IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

S.K.., et al., *Plaintiffs*, v. THE DISTRICT OF COLUMBIA, et al., *Defendants.*	Case No. 20-00753 (TFH) **ORAL ARGUMENT REQUESTED**

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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Plaintiffs C.G.1, C.G.2, C.G.3, N.G. and S.K.[1] respectfully submit this memorandum of points and authorities in opposition to the District of Columbia ("DC") and the DC Child and Family Services Agency's ("CFSA"), (collectively, the "Defendants") Motion to Dismiss Plaintiffs' Complaint (the "Motion to Dismiss" or "Motion"). For the reasons stated herein, Defendants' Motion to Dismiss should be denied.

INTRODUCTION

Defendants for at least the last 10 years have consistently and repeatedly engaged in the custom and practice of kinship diversion, ignoring the obligations imposed by law on Defendants to remove and place abused and neglected children in a licensed foster home and provide continued support both to these children and their relative caregivers, financially and otherwise. As a result, Plaintiffs are deprived of the benefits and services to which they are legally entitled under the Social Security Act ("SSA"),[2] the D.C. Child Abuse and Neglect Act, and the Interstate Compact for the Placement of Children ("ICPC"). Further, as stated in the Complaint and explained more fully below, such deprivation constitutes a violation of the U.S. Constitution and federal and state law. To remedy the harm caused by Defendants and prevent any further violations of Plaintiffs' rights, Plaintiffs seek declaratory, injunctive, and monetary relief.

Defendants' arguments for dismissal for failure to state a claim under Rule 12(b)(6) have no merit. Defendants' central argument is premised on the fact that Plaintiffs are not entitled to relief because Plaintiff Children were not removed and placed into foster care in accordance with the legally-required removal and placement procedures. This argument, however, conveniently

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[1] Plaintiffs N.G. and S.K. (the "Plaintiff Caregivers") and Plaintiffs C.G.1, C.G.2 and C.G.3 (the "Plaintiff Children," and together with the Plaintiff Caregivers the "Plaintiffs").

[2] For purposes of this memorandum, the term "SSA" means Title IV-E of the Social Security Act, enacted at 42 U.S.C. § 670, *et seq.*, as amended by the Adoption Assistance and Child Welfare Act of 1980 and the Adoption and Safe Families Act of 1997.

disregards the fact that it was Defendants' responsibility to take such actions, and highlights the fact that Defendants are instead operating outside the statutorily designated foster care requirements by removing and placing abused and neglected children in relatives' homes (including in other states) in order to avoid their obligations to these children and caregivers. Defendants cannot intentionally ignore the actions they are obligated by law to take and then later claim that Plaintiffs are not entitled to any benefits or services because of Defendants' willful violation of law. This circular reasoning undermines Defendants' obligation to protect children vulnerable to abuse and neglect and is insufficient to warrant a 12(b)(6) dismissal.

Contrary to the arguments set forth in the Motion, Plaintiffs have adequately pleaded their claims for relief. Plaintiffs have adequately alleged that, by engaging in the custom and practice of kinship diversion, Defendants have deprived Plaintiffs of the foster care maintenance payments, case plans, and services they are entitled to under the SSA. Consistent with the predominant weight of authority, these SSA provisions confer a privately enforceable right under 42 U.S.C. § 1983. Plaintiffs have also adequately alleged that Defendants have intentionally, and without rational basis, denied Plaintiffs of the processes, benefits, and services that are afforded to similarly situated abused and neglected children who have been placed with non-relative caregivers, in violation of Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment and the D.C Human Rights Act. Further, Plaintiffs have alleged that, by failing to follow the legally-required removal and placement procedures and provide Plaintiffs with the benefits and services they are entitled to, Defendants have deprived Plaintiffs of protected liberty and property interests without due process of law in violation of the Due Process Clause of the Fifth Amendment. Additionally, Plaintiffs have alleged that by such conduct, Defendants have breached the duty of care that they owed to Plaintiff Children under D.C. law, causing injury to Plaintiffs, and

accordingly, Defendants' actions constitute negligence. Finally, Plaintiffs have alleged with specificity that Plaintiff Caregivers relied, to their detriment, on Defendants' false representations and willful omissions regarding the removal and placement of Plaintiff Children and that Defendants' actions constitute fraudulent and negligent misrepresentation.

In short, none of the arguments raised by Defendants in their Motion have merit, and the Motion should be denied.

STATEMENT OF FACTS

In March 2019, C.G.1 and C.G.2, twelve-year-old twin girls, and their eleven-year-old brother, C.G.3, were hospitalized after they tried to harm themselves. Compl. ¶ 53. As a result, Defendants removed Plaintiff Children from their father's home and informally and illegally placed them through kinship diversion in the care of their maternal aunt who lived in Texas, Plaintiff N.G. *Id.* ¶ 54. Defendants informed N.G. that Plaintiff Children needed to be removed from their father's care and instructed N.G. to file a motion for emergency custody with the D.C. Superior Court to take custody of the children. *Id.* Defendants deliberately did not inform N.G. of her option to participate in the children's care by becoming a licensed foster parent and deliberately ignored their duty under the ICPC to obtain approval for the placement from the Texas Department of Family Services. *Id.* ¶ 55. Following this unlawful placement, Defendants failed to provide legally-required support or financial assistance to N.G. and the children. *Id.*

Because of the lack of services and support, N.G. was unable to provide for Plaintiff Children who suffer from trauma as well as serious medical, mental health, and educational issues. When N.G. notified Defendants that she could no longer care for Plaintiff Children, Defendants threatened to bring a neglect case against N.G. unless she found another relative to care for the children. *Id.* ¶ 56. Through this threat, Defendants caused Plaintiff Children to be removed from

N.G.'s home and informally and illegally placed through a second kinship diversion in the care of the children's maternal great-grandmother who lives in Maryland, Plaintiff S.K. *Id.* ¶¶ 7, 56. Although Defendants instructed N.G. to transfer custody of the children to S.K., Defendants never informed S.K. of her option to become a licensed foster parent for Plaintiff Children. *Id.* ¶ 57. Further, Defendants failed to notify and obtain approval for the placement from the Maryland Social Services Administration. *Id.* ¶ 58. Defendants have failed to provide legally-required support or financial assistance to S.K. and Plaintiff Children. *Id.*

The similarities between this case and *K.H. v. District of Columbia*, No. 1:19-cv-3124-TFH (January 27, 2020), demonstrate that CFSA's custom and practice of kinship diversion not only exists but is pervasive. CFSA has unlawfully denied Plaintiffs access to the required benefits and services that Plaintiffs, and others similarly situated, are not only entitled to but in need of given the neglect and abuse the children have endured.

ARGUMENT

I. STANDARD OF REVIEW

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss based on Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

When ruling on a motion to dismiss, the court must "accept all the well-pleaded factual allegations of the complaint as true and draw all reasonable inferences from those allegations in the plaintiff's favor." *Banneker Ventures LLC v. Graham*, 798 F.3d 1119, 1125 n.1 (D.C. Cir. 2015)

(citing *Ashcroft*, 556 U.S. at 678). The Court may consider facts alleged in the complaint, as well as "any documents either attached to or incorporated in the complaint and matters of which the court may take judicial notice." *Hurd v. D.C., Gov't,* 864 F.3d 671, 678 (D.C. Cir. 2017).

II. DEFENDANTS' MOTION RELIES ON AN INCORRECT INTERPRETATION OF THE D.C. CHILD ABUSE AND NEGLECT ACT

Defendants argue that kinship diversion is "one of CFSA's options for ensuring that children are provided with necessary care and assistance" and accordingly, Defendants were not obligated to follow the legally-required removal and placement procedures. Def. Mot. at 4. However, the relevant statutory provisions and their history demonstrate this is not the case. Under the D.C. Prevention of Child Abuse and Neglect Act of 1977 that was initially passed, when CFSA determined that a child was abused or neglected and in need of services, it was "authorized to provide or secure any necessary services, which may include: . . . temporary third-party placement with responsible neighbors or relatives," but only if that neighbor or relative was *not* a foster parent. § 4-1303.04(a), as repealed by D.C. Law 13-277, § 2(p), 48 D.C. Reg. 2043 (Apr. 4, 2001).

In 2001, however, the D.C. Council implemented sweeping revisions to the Child Abuse Act, including repealing § 4-1303.04(a) and thereby *revoking* CFSA's authority to divert abused and neglected children who could not safely remain in their homes to "third-party placements" with relatives or neighbors outside of the foster care system. Child and Family Services Agency Establishment Amendment Act of 2000, 48 D.C. Reg. 2043 (Apr. 4, 2001).[3]

In 2004, the D.C. Council enacted the Child in Need of Protection Amendment Act of 2004, in which it made a conforming revision to § 4-1303.04(b) to remove a reference to third-

[3] The D.C. Council left in place elsewhere in the statute other services that had been enumerated in § 4-1303.04(a) before the repeal of that section.

party placements for children who have been left alone or with inadequate supervision.[4] This revision was made in response to the urging of Judith Meltzer, the court-appointed monitor in *LaShawn A. v. Dixon*, Civ. A. No. 89-1754 (TFH) ("*LaShawn*"), who argued that third-party placements, "are often unlicensed relative placements or placements with neighbors or other available caretakers. . . . Consistent with ASFA and the *LaShawn* order, CFSA and the court have been working to eliminate third-party placements." *See, e.g.*, "Child in Need of Protection Act of 2003," D.C. Council, Comm. on the Judiciary, Report on Bill 15-389 at 22-23 (Nov. 14, 2004), http://lims.dccouncil.us/Download/12958/B15-0389-CommitteeReport1.pdf. Based on the changes made in 2001 and 2004, it is clear that kinship diversion is decidedly *not* "one of CFSA's options" for providing services to abused and neglected children**,** but instead was specifically foreclosed by the D.C. Council.

Defendants attempt to circumvent this clear legislative history by arguing that what Plaintiffs call kinship diversion is actually a service in which CFSA "assist[s] a parent to place a child with a relative" and, as such, is authorized under § 4-1303.03(a)(7).[5] Def. Mot. at 7. Defendants' role, however, goes far beyond mere assistance as CFSA directly arranges and effectuates these third-party placements, which are not permitted by applicable law, the *LaShawn*

[4] Prior to the 2004 amendment, § 4-1303.04(b) provided that when "a child has been left alone or with inadequate supervision *and a third-party placement cannot be made*, the Agency is authorized to make a temporary custodial placement" which requires the filing of a neglect petition in the D.C. Superior Court after five days if the parent or custodian fails to claim the child or immediately if there is evidence of immediate danger to the child. D.C. Code § 4-1303.04(b) (2001) (codified as amended at 52 D.C. Reg. 2315 (Apr. 12, 2005)) (emphasis added). Other than eliminating the reference to third-party placements, this paragraph was unchanged and remains in effect today.

