

1992 WL 151813
United States District Court, District of Columbia.

Brenda LAMPKIN, as legal guardian of Jessica
Lampkin and Christine Lampkin, minors, et al.,
Plaintiffs,

v.

DISTRICT OF COLUMBIA, et al., Defendants.

Civ. A. No. 92-0910 (RCL).

|
June 9, 1992.

MEMORANDUM OPINION

LAMBERTH, District Judge.

*1 This matter comes before the court upon plaintiffs' motion for preliminary injunction and defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs in this matter are ten homeless parents¹ (who are bringing this action on behalf of their children) and the National Law Center on Homelessness and Poverty. Defendants are the District of Columbia, Sharon Pratt Kelly in her official capacity as Mayor of the District of Columbia, the District of Columbia Public Schools, and Dr. Franklin L. Smith in his official capacity as the Superintendent of the District of Columbia public school system.

Plaintiffs bring this action for declaratory and injunctive relief pursuant to section 1983 of the Civil Rights Act, 42 U.S.C. § 1983 (1981 and Supp.1991) ("section 1983"). Plaintiffs contend that defendants have denied plaintiffs' rights under Title VI of the Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. §§ 11421-11432 (Supp.1991). For the following reasons, plaintiffs' motion for preliminary injunction shall be denied and defendants' motion to dismiss shall be granted.

In 1987, Congress passed the Stewart B. McKinney Homeless Assistance Act. 42 U.S.C. §§ 11421-11432 (Supp.1991) ("McKinney Act" or "the Act"). The Act is based upon Congress' policy that state educational systems shall assure that homeless children have equal access to free education.² Title VI, Part B of the Act, entitled Education for Homeless Children and Youth, is basically a grant statute. It authorizes the Secretary of Education to grant federal funds to states so that these states can carry out the activities that are described in subsections (c), (d) and (e) of section 11432. *Id.* at § 11432(a). In the present case, the District of Columbia³ received \$50,000.00 pursuant to the Act. *See id.* at § 11432(b).

Pursuant to subsection (c) of section 11432, these funds are to be used to, among other things: carry out the policies of the Act; provide such services and activities to homeless children and youths to enable them to enroll in, attend and achieve in school; carry out the state plan (discussed *infra*); and to develop and implement programs for school personnel to heighten awareness of the specific problems that surround the education of homeless children and youth. *Id.* at § 11432(c). The relevant portions of subsection (d) state that the Coordinator of Education of Homeless Children and Youth shall facilitate coordination between various state agencies and shall develop relationships between various educational programs and providers to "improve the provision of comprehensive services to homeless children and homeless youths and the families of such children and youths." *Id.* at § 11432(d)(4), (5).

Most of plaintiffs' claims are based upon defendants' alleged failure to comply with subsection (e). This subsection, entitled "State Plan," states that "[e]ach State shall adopt a plan to provide for the education of each homeless child or homeless youth within the State...." *Id.* at § 11432(e)(1). Among other things, each state plan must authorize the state educational agency to make the necessary determinations under this section and address the various problems that stand in the way of educating homeless children. *See id.* at § 11432(e)(1)(A)-(I).

*2 Subsection (e) also provides in relevant part that:

(2) Each plan adopted under this subsection shall assure, to the extent practicable under requirements relating to education established by State law, that local educational agencies within the State shall comply with the requirements of paragraphs (3) through (9).

(3)(A) The local educational agency of each homeless child and each homeless youth shall either—

(i) continue the child's or youth's education in the school of origin—

(I) for the remainder of the academic year; or

(II) in any case in which a family member becomes homeless between academic years, for the following academic year; or

(ii) enroll the child or youth in any school that nonhomeless students who live in the attendance area in which the child or youth is actually living are eligible to attend;

whichever is in the child's best interest or the youth's best interest.

(B) In determining the best interests of the child or youth for purposes of making a school assignment under subparagraph (A), consideration shall be given to a request made by a parent regarding school selection.

