# outh Law Developments


**Summary.** In the spring of 1992 the Supreme Court ruled in a landmark decision that children did not have a right to sue to enforce the "reasonable efforts" requirement of the federal Adoption Assistance and Child Welfare Act. Children's advocates are monitoring the impact of ***Suter v. Artist M.***, defending against its use by state agencies to avoid enforcement of federal statutory duties, and seeking a legislative solution to its adverse implications. Despite the decision, several major foster care reform cases have been settled this past year on favorable terms.



*by the National Center for Youth Law*

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# I. Child Welfare and Foster Care Litigation

**A major victory of 1992 was the comprehensive and detailed settlement reached in *Angela R. v. Clinton*, in which virtually all aspects of Arkansas' child welfare system were challenged.**

## A. *Suter v. Artist M.*

On March 25, 1992, the Supreme Court held in *Suter v. Artist M.*[1] that children had no right to sue under Section 1983 to enforce the requirement of the federal Adoption Assistance and Child Welfare Act (AACWA) that state agencies make "reasonable efforts" to prevent the need for foster placement and to reunify families.[2] In the wake of *Artist M.*, advocates are assessing the damage, seeking out alternative legal strategies, and looking to Congress for relief.

As a condition to receiving federal child welfare funds, AACWA requires a "state plan" covering many aspects of the state's child protection, foster care, and adoption systems. The state plan must have 16 specific features, including a "reasonable efforts" provision. In *Artist M.* the state argued that the "reasonable efforts" clause was too vague for courts to be able to enforce in a Section 1983 action.

Despite the narrow focus of the state's challenge, the basis and scope of the Supreme Court's decision are not clear. In some passages the Court appears simply to follow the framework established by prior cases for deciding whether a statute creates rights enforceable in a Section 1983 action,[3] and to rule that the "reasonable efforts" standard is unenforceable due to vagueness.

However, other parts of the opinion suggest a broader reasoning that could be applied to other parts of AACWA and to other "state plan" statutes. For instance, the Court states that AACWA "does place a requirement on the States, but that [the] requirement only goes so far as to ensure that the States have a plan approved by the Secretary which contains the 16 listed features [including reasonable efforts]."[4] The Court does not explicitly base its holding on this narrow and formalistic reading of AACWA, but these troubling dicta may be cited by state defendants in future cases to argue that "state plan" statutes create only the right to demand a proper plan — not a right to make the state actually do what the plan says.

photo by Pamela Abres

Advocates hope for a legislative solution to adverse implications of *Artist M.*

Thus, *Artist M.* may jeopardize the enforceability not only of AACWA but also of all the other Social Security Act programs structured as "state plan" statutes — AFDC (Title IV-A); Child Welfare Services (Title IV-B); Child Support and Enforcement of Paternity (Title IV-D); Adoption Assistance and Foster Care (Title IV-E); and Medicaid, including the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program (Title XIX).

## B. Reform Litigation After *Artist M.*

What does *Artist M.* mean for future child welfare reform actions and for other civil rights and welfare advocacy? The Supreme Court has not overruled *Wilder v. Virginia Hospital Association*,[5] *Wright v. Roanoke Redevelopment and Housing Authority*,[6] or any

[1] Suter v. Artist M., 112 S. Ct. 1360 (1992) (Clearinghouse No. 48,036).

[2] 42 U.S.C. § 671(a)(15).

[3] *See, e.g.*, Wilder v. Virginia Hosp. Ass'n, 110 S. Ct. 2510 (1990); Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418 (1987).

[4] *Artist M.*, 112 S. Ct. at 1367.

[5] *Wilder*, 110 S. Ct. 2510 (1990).

[6] *Wright*, 479 U.S. 418 (1987).







cases dealing with the scope of Section 1 It held only that the "reasonable ef- clause is not enforceable — leaving cates free to distinguish other provisions ACWA and other "state plan" provi- The opinion, however, has cast a on the future of Section 1983 litiga- because it can be read as disfavoring cement of "state plan" requirements.

