UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

RICHARD MESSIER, et al. :

v. : No. 3:94-CV-1706 (EBB)

SOUTHBURY TRAINING SCHOOL, et al. :

RULING ON MOTION TO DISMISS BY DEFENDANTS DPHAS AND DSS

Plaintiffs, three advocacy organizations and seven individual residents or former residents of Southbury Training School ("STS"), bring this class action for injunctive relief against defendants STS, Connecticut Department of Mental Retardation ("DMR"), Department of Public Health and Addiction Services ("DPHAS") and Department of Social Services ("DSS"). Plaintiffs allege violations of the Due Process Clause of the Fourteenth Amendment, Section 504 of the Rehabilitation Act of 1973 ("Section 504"), the Americans with Disabilities Act (the "ADA") and the Social Security Act. This Court denied a motion to dismiss by defendants DMR and STS (the "DMR defendants") on February 9, 1996, and granted plaintiffs' motion for class certification on July 8, 1996. Defendants DPHAS and DSS now move to dismiss all claims against them for failure to state a claim upon which relief may be granted. For the following reasons, defendants' motion [Doc. No. 82] is denied.[1]

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[1] The following discussion presumes familiarity with the background and procedural history of this case, as well as with this Court's rulings of February 9, 1996, and July 8, 1996.

DISCUSSION

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) should be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). "The function of a motion to dismiss 'is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984) (quoting Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980)). In considering a motion to dismiss, a court must presume all factual allegations of the complaint to be true and must draw any reasonable inferences in favor of the non-moving party. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Defendants assert five primary arguments in support of their motion to dismiss. First, defendants claim that DPHAS owes no substantive due process duty to plaintiffs, because DPHAS has no custodial role with respect to plaintiffs. Second, defendants state that DPHAS cannot be found to have violated procedural due process in relation to the issuance of DNR orders at private hospitals, because no state action is involved in such issuance. Third, defendants argue that even if state action can be found with respect to the issuance of DNR orders at private hospitals, DMR clients at such hospitals are afforded sufficient protections by existing procedural safeguards. Fourth, defendants assert

that plaintiffs cannot establish a legally tenable theory supporting their claims relating to community placement, and that, in any case, DPHAS and DSS play no role in making placement determinations. Finally, defendants claim that plaintiffs have no right to sue under 42 U.S.C. § 1983 ("Section 1983") for DSS' alleged failure to take "corrective action" to cure deficiencies, as required by federal regulations under the Social Security Act.

I. Substantive Due Process

Defendants assert that no claim for violation of substantive due process rights may be brought by plaintiffs against DPHAS, because DMR is the sole state agency retaining custody over plaintiffs, even when plaintiffs are taken away from DMR facilities for treatment at community medical centers. In support of this contention, defendants rely on Deshaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989), in which the Supreme Court found that a state's failure to protect an individual against private violence does not generally violate the Due Process Clause. Id. at 197. Specifically, the Court found that no violation may be found unless a state has custody of the individual, is in an analogous "special relationship" with the individual, or has created the danger facing the individual. Id. at 197-98, 201 n.9. The Deshaney Court explicitly distinguished the Court's earlier decisions in Estelle v. Gamble, 429 U.S. 97 (1976) and Youngberg v. Romeo, 457 U.S. 307 (1982), which establish that state prisoners and mentally retarded

residents of state institutions may sue for substantive due process violations.

The instant case falls squarely under Youngberg, as there is no dispute that the state has custody of plaintiffs. In urging this Court to distinguish among the various state agencies whose actions or inactions impact on care of plaintiffs, defendants assert a novel argument. Indeed, the parties have not cited, nor has this Court found, any other case in which such an argument has been made. In the below discussion, the Court analyzes the merits of defendants' novel attempt to extend Deshaney.

In explaining the rationale underlying Deshaney, the Supreme Court aptly explained the basis for the Estelle - Youngberg doctrine:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

489 U.S. at 200. The above rationale clearly applies to plaintiffs in the instant case. The true question, however, concerns whether the phrase "custodial state agency" should properly be substituted for "State" in the above formulation, as defendants suggest.