[5] Section 4-1303.03(a)(7) authorizes CFSA to "provide services to families and children who are eligible for such services, consistent with the requirements of this subchapter, through programs of services to families with children, child protective services, foster care, and adoption."

orders, the catch-all language of § 4-1303.03(a)(7), or the case law cited by Defendants.[6] In effecting these placements, CFSA intentionally operates outside the statutorily-created foster care system to avoid its obligation to provide required services and support to these vulnerable families.

Similarly, Defendants' contention that because § 4-1303.04(c) uses the phrase "is authorized to" (rather than the term "shall"), CFSA may – but is not required to – remove an abused or neglected child who cannot remain in the home with the provision of services, is without merit. It is clear from the legislative history and plain language of the statute that, if there are no *permissible* services available that would adequately protect the child, CFSA *must* remove the child in accordance with the three options listed in § 4-1303.04(c). Allowing CFSA to treat the options in 4-1303.04(c)(1)-(3) as "simply examples" would upset the careful balancing of parental rights and children's interests reflected in 4-1303.04(c) and give CFSA unfettered discretion to select any other course of action, including one that had been deliberately eliminated.

In short, when CFSA has determined that a child has been abused or neglected and cannot be protected in the home through the provision of services, CFSA *is required* by law to remove the child and cannot divert the child to a third-party placement.[7]

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[6] While Defendants cite *In re D.S.*, 88 A.3d 678, 690 n.19 (D.C. 2014) for this proposition, it does not permit kinship diversion, but rather simply provides that if a child has been removed to foster care, the parent's chosen custodian in care should be given weighty consideration.

[7] DC KinCare Alliance filed a Motion for Leave to file a Brief of *Amicus Curiae* in the *LaShawn* case, notifying the Court that members of the *LaShawn* plaintiff class were being diverted by CFSA to live informally with relatives, and the Court accepted the Brief. Because of the procedural posture of the LaShawn case, the Court indicated that if DC KinCare Alliance sought to challenge CFSA's pattern and practice of kinship diversion, it should file a separate case, which it has now done. Defendants continue to misleadingly claim that the Court in *LaShawn* did not find that "children 'diverted' by the practice are members of the plaintiff class there, nor has the Court taken other action requested by KinCare Alliance." See Def. Mot. at 9, n.8. Indeed, the children in this case and in *K.H.* are all automatically members of the LaShawn plaintiff class, which is defined to include "the presently-identifiable children who are not in the Department's legal or physical custody but who have been the victims, or are at risk, of neglect

III. DEFENDANTS' PLACEMENT OF PLAINTIFF CHILDREN VIOLATES THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

Defendants partially acknowledge the requirements of the ICPC before ignoring and distorting the statute's language to argue those requirements do not apply. The ICPC, a uniform law adopted by D.C., prohibits a state from "sending a child or causing a child to be sent into another party state 'for placement in foster care…unless the sending state complies with each requirement set forth in this compact and applicable laws of the receiving state that govern the placement of children.'" *In re T.M.J.*, 878 A.2d 1200, 1202 (D.C. 2005) (quoting D.C. Code § 4-1422 art. III(d)). Before placing a child in another state, the sending state must comply with the ICPC requirement for receiving written approval "that the proposed placement does not appear to be contrary to the best interests of the child," as well as any local laws governing the placement of children. *Id.* Each of D.C., Maryland, and Texas requires that a child be placed with a licensed foster parent. Once a child is placed in another state, the sending state retains jurisdiction over "all matters that relate to the custody, supervision, care, treatment, and disposition of the child that it would have had if the child had remained in [DC]" and continues to bear "financial responsibility for the support and maintenance of the child during the period of the placement." D.C. Code § 4–1422, art. V. "When necessary, CFSA shall make arrangements to ensure the return of the child to the District." CFSA Policy: Interstate Compact on the Placement of Children, at 4 (July 2010). These ICPC requirements apply any time a child is placed in foster care in another state even when the placement is with a relative. *Id.* at 5; *see also In re T.M.J.*, 878 A.2d at 1201 (denying approval of placement with grandmother after notification and investigation); *In re Yarisha F.*, 994 A.2d 296, 301 (Conn. App. 2010) (finding that the ICPC applies to intra-family placements).

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or abuse of which the Department knows or should know as a result of notice to or filings with the Department." *LaShawn A. v. Dixon*, 762 F. Supp. 959, 994 n.28 (D.D.C. 1991).

Defendants note that the ICPC does not apply to "private arrangements" made between close relatives "not brought about by a sending agency" and argue that the ICPC does not apply in this case because "none of the children here were formally placed in foster care or 'removed' from custody." Def. Mot. at 31 (citing *in re T.M.J.*, 878 A.2d at 1203-04). In effect, Defendants argue that the ICPC does not apply because of Defendants' willful and deliberate failure to follow the legally-required removal and placement procedures. Defendants cannot intentionally ignore the actions they are obligated by law to take and then later claim that the ICPC does not apply as a result of Defendants' failure to fulfill these obligations. Moreover, it is clear the ICPC applies in this case because the removal and placement of Plaintiff Children in another state was initiated and brought about *by CFSA*. As explained in a decision quoted approvingly in *In re T.M.J.*, "[t]he deliberate addition of the 'causes to be sent…' language reflects the compact's concern not only with a sending agency's direct action in sending…a child into another state, but also with actions that effectively, even if less directly, achieve the same thing." *In re Miller*, 36 P.3d 989, 992 (Or. App. 2001). Further, the ICPC itself provides that its provisions "shall be liberally construed to effectuate the purposes of the compact." D.C. Code §§ 4-1422, art. X.

Here, Defendants caused Plaintiff Children to be sent into another state. After Defendants had determined that Plaintiff Children had been neglected and immediate removal from their father's care was necessary, Defendants identified N.G. as a willing caregiver and instructed her to take custody of Plaintiff Children. Compl. ¶ 54. N.G's filing for custody of Plaintiff Children in the D.C. Family Court does not negate CFSA's responsibility for the placement, as N.G. only initiated this filing in response to CFSA's instructions. *Id.* Further, pursuant to the ICPC, when N.G. informed CFSA that she could no longer care for the children, CFSA was required to make arrangements for the return of Plaintiff Children to D.C. CFSA instead threatened to bring a

neglect case against N.G. unless she found another relative for Plaintiff Children to live with, effectively requiring N.G. to assume the responsibilities of CFSA. *Id.* ¶ 56. As a result of CFSA's coercive conduct, N.G. brought Plaintiff Children to live with S.K. and transferred physical custody to her pursuant to CFSA's direct instruction.[8] *Id.* ¶¶ 56-57.

Because these removals and placements would not have occurred but for Defendants' actions, it is clear that Defendants caused Plaintiff Children to be sent to another state for placement into foster care. As a result, Defendants were required to comply with the ICPC and were required to provide continued financial support during the period of placement.

IV. PLAINTIFFS STATE A CLAIM UNDER THE SOCIAL SECURITY ACT

A. The provisions of the Social Security Act under which Plaintiffs bring their claims pass the Supreme Court's test set out in *Blessing* and *Gonzaga* for whether a statute provides a private right of action.

Plaintiffs may enforce the provisions of the SSA cited in Count I of the Complaint under 42 U.S.C. § 1983. Section 1983 is a vehicle for individuals to enforce "any rights ... secured" by federal law. *DuBerry v. District of Columbia*, 824 F.3d 1046, 1051 n.4 (D.C. Cir. 2016). In *Blessing v. Freestone*, the Supreme Court established a three-part test for determining whether a federal law creates a right that can presumptively be enforced by private suit through § 1983: (1) "Congress must have intended that the provision in question benefit the plaintiff"; (2) "the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence"; and (3) "the statute must unambiguously impose a binding obligation on the States." 520 U.S. 329, 340-41 (1997) (citations omitted). In *Gonzaga University v. Doe*, the Supreme Court clarified that the first prong of the *Blessing* test

[8] Father signed a custodial power of attorney, granting S.K. legal custody of Plaintiff Children.

"require[s] a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries" that include the plaintiff in the case. 536 U.S. 273, 285 (2002).

If a statute passes the *Blessing* test,[9] a rebuttable presumption arises that a § 1983 action enforcing the right is available. *See Blessing*, 520 U.S. at 341. A state defendant can overcome this presumption only by showing that Congress *intended* to foreclose a remedy under § 1983, either expressly "or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement." *Id.* (citing *Livadas v. Bradshaw*, 512 U.S. 107 (1994)).

Before addressing each provision of the SSA individually, Plaintiffs note two general but important points. First, in Count I of the Complaint, Plaintiffs have alleged a number of violations of the SSA, many of which this Court has determined are privately enforceable.[10] Specifically, in *LaShawn* the Court concluded:

> It would strain logic to hold that plaintiffs, as the intended beneficiaries of the Adoption Assistance Act, nevertheless are precluded from enforcing their rights under the Act. Moreover, the provisions of the Act itself persuade the Court that the Act creates enforceable rights. These provisions are extraordinarily specific, spelling out exactly what a state must do for children in its care in order to receive funding under the Act. Based on this, the Court holds that the Adoption Assistance Act, by its terms, creates obligations sufficiently specific and definite to be within the competence of the judiciary to enforce, ... is intended to benefit the putative plaintiffs, and is not foreclosed by express provision or other specific evidence from the statute itself.

762 F. Supp. at 989 (quoting *Golden State Transit. v. City of L.A.*, 493 U.S. 103 (1989)).[11]

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[9] In this memorandum, the terms "*Blessing* test", "prong of *Blessing*" and "*Blessing* factor" refer to the three-part test established by the Supreme Court in *Blessing* as clarified by *Gonzaga*.

[10] Plaintiffs have alleged violations of 42 U.S.C. §§ 671(a)(10), (a)(16), (a)(22), (a)(29); 672(a); 675(1), (4)(A); 675(5). In *LaShawn A. v. Dixon*, the complaint alleged violations of 671(a)(10), (15); 672(e); 675(1), (5)(A), (5)(B) and also specifically footnotes 672(a)(1)'s requirement to make foster care maintenance payments. *See* 762 F. Supp. 959, 961-64 (D.D.C. 1991), *aff'd and remanded sub nom. LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993).