Advocates hoped for a legislative solu- to these adverse implications of *Artist M.* July 1992 the House passed an amendment the Social Security Act to explicitly grant orceable rights to persons hurt by a state's ure to comply with "state plan" require- ts in Social Security Act programs.[7] This ovision was included in the final Urban Aid , but the bill was vetoed.

Meanwhile, advocates have struggled to pond to *Artist M.* defenses in cases seeking nforce "state plan" requirements. State ncies have invoked *Artist M.* in a broad ge of cases, arguing that various "state lan" requirements are too vague to create nforceable rights, and arguing more broadly at all "state plan" requirements create only ights to "paper compliance." State agency


defendants in at least seven child welfare reform cases have filed motions arguing that *Artist M.* precludes enforcement of various provisions of AACWA and related statutes.[8] *Artist M.* defenses have also been raised in cases regarding juvenile detainees' rights under the Juvenile Justice and Delinquency Prevention Act,[9] AFDC payment standards,[10] AFDC fair hearings and "aid pending,"[11] minimum standards for emergency shelter,[12] food stamps,[13] Medicaid,[14] minimum AFDC

[7] H.R. 11, 102d Cong., 2d Sess., 138 CONG. REC. H5939 (daily ed. July 2, 1992). The provision reads:

> § 1123. EFFECT OF FAILURE TO CARRY OUT STATE PLAN.
>
> Each individual shall have the right not to be denied any service or benefit under this Act [the Social Security Act] as a result of the failure of any State to which Federal funds are paid under a title of this Act that includes plan requirements to have a plan that meets such requirements, or to administer such a plan in accordance with such requirements.

[8] *See* Timmy S. v. Stumbo, 916 F.2d 312 (6th Cir. 1990) (Clearinghouse No. 44,104) (affirming foster parents' right to fair hearing) (motion to vacate judgment now pending); Maher v. White, No. 90-4674, 1992 WL 122912 (E.D. Pa. 1992) (Clearinghouse No. 46,298) (plaintiffs' motion for summary judgment denied in part); Angela R. v. Clinton, No. LRC-91-451 (D. Ark. 1991) (Clearinghouse No. 48,193) (motion to modify settlement denied, appeal pending); Baby Neal v. Casey, No. 90-2343 (E.D. Pa. 1990) (motion to dismiss filed); Brown v. Williams, No. 91-54813 (Fla. Cir. Ct. of 11th Jud. Dist., Dade County, 1991) (Clearinghouse No. 47,856) (motion to dismiss denied); Washington State Coalition for the Homeless v. Department of Social & Health Servs., No. 91-2-15889 (Wash. Super. Ct., King County, 1991) (Clearinghouse No. 47,062) (motion to dismiss pending); Sheila A. v. Finney, No. 89-CV-33 (Dist. Ct. of Shawnee County, Kan. Division Four, 1990) (motion to dismiss filed).

[9] Doe v. Knauf, Civ. No. 91-187 (E.D. Ky., Aug. 24, 1992) (motion to dismiss denied).

[10] Johnson v. Berson, No. 92-S-1129 (D. Co. 1992) (Clearinghouse No. 48,256) (motion to dismiss filed); California Homeless & Hous. Coalition v. Healy, No. 943705 (Cal. Super. Ct., County of San Francisco, filed June 1992) (Clearinghouse No. 48,213) (motion to dismiss filed).

[11] Clifton v. Schafer, No. 91-1693 (7th Cir., July 16, 1992) (Clearinghouse No. 48,287) (no enforceable right to aid—pending).

[12] Fountain v. Kelly, No. 91-1462 (D.C. Ct. App., appellee's brief filed June 19, 1992).

[13] Ford v. Kreachbaum, No. C2-92-352 (D. Ohio 1992) (motion to dismiss filed).

[14] Pulkerson v. Maine Dep't of Human Servs., Civ. 92-238-P/DMC (D. Me., Aug. 13, 1992) (Clearinghouse No. 48,099) (magistrate's decision finding that copayment policy requirement creates enforceable rights).