In the absence of precedent directly on point, reasoning by analogy is necessary. In this connection, the Court first takes note of the well-settled rule that an individual's substantive due process rights do not disappear merely based upon a change in

that individual's residence status. See, e.g., Thomas S. v. Morrow, 781 F.2d 367, 374 (4th Cir.) ("Youngberg does not suggest that an incompetent person sheds the basic liberty interests that the Court identified when state officials and his guardian move him from one facility to another."), cert. denied, 476 U.S. 1124 (1986); Camp v. Gregory, 67 F.3d 1286, 1293 (7th Cir. 1995) (holding that children retain substantive due process rights when the state places them with a private agency or foster family), cert. denied, 116 U.S. 2498 (1996); Norfleet v. Arkansas Dep't of Human Servs., 989 F.2d 289, 291-93 (8th Cir. 1993) (same); Yvonne L. by & through Lewis v. New Mexico Dep't of Human Servs., 959 F.2d 883, 291-92 (10th Cir. 1992) (same); Meador v. Cabinet for Human Services, 902 F.2d 474, 476 (6th Cir.) (same), cert. denied, 498 U.S. 867 (1990); Taylor by & through Walker v. Ledbetter, 818 F.2d 791, 794-95 (11th Cir. 1987) (same), cert. denied, 489 U.S. 1065 (1989); Doe v. New York City Dep't of Social Servs., 649 F.2d 134 (2d Cir. 1981) (same), cert. denied, 464 U.S. 864 (1983).

The above-cited cases also clearly indicate that when a state has custody of an individual, the individual may sue under the Due Process Clause based upon inaction by the state, even when the ultimate harm alleged occurred at the hands of private actors.[2] Thus, whereas defendants in the instant case assert

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[2] The extent of this principle is aptly illustrated by the recent case of Wang v. Reno, 81 F.3d 808 (9th Cir. 1996). In Wang, the Ninth Circuit held that the federal government entered into a special custodial relationship with the plaintiff by

that plaintiffs complain of a privately-inflicted harm, it is clear that a state acting in a custodial relationship can be sued for failing to prevent privately-inflicted harms.[3]

Most significantly, the Court notes that a state may not avoid its constitutional obligations merely by contracting out caretaking functions. West v. Atkins, 487 U.S. 42, 55-56 & n.14 (1988). Similarly, this Court cannot fathom that a state can avoid constitutional obligations by splitting up functions among state agencies, and then asserting that only the agency given "custody" is subject to the Constitution.[4]

In the instant case, it may be that DMR is solely able to effect the changes that plaintiffs seek with respect to issuance of DNR orders. If so, then DPHAS is not a proper defendant in this aspect of the litigation. Based upon plaintiff's

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paroling him into the United States to testify at a drug conspiracy trial, and that the Due Process Clause therefore requires the government to protect him from harms which may be inflicted by the Chinese government upon his return, in retaliation for his testimony. 81 F.3d at 818-19.

[3] Counsel for defendants suggested at oral argument that if the instant plaintiffs may maintain their substantive due process claim, then any private hospital patient alleging that he or she has been mistreated may sue DPHAS for relief. However, such a private patient, if not in state custody, clearly cannot sue based upon substantive due process.

[4] The Court does not suggest that Connecticut has sought to effect such a result. Indeed, the state's division of authority may be entirely logical and appropriate. However, the Court is acutely aware that a contrary ruling on the issue in question might allow a state to assign different agencies responsibility for clothing, feeding, sheltering or training residents, while claiming that only a single custodial agency could be sued for constitutional violations.

allegations, however, it appears that, should plaintiffs in fact have a right to the relief that they seek, DPHAS's participation would be necessary to provide such relief. If so, then DPHAS does in fact have at least a marginal caretaking role with respect to plaintiffs, and is therefore not immune to suit under the Constitution.

In sum, the instant case is one in which the state not only has custody of plaintiffs, but has allegedly placed them at risk by taking them to private medical facilities and failing to require such facilities to afford plaintiffs sufficient safeguards prior to the issuance of DNR orders. To the extent that DPHAS' inaction may combine with DMR's affirmative actions and inaction to create this alleged harm, the Court finds that DPHAS may properly be sued under the Due Process Clause.