[11] Although *LaShawn* was decided pre-*Blessing*, the previous test for determining whether a plaintiff can bring a § 1983 suit articulated in *Golden State* was grounded in the same principles,

Second, Defendants rely on precedent that is inapplicable to the statutory sections at issue here. In *Suter v. Artist M.*, the U.S. Supreme Court held that the requirement for a state to take reasonable efforts under 42 U.S.C. § 671(a)(15) was not privately enforceable. 503 U.S. 347, 364 (1992). Following this decision, Congress quickly enacted 42 U.S.C. § 1320a-2, limiting the Court's holding in *Suter* to § 671(a)(15) and otherwise "overrid[ing] the reasoning in [*Suter*] … to enable appropriate provisions of the [SSA] to give rise to a private enforcement." *N.Y. State Citizens' Coal. for Children v. Poole*, 922 F.3d 69, 83 n.7 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 956 (2020). *See* 42 U.S.C. § 1320a-2. Here, Plaintiffs do *not* plead a claim under § 671(a)(15), and therefore the holding in *Suter* is not directly relevant.[12]

B. Plaintiffs have an enforceable right via § 1983 to foster care maintenance payments under §§ 672(a) and 675(4)(A) of the SSA.

Sections 672(a) and 675(4)(A) confer on foster care children and their caregivers an enforceable statutory right to foster care maintenance payments from the state. Under the first prong of *Blessing*, it is clear that §§ 672(a) and 675(4)(A) were intended to benefit Plaintiffs. Specifically, § 672(a) confers a specific monetary entitlement in the form of foster care maintenance payments to "each child who has been removed" from their parents' homes and placed in foster care, and designates foster parents as authorized recipients of these payments. *See*

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and required "the plaintiff must assert the violation of a federal right," and Congress must not have specifically foreclosed the § 1983 remedy. 493 U.S. at 106 (citation omitted).

[12] Similarly, Defendants' citation to *Melton v. District of Columbia*, 85 F. Supp. 3d 183 (D.D.C. 2015), does not support their enforceability arguments. In *Melton*, the *pro se* plaintiff did not cite to a provision of the SSA and therefore failed to state a claim. *Id.* at 191. The Court then relied on *Suter*'s holding with respect to 42 U.S.C. § 671(a)(15) to make the broader statement that "[a] private individual has no cause of action under the Act itself or through an action under 42 U.S.C. § 1983." *Id.* This dicta runs counter to the plain language of § 1320a-2 and clear congressional intent, of which the *Melton* Court did not reference. Nor did the *Melton* Court reference any post-*Suter* case law regarding private rights of action, either generally or under the SSA. Since 2015, no court evaluating whether a private of action exists under the SSA has even cited *Melton*.

Cal. State Foster Parent Ass'n v. Wagner, 624 F.3d 974, 980 (9th Cir. 2010) (holding that § 672 "establishes that participating states must make foster care maintenance payments on behalf of each child to a foster care provider such as individual foster parents."). This constitutes rights-creating language as it is framed in terms of, and focused on, the individuals who benefit from its mandate, *i.e.* foster children and their caregivers.

Although some federal statutes that broadly discuss policies or programs do not contain rights creating language, Title IV-E of the SSA uses rights-creating language by focusing on the individual needs of the statute's beneficiaries. *See Poole*, 922 F.3d. at 81. Section 672(a) specifies that foster care maintenance payments are necessary for "each child" to have basic necessities and identifies the child's foster parent as the recipient of the payments to provide for the child's care. *Id.* at 81-82. As noted in *Poole*, the fact that § 672(a) and § 675(4)(A) also concern state requirements does not diminish the mandatory monetary entitlement, which is "specific and definite" and focused on the needs of the individual, "not aggregate services."[13] *Id.* This focus on the individual in § 672(a) differs from the focus on the policy or program in the statutes examined in *Blessing* and *Gonzaga*. *Id.; see also D.O. v. Glisson*, 847 F.3d 374, 378 (6th Cir.), *cert. denied*, 138 S. Ct. 316 (2017) ("Unlike [the Family Educational Rights and Privacy Act in] *Gonzaga*, the [SSA] requires individual payments and focuses on the needs of specific children, as opposed to merely speaking to the state's policy or practice."). Rather, the language of the SSA is similar to that of the Federal Housing Act and the Medicaid Act, both of which the Supreme Court has concluded create enforceable rights. *See Wright v. City of Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418 (1987); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990).

[13] Defendants' citation of minority views and consignment of the prevailing view to an incomplete footnote, similarly does not diminish the enforceability under § 1983. *See* Def. Mot. at 21 & n.10.

Turning to the second *Blessing* factor, determining whether the state has made the required foster care maintenance payments, is well within a federal district judge's competency. Section 672(a) specifies that its intended beneficiaries are entitled to foster care maintenance payments, and § 675(4)(A) specifies that these payments must cover the cost of food, clothing, shelter, daily supervision, and other necessities. It is well within the Court's purview to determine whether Plaintiffs have received those enumerated benefits. *See Poole*, 922 F.3d at 82 ("review[ing] how a state had determined the amounts it pays, including how it quantified the costs of the specific expenses listed in Section 675(4)…falls comfortably within what courts regularly do"); *Glisson*, 847 F.3d at 378; *Wagner*, 624 F.3d at 981.

Further, sections 672(a) and 675(4)(A) pass the third part of the *Blessing* test, as they unambiguously impose a binding obligation on the state. As Defendants in fact acknowledge, the statutes repeated use of the word "shall," makes clear that the SSA provisions prescribe mandatory requirements for the States, and DC, to follow. *Poole*, 922 F.3d at 79 (noting that the SSA "defines, with particularity and in absolute terms, what expenses constitute those [foster care] payments"); *Glisson*, 847 F.3d at 378; *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1194 (8th Cir. 2013) (noting other mandatory requirement language in §1320a). Once a state submits a plan to participate in the program, as DC has, these payments are mandatory – in the words of the Sixth Circuit, "[i]t isn't optional." *Glisson*, 847 F.3d at 379. "When Congress names the state as the subject, writes in the active voice, and uses mandatory language, it leaves no doubt about the actor's identity or what the law requires." *Id.*

Therefore, sections 672(a) and 675(4)(A) satisfy all three prongs of the *Blessing* test, and confer a private right of action enforceable under § 1983. This conclusion is consistent with the holdings of the majority of circuit courts and district courts that have considered the issue. *See*

Poole, 922 F.3d 69; *Glisson*, 847 F.3d at 374 (6th Cir.); *Wagner*, 624 F.3d at 979-980 (9th Cir. 2010); *see, also Connor B. v. Patrick*, 771 F. Supp. 2d 142 (D. Mass. 2011); *Lamaster v. Ind. Dep't of Child Servs.* No. 4:18-cv-00029-RLY-DML, 2019 WL 1282043 (S.D. Ind. Mar. 20, 2019).

In arguing against this conclusion, Defendants repeatedly point to alternative methods of enforcement and cite to outlier decisions, such as *Kincade*, and dissents to support their arguments regarding §§ 672(a) and 675(4)(A). But even the court in *Kincade* – the lone circuit court decision to find no private right of action under these SSA provisions – analyzed only the first *Blessing* factor. Defendants cannot escape the prevailing view that the statute's intended beneficiaries can bring suit to enforce their rights under these sections.

Defendants also argue that substantial compliance review by the U.S. Department of Health and Human Services ("HHS") somehow rules out a private right of action under § 1983. *See* Def. Mot. 18-21. However, substantial compliance review, "coupled with funding cutoffs," does no such thing. *Poole*, 922 F.3d at 76 (stating that "(limited) federal agency review for a state's substantial compliance is insufficient to supplant enforcement through Section 1983"). The Supreme Court explicitly rejected this argument in *Blessing*, and further confirmed this position in *Wilder* by identifying an enforceable right to "reasonable and adequate" reimbursement rates, even though the Medicaid statute contained a substantial compliance requirement. *Poole*, 922 F.3d at 83 (*Blessing*, 520 U.S. at 348; *Wilder*, 496 U.S. at 519). Moreover, the SSA's remedial mechanisms under § 671 do not rebut the presumption of private enforcement as these mechanisms only provide for institutional review of the state child welfare agency by HHS and do not establish another enforcement mechanism for judicial review of individual grievances. *Id.* at 77-78. As noted in *Poole*, "the Supreme Court has generally found a remedial scheme sufficiently comprehensive to supplant Section 1983 only where it 'culminate[s] in a right to judicial review'

in federal court." *Id.* at 84 (quoting *Wilder*, 496 U.S. at 521). The SSA, however, "provides no federal court review of an individual's claim, other than what, under *Blessing*, is presumptively available under Section 1983." *Id.* Because the remedial mechanisms under § 671 are neither comprehensive nor effective for individuals like Plaintiffs who have not received benefits, these mechanisms do not rebut the presumption of private enforcement and absent § 1983, "foster families possess no federal mechanism to ensure compliance with the Act." *Glisson*, 847 F.3d at 380. Defendants therefore fail to rebut the presumption.

Defendants also cite an Eleventh Circuit decision, *31 Foster Children v. Bush*, 329 F.2d 1255 (11th Cir. 2003) to argue that a definitional section cannot confer enforceable rights. *See* Def. Mot. at 18. Even if that decision were binding on this Court, the Eleventh Circuit only said definitional provisions "*alone* cannot" be the basis of rights enforceable under § 1983. 329 F.2d at 1271 (emphasis added). Here, the definitional section is not the basis for Plaintiffs' enforceable right. The relevant right – the right to foster care maintenance payments – is conferred by § 672(a); the definitional section, 675(4)(A), simply specifies what those payments are meant to cover.

Additionally, Defendants argue that 672(a) "does not speak in the mandatory language needed to confer an enforceable right for Spending Clause legislation" and serves as a "roadmap," not marching orders. Def. Mot. at 20. The "Supreme Court has repeatedly recognized that a federal statute can create an enforceable right under § 1983 when it explicitly confers a specific monetary entitlement on an identified beneficiary." *Wagner*, 624 F.3d at 977 (citing *Wilder*. 479 U.S. at 498; *Wright*, 479 U.S. at 428). Here, the SSA establishes an "enforceable right under § 1983 to foster care maintenance payments from the State that cover the cost of the expenses enumerated in §

675(4)(A)."[14] *Id.* at 982. Moreover, by amending the SSA in response to the *Suter* decision, it is clear that Congress intended to "enable appropriate provisions of the Social Security Act to give rise to a private enforcement action." *Poole*, 922 F.3d at 83 n.7.

Taking a page from the *Poole* dissent, Defendants also argue that the Supreme Court's decision in *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), supports its position that Sections 672(a) and 675(4)(A) do not create a private right of enforcement. However, as noted in the *Poole* majority, *Armstrong* "did not consider whether the plaintiffs would have had a private cause of action under § 1983" but rather, "addressed the question of whether the plaintiffs had a cause of action in equity." *Poole*, 922 F.3d at 85. Moreover, *Armstrong* is distinguishable because the section of the Medicaid Act at issue in that case was "judicially unadministrable [in] nature" whereas the provisions of the SSA are judicially administrable. *Id.* Accordingly, finding a § 1983 right of action in the context of §§ 672(a) and 675(4)(A) is not inconsistent with *Armstrong*.