**The Sixth Circuit acknowledged that juveniles require more substantial remedies for lack of access than adults because they are young and inexperienced with the criminal system.**

levels required by the Medicaid statute,[15] child care for JOBS program participants,[16] child support enforcement,[17] education rights for homeless youth,[18] and wage levels under the Housing and Community Development Act.[19]

Legal services support centers and other national advocacy groups are working together to monitor the legislative developments and the impact of *Artist M.* on Section 1983 litigation and to provide advice and technical assistance to advocates in cases affected by *Artist M.*[20]

### C. Foster Care Reform Litigation

A major victory of the year was the comprehensive and detailed settlement reached in *Angela R. v. Clinton*,[21] which challenged virtually all aspects of Arkansas' child welfare system. The settlement covers caseloads and training of agency workers; child protective services; prevention and family reunification services; standards for foster care; health care for foster children; and case planning, case review, and quality assurance mechanisms. The settlement provides for a five-member panel to monitor its implementation and resolve disputes over compliance. On May 5, 1992, the district court approved the settlement.

After *Artist M.* was decided, however, and after submitting the settlement for the district court's approval, the defendants moved to alter the class definition and the scope of the settlement. The district court denied this motion. The state's appeal of this denial is pending before the Eighth Circuit. Meanwhile, the state agency has begun to implement the terms of the settlement, and the monitoring committee has started its work.

The relief obtained in another landmark case is also in jeopardy. The District of Columbia has appealed the district court's sweeping decision in *LaShawn A. v. Dixon*,[22] arguing that in light of *Artist M.* the plaintiffs are not entitled to any of the relief granted.

[15] Stowell v. Ives, Civil 92-66-P-C (D. Me. Mar. 16, 1992), appeal docketed, No. 92-1342 (1st Cir. 1992) (Clearinghouse No. 48,102) (action dismissed on grounds that Medicaid provision does not create enforceable right) (*Artist M.* raised in appeal briefs).

[16] Maynard v. Williams, No. 92-40279 MP (N.D. Fla. 1992) (motion to dismiss filed).

[17] King v. Bradley, No. 92 C 1564 (E.D. Ill., filed Mar. 3, 1992) (Clearinghouse No. 47,992) (motion to dismiss filed); Mason v. Bradley, No. 91 C 3791 (N.D. Ill., filed Apr. 20, 1992) (Clearinghouse No. 48,202) (dismissal granted); Albiston v. Commissioner, Maine Dep't of Human Servs., No. 90-262-P-C (D. Me. 1990) (Clearinghouse No. 46,688) (magistrate's recommendation in plaintiffs' favor pending before district court); Howe v. Ellenbecker, Civ. 90-3007 (D.S.D. 1990) (Clearinghouse No. 45,531) (motion for reconsideration denied).

[18] Lampkin v. District of Columbia, No. 92-0910 (D.D.C. 1992) (Clearinghouse No. 48,581) (motion to dismiss granted).

[19] Kam Shing Chan v. City of New York, No. 90 Civ. 5653, 1992 WL 123788 (S.D.N.Y. 1992) (dismissal denied).

[20] Support center contacts include the following: Martha Matthews at the National Center for Youth Law, Tim Casey at the Center on Social Welfare Policy and Law, Chris Hansen at the ACLU Children's Rights Project, Jane Perkins at the National Health Law Project, Bob Pressman at the Center for Law and Education, and Carrie Lewis at the Food Research & Action Center.

[21] Angela R. v. Clinton, No. LRC-91-415 (D. Ark., filed July 8, 1991) (Clearinghouse No. 48,193). The National Center for Youth Law prepared a comprehensive explanation of the settlement for the Mar.-Apr. 1992 issue of YOUTH LAW NEWS. Copies are available from the National Center for Youth Law.

[22] LaShawn A. v. Dixon, 762 F. Supp. 959 (D.D.C. 1991) (finding statutory and constitutional violations in foster care system).