(5) Each homeless child shall be provided services comparable to services offered to other students in the school selected according to the provisions of paragraph (3), including transportation services, educational services for which the child meets the eligibility criteria, such as compensatory educational programs for the disadvantaged, and the educational programs for the handicapped and for students with limited English proficiency; programs for vocational education; programs for the gifted and talented; and school meal programs.

(7) Each local educational agency serving homeless children or youth that receives assistance under this subchapter shall coordinate with local social services agencies, and other agencies or programs providing services to such children or youth and their families.

(9) Each State and local educational agency shall review and revise any policies that may act as barriers to the enrollment of homeless children and youth in schools selected in accordance with paragraph (3). In reviewing and revising such policies, consideration shall be given to issues concerning transportation, requirements of immunization, residency, birth certificates, school records, or other documentation, and guardianship. Special attention shall be given to ensuring the enrollment and attendance of homeless children and youths who are not currently attending

school.

Id. at § 11432(e).

Also relevant to this case is section 11432(f) of the Act. This section provides that “[n]o State may receive a grant under this section unless the State educational agency submits an application to the Secretary at such time, in such manner, and containing or accompanied by such information as the Secretary may reasonably require.” *Id.* at § 11432(f). *See also id.* at § 11433(d)(1) (which provides that “[a] local educational agency that desires to receive a grant under this section shall submit an application to the State educational agency at such time, in such manner, and containing or accompanied by such information as the State agency may reasonably require according to the guidelines issued by the Secretary”). The application must include:

*3 (A) a description of the services and programs for which assistance is sought and the problems sought to be addressed through the provisions of such services and programs;

(B) assurances that the applicant complies with or will use requested funds to come into compliance with paragraphs (3) through (9) of section 11432(e) of this title;

(C) an assurance that assistance under the grant will supplement and not supplant funds used before the award of the grant for purposes of providing services to homeless children and homeless youth.

(D) a description of policies and procedures that the agency will implement to ensure that activities carried out by the agency will not isolate or stigmatize homeless children or homeless youth.

Id. at § 11933(d)(1).

The final provision of the Act which is relevant to this case is section 11434. This section imposes various duties upon the Secretary of Education. This provision states, in relevant part, that:

[i]n reviewing the State plans submitted by the State educational agencies under section 11432(e) of this title, the Secretary shall evaluate whether State laws, policies, and practices described in such plans adequately address the problems of homeless children and

homeless youth relating to access to education and placement as described in such plans.

Id. at § 11434(b)(1).

Plaintiffs assert that defendants have failed to comply with Title VI of the McKinney Act in that defendants have: (1) failed to implement a best interest standard in placing homeless children in schools; (2) failed to ensure transportation to and from the school that is in the best interest of homeless children to attend; (3) failed to coordinate social services and public education for homeless children, and to ensure access to comparable educational services and school meal programs; and (4) failed to provide access to free, appropriate public education for homeless children.

In addition to their section 1983 claims under the McKinney Act, plaintiffs allege that defendants violated their rights to equal protection under the Fifth Amendment to the United States Constitution. Plaintiffs state that although they are similarly situated to handicapped children in their need for transportation assistance, defendants provide transportation assistance to handicapped children and not to homeless children.

Defendants oppose plaintiffs' motion for preliminary injunction on the ground that plaintiffs are not entitled to injunctive relief. Further, in their motion to dismiss, defendants assert that plaintiffs have failed to state a claim upon which relief can be granted because plaintiffs do not have a private right of action under the McKinney Act for the relief sought and because have failed to adequately plead an equal protection claim.

II. ANALYSIS

A. Legal Standard

Pursuant to the Federal Rules of Civil Procedure, the court may dismiss plaintiffs' claims for failure to state a claim upon which relief may be granted. Fed.R.Civ.P. 12(b)(6). For the purposes of this motion, the court shall accept all of plaintiffs' allegations as true.