This Court should follow the substantial majority of federal circuits and district courts that have considered the issue and find that Congress unambiguously conferred a private right of action under § 1983 with respect to 42 U.S.C. §§ 672(a) and 675(4)(A).

1. *Plaintiffs have stated a claim that they are entitled to foster care maintenance payments.*

As the Supreme Court stated in *Miller v. Youakim*, 440 U.S. 125, 145 (1979), the right to receive foster care maintenance payments under Title IV-E of the SSA "arises from the status of the child as a subject of prior neglect." Plaintiff Children have been the subject of prior neglect and, consistent with the Court's decision in *Miller*, Plaintiff Children fall within the class of intended beneficiaries under the SSA and have a right to receive foster care maintenance payments.

[14] Although the Supreme Court had the opportunity to grant certiorari in *Glisson* or in *Poole*, the writ of certiorari was denied in each case.

Plaintiffs have adequately pleaded their entitlement to foster care maintenance payments under § 672(a) in the Complaint because Defendants were responsible for the placement and care of Plaintiff Children, as required by § 672(a)(2)(B). As discussed above, after Defendants had determined that Plaintiff Children had been neglected and that immediate removal from their father's care was necessary, Defendants removed Plaintiff Children from their father's care and informally and illegally placed them through kinship diversion in the care of Plaintiff Caregivers. Compl. ¶¶ 54, 56. Additionally, Plaintiff Children were eligible for benefits under the federal Temporary Assistance for Needy Families program prior to being removed from their father's home, and are eligible for foster care maintenance payments pursuant to § 672(a)(3). *Id.* ¶¶ 55, 58.

Defendants' intentional violations of law do not subvert Plaintiffs' rights to foster care maintenance payments. As noted above, because Defendants intentionally circumvented the legally-required removal procedures, there was no "judicial determination to the effect that continuation in the home from which removed would be contrary to the welfare of the child and that reasonable efforts [to prevent removal] have been made." § 672(a)(2)(A)(ii). Further, Defendants' deliberate failure to obtain approval for the placements from the family services agencies in Texas and Maryland, as required by the ICPC, directly caused Plaintiff Children to not be placed in a foster family home licensed by the state, as required under § 672(a)(2)(C). Defendants cannot intentionally ignore the actions they are obligated by law to take and then later claim that Plaintiffs are not entitled to foster care maintenance payments because of Defendants' failure to fulfill these obligations. Defendants are the ones that deliberately prevented Plaintiff Children from being placed in a formal foster care arrangement, and now claim that Plaintiffs are therefore not entitled to foster care maintenance payments on this basis. The Court should not condone this end-run around a statute that is intended to benefit people like Plaintiffs.

Because Plaintiffs would have been eligible for foster care maintenance payments but for Defendants' willful violations of law, Plaintiffs have adequately pleaded that they have met the statutory criteria and are entitled to these payments. Accordingly, the Court should deny the Motion to Dismiss this part of Count I.

2. *Defendants should be equitably estopped from arguing that the SSA does not apply to children in Plaintiffs' circumstances.*

Because Defendants' deliberately and willfully failed to remove Plaintiff Children in accordance with legally-required procedures and place Plaintiff Children with a licensed or approved foster parent, Defendants should be equitably estopped from arguing that Plaintiffs are not eligible for foster care maintenance payments due to non-compliance with § 672's removal and placement requirements. "The doctrine of equitable estoppel is not, in itself, either a claim or a defense. Rather, it is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct." *Rogers v. Exec. Office for US Attorneys*, No. CV 18-454 (RBW), 2019 WL 1538252, at *1 (D.D.C. Apr. 9, 2019) (quoting *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988)). To apply equitable estoppel to the government, a party must show that (1) "'there was a definite representation to the party claiming estoppel,' (2) the party 'relied on its adversary's conduct in such a manner as to change his position for the worse,' (3) the party's 'reliance was reasonable' and (4) the government 'engaged in affirmative misconduct.'" *Morris Commc'ns, Inc. v. FCC*, 566 F.3d 184, 191 (D.C. Cir. 2009) (quoting *Graham v. SEC*, 222 F.3d 994, 1107 (D.C. Cir. 2000) (internal quotations omitted)). "Estoppel generally requires that government agents engage—by commission or omission—in conduct that can be characterized as misrepresentation or concealment, or, at least, behave in ways that have or will cause an egregiously unfair result." *GAO v. Gen. Accounting Office Pers. Appeals Bd.*, 698 F.2d 516, 526 (D.C. Cir. 1983).

In *Ramallo v. Reno*, this Court held the U.S. was estopped from deporting a woman who testified against South American drug gangs through an agreement with prosecutors as the woman had entered the agreement based on the government's promise to not deport her. 931 F. Supp. 884 (D.D.C. 1996). The Court concluded the woman's reliance on the government's promise was reasonable, given the shared understanding of the danger involved, and that estoppel was "necessary to overcome the grave injustice that would befall Ramallo if she is deported." *Id.* at 895. Courts have also found equitable estoppel against the government to prevent other grave injustices. *See, e.g.*, *Estate of Amaro v. City of Oakland*, 653 F.3d 808, 813-15 (9th Cir. 2011) (finding equitable estoppel applied "where a plaintiff believes she has a 42 U.S.C. § 1983 claim but is dissuaded from bringing the claim by affirmative misrepresentations and stonewalling by the police,"); *Furcron v. United States*, 626 F. Supp. 320 (D. Md. 1986) (finding taxpayers, who allegedly had timely tendered cashier's check in satisfaction of their tax liability and were subsequently required by the IRS to pay that amount again, alleged facts indicating estoppel sufficient to survive a motion to dismiss).

Here, Defendants' failure to remove and place Plaintiff Children in a formal foster care arrangement meets the requirements for equitable estoppel because Defendants made definitive representations that Plaintiff Caregivers needed to take custody of the children. Specifically, CFSA told N.G. that the children needed to be removed from their father's care and explicitly informed N.G. that she needed to file a motion for emergency custody in order to take custody of the children. Compl. ¶ 54. At the same time, CFSA intentionally failed to inform N.G. of her option to become a foster parent for Plaintiff Children. *Id.* Later, CFSA threatened to bring a neglect case against N.G. if she did not find another relative to care for the children, which caused Plaintiff Children to again be informally and illegally placed in the care of S.K. *Id.* ¶ 56. CFSA

intentionally failed to inform S.K. of her option to become a foster parent for the children in order to avoid its obligations to provide foster care maintenance and support for the children. *Id.* ¶ 57.

Similar to *Ramallo* and *Estate of Amaro*, Defendants' misrepresentations constitute affirmative misconduct, and in each case, Plaintiff Caregivers reasonably relied on these misrepresentations and assumed custody of the children to their detriment, missing out on important resources and services to which they were entitled. Further, Defendants willfully and deliberately failed to fulfill their statutory duty to petition the court for a judicial determination of neglect and ensure Plaintiff Caregivers had been licensed or approved as foster parents precisely to avoid providing these resources and services to Plaintiffs.

Finally, as pleaded in the Complaint, CFSA's actions led to an egregiously unfair result for Plaintiffs. *See* Compl. ¶¶ 55, 58. Accordingly, CFSA should be equitably estopped from arguing that Plaintiffs have not met all of the SSA requirements for foster care maintenance payments.

C. Plaintiff Children have an enforceable right via § 1983 to receive a case plan that is reviewed under the state's case review system pursuant to §§ 671(a)(16), 675(1), and 675(5) of the SSA.

Sections 671(a)(16), 675(1), and 675(5) of the SSA confer an enforceable statutory right to their intended beneficiaries to receive a written case plan that ensures the safety and well-being of a child in an out-of-home placement and to have such case plan be periodically reviewed under the state's case review system, including when a child is placed out of state. Interstate Compact on the Placement of Children at 5; *see also* D.C. Code § 4-1422, art. V.

Under the first prong of *Blessing*, it is clear that §§ 671(a)(16), 675(1), and 675(5) were intended to confer a benefit on Plaintiff Children. Similar to the right to foster care maintenance payments explained in Part IV.B above, §§ 671(a)(16) and 675(1) focus on the individual needs of the statute's beneficiaries by requiring a State, such as DC, to develop a case plan to ensure the

continued safety and well-being of "each child receiving foster care maintenance payments," which includes an assessment of the safety and appropriateness of the placement, and describes the services the child and foster parent will receive to "address the needs of the child while in foster care." § 671(a)(16). Section 675(5) also focuses on the beneficiaries' individual needs by requiring a State such as DC, to establish a case review system that assures "each child has a case plan designed to achieve placement in a safe setting that is … consistent with the best interest and special needs of the child." By focusing on the individual needs of each child, §§ 671(a)(16), 675(1), and 675(5) establish rights creating language and satisfy the first prong of *Blessing*.

Further, Plaintiff Children's right to a case plan meets the second prong of *Blessing* because the right is not so "'vague and amorphous' that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-41. Sections 671(a)(16) and 675(1) establish specific requirements for each case plan which must include, *inter alia*, a discussion of the safety and appropriateness of the placement, a plan for "assuring the child receives safe and proper care," and copies of the child's health and education records. 42 U.S.C. § 675(1)(B). Further, § 675(5) sets forth specific requirements for reviewing the plan under the case review system, requiring that the status of each child be reviewed "no less frequently than once every six months." Because §§ 671(a)(16), 675(1), and 675(5) set forth detailed requirements for a case plan and case review system, it is within the Court's competency to determine whether Plaintiffs have received these services.

Defendants do not contest the clarity of the case plan requirements, effectively conceding that they are not vague nor amorphous, and merely state that "[t]o the extent plaintiffs' claim for damages…is based on their claim under § 671(a)(16), the 'written case plan requirement does not

confer rights that can be the subject of an action for damages under § 1983.'"[15] Def. Mot. at 25 n.14 (quoting *Estate of Place v. Anderson*, 398 F. Supp. 3d 816, 844 (D. Colo. 2019)).

