to court "to the extent they were able to prior to the decision in Suter v. Artist M...." (emphasis added). H.R. Rep. 103-761, Appendix B.[18]

The amendment does not require this court to reverse the trial court's decision regarding the federal claims. The trial court's decision is correct because the claims are unenforceable pursuant to existing case law because the statutes do not create a federal right to housing assistance.

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[18] Congress was concerned because the state plan titles of the Social Security Act include AFDC, Medicaid and other public assistance programs. Appendix B. These programs have been the subject of litigation brought pursuant to 42 U.S.C. § 1983 for decades.

C. A Federal Requirement that Fails to Provide Sufficiently Specific and Definite Standards is not Judicially Enforceable.

1. The Pre-Suter Standards Are Necessary to Maintain a § 1983 Action.

Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. Although statutory violations are cognizable under Section 1983, Maine v. Thiboutot, 448 U.S. 1, 65 L.Ed.2d 555, 100 S.Ct. 2502 (1980), not every statutory violation gives rise to a Section 1983 action. The plaintiffs must assert the violation of a "federal right," Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 107 L.Ed.2d 420, 110 S. Ct. 444, 448 (1989), and Congress must not have foreclosed the enforcement of that right under Section 1983. Middlesex County Sewerage Auth. v. National Sea Clamers Ass'n, 453 U.S. 1, 69 L.Ed.2d 435, 101 S.Ct. 2615 (1981) (finding Section 1983 action foreclosed by a comprehensive scheme of remedies).

In order to find an "enforceable right," a

court must conclude, first, that the provision in question was intended to benefit the putative plaintiff. Wilder v. Virginia Hospital Ass'n, 496 U.S. 498, 509, 110 L.Ed.2d 455, 110 S. Ct. 2510, 2517 (1990). Second, even if an intent to benefit the respondent is shown, a Section 1983 action will not lie where the provision at issue, rather than creating an obligation that binds the governmental unit, "does no more than express a congressional preference." Golden State Transit Corp., 493 U.S. at 106, quoting Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 19, 67 L.Ed.2d 694, 101 S.Ct. 1531 (1981). Third, "[i]n 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.'" Golden State Transit Corp., 493 U.S. at 108, quoting Wright v. Roanoke Redevelopment & Housing Auth. 479 U.S. 418, 432, 93 L.Ed.2d 781, 107 S.Ct. 766 (1987). Where "[t]he interest the respondent asserts is 'too vague and amorphous'" for the courts to administer, an

enforceable right within the meaning of Section 1983 will not be recognized. Wilder, 496 U.S. at 509, quoting Wright, 479 U.S. at 432,

In Pennhurst, 451 U.S. 1 (1981), the Supreme Court held that a federal-state cooperative funding statute, such as the AACWA, is "in the nature of a contract." Id. at 17. The legitimacy of Congress' authority to create federal rights in a spending clause statute "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" Id. The Court explained:

> There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Id. (citations omitted) (emphasis added). "The crucial inquiry ... [is] whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." Id. at 25.

Thus, the Court rejected the plaintiffs' claim in Pennhurst that the Developmentally Disabled

Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000, et. seq., created a federal right to "appropriate treatment" in the "least restrictive setting." The Court found such an obligation on the States to be "largely indeterminate," and held that "[i]t is difficult to know what is meant by providing 'appropriate treatment' in the 'least restrictive' setting, and it is unlikely that a State would have accepted federal funds had it known it would be bound to provide such treatment." Id. at 24-25.

In Wright, 479 U.S. 418 (1987), the Court found that the Brooke Amendment to the Housing Act of 1937, 42 U.S.C. § 1437a, created an enforceable right under Section 1983 to a "reasonable" rent allowance for utilities in public housing projects. In so holding the Court reviewed the legislative history, statutory structure, and regulations implementing the Brooke Amendment. Id. at 424-432. In particular, the Court found the statute limited rent amounts to an objective benchmark of no more than 30 percent of the tenants' income, and federal regulations specifically defined the "statutory

concept of 'rent,'" and set forth guidelines for local authorities to follow in determining utility allowances. Id. at 431-32.

Likewise, in Wilder 496 U.S. 498 (1990) the Court carefully conducted the crucial inquiry required by Pennhurst to determine whether the Boren Amendment to the Medicaid Act, 42 U.S.C. § 1396(a)(13)(A), created an enforceable right under Section 1983. The Boren Amendment required that to receive federal Medicaid funds, a State must have a plan that provides for the payment of rates to medical facilities that the State finds are "reasonable and adequate." The Court held this provision to be "cast in mandatory rather than precatory terms." 496 U.S. at 512. The Court also conducted a detailed review of the context, statutory structure, legislative history, and regulatory framework of the Boren Amendment before concluding that Congress had intended to establish an enforceable right. Congress clearly defined this right by linking "reasonable and adequate" rates to an "objective benchmark." This "benchmark" consisted of statutory and regulatory

factors to be used in calculating the reasonableness of such rates. 496 U.S. at 519-20.