B. Section 1983

*4 42 U.S.C. § 1983 provides a federal remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and federal laws." Section 1983 is available as a remedy for violations of federal statutes as well as for constitutional violations. *See Maine v. Thiboutot*, 448 U.S. 1 (1980). Prior to the United States Supreme Court's ruling in *Suter v. Artist M.*, 503 U.S. 347, 112 S.Ct. 1360 (1992), the Court had developed a two-part line of inquiry for determining whether section 1983 provides a remedy for a statutory violation. First, since section 1983 speaks in terms of "rights, privileges or immunities," not violations of federal law, the court must determine whether plaintiff asserted a violation of a federal right. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989). The Supreme Court has recognized three basic considerations that courts should consider when finding whether plaintiffs assert a violation of a right. First, courts should consider whether the provision at issue creates a binding obligation upon the government, in which case a federal right would be created, or whether the provision does "no more than express a congressional preference for certain kinds of treatment," in which case no federal right would be created. *Id.* (quoting *Penhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19 (1981)). Second, courts should consider whether the interest is "too vague and amorphous" so that it is considered "beyond the competency of the judiciary to enforce." *Golden State*, 493 U.S. at 106 (quoting *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431-32 (1987)). If so, then no federal right is created. Third, courts should consider whether the provision in question was "inten[ded] to benefit" the plaintiff. *Golden State*, 493 U.S. at 106 (quoting *Wright*, 479 U.S. at 430)). If so, then a federal right may be created.

Second, should the court find that plaintiffs have asserted a federal right, section 1983 provides a remedial cause of action "unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." *Wright*, 479 U.S. at 418. Defendants must demonstrate that Congress has "specifically foreclosed a remedy under § 1983" by providing a comprehensive enforcement mechanism to protect a federal right. *Golden State*, 493 U.S. at 106 (quoting *Smith v. Robinson*, 468 U.S. 992, 1005 n. 9 (1984)). *See also Middlesex County Sewage Authority v. National Sea Clammers Ass'n.*, 453 U.S. 1 (1981). The Supreme Court has stated that "[w]e do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy" for the deprivation of a federal right. *Wright*, 479 U.S. at 418-419 (quoting *Smith*, 468 U.S. at 1012)). The

Court rarely finds that a remedial scheme established by Congress is sufficient to displace the remedy that is provided by § 1983.⁴ See *Wilder*, 110 S.Ct. at 2523.

*5 The availability of an administrative mechanism is not necessarily seen by the Court as sufficient to show that Congress intended to foreclose a section 1983 remedy. *Golden State*, 493 U.S. at 106 (cites omitted). Rather, a private right of action under section 1983 is foreclosed “only when the statute itself creates a remedial scheme that is ‘sufficiently comprehensive ... to demonstrate congressional intent to preclude the remedy of suits under § 1983.’ ” *Wilder v. Virginia Hospital Ass’n*, 496 U.S. 498, 110 S.Ct. 2510, 2523 (1990) (quoting *Sea Clammers*, 453 U.S. 1, 20 (1981)).

Moreover, the Court has also held that the generalized authority to cut off federal funds is “insufficient to indicate a congressional intention to foreclose § 1983 remedies.” *Wright*, 479 U.S. at 428 (cites omitted). See also *Wilder*, 110 S.Ct. at 2524; *Suter*, 112 S.Ct. at 1376 (Blackmun, J., dissenting) (in which Justice Blackmun noted that “ever since *Rosado v. Wyman*, 397 U.S. 397 (1970), the power of the secretary to enforce congressional spending conditions by cutting off funds has not prevented the federal courts from enforcing the same conditions”).

In *Suter*, which is factually similar to the present case, the Court broke from this line of inquiry. See *Suter*, 112 S.Ct. at 1376 (Blackmun, J., dissenting).⁵ The issue presented in *Suter* was whether section 1983 permits private individuals the right to enforce the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620–628, 670–679a (“Adoption Act”). The Adoption Act established a federal reimbursement program for various expenses incurred by states in administering foster care and adoption services. *Suter*, 112 S.Ct. at 1363. The Act provided that states which satisfy the Act’s requirements will be reimbursed for a percentage of foster care and adoption assistance programs. *Id.*

In order to participate in the reimbursement program, the Adoption Act required that states submit a plan to the Secretary of Health and Human Services for approval by the Secretary. *Id.* at 1363–64. The Adoption Act listed 16 qualifications that state plans must contain in order to gain the Secretary’s approval. *Id.* at 1364. One of the requisite features was that “reasonable efforts will be made [by the state agency] (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.” *Id.* (quoting 42 U.S.C. § 671(a)(15)).