Although Defendants argue that "[t]he statute imposes an obligation on the state to receive an approval from HHS and does not confer a benefit on individuals," Defendants rely on a Minnesota district court case, which is not binding on this court. Def. Mot. at 24 (citing *T.F. by Kenner v Hennepin Cty.*, 2018 WL 940621, *6 (D. Minn. Feb. 16, 2018)). A number of Circuit Courts have held that § 671(a)(16) confers rights that are privately enforceable under § 1983. *See Henry A. v. Willden*, 678 F.3d 991, 1006-1007 (9th Cir. 2012) (holding that "the case plan provisions are enforceable through § 1983."); *Marisol A. v. Giuliani*, 929 F. Supp. 662, 683 (S.D.N.Y. 1996) *aff'd* 126 F.3d 372 (2d Cir. 1997) (stating that "both §§ 671(a)(1) and (a)(16) are clear and are not beyond the power of the Court to enforce"); *Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983) (allowing plaintiffs to proceed with a private cause of action for violations of the case plan provision in § 671(a)(16) and the status review provision in § 675(5)(B)). Given the clear, rights-creating language of §§ 671(a)(16), 675(1), and 675(5), and consistent with prior Circuit Court decisions, this Court should find that Plaintiff Children have a privately enforceable right to receive a case plan that is reviewed under the state's case review system.

D. Plaintiff Caregivers have an enforceable right via § 1983 to receive notice of their options to participate in the care and placement of Plaintiff Children under 42 U.S.C. § 671(a)(29) of the SSA.

When children are removed from their homes, Section 671(a)(29) confers an enforceable statutory right to adult relatives, such as Plaintiff Caregivers, to receive an explanation of the

[15] Although Defendants cite to *Connor B. ex. rel. Vigurs v. Patrick*, 774 F.3d 45 (1st Cir. 2014), the case did not challenge the enforceability of the case plan requirement since *Lynch* had already decided the issue. *Id.* at 61. *Connor B.* presents no barrier to finding Defendants liable for failing to develop and implement case plans for Plaintiff Children.

options the relative has to participate in the care and placement of the child. This section features language clearly targeting a class of intended beneficiaries that is specific and mandatory, meeting the threshold for a privately enforceable right under the *Blessing* test.

Section 671(a)(29) meets the first prong of *Blessing*, as the provision is intended to benefit both children who have been removed from their home due to abuse or neglect and the adult relatives of these children. The statute creates for that class of relatives a right to receive notice of the child's removal and an explanation of their options to participate in the child's placement and care. The relative caregiver's right to receive notice of a child's removal, is analogous to the case in *Salazar*, in which the Court found that a Medicaid provision requiring the State to "inform 'all persons' under the age of 21 who are Medicaid-eligible of the services … to which they are entitled" with a "focus . . . on the 'individuals protected'" and accordingly was enforceable under § 1983. *Salazar v. District of Columbia*, 729 F. Supp. 2d 257, 269 (D.D.C. 2010) (quoting *Alexander v. Sandoval*, 532 U.S. 275 (2001)). The court emphasized that although the provision was part of a regulatory scheme outlining "plan requirements," that broader scheme did not affect the rights-conferring language of that specific provision. *Id.* at 270. Similarly, while the SSA establishes a broader scheme outlining the requirements for the development of a state plan, § 671(a)(29) in particular focuses on the needs of intended beneficiaries and creates a private right of action for those beneficiaries.[16] *Gonzaga*, 536 U.S. 273; *Garnett v. Zeilinger*, 323 F. Supp. 3d 58 (D.D.C. 2018). As a result of the rights-creating language directed toward the intended beneficiaries of the statute – children removed from the custody of their parents and their relative caregivers – § 671(a)(29) creates a substantive individual right for purposes of a § 1983 action.

[16] This applies regardless of whether the statute is designed to condition the receipt of federal funds upon a state agency's compliance with it. *Wilder*, 496 U.S. at 498; *Salazar*, 729 F. Supp. 2d 257.

Further, under the second prong of *Blessing*, the rights § 671(a)(29) grants to children and their caregivers are specific, delineated in the statute's text, and enforceable by the courts. They are not "so 'vague and amorphous' that [their] enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-41. When a statute sets forth in objective terms what actions a state must take, even when the state retains some compliance discretion, it is judicially enforceable for purposes of construing a private right. *DuBerry*, 824 F.3d at 1053.

Section § 671(a)(29) outlines, with specificity, how to provide proper notice to relatives of a child removed from their parent's custody. As the statute in question in *DuBerry* did, § 671(a)(29) allows for an easy determination of whether or not a State has fulfilled its obligation. D.C. should have informed the relative of the child's removal, explained what options the relative has under federal, state, and local law, and described the requirements to become a foster family home – all determinable in relevant statutes. The plain language of § 671(a)(29) unambiguously binds the state to provide the specified notice as evidenced by the fact that the statute speaks in terms that are clearly mandatory, rather than precatory. *Blessing*, 520 U.S. at 340-41. As the statute in question in *Blessing* did, the statute here conditions the state's receipt of federal funds on its compliance with the statute and uses mandatory language to describe the obligation–the state "*shall*" give notice and explanation to the relevant family members. § 671(a)(29).

Because the statute specifically obligates a state, such as D.C., to notify relatives of a child who has been removed of their options "to participate in the care and placement of the child," Plaintiff Caregivers are the intended beneficiaries of § 671(a)(29). As contemplated by this section, Plaintiff Children were removed from the custody of their father, and as a result, the children's relatives, including Plaintiff Caregivers, were entitled to receive notice of their options to participate in Plaintiff Children's care. Any notice CFSA would have provided under this

section would have been to the great benefit of these Plaintiffs, as Plaintiff Caregivers would have been informed of the option to have CFSA formally remove and place Plaintiff Children in Plaintiff Caregiver's care, so that Plaintiffs could receive continued benefits and services. Accordingly, the private right conferred by § 671(a)(29) is Plaintiffs' to enforce.

While no court has extensively considered whether the notification provision of § 671(a)(29) creates a private right of action, in *Murphy v. Baker*, No. 15-30187-MGM, 2017 WL 2350246, at *9 (D. Mass. May 4, 2017), the Court in dicta acknowledged that it "might be possible to read the text of § 671(a)(29) as conferring an enforceable private right to kinship notification on a child removed from the care and custody of his or her parent." However, because neither the child nor the child's relatives were party to the case, the Court did not decide the issue.

Further, while Defendants argue that § 671(a) is part of a "comprehensive enforcement scheme" that is incompatible with private enforcement, as discussed above, the fact that a statute is part of an administrative scheme allowing for the revocation of federal funds does not preclude its private enforcement via a § 1983 action. *Wilder*, 496 U.S. at 498; *Wright*, 479 U.S. 418. Because the SSA does not provide for judicial review of individual grievance, the remedial scheme is not sufficiently comprehensive to supplant § 1983. *Wilder*, 496 U.S. at 521. Accordingly, this Court should find that Plaintiff Caregivers have a privately enforceable right to receive notice of the option to participate in the placement and care of Plaintiff Children.

E. Plaintiff Children have an enforceable right via § 1983 to receive services to protect the their safety and health under § 671(a)(22) of the SSA.

Section 671(a)(22) confers on its intended beneficiaries an enforceable statutory right to receive services from the state to protect the child's safety and health. The language of § 671(a)(22) meets the threshold set forth in *Blessing*, clearly conferring a privately enforceable right.

First, Section 671(a)(22) contains rights-creating language that focuses on the individuals it intends to benefit, "rather than having a system-wide or aggregate focus." *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 292 (N.D. Ga. 2003). It provides that a state shall "ensure that children in foster care placements … are provided quality services that protect the safety and health of the children." *Id.* at 291 n.16 (quoting 42 U.S.C. § 671(1)(22)). This language is clearly focused on and intended to benefit foster care children and satisfies the first prong of *Blessing*. Further, the prescription of the section is specific and delineated – its beneficiaries must receive services sufficient to ensure their safety and health. Its mandate is "not too 'vague and amorphous' to be enforced by the judiciary," nor is it less than clearly mandatory. *Id*. at 294 (quoting *Blessing*, 520 U.S. at 340-41).While the standard for "quality services" may be flexible, the statute establishes a threshold: at a minimum, states must provide children in foster care placement "services to protect the safety and health of the children." The state cannot refuse to provide services to children in such circumstances, as Defendants have done here.[17] Finally, the SSA as a whole does not contain a separate enforcement mechanism through which an aggrieved party could seek recourse. *Id*. Accordingly, § 671(a)(22) satisfies all three prongs of the *Blessing* test.

Because Plaintiff Children have been removed by CFSA and placed in the care of Plaintiff Caregivers, Plaintiff Children are the intended beneficiaries of § 671(a)(22) and are entitled to the "quality services" mandated by this section. Thus, the private right it creates is theirs to enforce.

While some courts have found that the language of § 671(a)(22) is "vague," and declined to find a privately enforceable right in its strictures, *see Clark K. v. Guinn*, No. 2:06-CV-1068-RCJ-RJJ, 2007 WL 1435428, at *10 (D. Nev. May 14, 2007), others, looking at the plain language

[17] The ICPC makes clear that the sending state retains jurisdiction over all matters that relate to the care and treatment of the child, and can enter into an agreement with an agency in the receiving state to provide services to the child. D.C. Code § 4-1422, art. V.

of the statute's text, have held that this section is designed to benefit a clearly identifiable class of plaintiffs – foster children – and that its mandate is quite clear. *Kenny A*, 218 F.R.D. at 292. In *Kenny A*, the Court not only found that § 671(a)(22) created a privately enforceable right, but that plaintiffs' claims were strengthened by the fact that they relied on "additional statutory provisions which … contain the requisite rights-creating language," as Plaintiffs have done here. *Id*.

Defendants argue that § 671(a)(22) only requires "generalized actions," and thus does not meet the threshold for "specific types of mandatory actions" that *Gonzaga* requires. Def. Mot. at 17. However, as the Court in *Kenny A* found, it is hardly ambiguous that the statute entitles foster children to services to keep them safe and healthy. To read the statute otherwise would render it impossible for children affected by CFSA's actions to seek remedy, a result incompatible with the purpose of the SSA. Accordingly, the Court should find that Plaintiff Children have a privately enforceable right to receive services for their health and safety under § 671(a)(22).

F. Plaintiff Children have an enforceable right via § 1983 to be placed in a foster care home that meets standards for safety, sanitation, and non-discrimination under § 671(a)(10) of the SSA.

Section 671(a)(10) confers an enforceable statutory right to foster care children, such as Plaintiff Children, to be placed in a foster care home that meets the standards set forth therein. Section 671(a)(10) is enforceable via § 1983 as it clearly targets a class of intended beneficiaries and is specific and mandatory, passing the *Blessing* test for a privately enforceable right. This Court suggested as much in *LaShawn* and should similarly hold here.