Both Wilder and Wright involved monetary calculations. In both instances market rates, in addition to the objective benchmarks set forth in the statutes themselves, provided guidance as to what rate was "reasonable."

2. The Case Plan and Case Review Sections of the Adoption Assistance and Child Welfare Act Do Not Create a Judicially Enforceable Right to Housing Assistance.

Under Pennhurst and its progeny the Adoption Assistance and Child Welfare Act (AACWA) does not create a judicially enforceable federal right to housing assistance. First, the state is not on notice, based on the wording of the statute, that any type of housing assistance is mandated. Pursuant to Pennhurst the statute fails to "speak with a clear voice" (or for that matter any voice) regarding housing assistance.

Second, the statutes cited by plaintiffs do not unambiguously provide housing assistance. The statute speaks in broad goal-oriented terms of "a discussion of the appropriateness of the

placement," a plan for "proper care," "improvement" of the home, and a plan to achieve the "least restrictive . . . setting." See 42 U.S.C. 675(1)(A) and (B). These are the types of phrases that Pennhurst found "indeterminate" and judicially unenforceable.

Third, unlike Wright and Wilder, there are no regulations or objective benchmarks established by Congress which allow judicial enforcement. Both the case plans and the case review for each juvenile court case will be dependent on the unique facts of each case and the social work judgments that flow from those facts.

Finally, the legislative history of the AACWA makes it clear that there was no intent to require the states to provide housing assistance or any other particular service. The AACWA was passed to prevent unnecessary placement of children in foster care and to prevent foster care children from getting "lost in the system." H.R. Rep. No. 96-136, 96th Cong., 1st Sess. 46 (1979).

The House Ways and Means Committee Report on the AACWA specifically states:

> [T]he Committee recognizes that the preventive services requirement would be inappropriate in certain specific circumstances. This would be the case where the home situation presents a substantial and immediate danger to a child which would not be mitigated by the provision of preventive services....
>
> The Committee recognizes that the entire array of possible preventive services are not appropriate in all situations. The decision as to the appropriateness of specific services in specific situations will have to be made by the administering agency having immediate responsibility for the care of the child.

H.R. Rep. No. 96-136, 96th Cong., 1st Sess. 47 (1979). Congress thus chose not to define services a state must provide. In Suter v. Artist M., 118 L.Ed.2d 1 (1992), the Court concluded that the legislative history of the AACWA left a great deal of discretion to the states regarding services. Id. at 15.

The federal courts that have ruled on the issue of the enforceability of the federal "case plan" and "case review" requirements uniformly support the trial court's decision in this case. Some courts have allowed plaintiffs to maintain a § 1983 action for injunctive relief where they have alleged that the state does not develop case plans

and review cases. These cases do not support the plaintiffs' efforts to bootstrap substantive services on to the procedural requirements of a case plan and a case review. See Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983), L.J. By And Through Darr v. Massinga, 838 F.2d 118 (4th Cir. 1988). Clearly, a case plan must be meaningful and it must relate to the actual reason or reasons the child was removed. It does not follow that a case plan is meaningless unless it contains a provision for housing assistance.

The case review provision is also procedural. It requires a system for reviewing each case to make sure that the child's placement is appropriate. All of these procedural protections are provided for in the statute governing dependency and termination proceedings. RCW 13.34 et. seq.

In B.H. v. Johnson, 715 F. Supp. 1387 (N.D. Ill. 1989), the court refused to dismiss Title IV-E claims regarding case review system and case plans but held:

> We stress, however, that plaintiffs' entitlement to a case review system and

> an individualized case plan does not give rise to the sweeping rights asserted by plaintiffs, such as the right to an adequate number of caseworkers, family reunification services, services to "troubled families," or rights of meaningful visitation between siblings. The case plans are procedures intended only to monitor the progress and well-being of children in state and foster care. Id. at 1402.

See also Del A. v. Roemer, 777 F.Supp. 1297 (E.D. La. 1991) [court found titles IV-B and IV-E statutes were not enforceable using the Wilder analysis]; Aristotle v. Johnson, 721 F.Supp. 1002 (N.D. Ill. 1989) [court dismissed the IV-E claims regarding "reasonable efforts" and "least restrictive setting" because they were vague and amorphous, and also dismissed the claim to "meaningful sibling visitation" because it could not be found in the statute]; Scrivner v. Andrews, 816 F.2d 261 (6th Cir. 1987) [court dismissed IV-E claims to "meaningful visitation" brought under the case plan, case review and dispositional portions of statute because visitation was not mentioned in the statute].