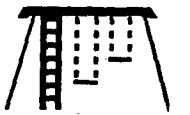
Also, in an unusual development, the ent decree approved by the district court H. v. Johnson,[23] addressing a broad of problems in Illinois' child welfare m, was challenged by a would-be interas being inadequate to protect children other persons involved in the child welystem. The Seventh Circuit heard the rvenor's appeal in September 1992. eanwhile, the defendants submitted an imentation plan, and the parties have since reed on implementation of the settlement. he court has appointed a monitor to oversee ompliance with the settlement agreement.

Several other major reform cases have en resolved this year. In December 1991 district court approved the settlement in C. v. Hornsby,[24] a lawsuit challenging Alama's child welfare services and foster care ystem for emotionally disturbed children. he parties are working on an implementaion plan, to be completed in late 1992, that ill address goals and timetables for carrying ut the settlement; development of needed ervices; training of caseworkers, foster parents, and service providers; and a quality assurance/monitoring system. Starting in February 1992, defendants began implementing the decree in six pilot counties.

Also, a settlement was reached in July 1992 in *B.M. v. Richardson*,[25] a lawsuit against the child welfare agency in Marion County, Indiana. The settlement covers caseload, performance, and training standards for caseworkers and supervisors, and foster family recruitment, supervision, and retention. Notice to the class and approval by the district court are pending.

*Jesse E. v. New York City Department of Social Services*,[26] a foster care reform case concerning the rights of siblings to be placed together or, if they must be separated, at least to receive adequate visitation, is being negotiated. A consolidated preliminary injunction hearing and trial on the merits, set for October 1992, was postponed, pending settlement.

Finally, a trial on contempt motions took place in January 1992 in *G.L. v. Zumwalt*,[27] a case that illustrates the ongoing problems of implementing foster care reform settlements and monitoring their compliance. The case, seeking to protect the health, safety, and welfare of foster children in Jackson County, Missouri, was originally filed in 1977.



### D. Foster Care Benefits

In *DeFehr ex rel. Lipscomb v. Simmons*[28] the Court of Appeals for the Ninth Circuit, sitting *en banc*, held that the denial of state-funded foster care benefits to children placed with relatives did not violate the U.S. Constitution. The decision reversed a 1989 panel decision which had held that Oregon's policy of denying state foster care benefits to children placed with relatives was unconstitutional because it impermissibly interfered with the fundamental right to family integrity by impinging on the right of children to live with relatives.[29]

Although the *en banc* majority agreed that the state owed a child in its custody "reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child,"[30] it held that the "government has an affirmative obligation to facilitate the exercise of constitutional rights by those in its custody only when circumstances of the custodial relationship directly prevent individual exercise of those rights."[31] Since the Oregon policy did not directly prohibit a foster child from living

[23] B.H. v. Johnson, 715 F. Supp. 1387 (N.D. Ill. 1989) (Clearinghouse No. 45,092) (motion to dismiss granted in part, denied in part) (consent decree approved Dec. 20, 1991).

[24] R.C. v. Hornsby, No. 88-81170-N (order of Dec. 18, 1991) (Clearinghouse No. 45,438).

[25] B.M. v. Richardson, No. IP 89-1054-C (S.D. Ind., filed 1989) (Clearinghouse No. 45,225).

[26] Jesse E. v. New York City Dep't of Social Servs., No. 90 CIV 7274 (S.D.N.Y., filed Nov. 3, 1990).

[27] G.L. v. Zumwalt, 731 F. Supp. 365 (W.D. Mo. 1990) (setting timetable for consideration of contempt motion); 564 F. Supp. 1030 (W.D. Mo. 1983) (consent decree) (Clearinghouse No. 20,937).

[28] DeFehr *ex rel.* Lipscomb v. Simmons, 962 F.2d 1374 (9th Cir. 1992).

[29] Lipscomb v. Simmons, 884 F.2d 1242 (9th Cir. 1989).

[30] *DeFehr ex rel. Lipscomb*, 962 F.2d at 1379.