II. Procedural Due Process

A. State Action

Defendants assert that plaintiffs may not pursue a procedural due process claim, because decisions by private physicians at community medical facilities do not constitute state action. In support of this contention, defendants rely primarily on Blum v. Yaretsky, 457 U.S. 991 (1982), in which the Supreme Court held that decisions by private nursing homes to transfer or discharge patients do not constitute state action, even though the state responds to such decisions by adjusting the patients' Medicaid benefits.

Plaintiffs in Blum challenged the specific transfers and discharges, not the state's response thereto. 457 U.S. at 1005. In the instant case, however, plaintiffs do not challenge the specific decisions of private physicians to issue DNR orders. To the contrary, plaintiffs challenge the state's decision to place plaintiffs in medical facilities wherein there exists a risk of issuance of DNR orders absent certain safeguards, as well as the State's alleged failure to insist that such safeguards be implemented. Thus, there is no need to undertake a Blum analysis as to whether state action exists, as there is no question that the state is responsible for determining where plaintiffs receive medical treatment, nor is there any question that the state, acting in either its custodial or regulatory capacity, has the authority to require further safeguards.[5]

B. Adequacy of Existing Safeguards

Defendants further claim that even if state action can be found with respect to the issuance of DNR orders at private hospitals, DMR clients at such hospitals are afforded sufficient protections by existing procedural safeguards. In support of this argument, defendants point to various state and federal laws and regulations designed to assure that patients' wishes regarding medical care are honored. It is certainly possible

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[5] Conn. Gen. Stat. § 17a-238(g) indicates that DMR, acting in its custodial role, may require certain safeguards prior to the issuance of DNR orders with respect to its clients who are treated at private medical facilities.

that, upon summary judgment or at trial, defendants will be able to succeed in showing that existing safeguards provide sufficient protections such that plaintiffs cannot show any constitutional violation. However, for the purposes of the instant motion to dismiss, this Court must accept as true all facts alleged in plaintiffs' complaint. Plaintiffs allege that DNR orders "are imposed as a matter of course on many STS residents who are admitted to community medical facilities for treatment." Second Am. Compl. ¶ 72. Thus, for the purposes of this ruling, the Court presumes that plaintiffs will be able to show that existing safeguards are, in fact, inadequate.[6]

III. Claims Relating to Community Placement

Defendants assert that it is inappropriate to apply the Youngberg professional judgment standard to decisions concerning community placement, and, therefore, that plaintiffs cannot establish a legally tenable theory supporting their claims relating to community placement. This Court has already addressed these arguments in its Ruling on DMR Defendants' Motion to Dismiss of February 9, 1996, and in its Ruling on Plaintiffs' Motion for Class Certification of July 8, 1996. As discussed in

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[6] The Court notes with some consternation that the parties have failed to discuss the import of DMR's Revised Protocol for Review of DNR Orders, dated March 27, 1996. Indeed, the Court became aware of this policy only incidentally. However, a copy of the policy has now been docketed in this case, and the Court intends to consider at future stages of litigation the extent to which the policy affords to plaintiffs all the process that is due.

those rulings, this Court disagrees with defendants' view of the law.[7]

IV. Right to Sue For Violations of the Social Security Act

A. Analytic Framework

This Court has previously explained the current state of the analytic framework applicable to determinations as to whether a plaintiff may sue under Section 1983 for violations of a federal statute. See Ruling on DMR Defendants' Motion to Dismiss, Feb. 9, 1996, at 19-26. The framework outlined in this Court's previous ruling is summarized below.

Section 1983 generally provides a cause of action for violations of federal statutes by state and local governmental units, Maine v. Thiboutot, 448 U.S. 1, 4 (1980), unless a given action falls into one of two exceptions: (1) cases in which the statute in question does not create an enforceable "right, privilege or immunity"; and (2) cases in which such a right exists but Congress has foreclosed enforcement of the right under Section 1983. Wright v. Roanoke Redevelopment & Housing Auth.,

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[7] Of course, plaintiffs' claims relating to community placement are not brought against DSS and DPHAS, except to the extent that 42 U.S.C. § 1396a(a)(31) and 42 C.F.R. § 456.609 require inspection teams to determine whether it is "necessary and desirable" that ICF/MR residents' remain in their current placement, and whether it is feasible to meet their needs through "alternative institutional or noninstitutional services." 42 C.F.R. § 456.609. In this respect, community placement issues arise to some degree in relation to plaintiffs' claims concerning inadequate inspections and lack of "corrective action" by DSS in response to such inspections. These claims are addressed below.