In the case at bar, the plaintiffs are attempting to claim that housing assistance is

mandated by the case plan and case review section of the AACWA. There is no support for this position in the statute or legislative history and the trial court's decision to dismiss the claims should be affirmed.

IV. THE COURT DID NOT HAVE JURISDICTION TO ENTER A JUDGMENT REGARDING THE RCW 13.34 CLAIMS.

Juvenile Court has been granted exclusive jurisdiction regarding cases involving dependent children.[19] The legislature has concluded that these cases shall be litigated in a forum with expertise in the area of juvenile issues.

The trial court was also precluded from asserting jurisdiction pursuant to the Uniform Declaratory Judgment Act because of the legislature's directive that dependency matters be litigated in Juvenile Court. See Department's Brief at 50-1. The cases cited by the Department are right on point: the principle enunciated in both cases is that when the legislature has granted

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[19] Respondents assert that Juvenile Court only has exclusive jurisdiction in termination and ARP proceedings. That is clearly incorrect. RCW 13.04.030(2). See also In re Marriage of Perry, 31 Wn. App. 604, 644 P.2d 142 (1982).

a litigant a statutory remedy they cannot choose to file an action under the Uniform Declaratory Judgment Act. In this case the named plaintiffs sought a declaratory judgment regarding "reasonable efforts" while their cases continued to be litigated in Juvenile Court and while juvenile court continued to find that in fact "reasonable efforts" had been made in their case.

Finally, there was no justiciable controversy. The "judicial determination" by the trial court was not conclusive for the named plaintiffs or any other class member. Both named plaintiffs' cases continued to be litigated separately in Juvenile Court where Coughlin had her parental rights terminated and Sanders was reunited with her children. CP 486, 490. The trial court decision raises more questions than it answers regarding the "housing assistance" that the juvenile court can order. The plaintiffs, in their cross-appeal, recognize that the trial court's order "involves hairsplitting over 'primary' and 'secondary' factors . . ." Respondent's Brief at 48. The court does not define "primary" nor does it address

numerous potential problems: whether there is a cap on housing assistance, whether the assistance will be one-time or ongoing, or how the courts will coordinate to ensure that there is some uniformity statewide in the disbursement of such assistance. These problems were appropriately identified by the court in In re the Welfare of J.H., 75 Wn. App. at 894-95, as a reason why the judiciary does not create or administer what amounts to a financial assistance program.

V. NEITHER RCW 13.34 NOR RCW 74.14A AUTHORIZE THE CREATION OF A HOUSING ASSISTANCE PROGRAM.

The decision to create and fund a program is a legislative decision. Plaintiffs have stipulated that the legislature has not appropriated funds for housing assistance for the Department. CP 664 at #4. They maintain that the Department has unfettered discretion to use funds for housing assistance.[20] This is not true. The Department must use funds in conformance with the statutes and budget directives that it receives from the

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[20] The plaintiffs do not explain how private agencies, who are also subject to the reasonable efforts requirements of RCW 13.34, will pay for housing assistance payments.

legislature. See In re the Welfare of J.H., 75 Wn. App. at 893; RCW 43.88.130 and .290. The legislature, in its Operating Budgets for 1991-93 and 1993-95, has clearly stated that the Department does not have the authority to create new programs. See Laws of 1991, 1st Ex. Sess., ch. 16, § 201; Laws of 1993, 1st Ex. Sess., ch. 24, § 201 (App. C and D).

Decisions regarding funding are difficult given the many compelling needs of our state's children. When the Governor's Commission on Children released its final report to the legislature, it specifically addressed the funding of children's programs:

> Chronic under-funding of children's programs has led to the present crisis. Children have not been a priority for state-funded services.
>
> Funding of preventive services is disproportionately low. If, however, funds are taken from existing services to fund preventive services, a dilemma is created: Children and families with critical needs might not be served. . . .
>
> The Commission has come to the conclusion that there is simply not enough public money currently available to continue to take care of existing crises and meet future needs in a proactive planned way.

S.J. Ex. S at 10.

The legislature decides what child welfare services will be funded and the amount of funding they will receive. The trial court's decision regarding housing payments, and the plaintiffs' request to expand the scope of relief granted by the court, contravene the public policy decisions the legislature has explicitly made in statutes and appropriations governing child welfare services.

Plaintiffs maintain that this court should create a housing assistance program of unspecified proportions for children who do not fall within the parameters of the "reasonable efforts" claims of RCW 13.34. Respondent's Brief at 48. This program would include families who voluntarily place their children in foster care and need housing assistance to prevent or shorten the placement. The plaintiffs cite RCW 74.14A.020 in support of their position.