Respondents in *Suter* filed a class-action suit seeking declaratory and injunctive relief under the Adoption act. *Id.* at 1364. Respondents claimed that the state agency, in violation of the Adoption Act, “failed to make reasonable efforts to prevent removal of children from their homes and to facilitate reunification of families where removal had occurred.” *Id.* (footnote omitted). The United States District Court for the Northern District of Illinois found that the Adoption Act created a right of action under section 1983. *Artist M. v. Johnson*, 726 F.Supp. 690 (N.D.Ill.1989). The United States Court of Appeals for the Seventh Circuit, relying primarily upon *Wilder*, affirmed, holding that the “reasonable efforts” clause of the Adoption Act could be enforced under section 1983. *Artist M. v. Johnson*, 917 F.2d 980 (7th Cir.1990).

*6 The Supreme Court reversed and held that the Adoption Act does not confer an enforceable right of action based on section 1983. *Suter*, 112 S.Ct. at 1365. The Court held that the fact that the language of 42 U.S.C. § 671(a)(15) is mandatory in its terms does not alone create a right that is enforceable under section 1983. Rather, the Court considered exactly what the Act required the states to do. *Id.* at 1367. The Court then held that the Adoption Act only required that states have their plans approved by the Secretary, meaning that their plans must contain the 16 features that are required by the statute. *Id.* The Court then recognized that Illinois’ state plan was approved by the Secretary. *Id.* The Court distinguished the Adoption Act from the statute in *Wilder*, a case in which the Court found created an enforceable right, because the statute in *Wilder* actually required that states adopt reasonable and adequate rates.⁶ *Id.* at 1368.

Title VI of the McKinney Act, Part B, closely resembles the Adoption Act in *Suter* in two ways. First, like the Adoption Act, portions of the McKinney Act are mandatory in their terms. For example, 42 U.S.C. § 11432(e)(3)(A) provides that the local educational agency “shall either—continue the child’s or youth’s education in the school of origin ... or ... enroll the child or youth in any school that nonhomeless students who live in the attendance area in which the child or youth is actually living are eligible to attend; whichever is in the child’s best interest or in the youth’s best interest.” According to *Suter*, however, such mandatory language alone does not create a right of action under § 1983. Rather, the court must determine exactly what the McKinney Act requires defendants to do.

The second similarity between the McKinney Act and the Adoption Act is the fact that both statutes only require states to submit plans or applications to be approved by

the federal government. Title VI of the McKinney Act authorizes the Secretary of Education to grant federal funds to state educational agencies so that these agencies may carry out the activities that are authorized in subsections (c), (d) and (e) of section 11432. 42 U.S.C. § 11432(a), (b). One of these activities is preparing and carrying out a state plan which must comply with the requirements that are set forth in subsection (e). *Id.* at § 11432(d), (e). The state plan is designed to assure that local agencies comply with the provisions that are set forth in § 11432(e)(3) through (9), the sections which contain the mandatory language that plaintiffs point to in claiming that the Act creates a private right of action. *Id.* at § 11432(e)(2).

Section 11432(f) of the McKinney Act provides that no state may receive grants under the Act unless it submits a proper application to the Secretary of Education. Such an application must, among other things, assure that the applicant will use its federal funds to come into compliance with the requirements of section 11432(e)(3)–(9). The final piece of this statutory framework is provided by section 11434. This section requires the Secretary of Education to assure that the State educational agencies' applications are proper in order for it to grant federal funds under this statute.

*7 Thus, much like the Adoption Act in *Suter*, the McKinney Act does not confer an enforceable right upon plaintiffs.⁷ Rather, the only requirement that the Act imposes upon states is the duty to submit a proper application if the state wishes to receive federal funding to educate homeless children. *See id.* at § 11432(f); § 11433(d). The only enforceable duty that the Act may impose is upon the Secretary of Education. The Secretary must comply with section 11434 and review state plans as well as state laws, policies and practices to assure that the states adequately address the problems of educating homeless children before the Secretary may grant federal funds to each state. *See id.* at §§ 11434(b)(1).