With respect to the first prong of *Blessing*, § 671(a)(10) clearly intends to benefit foster children by mandating that the homes in which they are placed meets certain minimum standards. The main case Defendants cites concedes as much. *See Yvonne L. ex rel. Lewis v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 887 (10th Cir. 1992) ("Defendants properly do not dispute

that children in state foster care, including plaintiffs, are intended beneficiaries of the [SSA].")[18] Like other provisions of § 671 and § 672, § 671(a)(10) necessarily contains aggregate aspects, but its predominant focus is the individual, as the standards in question "shall be applied … to *any foster family home*," 671(a)(10)(B); "ensure appropriate liability for caregivers when a child participates in an approved activity," 671(a)(10)(C); and be waived "*only on a case-by-case basis* for non-safety standards … in relative foster family homes for *specific children* in care." 671(a)(10)(D) (emphases added). Finally, § 671(a)(10) does not contain any other enforcement mechanism through which an aggrieved individual can obtain review.

Additionally, Section 671(a)(10) satisfies the third prong of *Blessing* as it unambiguously imposes a binding obligation on Defendants like the other sections of § 671(a) discussed above and for the same reasons. Several courts have found § 671(a)(10) satisfies this condition, including *Yvonne*. 959 F.2d at 888 ("The [SSA] indicates an intent to bind the state, because it sets out a quid pro quo: foster care payments in exchange for specified planning and operation standards.")

The second prong of the *Blessing* test – whether the provision is too vague and amorphous to be enforced by a judge – is the only point of contention. This Court already decided this issue: the *LaShawn* Complaint alleged a violation of § 671(a)(10), and this Court found it, and other provisions, were enforceable. 762 F. Supp. at 989. The Southern District of New York reached the same conclusion and was affirmed by the Second Circuit. *See Marisol A.*, 929 F. Supp. at 683 (holding that § 671(a)(10) is "clear" and "not beyond the power of the Court to enforce"). Other district courts have followed suit. *See Brian A. v. Sundquist*, 149 F. Supp. 2d 941 (M.D. Tenn. 2000). In particular, the *Sundquist* Court, which cited both *Marisol A.* and *LaShawn*, distinguished

[18] Defendants repeated citations to *Estate of Place v. Anderson*, 398 F. Supp. 3d 816 (D. Colo. 2019), land harmlessly, as that case simply applies *Yvonne*, which itself is out-of-circuit.

(a)(10) from (a)(15) and noted, that "In contrast to the *Suter* language simply requiring the state to make 'reasonable efforts' with no elaboration on what that entailed, this section requires that the state establish standards 'reasonably in accord with recommended standards of national organizations concerned with the standard for such institutions or homes.'" *Id.* at 949.

Although the Fourth Circuit concluded in *White v. Chambliss* that § 671(a)(10) is too vague or amorphous to be judicially enforceable, this decision was published nine days after *Blessing* and did not cite to the case. *See* 112 F.3d 731, 739 (4th Cir. 1997). Additionally, *White* misreads 42 U.S.C. § 1320a-2 as having no effect on non-(a)(15) provisions of § 671. *See* 112 F.3d 739 n.4. More importantly, Congress amended § 671(a)(10) after *Yvonne* and *White*. When those courts considered § 671(a)(10), that section of the statute consisted only of the current § 671(a)(10)(A). But in 2014, Congress added § 671(a)(10)(B)-(D), providing considerably more guidance. *See* Preventing Sex Trafficking and Strengthening Family Act, Pub. L. No. 113-183, 128 Stat. 1919 (Sept. 29, 2014). Section 671(a)(10)(B) specifies to whom the standards should be applied and what they must contain; § 671(a)(10)(C) specifies further content of the standards with respect to liability; and § 671(a)(10)(D) provides for when the standards can be waived. Given this added content in the statute, the *Yvonne* and *White* decisions should carry little, if any, weight.

Further, Plaintiffs have adequately pleaded that Defendants failed to ensure Plaintiff Children were placed in a home that met the applicable standards for foster family homes, despite the fact that Plaintiff Children were entitled to such placement, pursuant to the SSA and ICPC.[19] Compl. ¶¶ 26(b), 37, 47. Because Plaintiff Children were removed from the care of their father by CFSA, Plaintiff Children were entitled to be placed in a licensed foster family home. Once

[19] As a factual matter, Plaintiff Caregivers' homes met all applicable licensing requirements or would have been eligible for non-safety related waivers.

Defendants identified Plaintiff Caregivers as willing caregivers, however, Defendants bypassed the foster system, immediately placing Plaintiff Children with these relatives without removing Plaintiff Children in accordance with legally-required procedures or notifying or obtaining approval from the local family services agencies. As a result, Plaintiff Children were placed in homes that had not been investigated, approved or licensed for foster care placements. *See* Compl. ¶¶ 55, 58. Accordingly, the Court should find that Plaintiff Children, as the intended beneficiaries of § 671(a)(10), have a privately enforceable right to be placed in a foster family home that meets applicable standards under that section.

V. PLAINTIFFS ADEQUATELY ALLEGE DEFENDANTS' ILLEGAL PRACTICE OF KINSHIP DIVERSION VIOLATES THE EQUAL PROTECTION CLAUSE

The Fifth Amendment's guarantee of equal protection "requires state actors to treat similarly situated persons alike." *Grissom v. District of Columbia*, 853 F. Supp. 2d 118, 126 (D.D.C. 2012) (citation omitted). A "class of one" equal protection claim may be maintained "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (citations omitted); *see also 3883 Connecticut LLC v. District of Columbia*, 336 F.3d 1068, 1075 (D.C. Cir. 2003) (citation omitted) (holding that there are "two essential elements of [a] 'class of one' equal protection claim: (1) disparate treatment of similarly situated parties (2) on no rational basis."). Defendants acted with discriminatory intent by intentionally and irrationally denying Plaintiffs and other similarly situated children and relative caregivers the same services and benefits provided to children and caregivers who are not related to each other, thus violating the Equal Protection Clause.

In *Miller v. Youakim*, the Supreme Court held that foster parents who were related to the foster children in their care were entitled to foster care benefits on the same basis as unrelated

foster care providers. 440 U.S. at 133. In particular, the Court stated "[t]he legislative materials at no point suggest that Congress intended to subject some foster homes, but not others, to minimum standards of quality, as could result if § 408 excluded relatives' homes from the definition of 'foster family home.'" *Id.* at 140. Rather,

> Congress attached considerable significance to the unique needs and special problems of abused children who are removed from their homes … [and] Section 408 embodies Congress' recognition of the peculiar status of neglected children in requiring that States continually supervise the care of these children, § 408 (a)(2), develop a plan tailored to the needs of each foster child 'to assure that he receives proper care,' § 408 (f)(1), and periodically review both the necessity of retaining the child in foster care and the appropriateness of the care being provided.

Id. at 141 (internal citations omitted).

The Court stated, "We think it clear that Congress designed the [SSA] program to include foster children placed with relatives," as the need for resources, both monetary and service, "to provide a proper remedial environment for such foster children *arises from the status of the child as a subject of prior neglect, not from the status of the foster parent.*" *Id.* at 145 (emphasis added). Plaintiffs have pleaded facts sufficient to show that Defendants acted with discriminatory intent by intentionally denying Plaintiffs and other similarly situated children and relative caregivers the same services and benefits provided to non-relative children and caregivers with no rational basis for doing so. As alleged in the Complaint, once Defendants identified Plaintiff Caregivers as willing caregivers, Defendants misled them into believing they needed to take physical custody and/or file for legal custody in court in order to protect Plaintiff Children from being subjected to further neglect or abuse or from being placed with a stranger. Compl. ¶¶ 55, 58. To deny these neglected children and relative caregivers the necessary and essential resources required by law on the basis that the caregivers are relatives, as opposed to strangers, is not a rational basis. Defendants deliberately failed to follow the required removal and placement procedures that are

afforded to other abused or neglected children merely because Plaintiff Caregivers are related to Plaintiff Children. In doing so, Defendants denied Plaintiffs the benefits and services they are entitled to under the SSA, ICPC and D.C. law.

Further, Plaintiffs have alleged facts sufficient to show that they were treated differently from similarly situated non-relative foster parents and children. Plaintiffs have alleged that CFSA deviated from the legally-required removal and placement procedures for neglected children, including by failing to, *inter alia*: file a neglect petition in court with respect to Plaintiff Children, obtain approval for the out-of-state placement from the local family services agency, pay Plaintiffs the foster care subsidy, or provide Plaintiffs with associated services. Plaintiffs do not, as Defendants claim, merely "allege facts regarding their own interactions with CFSA," Def. Mot. 27, but rather show a pattern and practice of intentional discrimination based solely on Plaintiffs' familial relationship. Defendants fail to offer any explanation for this disparity in treatment, and there is no rational basis to justify Defendants' deprivation. As a result, Plaintiffs have adequately stated a claim that Defendants' conduct violates Plaintiffs' Equal Protection rights.

VI. PLAINTIFFS ADEQUATELY ALLEGE DEFENDANTS' ILLEGAL PRACTICE OF KINSHIP DIVERSION VIOLATES PLAINTIFFS' DUE PROCESS RIGHTS

The Due Process Clause of the Fifth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire and more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). Section 672(a) of the SSA requires the state to make foster care maintenance payments on "behalf of each child" in foster care. 42 U.S.C. § 672(a). As discussed above in Part IV.B.2, Defendants' deliberate failure to follow legally-

required procedures when Defendants removed and placed Plaintiff Children with Plaintiff Caregivers does not negate Plaintiffs' right to receive foster care maintenance payments.

While "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion," the SSA clearly requires the State to take certain actions, and confer certain benefits, when it has decided a child is in an unsafe environment. *Id*. at 756 (citation omitted); 42 U.S.C. §§ 671(a)(16), 671(a)(29), 672(a), 675(1)(A). While the state may retain discretion to determine the severity of a child's situation, the steps it must take upon making that determination are mandated by statute. Therefore, Plaintiffs have precisely the "legitimate claim of entitlement" to foster care maintenance payments contemplated by *Roth*. 408 U.S. at 577.

Further, children in foster care and their caregivers have a substantive due process claim to "adequate food, shelter, clothing, medical care, and reasonable safety." *Marisol A.*, 929 F. Supp. at 676 (finding that children at risk of abuse whose cases were "mishandled" by a state agent could state a claim for a due process right to adequate care). Once the deprivation of a constitutionally protected liberty or property interest has been shown, a court must determine whether a plaintiff was afforded adequate due process protection. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

CFSA has violated Plaintiffs' procedural due process rights by failing to notify Plaintiff Caregivers of the option to have Plaintiff Children placed with them in a formal foster care arrangement, and by failing to provide benefits to Plaintiff Children and Plaintiff Caregivers, in each case without providing Plaintiffs the opportunity for a fair and adequate hearing. With regard to N.G., since CFSA did not notify her of her options to participate in the care and placement of Plaintiff Children as is required by 42 U.S.C. § 671(a)(29) and since N.G. did not become aware that she could apply to become a licensed foster parent until after the children were no longer in her care, it is patently unfair to require N.G. to have intuited that knowledge at the relevant time.