A. The Children and Family Services Act, RCW 74.14A, Was Not Intended to Create a Housing Assistance Program.

The plain language of RCW 74.14A.020 sets forth policy guidelines. It is well established in Washington that "statutory policy statements as a

general rule do not give rise to enforceable rights and duties." Aripa v. Social and Health Services, 91 Wn.2d 135, 139, 588 P.2d 185 (1978).

The plaintiffs maintain that RCW 74.14A creates the right to "housing assistance" for children. The language of RCW 74.14A is general and was intended as policy guidelines for the Department. It directs the Department to "address the needs of emotionally disturbed and mentally ill children, potentially dependent children and families in conflict . . .." RCW 74.14A.020 The statute speaks in broad terms of serving families in the least restrictive setting, of coordinating services, and implementing comprehensive preventative and early intervention services. RCW 74.14A.020. No specific services are specified.

The intent of the legislature to set broad guidelines and goals for the Department was confirmed in a 1992 amendment which states:

> To update, specify, and expand the policy stated in RCW 74.14A.020 the following is declared:
>
> It is the policy of the State of Washington to promote . . .

RCW 74.14A.025 (emphasis added).

The Department has consistently interpreted RCW 74.14A as policy guidelines, not authorization for specific services. CP 524-25. The history of RCW 74.14A supports the Department's position. In 1983, when 74.14A was originally passed, the legislature authorized the Department to do a study regarding child welfare services. The legislature placed the Department in charge of the studies and made it responsible for designing the specific action steps to be taken to implement the legislature's policies.

The Department produced an "Implementation Plan," SJ Ex. O, and "A Cost Plan--Children and Family Services," November 1984, ("Cost Plan"), SJ Ex. P. The Cost Plan documented the Department's progress in the Implementation Plan, and it described the cost of child welfare services enhancements. Id. at 4.

The Implementation Plan and Cost Plan requested by the legislature demonstrate that the legislature had concerns about the child welfare system but that there were no specific concerns regarding "homeless" children as a separate

category, or "housing assistance". None of the action steps in the two studies involved housing assistance, nor did the legislature direct the Department to address the issue.

B. RCW 13.34 Does Not Create the Right to a Housing Assistance Program.

1. In re the Welfare of J.H. is Binding Precedential Authority.

In this case, the trial court relied upon the reasonable efforts language of RCW 13.34 to hold that Juvenile Court has the authority to order the payment of housing services. In In re the Welfare of J.H., 75 Wn. App. 887, 880 P.2d 1030 (1994), rev. denied, 126 Wn.2d 1024 (1995), the court held that a court cannot order payment for a service when there is no statutory basis and no appropriation for such service. Id. at 894-95.

Plaintiffs state that In re the Welfare of J.H. is no longer valid law because of In re Detention of J.S., 124 Wn.2d 689, 880 P.2d 976 (1994), and because of recent amendments to RCW 13.34. They are wrong on both counts. These arguments were made to this court in a Motion for Reconsideration and to the Supreme Court in a

Petition for Certiorari. This court, however, refused to reconsider its decision, and the Supreme Court denied review.

2. The Decision is not in Conflict with In re Detention of J.S.

In In re Detention of J.S., 124 Wn.2d 689, 880 P.2d 976 (1994), the issue was whether the court had the authority, in a civil commitment case, to order a committed patient be placed in a "less restrictive alternative" to Western State Hospital. The Court found that the trial court had been granted the specific authority to make that kind of an order by both statute and court rule. 124 Wn.2d at 697. The Court rejected the argument that the trial court had authority to dictate what specific "less restrictive" form of treatment would be provided. Id. In fact it found the portion of the trial court's order which did just that to be too specific. Id. The court specifically found in J.S. that Juvenile Dependency cases were not relevant because the dependency statute is not "sufficiently analogous" to the civil commitment statute. 124 Wn.2d at 696.

The plaintiffs argue that the dependency

statute gives the court the authority to order housing assistance. However, unlike the statute at issue in J.S., the dependency statute does not provide the trial court with specific authority to order payment for any type of housing assistance.

3. The recent amendments to RCW 13.34 do not apply to this case and, even if the amendments do apply, they do not authorize the Court to order the Department to pay for housing.

The recent amendments that the plaintiffs cite do not apply to this case. The trial court did not base its summary judgment ruling on the amendments. The plaintiffs never moved to amend their complaint and add those provisions. If the plaintiffs believe that these amendments independently provide a basis for housing assistance, then they should file a new lawsuit based on these statutes.

Even if this court considers the amendments, they do not support the plaintiffs' position. The recent amendment to RCW 13.34.120(2)(c) (Supp. 1996) requires the Department, if removal is recommended, to inform the juvenile court of the preventive services that have been offered or provided to the family. It does not require the

Department to provide services, nor does it authorize the court to order the Department to provide services.