Accordingly, like in *Suter*, the mandatory language that is cited by plaintiffs in section 11432(e)(3)–(9) does not create an enforceable right under section 1983. Rather, this language merely sets forth the criteria that the Secretary must consider when deciding whether a state's application is proper. *See id.* at § 11434(b)(1). It is then up to the Secretary to determine whether the states' applications are adequate and whether the states deserve a federal grant. *See id.* Consequently, the court shall grant defendants' motion to dismiss plaintiffs' section 1983 claims because plaintiffs have failed to state a claim upon which relief can be granted.⁸

C. Implied Right of Action

In *Suter*, after finding that the Adoption Act did not create an enforceable right of action under section 1983, the Court briefly addressed whether the Adoption Act contained an implied right of action. The Court applied the familiar test from *Cort v. Ash*, 422 U.S. 66 (1975), and held that the Adoption Act did not. In the present case, plaintiffs' statutory claims are based solely upon section 1983 and not directly under the McKinney Act. Thus the court need not address whether the McKinney Act creates an implied right of action. Even if the court were to address this issue, however, the court would conclude that the McKinney Act does not contain an implied right of action.

In *Cort*, the United States Supreme Court set forth a four-part test for determining whether a statute creates an implied right of action. The four factors are:

[f]irst, is the plaintiff one of the class for whose *especial* benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action solely on federal law?

Id. at 78 (internal quotation marks omitted; emphasis in original).

*8 In the present case, although plaintiffs are in the class for whose benefit the statute was created, it is the judgment of the court that the second and third factors of this test have not been met. As is discussed above, given the overall scheme of Title VI of the McKinney Act and the lack of legislative history on this issue,⁹ the court cannot find that Congress intended to imply a private

right of action as a remedy for this statute. The only duty that Congress intended to impose was upon the Secretary of Education to grant funds only to those states which submitted a proper application.

In addition, granting an implied right of action in this case would be inconsistent with the McKinney Act's overall statutory scheme. When read in its entirety, it is evident that the Act is designed to provide federal assistance to those states that choose to provide these programs to help educate homeless children. These grants are made only if the states submit a proper application and the decision to grant federal funds is left to the Secretary upon his review of the states' applications, laws and policies. Thus, according to the letter of the Act, the remedy for a state's failure to comply with its state plan lies with the Secretary of Education, not with parties like plaintiffs. To find an implied right of action in this case would be the equivalent of the judiciary rewriting the statute.

D. Equal Protection

The court shall also dismiss plaintiffs' equal protection claim. In *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954), the United States Supreme Court held that the equal protection guaranties that are provided in the Fourteenth Amendment to the Constitution are applicable to the District of Columbia through the equal protection component of the Due Process Clause of the Fifth Amendment. The Equal Protection Clause of the Fourteenth Amendment essentially commands that all persons that are similarly situated should be treated alike. *Cleburn v. Cleburn Living Center, Inc.*, 473 U.S. 432, 439 (1984) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). When a law is challenged on equal protection grounds, the general rule is that the law is presumed to be valid and will be sustained if the classification that is drawn by the statute is rationally related to a legitimate government interest. *Cleburn*, 473 U.S. at 440 (cites omitted). In the present case, both parties agree that education is not a fundamental right and that no suspect classes are involved. See *Kadrmas v. Dickenson Public Schools*, 487 U.S. 451, 457–58 (1988). Thus, both parties recognize that rational basis scrutiny is appropriate for evaluating this claim.

Plaintiffs assert that defendants have violated their equal protection rights because defendants refuse to provide homeless children with necessary transportation assistance to and from school but defendants do provide transportation assistance to mentally and physically handicapped children. Defendants do treat homeless children differently than handicapped children for the

purposes of providing transportation assistance to and from school. The court cannot find, however, that this disparate treatment violates plaintiffs' rights to equal protection under the Fifth and Fourteenth Amendments.