479 U.S. 418, 423 (1987).

Under the first exception, the Supreme Court has held that no enforceable right exists if: the statutory provision in question was not intended to benefit the putative plaintiffs; the provision reflects merely a "congressional preference" rather than a "binding obligation"; or the plaintiffs' interest is "too vague and amorphous" such that it is "beyond the competence of the judiciary to enforce." Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 509 (1990) (citation omitted). Moreover, in light of Suter v. Artist M., 503 U.S. 347 (1992) and its progeny, courts should strictly enforce the requirement that statutory language must be definite and specific in order to confer an enforceable right. See Marshall v. Switzer, 10 F.3d 925, 929 (2d Cir. 1993) (holding that Suter requires definite and specific statutory language in order for an alleged violation to be actionable); Chan v. City of New York, 1 F.3d 96, 104 (2d Cir.) (same), cert. denied, 510 U.S. 978 (1993).[8]

With respect to the second exception, courts "[should] not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." Wilder, 496 U.S. at 520 (citations omitted). Thus, defendants have the burden of showing "by express provision or other specific evidence from the statute itself that Congress

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[8] As noted in this Court's prior decision, this aspect of Suter survives Congress's attempt to curtail the impact of Suter by passing Pub. L. No. 103-382, 108 Stat. 4057 (codified at 42 U.S.C. § 1320a-2).

intended to foreclose such private enforcement." Id. at 520-21 (citation omitted). In the absence of an express provision, private enforcement may only be deemed to be foreclosed if the statute itself creates a remedial scheme that is "'sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.'" Id. at 521 (quoting Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 20 (1981)).

B. Statutory Scheme

The Social Security Act requires that every state participating in Medicaid must provide in its state plan, with respect to each intermediate care facility for the mentally retarded ("ICF/MR"):

> (A) with respect to each patient . . . for a regular program of independent professional review (including medical evaluation) which shall periodically review his need for [] services.
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> (B) with respect to each [ICF/MR] within the State, for periodic onsite inspections of the care being provided to each person receiving medical assistance, by one or more independent professional review teams (composed of a physician or registered nurse and other appropriate health and social service personnel), including with respect to each such person (i) the adequacy of the services available to meet his current health needs and promote his maximum physical well-being, (ii) the necessity and desirability of his continued placement in the facility, and (iii) the feasibility of meeting his health care needs through alternative institutional or noninstitutional services; and
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> (C) for full reports to the State agency by each independent professional review team of the findings of each inspection under subparagraph (B), together with any recommendations.

42 U.S.C. § 1396a(a)(31).

Pursuant to the statute, HHS has promulgated extensive regulations governing such "individual review" ("IR") inspections. These regulations set forth specific requirements as to the make-up of the inspection team, 42 C.F.R. §§ 456.602-456.604; provide that inspections of each facility must be conducted at least annually, 42 C.F.R. § 456.606; provide that no facility may be notified of an inspection more than 48 hours prior to the inspection, 42 C.F.R. § 456.607; and require inspection teams to have personal contact with each ICF/MR resident and to personally review each patient's record, 42 C.F.R. § 456.608. In addition, the regulations provide that:

> The team must determine in its inspection whether --
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> (a) The services available in the facility are adequate to --
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> (1) Meet the health needs [] and the rehabilitative and social needs of each recipient in an ICF; and
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> (2) Promote his maximum physical, mental and psychological functioning.
>
> (b) It is necessary and desirable for the recipient to remain in the facility;
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> (c) It is feasible to meet the recipient's health needs [and] rehabilitative needs through alternative institutional or noninstitutional services; and
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> (d) Each recipient . . . is receiving active treatment as defined in § 441.154 of this subchapter.