The recent amendment to RCW 13.34.130(1)(b) (Supp. 1996) requires the court to enter a finding that preventive services have been offered or provided before it authorizes out-of-home placement. An order for out-of-home placement is conditioned on the above finding and a finding that reasonable efforts were made to prevent placement; the statute does not authorize the court to order the provision of specific "preventive services".

The recent amendments to RCW 13.34.145(5) (Supp. 1996) are contained within a statute which requires the Department and the court to engage in permanency planning for a child. This statute requires specific time frames for entry of a permanency plan for children who have been placed out of the home which includes "reasonable efforts to return the child to the parent's home." The general "reasonable efforts" language does not authorize a court to order the Department to provide money to a family to pay for housing. The

plaintiffs cannot point to any language in the statute which authorizes a "housing assistance" program.

4. There is no statutory basis for expanding the scope of relief granted by the trial court.

The trial court held that a juvenile court can require the Department to provide "housing assistance" if homelessness is the "primary" fact that would result in a child's placement or prevent reunification ..." CP 983.

The Department's position is that there is no statutory authority to require "housing assistance". The court, under the guise of interpreting the statute, has amended the statute. In an effort to limit "housing assistance", the court limited its ruling to cases where homelessness was a "primary factor" resulting in out-of-home placement.

The legislature is fully capable of addressing "service" problems in RCW 13.34. In 1993, it amended the statute to delineate specific requirements regarding substance abuse evaluations and reports. RCW 13.34.174 (Supp. 1996). The

legislature also made it clear that the statutory reporting provisions did not allow juvenile court ot order the Department to pay for alcohol or substance abuse evaluations. RCW 13.34.174(5) (Supp. 1996). There is no such limiting language regarding "housing assistance" because there is no statutory language addressing housing in RCW 13.34 and the scope of the trial court's current ruling could not have been foreseen by the legislature.

If the legislature intended to create a housing assistance program with this purpose it could easily do so. It has created a number of programs addressing housing and homelessness through the Department of Community, Trade and Economic Development. See Department's Brief at 37-43. The legislature has created and funded the Aid to Families with Dependent Children program. RCW 74.12. It has also created some programs within the child welfare system that can, in a limited fashion, address housing. For example, the Home Based Services program can be used for housing or other concrete services to prevent out-of-home placement. See Department's Brief at 10, 45-46.

This is a limited program designed to prevent out-of-home placements. It is not intended to substitute for the state's housing programs and income assistance programs.

The legislature has also created the Family Preservation Act which has a housing component. RCW 74.14C, 74.14C.020(3)(b) (Supp. 1996). The legislature provided that the service is available within appropriated funds; it also limited judicial authority to order the provision of the service and it defined the services, the Department's duties and the eligibility criteria. RCW 74.14C.005(3); RCW 74.14C.005(4); RCW 74.14C.020, .030 and .040 (Supp. 1996). The legislature also authorized a study to evaluate the program's effectiveness. RCW 74.14C.050 (Supp. 1996). Finally, the legislature authorized the secretary to transfer foster care funds to purchase family preservation services. RCW 74.14C.070 (Supp. 1996).

This carefully crafted piece of legislation stands in stark contrast to the trial court's order regarding housing assistance. The legislature was careful to limit the program and to require

planning and data collection for long term implementation of the program. There are no such safeguards in the judicially constructed "housing assistance" program.

Plaintiffs argue that housing assistance is more cost effective than foster care. The court in J.H. correctly noted that this was an argument that needed to be addressed to the legislature. J.H. 75 Wn. App. at 894. The legislature has in fact allowed for the transfer of foster care monies for family preservation and other preventive services. RCW 74.14C.070 (Supp. 1996). But the transfer of such funds is purely a matter of agency discretion. Id. The legislature did not mandate the Department to transfer funds for that purpose, and did not authorize the court to order the Department to pay for these services. The legislature was cognizant of the fact that if foster care funds are exhausted and placements are necessary, the Department will not have safe, secure homes for children. It is the legislature that bears the ultimate responsibility for deciding how funds are to be allocated and whether such expenditures serve the

public interest.

VI. CONCLUSION

The trial court decision requiring the Department to prepare a housing plan for homeless children and their parents should be reversed. The statute refers to child welfare services and does not mention housing. The Department has, pursuant to statute, produced child welfare plans. The legislature has explicitly delegated planning for housing to another state agency with expertise and statutory authority in housing. The trial court's decision will divert scarce resources from the Department's Division that deals with the complex and intractable problems of child abuse and neglect. These resources cannot be replaced, and it is the legislature, not the courts, that has the authority to make a public policy decision with such profound consequences.