*9 Defendants are required to provide transportation assistance to handicapped children under the Education for All Handicapped Children Act, 20 U.S.C. §§ 1400 *et seq.* This Act defines handicapped children as children:

(A) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbances, orthopedic impairment, autism, traumatic brain injury, other health impairments, or special learning disabilities; and

(B) who, by reason thereof need special education and related services.

Id. at § 1401(a)(1). The Act provides that transportation is a "related service" under 20 U.S.C. § 1401(a)(17).

Defendants have a rational basis for treating handicapped children differently than homeless children for the purposes of providing transportation assistance to and from school. Handicapped children, because of their disability, are by definition less able to travel to school than non-disabled children. Plaintiffs have failed to show that homeless children, by virtue of their homelessness alone, are physically or mentally less capable of travelling to school than nonhomeless children.

A separate order shall issue this date.

ORDER

This matter comes before the court upon plaintiffs' motion for preliminary injunction and defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated in the court's memorandum opinion of this date, it is hereby ORDERED that

1. Defendants' motion to dismiss is GRANTED.
2. Plaintiffs' motion for preliminary injunction is DENIED as moot.
3. This case stands DISMISSED WITH PREJUDICE.

SO ORDERED.

Not Reported in F.Supp., 1992 WL 151813, 60 USLW
2807

All Citations

Footnotes

¹ The ten parents are: Brenda Lampkin, Sadie Chatmon, Denise Dabney, Barbette Fribbley, Dawn Harvell, Gail Mason, Twana Robb, Maria Summers, Patricia Sumpter and Cherise Thornes.

² 42 U.S.C. § 11431 provides that:
(1) each State educational agency shall assure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education which would be provided to the children of a resident of a State and is consistent with the state school attendance laws;

(3) homelessness alone should not be sufficient reason to separate students from the mainstream school environment.

³ The District of Columbia is considered a “state” for the purposes of Title VI of the McKinney Act. *See* 42 U.S.C. § 11421(d).

⁴ In *Wilder*, the Court noted that it has found that Congress’s remedial scheme was sufficient to displace section 1983 only on two occasions. In *Sea Clammers*, the Court held that the enforcement scheme that was created in the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, demonstrated congressional intent to foreclose the section 1983 remedy because it granted the Environmental Protection Agency considerable enforcement power through the use of noncompliance orders, civil suits, criminal penalties and two citizen-suit provisions. *Sea Clammers*, 453 U.S. at 13. In the other case, *Smith v. Robinson*, the Court held that the administrative scheme set forth in the Education of the Handicapped Act, which contained a “carefully tailored administrative and judicial mechanism” foreclosed section 1983 as a remedy. *Smith v. Robinson*, 468 U.S. 992, 1009 (1984).

⁵ In his dissent, Justice Blackmun stated that “the Court reach[ed] [d] its conclusion without even stating, much less applying, the principles our precedents have used to determine whether a statute has created a right enforceable under § 1983.” *Suter*, 112 S.Ct. at 1371.

⁶ The Court also held that the “reasonable efforts” clause in § 671(a)(15) of the Adoption Act does not confer an enforceable right upon the Adoption Act’s beneficiaries, but rather “it impose[s] only a generalized duty on the State, to be enforced not by private individuals, but by the Secretary....” *Suter*, 112 S.Ct. at 1368–69.

⁷ Due to the similarity between the McKinney Act in the present case and the Adoption Act in *Suter*, the court shall follow the analysis that the Supreme Court applied in *Suter*. Accordingly, the court does not reach on the issue of whether Title VI of the McKinney Act would create an enforceable right of action pursuant to section 1983 under the Supreme Court’s pre-*Suter* jurisprudence.

⁸ Since the court shall grant defendants’ motion to dismiss on the ground that plaintiffs do not have a right of action under section 1983, the court need not pass on whether defendants have actually complied with the McKinney Act.

⁹ The parties have not cited, and the court has not uncovered, any legislative history that is relevant to this inquiry.

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