42 C.F.R. § 456.609.

In making the above-described determinations, the regulations state that an inspection team may consider patients'

medical, social and psychological evaluations and plans of care; the frequency with which attending physicians review prescribed medications; the frequency with which residents are tested and observed; the consistency with which notes are recorded concerning patients; patients' cleanliness, bedsores, malnutrition, dehydration or absence thereof; residents' maintenance of physical, mental and psychosocial function; the extent to which a planned program of activities to prevent regression is implemented and the extent to which there is progress toward stated objectives; whether a resident needs any service that is not being furnished; and whether a resident requires continued placement in the ICF/MR or there exists a plan to transfer the resident elsewhere. 42 C.F.R. § 456.10.

The inspection team must promptly submit a report, 42 C.F.R. § 456.11, and DSS must then "take corrective action as needed based on the report and recommendations of the team." 42 C.F.R. § 456.13. Although the term "corrective action" is not defined under 42 C.F.R. § 456, the meaning of the term is explicated by other statutory and regulatory provisions. Specifically, 42 U.S.C. § 1396a provides in relevant part:

> **(i) Termination of certification for participation of and suspension of State payments to [ICF/MR units].**
>
> (1) In addition to any other authority under State law, where a State determines that [an ICF/MR] which is certified for participation under its plan no longer substantially meets the requirements for such a facility under this subchapter and further determines that the facility's deficiencies --
>
> (A) immediately jeopardize the health

and safety of its patients, the State shall provide for the termination of the facility's certification for participation under the plan and may provide, or

(B) do not immediately jeopardize the health and safety of its patients, the State may, in lieu of providing for terminating the facility's certification under the plan, provide

that no payment will be made under the State plan with respect to any individual admitted to such facility after a date specified by the State.

(2) The State shall not make such a decision with respect to a facility until the facility has had a reasonable opportunity [] to correct its deficiencies [and] reasonable notice and opportunity for a hearing.

(3) The State's decision to deny payment may be made effective only after such notice to the public and to the facility . . .

42 U.S.C. § 1396a(i). Pursuant to this statutory provision, 42 C.F.R. §§ 442.117 - 442.119 provide as follows:

§ 442.117 Termination of certification for ICFs/MR whose deficiencies pose immediate jeopardy.

(a) A survey agency must terminate a facility's certification if it determines that --

(1) The facility no longer meets conditions of participation for ICFs/MR as specified in subpart I of part 483 of this chapter[; and]

(2) The facility's deficiencies pose immediate jeopardy to residents' health and safety.

(b) Subsequent to a certification of a facility's noncompliance, the Medicaid agency must, in terminating the provider agreement, follow the appeals process specified in part 431, subpart D of this chapter.

§ 442.118 Denial of payments for new admissions to an ICF/MR

(a) *Basis for denial of payments.* The Medicaid agency may deny payment for new admissions to an ICF/MR that no longer meets the applicable conditions of participation [in 42 C.F.R. § 483 et seq.].

(b) *Agency procedures.* Before denying payments for new admissions, the Medicaid agency must comply with the following requirements:

(1) Provide the facility up to 60 days to correct the cited deficiencies and comply with conditions of participation for ICFs/MR.

(2) If at the end of the specified period the facility has not achieved compliance, give the facility notice of intent to deny payment for new admissions, and opportunity for an informal hearing.

(3) If the facility requests a hearing, provide an informal hearing that includes --

(i) The opportunity for the facility to present, before a State Medicaid official who was not involved in making the initial determination, evidence or documentation, in writing or in person, to refute the decision that the facility is out of compliance with the conditions of participation for ICFs/MR.

(ii) A written decision setting forth the factual and legal bases pertinent to a resolution of the dispute.

(4) If the decision of the informal hearing is to deny payments for new admissions, provide the facility and the public, at least 15 days before the effective date of the sanction, with a notice that includes the effective date and the reasons for the denial of payments.

§ 442.119 Duration of denial of payments and subsequent termination of an ICF/MR.

(a) *Period of denial.* The denial of payments for new admissions will continue for 11 months after the month it was imposed unless, before the end of that period, the Medicaid agency finds that --

(1) The facility has corrected the deficiencies or is making a good faith effort to achieve compliance with the conditions of participation for ICFs/MR; or

(2) The deficiencies are such that it is necessary to terminate the facility's provider agreement.