The trial court's decision regarding the juvenile court's authority to order "housing assistance" payments should also be reversed. Only the legislature possesses the authority to create and fund programs. In this case, there is no

statutory authority for housing assistance payments. No matter how laudable the goal, a court cannot create a program by judicial fiat.

The court should affirm the trial court's dismissal of the state and federal constitutional claims and the federal claims brought pursuant to 42 U.S.C. § 1983. The constitutional claims are groundless. The federal claims for housing assistance are unsupported by the language of the federal statutes. These claims should not be reinstated.

RESPECTFULLY SUBMITTED this 16 day of February, 1996.

CHRISTINE O. GREGOIRE
Attorney General

By _____
MICHAEL W. COLLINS
Assistant Attorney General
WSBA # 19375

By _____
TRISHA L. McARDLE
Assistant Attorney General
WSBA # 16371
Attorneys for Appellants

(C) the amount of such funds withheld is related to the extent of the failu to so conform; and

(4) require the Secretary, with respect to any State program found to have faile substantially to so conform—

(A) to afford the State an opportunity to adopt and implement a correctiv action plan, approved by the Secretary, designed to end the failure to s conform;

(B) to make technical assistance available to the State to the extent feasible to enable the State to develop and implement such a corrective action plan

(C) to suspend the withholding of any Federal matching funds under thi section while such a corrective action plan is in effect; and

(D) to rescind any such withholding if the failure to so conform is ended b successful completion of such a corrective action plan.

(c) Provisions for administrative and judicial review

The regulations referred to in subsection (a) of this section shall—

(1) require the Secretary, not later than 10 days after a final determination tha a program of the State is not in conformity, to notify the State of—

(A) the basis for the determination; and

(B) the amount of the Federal matching funds (if any) to be withheld from the State;

(2) afford the State an opportunity to appeal the determination to the Departmental Appeals Board within 60 days after receipt of the notice described in paragraph (1) (or, if later, after failure to continue or to complete a corrective action plan); and

(3) afford the State an opportunity to obtain judicial review of an adverse decision of the Board, within 60 days after the State receives notice of the decision of the Board, by appeal to the district court of the United States for the judicial district in which the principal or headquarters office of the agency responsible for administering the program is located.

(Aug. 14, 1935, c. 531, Title XI, § 1123, as added Oct. 31, 1994, Pub.L. 103–432, Title II, § 203(a), 108 Stat. 4454.)

HISTORICAL AND STATUTORY NOTES

Effective Dates

1994 Acts. Section 203(c)(1) of Pub.L. 103–432 provided that: "The amendment made by subsection (a) [enacting this section] shall take effect on the date of the enactment of this Act [Oct. 31, 1994]."

Prior Provisions

A prior section 1123 of Act Aug. 14, 1935, c. 531, Title XI, as added Oct. 30, 1972, Pub.L. 92–603, Title II, § 241, 86 Stat. 1418, and amended Dec. 5, 1980, Pub.L. 96–499, Title IX, § 911, 94 Stat. 2619; Sept. 3, 1982, Pub.L. 97–248, Title I, § 126, 96 Stat. 366; Apr. 7, 1986, Pub.L. 99–272, Title IX, § 9303(b)(4), 100 Stat. 189, which related to qualifications for health care personnel and was classified to section 1320a–2 of this title, was repealed by Pub.L. 100–360, Title IV, § 430(a), as added Pub.L. 100–485, Title VI, § 608(b), (g)(1), Oct. 13, 1988, 102 Stat. 2412, 2424, effective as if included in the enactment of Pub.L. 100–360, July 1, 1988, 102 Stat. 683.

Promulgation of Regulations

Section 203(c)(3) of Pub.L. 103–432 provided that: "The Secretary shall promulgate the regulations referred to in section 1123(a) of the Social Security Act (as added by this section) [subsec. (a) of this section] not later than July 1, 1995, to take effect on April 1, 1996."

§ 1320a–2. Effect of failure to carry out State plan

In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., 112 S.Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in Suter v. Artist M. that section 671(a)(15) of this title is not enforceable in a private right of action.

(Aug. 14, 1935, c. 531, Title XI, § 1123, as added Oct. 20, 1994, Pub.L. 103–382, Title V, § 555(a), 108 Stat. 4057.)

App. A

Multiethnic Foster Care and Adoption Placements

Title VI of the Civil Rights Act of 1964 provides that programs that recei federal funds cannot discriminate on the basis of race, color, or national origin. Although race, color, or national origin may not be used as a basis providing benefits or services, the federal policy guidelines that interpret Title VI's meaning in the context of adoption and foster care permit official to consider these factors in making placements. The guidelines state that: "I placing a child in an adoptive or foster home it may be appropriate to consic race, color, or national origin as one of several factors ... This policy is based on unique aspects of the relationship between a child and his or her adoptive or foster parent. It should not be construed as applicable to any other child welfare or human services area covered by Title VI."