With regard to S.K., when she became aware that she could apply to become a licensed foster parent, despite CFSA's withholding that information from her, counsel wrote to CFSA on S.K.'s behalf asking to begin the process of her licensure. CFSA's written response stated unequivocally that it would not consider formal removal procedures for Plaintiff Children or licensing of S.K. S.K. had no administrative remedy to appeal CFSA's decision to abdicate its responsibilities to her and Plaintiff Children and to avoid the required court oversight provided by a neglect case. It would be patently unfair to expect S.K. to go through the process of an application for foster care that she knows to be futile, be turned down, and then file for a fair hearing pursuant to D.C. Mun. Regs. tit. 29, § 5901.1(d). The heart of procedural due process is the opportunity to be heard at "a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). Processes that are "unavailable or patently inadequate" do not meet that standard. *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000).

Further, Defendants have deprived Plaintiff Children of their right to familial integrity and have done so without providing sufficient procedural safeguards. Although the need to protect children from abuse and neglect is a well-recognized, compelling reason to disrupt familial integrity, such disruption cannot occur without following the required procedures. Defendants rightly argue that "parents have a fundamental liberty interest in family integrity." Def. Mot. at 33. What they fail to recognize, however, is that "children enjoy the corresponding familial right to be raised and nurtured by their parents." *Berman v. Young*, 291 F.3d 976, 983 (7th Cir. 2002) (citing *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000)); see also *Franz v. United States*, 707 F.2d 582, 595 (D.C. Cir. 1983) (finding "[t]he constitutional interest in the development of parental and filial bonds free from government interference" . . . is "above all, manifested in the reciprocal rights of parent and child to one another's companionship") (citations omitted). Specifically, CFSA is

required to file a neglect petition in the D.C. Family Court when it determines a child must be removed from their home. Defendants' failure to petition the court violates Plaintiff Children's right to familial integrity as it does not provide the opportunity for a full and adequate court hearing regarding whether the child could be protected in their home with the provision of services and resources or whether removal is necessary. Moreover, these children are denied their procedural rights to: ensure Defendants' actions, including removal, are appropriate; appointment of a guardian *ad litem*; establishment of a case plan; provision of services; expression of their views to the court regarding their placement and services; and permanency through reunification with their parents or guardianship or adoption with their foster family. Plaintiffs' interactions with CFSA and custody hearings in D.C. Family Court do not constitute the type of "adequate process" required when depriving Plaintiffs of their protected liberty and property interests.[20]

Accordingly, the Court should find that Plaintiffs have adequately stated a claim that Defendants' conduct violates Plaintiffs' Due Process rights.

VII. PLAINTIFFS ADEQUATELY ALLEGE CLAIMS OF INTENTIONAL DISCRIMINATION ON THE BASIS OF FAMILIAL STATUS UNDER THE DISTRICT OF COLUMBIA HUMAN RIGHTS ACT ("DCHRA")

The DCHRA prohibits both intentional and unintentional discrimination against members of a protected class. It is "an unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility, service, program, or benefit to any individual on

[20] A custody matter is designed to determine the best interests of the child as between private parties who have standing to make that request. A custody matter does not require free legal representation for children or their parents, nor any of the other due process protections inherent in a neglect case. Neither N.G. nor Plaintiff Children were represented by counsel in the custody case, which was voluntarily dismissed with no case plan or permanency plan for Plaintiff Children. S.K. was never a party to a custody case at all. Moreover, Defendants are not parties to custody cases and, therefore, the Court cannot provide any due process for parents or children with respect to Defendants' actions or inactions nor can it provide any remedies for same.

the basis of an individual's actual or perceived: . . . familial status." D.C. Code § 2-1402.73. "Any practice which has the effect or consequence of violating any of the provisions of this chapter shall be deemed to be an unlawful discriminatory practice." § 2-1402.68. The DCHRA defines "familial status" as "one or more individuals under 18 years of age being domiciled with: (1) a parent or other person having legal custody of the individual; or (2) the designee, with written authorization of the parent, or other persons having legal custody of individuals under 18 years of age." D.C. Code § 2-1401.02(11A). The DCHRA also protects any person who is "in the process of securing legal custody of any individual under 18 years of age." *Id.*

The D.C. Council enacted the DCHRA as "the most comprehensive of its kind," *see* D.C. Council, Comm. on Pub. Servs. and Consumer Affairs, Report on Bill 2–179 at 1 (July 5, 1977), and the D.C. Court of Appeals has explicitly noted that the Council "intended the Human Rights Act to be a powerful, flexible, and far-reaching prohibition against discrimination of many kinds" and should not be interpreted as being "'limited to those aspects [of discrimination] specifically described [in the Act]." *Jackson v. D.C. Bd. of Elections and Ethics*, 999 A.2d 89, 98 (D.C. 2010). Accordingly, Courts have held that the DCHRA should be construed broadly. *See George Washington Univ. v. D.C. Bd. of Zoning Adjustment*, 831 A.2d 921, 939 (D.C. 2003); *Estenos v. PAHO/WHO Federal Credit Union*, 952 A.2d 878, 887 (D.C. 2008).

As exemplified in this case, when CFSA diverts children to live with relatives, and those relatives file for legal custody of the children in court or are granted legal custody through a custodial power of attorney, either at CFSA's suggestion or otherwise, CFSA treats those caregivers differently than caregivers who do not have or are not seeking legal custody, in violation of the DCHRA. Specifically, when a relative is seeking or has obtained legal custody of a diverted child, CFSA refuses to seek approval for an out-of-state placement or provide any benefits or

services to the family. By contrast, if a relative does not seek or obtain legal custody of a diverted child, CFSA is required to receive approval from the local family services agency, formally place the child in a licensed foster home, and provide continuing benefits and services. In the latter scenario, the foster parent and CFSA have physical custody, however, the parent retains legal custody of the child.

Defendants try to analogize the present facts to those in *McNair v. District of Columbia*, 213 F. Supp. 3d 81 (D.D.C. 2016). *See* Def. Mot. at 38. The court in *McNair* held that the plaintiff failed to establish gender discrimination where her allegations "suggest[ed] that, at best, she was treated differently from all other employees—which presumably includes both men and women." 213 F. Supp. at 87 (citation omitted). But *McNair* is readily distinguishable from the present case. By failing to provide relative caregivers with the same benefits and services it provides to non-relative caregivers, CFSA intentionally treats relative caregivers, such as Plaintiff Caregivers, who have or are seeking legal custody of the children in their care (and who therefore fall within the DCHRA's definition of familial status) differently from licensed foster parents, who have only physical custody of the children in their care (and accordingly, do not meet the DCHRA's definition of familial status). Contrary to Defendants' suggestion, this discriminatory practice does not hinge on the presence of minor children in the home, which is true of both groups, but rather on the caregivers' legal relationship to those minor children. Furthermore, while the plaintiff in *McNair* was not able to proceed on her gender discrimination claim, she was allowed to proceed on her racial discrimination claim by alleging "that the denial of her telecommuting request was racially discriminatory because she alleged that coworkers of a different race were allowed to work from home." *See* Def. Mot. at 38. Plaintiffs allege that the denial of the benefits provided to

licensed foster parents is a direct result of Plaintiffs Caregivers' familial status, and the claim should be allowed to proceed as in *McNair*.

VII. PLAINTIFFS ADEQUATELY STATE A CLAIM FOR NEGLIGENCE

To establish negligence, a plaintiff must prove "a duty of care owed by the defendant to the plaintiff, a breach of that duty by the defendant, and damage to the interests of the plaintiff, proximately caused by the breach." *Turner v. District of Columbia*, 532 A.2d 662, 666 (D.C. 1987) (quoting *District of Columbia v. Cooper*, 483 A.2d 317, 321 (D.C. 1984) (citations omitted)). Plaintiffs have alleged sufficient facts to show that Defendants had a duty of care to Plaintiff Children, which arises out of Defendants' special relationship to neglected children, and Defendants breached that duty, causing damage to the Plaintiffs' interests. Compl. ¶¶ 86-88.

A "special relationship" exists between CFSA and D.C.'s abused and neglected children, imposing statutorily-defined duties and responsibilities to those children on the agency and its employees. *Turner*, 532 A.2d at 668. In particular, this jurisdiction recognizes that the Child Abuse Act imposes "upon certain public officials specific duties and responsibilities which are intended to protect a narrowly defined and otherwise helpless class of persons: abused and neglected children." *Id*. That special relationship renders D.C. liable to members of that protected class for the negligence of its agency. As in *Turner*, Plaintiffs here allege that CFSA has been negligent in fulfilling its duty to protect and serve children in abusive or neglectful environments. There can be no reasonable dispute that Plaintiff Children's status as members of the class that the Child Abuse Act is designed to protect allows them to assert such a claim.

Defendants breached the duty of care they owed to Plaintiff Children. Once CFSA had determined Plaintiff Children were neglected and could not be adequately protected in their home through the provision of services, CFSA had a legal duty to remove Plaintiff Children through

petitioning the D.C. Family Court, place the children with a licensed foster parent, and provide certain benefits and services to them, including foster care maintenance payments, a case plan, and services to ensure their safety and well-being. §§ 4-217.01, 4-1301.09, 4-1303.04(c)(2), 4-1301.07(a), 16-2309(a)(3); *see also* CFSA Policy: Interstate Compact on the Placement of Children at 1. By failing to take such actions, and instead engaging in the practice of kinship diversion, Defendants breached its duties to Plaintiff Children.

As for Defendants' suggestion that Plaintiffs have failed to allege injury giving rise to a claim for monetary relief, it is well established that, when a special relationship exists between the defendant and plaintiff, wherein the defendant has an obligation to care for the plaintiff's economic well-being, the defendant may be held liable under a negligence theory for economic losses suffered by the plaintiff. *Aguilar v. RP MRP Wash. Harbour, LLC*, 98 A.3d 979, 985-86 (D.C. 2014); *Whitt v. Am. Prop. Constr., P.C.*, 157 A.3d 196, 206 (D.C. 2017). Where a defendant is expressly obligated to care for a plaintiff's economic well-being, or undertakes action that implicates plaintiffs' "economic expectancies," such a special relationship exists. *Id*. at 205. Because the Child Abuse Act creates a "special relationship" between Plaintiff Children and Defendants, the economic losses the Plaintiffs have incurred due to Defendants' failure to fulfill their statutory obligations constitute a *prima facie* injury for purposes of their negligence claim. *Turner*, 532 A.2d at 666. Therefore, Plaintiffs have suffered an injury sufficient for bringing a claim of negligence against Defendants.