(b) *Subsequent termination.* The Medicaid agency must terminate a facility's provider agreement --

(1) Upon the agency's finding that the facility has been unable to achieve compliance with the conditions of participation for ICFs/MR during the period that payments for new admissions have been denied;

(2) Effective the day following the last day of the denial of payments period; and

(3) In accordance with the procedures for appeal of terminations set forth in subpart D of part 431 of this chapter.

42 C.F.R. §§ 442.117 - 442.119. Moreover, as may be inferred from the above regulations, 42 C.F.R. §§ 431.151 - 431.154 set forth extensive appeal procedures which a state must follow in the course of terminating ICF/MR provider agreements.

C. Analysis

Plaintiffs contend that DSS has failed to carry out its duty to take corrective action as set forth by the statutory scheme, and plaintiffs seek relief for such violations under Section

1983. Defendants, while not admitting that any violations have occurred, challenge plaintiffs' right to sue under Section 1983 for DSS' alleged failure to take corrective action.[9] Defendants admit that plaintiffs possess a right to sue for alleged violations of DSS' duty to carry out IR inspections.[10]

Defendants assert that DSS' duty to take "corrective action" falls into the first Wilder exception. This Court disagrees. First, the Court finds that those plaintiffs who are ICF/MR residents are the intended beneficiaries of the "corrective action" requirement. Wilder, 496 U.S. at 509. Second, the statutory scheme clearly imposes a binding obligation upon participating states, rather than merely stating a congressional

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[9] The Court concurs with plaintiffs that the Second Circuit's decision in Hillburn v. Maher, 795 F.2d 252 (2d Cir. 1986), cert. denied, 479 U.S. 1046 (1987) substantially supports the right of plaintiffs to sue for violations of 42 C.F.R. § 456.613. In Hillburn, the appellate court upheld the district court's injunction, in which the district court had relied on the "corrective action" clause of Section 456.613 to require the Connecticut Department of Income Maintenance (now DSS) to consult with officials at skilled nursing facilities (SNFs) found to have deficiencies, and to terminate provider agreements of SNFs unable to cure the deficiencies after consultation. 795 F.2d at 260-61. However, because Hillburn was decided prior to Wilder and Suter, and neither the district court nor the appellate court directly addressed plaintiffs' right to sue, this Court does not find Hillburn to be entirely dispositive. The Court therefore undertakes the following analysis of plaintiffs' right to sue.

[10] Although defendants assert only that the statutory scheme "at best [confers] a right upon plaintiffs to have the subject inspections take place," Mem. Supp. Mot. Dismiss at 35, defendants make no arguments explicitly or implicitly tending to show that a right to sue for inspections does not exist. Moreover, this Court finds that the statutory and regulatory provisions setting forth the inspection requirements easily satisfy the requirements of Wilder and Suter.

preference. Wilder, 496 U.S. at 509. See 42 C.F.R. § 456.613 ("The agency must take corrective action . . .").

Third, even if the corrective action provision is viewed through the strict lens of Suter, it is not "too vague and amorphous" such that it would be "beyond the competence of the judiciary to enforce." Wilder, 496 U.S. at 509. Defendants assert that the term "corrective action" is in fact too vague for the judiciary to enforce, because it is not explained under 42 C.F.R. § 456.613. However, as set forth above, the statutory scheme as a whole leaves little doubt as to the meaning of corrective action. Most significantly, the scheme requires DSS to terminate a facility's provider agreement upon a finding of deficiencies, such as those alleged by plaintiffs in the instant case, which jeopardize the health and safety of ICF/MR residents.[11]

Defendants point to an opinion by a federal district court

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[11] The statutory scheme gives DSS some discretion as to whether to deny payment for new admissions upon a finding of lesser deficiencies. See 42 C.F.R. § 442.118 ("The Medicaid agency may deny payment for new admissions . . ."). However, the obligatory language of the corrective action provision clearly indicates that DSS is required to take some enforcement action, up to and including denial of payments for new admissions, in response to less serious deficiencies. If this Court were to determine that deficiencies exist but are not so serious as to jeopardize the health and safety of ICF/MR residents, and that DSS has taken some corrective action in response to such lesser deficiencies, then the Court might very well determine that plaintiffs cannot require denial of payments for new admissions. However, recognition of this small amount of discretion in no way renders the corrective action provision too vague for judicial enforcement, particularly in a case in which plaintiffs allege deficiencies which threaten the health and safety of residents.