Subtitle B-Other Provision

Effect of Failure to Carry Out State Plan

The "State plan" titles of the Social Security Act include Aid to Families with Dependent Children (AFDC) (Title IV-A), Child Welfare Services (Title IV-B), Child Support and Establishment of Paternity (Title IV-D), Fost

Care and Adoption Assistance (Title IV-E), Job Opportunities and Basic Skills Training (JOBS) (Title IV-F), and Medicaid (Title XIX). Under these titles, a a precondition of funding, each participating State is required to develop a written "State plan" that meets certain statutory requirements in order to be approved by the Secretary of the Department of Health and Human Services (HHS

The Adoption Assistance and Child Welfare Act of 1980 amended the Social Security Act to require States to provide in their Title IV-E plans that, in the case of each child, reasonable efforts will be made (a) prior to the placement of the child in foster care, to prevent or eliminate the need for removal of the child from his home, and (b) to make it possible for the child to return to his home (sec. 471(a)(15)).

On March 25, 1992, the U.S. Supreme Court held in SUTER v. Artist M., that the "reasonable efforts" clause does not confer a federally-enforceable right on its beneficiaries, nor does it create an implied cause of action on their behalf. In rendering its opinion, the Court also stated that although section 471(a) does place a requirement on the States, that requirement "only goes so far as to ensure that the States have a plan approved by the Secretary which contains the 16 listed features."

House Bill

B-2

The provision would amend Title XI of the Social Security Act by adding a new section that reads as follows: "In an action brought to enforce provision of the Social Security Act, such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan. This section not intended to limit or expand the grounds for determining the availability private actions to enforce State plan requirements other than by overturning any such grounds applied in SUTER v. Artist M., 112 S. Ct. 1360 (1992), but n applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in SUTER v. Artist M. that section 471(a)(15) of the Act is not enforceable in a private right of action."

The intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the Social Security Act are able to seek redress in the federa courts to the extent they were able to prior to the decision in SUTER v. Arti M., while also making clear that there is no intent to overturn or reject the determination in SUTER that the reasonable efforts clause to Title IV-E does not provide a basis for a private right of action.

The amendment would apply to actions pending on the date of enactment and t actions brought on or after the date of enactment.

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EATH INVESTIGATION

. . . . $ 14,000

RSE RACING COMMIS-

. . . . $ 4,876,000

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UOR CONTROL BOARD

. . . . $ 111,231,000

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LITIES AND TRANSPOR-

. . . . . $ 29,239,000
. . . . . $ 320,000
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the following conditions and
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spent to assist the legislature
procedures for the optimum
services in Washington state.

OARD FOR VOLUNTEER

. . . . . $ 398,000

LITARY DEPARTMENT

. . . . . $ 8,365,000
. . . . . $ 8,850,000
. . . . . $ 186,000
. . . . . $ 17,401,000

PUBLIC EMPLOYMENT

. . . . . $ 1,771,000
. . . . . $ 2,637,000

TOTAL APPROPRIATION . . . . . $ 4,408,000

NEW SECTION. **Sec. 151. DEPARTMENT OF COMMUNITY, TRADE, AND ECONOMIC DEVELOPMENT.** On July 1, 1994, all appropriations and all conditions and limitations contained in sections 217 and 308 of this act shall be provided for the department of community, trade, and economic development. If Engrossed Substitute Senate Bill No. 5868 or substantially similar legislation creating a department of community, trade, and economic development is not enacted by July 1, 1994, this section shall have no effect.

NEW SECTION. **Sec. 152. FOR THE DEPARTMENT OF FINANCIAL INSTITUTIONS**

Securities Regulation Fund Appropriation . . . . . $ 3,031,000

The appropriation in this section is subject to the following conditions and limitations: If Substitute Senate Bill No. 5270, or substantially similar legislation, creating a department of financial institutions is not enacted by July 1, 1993, the securities regulation fund appropriation shall be null and void and the department of licensing general fund—state appropriation shall be increased by $3,031,000.

PART II
HUMAN SERVICES

NEW SECTION. **Sec. 201. FOR THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES.** (1) Appropriations made in this act to the department of social and health services shall initially be allotted as required by this act. Subsequent allotment modifications shall not include transfers of moneys between sections of this act except as expressly provided in this act, nor shall allotment modifications permit moneys that are provided solely for a specified purpose to be used for other than that purpose.