VIII. PLAINTIFFS HAVE ADEQUATELY PLEADED A CLAIM FOR FRAUDULENT MISREPRESENTATION.

Plaintiffs have adequately pleaded, with particularity, fraudulent misrepresentation by Defendants' agents, alleging facts showing Defendants' intentionally failed to disclose material information which they had a duty to disclose. To plead fraudulent misrepresentation, a plaintiff

must allege facts showing that a person: "(1) made a false representation of or willfully omitted a material fact; (2) had knowledge of the misrepresentation or willful omission; (3) intended to induce [another] to rely on the misrepresentation or willful omission; (4) the other person acted in reliance on that misrepresentation or willful omission; and (5) suffered damages as a result of [that] reliance." *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1130 (D.C. 2015) (quoting *Schiff v. Am. Ass'n of Retired Persons*, 697 A.2d 1193, 1198 (D.C. 1997)). The Complaint describes in detail the circumstances under which identified CFSA employees came into contact with Plaintiffs and alleges that those CFSA employees "knowingly" made false representations and omitted facts they had a duty to disclose under § 671(a)(29) "with the intent to induce reliance." Compl. ¶¶ 91-93. Plaintiffs' allegations in the Complaint therefore satisfy the pleading requirements.

With respect to the first element, Defendants' agents made false representations to both N.G. and S.K. by failing to disclose a material fact when a duty to disclose that fact had arisen. *See Sundberg*, 109 A.3d at 1131 (quoting *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 438 (D.C. 2013)). Defendants acknowledge that § 671(a)(29) "requires" them to "provide notice to a child's family members and relatives," including their "options." Def. Mot. at 42. Defendants contend that language "does not, by its terms, require specific disclosures," but the plain language of § 671(a)(29) compels the opposite conclusion: it requires that the state "explain[] the options the relative has under Federal, State, and local law to participate in the care and placement of the child" and "describe[] the requirements…to become a foster family home and the additional services and supports that are available for children placed in such a home." § 671(a)(29)(B). That is plainly sufficient specificity to give rise to a duty to disclose, particularly where, as here, Defendants' agents are alleged to have never explained the options to Plaintiff Caregivers.

Defendants argue that Plaintiffs have failed to meet the pleading standard because the Complaint does not allege that CFSA employees had knowledge of the falsity of their willful omission. *See* Def. Mot. at 43. This argument, however, relies on an incorrect interpretation of Rule 9(b) of the Federal Rules of Civil Procedure, which requires only that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Further, the cases Defendants cite do not support their incorrect reading of Rule 9(b)'s "knowledge" pleading requirement. Rather in each of these cases, the Court found the plaintiff failed to meet Rule 9(b)'s particularity requirements because the pleading did not contain sufficient details, such as specifying the misrepresentation, who made it, and when, or otherwise provide any facts to support an inference of fraudulent misrepresentation. Def. Mot. at 43 (citing *De La Fuente v. DNC Services Corp.*, 2019 WL 1778948, at *10-11 (D.D.C. Aug. 2, 2019); *Plummer v. Safeway, Inc.*, 934 F. Supp. 2d 191, 199 (D.D.C. 2013)). The instant Complaint suffers from none of these defects.

Defendants also broadly, and wrongly, state that Plaintiffs have not pleaded with particularity other elements of fraudulent misrepresentation. Defendants' Motion does not specifically dispute the sufficiency of Plaintiffs' allegations as to reliance, and they are sufficient. "The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered by one who justifiably relies upon the truth of the matter misrepresented, if his reliance is a substantial factor in determining the course of conduct that results in his loss." *Va. Acad. of Clinical Psychologists v. Grp. Hospitalization & Med. Servs., Inc.*, 878 A.2d 1226, 1238 (D.C. 2005) (citing Restatement (Second) of Torts § 546 (1977)). "It is not ... necessary that a plaintiff's reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct ... It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision." *Id.* (quoting *City Sols. Inc. v. Clear*

Channel Commc'ns, Inc., 365 F.3d 835, 840 (9th Cir. 2004). Here, the Complaint alleges that Plaintiff Caregivers met with the respective identified CFSA agents, were urged to take a single course of action without being informed of their other options, and then took the course the government experts told them to take. Compl. ¶¶ 54, 57. As alleged in the Complaint, faced with a stressful, unfamiliar situation, Plaintiff Caregivers reasonably relied on the CFSA authorities and took the actions those CFSA agents directed.

Defendants also do not specifically dispute the specificity of Plaintiffs' allegations of harm resulting from the CFSA agents' false representations and willful omissions, and those are similarly pleaded with particularity. In addition to non-monetary harm, Plaintiffs specify the amount of foster care maintenance payments they have not received. Compl. ¶¶ 55, 58.

Defendants seem to suggest that there are simply not enough facts in the Complaint to support a fraudulent misrepresentation claim. But pleading with particularity need not equate to pleading at length, as long as all of the required elements are plausibly pleaded. *See Daisley v. Riggs Bank, N.A.*, 372 F. Supp. 2d 61, 79 (D.D.C. 2005) (finding the plaintiff stated a claim for fraudulent misrepresentation when he pleaded "the subject matter of the alleged misrepresentation, identifie[d] which defendant allegedly made the misrepresentation, and attribute[d] the misrepresentation to a particular period of time"); *D'Ambrosio v. Colonnade Council of Unit Owners*, 717 A.2d 356, 361 (D.C. 1998) (finding that a claim for fraudulent misrepresentation can be pleaded in "extremely short and plain terms" as long as the "allegations are specific enough to inform [the Defendant] of the act of which [the Plaintiff] complains and to enable it to prepare an effective response and defense") (citation omitted).

Plaintiffs have pleaded more facts pertinent to the fraud than the plaintiffs in *D'Ambrosio* or *Daisley*. Contrary to Defendants' suggestion, the Complaint names the CFSA agents who made

the statements; states where and when the misrepresentations occurred; notes what Defendants said and what they did not, but were required by law to, say; and explains how Plaintiffs reasonably relied on the willful omissions and suffered damages as a result. *See* Compl. ¶¶ 54, 57. Accordingly, Plaintiffs have pleaded fraudulent misrepresentation with sufficient particularity, and the Court should deny the Motion with respect to this claim.

IX. PLAINTIFFS HAVE ADEQUATELY STATED A CLAIM FOR NEGLIGENT MISREPRESENTATION

Contrary to Defendants' argument regarding Count VII, Plaintiffs have pleaded sufficient facts to support a claim for negligent misrepresentation. Unlike fraudulent misrepresentation, "a complaint alleging negligent misrepresentations need not allege that the defendant had knowledge of the falsity of the representation or the intent to deceive." *Sundberg*, 109 A.3d at 1131 (citing *Kumar v. D.C. Water & Sewer Auth.*, 25 A.3d 9, 15 (D.C. 2011)). A plaintiff must only allege facts showing that the defendant: (1) "made a false statement or omitted a fact that he had a duty to disclose"; (2) that it "involved a material issue"; and (3) that the plaintiff "reasonably relied upon the false statement or omission to his detriment." *Sundberg*, 109 A.3d at 1131 (quoting *Kumar*, 25 A.3d at 15 n.9). In *Ponder v. Chase Home Fin., LLC*, this Court held that the plaintiff had adequately pleaded a claim for negligent misrepresentation against his mortgage lender where the complaint alleged that the lender had proceeded with foreclosure despite the fact that the lender's agent had informed the plaintiff that a loan modification had been approved and all foreclosure proceeding would cease. 865 F. Supp. 2d 13, 20 (D.D.C. 2012). The Court denied the bank's motion to dismiss because it had misrepresented material facts related to the status of the approval and the foreclosure proceeding and should have known that the borrower would rely on the agent's communications, which he plausibly pleaded he had. *Id.* Like the borrower in foreclosure in *Ponder*, Plaintiffs were vulnerable people in difficult situations relying on

institutional experts to guide them to a safe and positive result. Like the agents in *Ponder*, the CFSA agents misrepresented Plaintiffs' options, which misrepresentation Plaintiffs reasonably relied on, leading to a bad result, financial and otherwise, for which Plaintiffs now seek redress.

Defendants suggest that the "options" they concede § 671(a)(29) requires them to explain are "legal," not "factual," and therefore failure to explain them as required by statute cannot be a misrepresentation. The case Defendants cite for this proposition is distinguishable. In *Falconi-Sachs v. LPF Senate Square, LLC*, a tenant sued her landlord, alleging that the landlord falsely represented that she was obliged to pay a late fee and any associated attorney's fees. 142 A.3d 550, 552-53 (D.C. 2016) (*per curiam*). The appellate court affirmed the dismissal of the misrepresentation counts on the basis that the obligation to pay was a matter of law, not fact, and defendants were not subject to a duty to disclose. *Id*. While *Falconi-Sachs* concerned defendant's interpretation of law, in this case, the misrepresentation concerns Defendants' failure to disclose material *facts* – namely, the *options* Plaintiff Caregivers had for the protection of the child in need – and those were facts that Defendants had a statutory duty to disclose.

For the reasons stated above, Plaintiffs have pleaded with sufficient particularity that CFSA agents omitted material facts they had a duty to disclose, and Plaintiff Caregivers reasonably relied on those omissions and suffered damages as a result. Accordingly, the Court should deny the Motion with respect to this claim.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion to Dismiss in its entirety. If the Court determines that any of the claims subject to that motion have not been sufficiently pleaded, Plaintiffs respectfully request that they be granted leave to amend to cure any deficiencies.

Dated: June 23, 2020

By: /s/ Samantha Badlam

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2020 I caused a true and correct copy of the foregoing document to be served upon all counsel of record via the ECF system.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

S.K.., et al.,	)	
Plaintiffs,	)	Case No. 20-00753 (TFH)
v.	)	**ORAL ARGUMENT REQUESTED**
THE DISTRICT OF COLUMBIA, et al.,	)	
Defendants.	)	

[PROPOSED] ORDER DENYING DEFENDANTS THE DISTRICT OF COLUMBIA AND THE CHILD AND FAMILY SERVICES AGENCY'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12

UPON CONSIDERATION OF Defendants the District of Columbia ("DC") and the DC Child and Family Services Agency's ("CFSA") Motion to Dismiss pursuant to Fed. R. Civ. P. 12 (b) (6) [Docket #10] it is hereby:

ORDERED that Defendants' Motion to Dismiss is **DENIED**.

SO ORDERED.

Date

HONORABLE THOMAS F. HOGAN
SENIOR UNITED STATES DISTRICT JUDGE