in the Southern District of Ohio, Martin v. Voinovich, 840 F. Supp. 1175 (S.D. Ohio 1993). In that decision, apparently the only one by any court directly considering whether plaintiffs may sue under Section 1983 for violation of 42 C.F.R. § 456.613, the district court found that:

> Section 456.613 does not explain the meaning of "take corrective action," and there is no guidance as to the meaning of the phrase elsewhere in the code or statute. It does not explain, for instance, whether taking corrective action means the State agency must adopt to the letter every recommendation made by the team, or whether the agency is merely required to consider the team's recommendation in deciding what action to take. [] This provision also fails to give guidance as to when the corrective action must occur. Must it occur immediately, or may the State devise a long term plan of corrective action based on its limited resources? Plaintiffs do not have a claim under this provision because it offers no guidance on these basic questions.

840 F. Supp. at 1196-97. However, the district court failed to consider the extensive regulations discussed above governing the corrective actions that a Medicaid agency is required to and permitted to take. For this reason, this Court disagrees with the finding of the Voinovich court. As discussed previously, the statutory scheme affords this Court a substantial basis for determining whether DSS has satisfied its legal duty to take corrective action, particularly given that plaintiffs allege deficiencies which endanger the health and safety of ICF/MR residents.[12]

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[12] The regulations setting forth DSS's duties and powers to take corrective action fall under 42 C.F.R. § 442, which relates to certification of ICFs/MR. In Connecticut, such certification is typically conducted via facility inspections by DPHAS. These facility inspections are separate and distinct from

Having found that each of the three elements set forth under the first Wilder exception points toward finding an enforceable right to sue, the Court lastly examines the second exception set forth under Wilder -- whether Congress has foreclosed enforcement of the right under Section 1983. As noted previously, a court may only conclude that Congress has intended to preclude suit under Section 1983 if the statute in question either includes an express provision to that effect or creates a remedial scheme sufficiently comprehensive so as to indicate Congress's intent. Wilder, 496 U.S. at 520-21.

In the instant case, the provisions of the Social Security Act at issue contain no express provision foreclosing suit and provide no remedial scheme by which ICF/MR residents may petition to obtain greater services or to force a Medicaid agency to take corrective action to cure deficiencies. Indeed, the only remedial measure established by the statutory scheme, other than those at issue in this case, is withdrawal of funding by HHS for

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the IR inspections conducted by DSS. It is unclear to the Court whether plaintiffs assert violations by DPHAS of its facility inspection duties. Indeed, the State itself, in its briefs, conflated the IR inspection process with the facility inspection process, finally clarifying the distinction at oral argument. If plaintiffs in fact assert violations of DPHAS' inspection duties in addition to DSS' inspection duties, then plaintiffs must promptly seek to amend their complaint to reflect this distinction. However, whether or not plaintiffs assert such violations by DPHAS, the statutory scheme clearly requires DSS to take the corrective actions outlined in 42 U.S.C. § 1396a(i) and 42 C.F.R. §§ 442.117 - 442.119 upon a finding of deficiencies found pursuant to either DPHAS' facility inspections or DSS's IR inspections. See § 1396a(i) (establishing corrective mechanisms applicable "where a State determines that [an ICF/MR] no longer substantially meets the requirements for such a facility").

non-compliance with program conditions. 42 U.S.C. § 1396i(b). In Wilder, the Supreme Court found that an analogous remedial measure authorizing HHS to withdraw funds for non-compliance in no way indicated Congressional intent to foreclose suit under Section 1983. 496 U.S. at 521-22.

Thus, neither of the exceptions set forth under Wilder are applicable in the instant case, meaning that plaintiffs may validly sue under Section 1983 for alleged violations of a Medicaid agency's failure to take corrective action upon a finding of deficiencies in ICF/MR units. Presuming the facts alleged in plaintiffs' complaint to be true, plaintiffs' Section 1983 action clearly states a claim upon which relief can be granted.

SUMMARY

For the foregoing reasons, defendants' Motion to Dismiss [Doc. No. 82] is denied.

SO ORDERED.

ELLEN BREE BURNS, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Dated at New Haven, Connecticut, this 4th day of September, 1996.