(2) The department of social and health services shall not initiate any services that will require expenditure of state general fund moneys unless expressly authorized in this act or other law, or unless the services were provided on March 1, 1993. The department may seek, receive, and spend, under RCW 43.79.260 through 43.79.282, federal moneys not anticipated in this act as long as the federal funding does not require expenditure of state moneys for the program in excess of amounts anticipated in this act. If the department receives unanticipated unrestricted federal moneys, those moneys shall be spent for services authorized in this act or in any other legislation providing appropriation authority, and an equal amount of appropriated state general fund moneys shall lapse. Upon the lapsing of any moneys under this subsection, the office of financial management shall notify the legislative fiscal committees. As used in this subsection, "unrestricted federal moneys" includes block grants and other funds that federal law does not require to be spent on specifically defined projects or matched on a formula basis by state funds.

App. C

(cigarette tax enforcement). If the bill is not enacted by July 31, 1991, the amount provided shall lapse.

*Sec. 148 was partially vetoed, see message at end of chapter.

NEW SECTION. Sec. 149. FOR THE UTILITIES AND TRANSPORTATION COMMISSION

Public Service Revolving Fund Appropriation	$	29,189,000
Grade Crossing Protective Fund Appropriation	$	320,000
TOTAL APPROPRIATION	$	29,509,000

The appropriations in this section are subject to the following conditions and limitations: $50,000 of the public service revolving fund appropriation is provided solely for the purpose of contracting with the state energy office to develop plans and recommendations to expand the availability of compressed natural gas refueling stations for motor vehicles, pursuant to chapter 199, Laws of 1991 (Engrossed Substitute House Bill No. 1028).

NEW SECTION. Sec. 150. FOR THE BOARD FOR VOLUNTEER FIRE FIGHTERS

Volunteer Fire Fighters' Relief and Pension		
Administrative Fund Appropriation	$	373,000

NEW SECTION. Sec. 151. FOR THE MILITARY DEPARTMENT

General Fund—State Appropriation	$	9,549,000
General Fund—Federal Appropriation	$	7,582,000
General Fund—Private/Local Appropriation	$	180,000
TOTAL APPROPRIATION	$	17,311,000

The appropriations in this section are subject to the following conditions and limitations: $10,000 of the general fund—state appropriation is provided to the public affairs office for headquarters STARC, Camp Murray, Washington air national guard solely for the purpose of a publication to assist in the recruitment and retention of the Washington national guard.

NEW SECTION. Sec. 152. FOR THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

General Fund Appropriation	$	2,176,000

PART II
HUMAN SERVICES

*NEW SECTION. Sec. 201. FOR THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES

(1) Appropriations made in this act to the department of social and health services shall initially be allotted as required by this act. Subsequent allotment modifications shall not include transfers of moneys between sections of this act except as expressly provided in this act, nor shall allotment modifications permit

moneys that are provided solely for a specified purpose to be used for other than that purpose.

(2) The department of social and health services shall not initiate any services that will require expenditure of state general fund moneys unless expressly authorized in this act or other law, or unless the services were provided on March 1, 1991. The department may seek, receive, and spend, under RCW 43.79.260 through 43.79.282, federal moneys not anticipated in this act as long as the federal funding does not require expenditure of state moneys for the program in excess of amounts anticipated in this act. If the department receives unanticipated unrestricted federal moneys, those moneys shall be spent for services authorized in this act, and an equal amount of appropriated state general fund moneys shall lapse. As used in this subsection, "unrestricted federal moneys" includes block grants and other funds that federal law does not require to be spent on specifically defined projects or matched on a formula basis by state funds.

(3) Appropriations in this act derived from the $31,600,000 federal child care block grant and the Title IV-A grant are subject to the following conditions and limitations:

(a) $13,290,000 is provided solely for vendor rate increases for child care facilities. Increases by cluster shall result in rates set at a uniform percentile of child care provider rates across clusters. Rates set by other methods shall result in the same percentage increase as the state-wide average increase for rates set by cluster. The department shall transfer rate increase funds among child care programs as necessary to maintain a uniform rate policy.

(b) $6,200,000 is provided solely for funding the early childhood education and assistance program in the department of community development.

(c) $4,901,000 of this amount is provided solely for block grants to communities for locally designated child care services. Distribution of this money shall take into account the number of infants and children up to age 13 and the incidence of poverty in each community.

(d) $1,000,000 is provided solely to contract with eligible providers for specialized child care and respite care for children of homeless parents. Providers shall demonstrate that licensed child-care facilities are available to provide specialized child care for children under six years of age. Respite child-care providers shall demonstrate that respite child care is available for children under six years of age and shall submit to a felony background check through the state patrol. Child-care services provided by shelters shall be subject to department of community development rules on applicant eligibility criteria. The total allocation to providers within a county shall be not less than twenty-five thousand dollars per fiscal year in counties that had at least one hundred children under the age of five served in emergency shelters for the preceding year as reported by the department of community development and not less than ten thousand dollars for all other counties. If Substitute Senate Bill No. 5653