[31] *Id.*

*photo by Robert Serafin*

According to a 1992 California district court decision, children who are neither siblings nor half-siblings will comprise separate assistance units, unless the caretaker is legally responsible to support the nonsibling children.

with relatives, the policy did not violate the government's duty. The court also noted that Oregon had no affirmative obligation to fund the exercise of the right to maintain family relationships. Applying a "rational basis" test, the court held that the denial of foster care benefits was not irrational, given the state's need to allocate scarce resources, and that the policy did not prohibit the exercise of a fundamental right.[32]

*Lipscomb* does not affect children who are eligible for federal foster care benefits under Title IV-E of the Social Security Act. Under the Supreme Court decision *Miller v. Youakim*,[33] states are required to pay federal foster care benefits to IV-E eligible children who are placed with relatives.

A district court decision that will result in higher AFDC benefits for thousands of California children living with nonparent relatives was handed down in April 1992. Under *Edwards v. Carlson*,[34] states may not require nonsiblings who receive AFDC benefits and care by the same "caretaker relative" to be treated as a single AFDC "assistance unit." As a result, the total income to the affected AFDC household will, in some cases, increase by hundreds of dollars per month.

Prior to *Edwards*, California regulations governing the AFDC program required all AFDC-eligible children in a household with a single caretaker relative to be combined into a single assistance unit, even when the children were not siblings and were not the legal responsibility of the caretaker relative. Because of the incrementally smaller amounts added to AFDC grants for each additional person, this policy resulted in households receiving a smaller total AFDC income than they would have received if separate groups of children had been treated as separate assistance units with the same household.

In *Edwards* the district court indicated, in its order for declaratory and injunctive relief, that the law was clear and that California's regulations violated federal law and regulations.[35] The court granted plaintiffs' motion for summary judgment and ordered California to cease requiring nonsibling children with a single caretaker relative to be combined into a single assistance unit. Under the order, children who are neither siblings nor half-siblings will comprise separate assistance units, unless the caretaker is legally responsible to support the nonsibling children.

### E. Liability of Child Welfare Employees

During the last year federal courts in two more circuits held that children in foster care had a constitutional right to be kept reason-

[32] *DeFehr ex rel. Lipscomb*, 962 F.2d at 1380-84.

[33] Miller v. Youakim, 440 U.S. 125 (1979) (Clearinghouse No. 15,393).

[34] Edwards v. Carlson, CV-S 91 1473 DFL (E.D. Cal. 1992) (Clearinghouse No. 48,212). *See* YOUTH LAW NEWS, May-June 1992.

[35] *Edwards*, CV-S 91 1473 DFL (E.D. Cal. 1992). Two years ago, in Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990) (Clearinghouse No. 44,989), the U.S. Court of Appeals for the Ninth Circuit struck down a Washington state AFDC regulation mandating that sibling and nonsibling children residing in the same household with one caretaker relative or a relative married couple be consolidated into one assistance unit.





**In *DeFehr ex rel. Lipscomb v. Simmons* the Court of Appeals for the Ninth Circuit, sitting *en banc*, held that the denial of state-funded foster care benefits to children placed with relatives did not violate the U.S. Constitution.**

...e from harm while in the state's cus-... These recent decisions further erode ...ity of state officials to avoid liability ...ages for failing to protect foster chil-... the past, caseworkers, supervisors, ...dministrators had successfully claimed ...nity, resulting in dismissal of lawsuits ...re trial.[37]

In *Yvonne L. v. New Mexico Department of Social Services*[38] two children filed a civil rights complaint against the director of the local Human Services Department (HSD) and several other HSD employees. Yvonne was placed in HSD's custody in 1983. HSD placed her at Child Haven, a nonprofit private agency where she was raped and sodomized by another resident. Yvonne claimed that the defendants violated her federal statutory and constitutional rights by placing her in a shelter home that was unsafe, due to inadequate staffing and supervision and to a failure to screen and isolate children who posed a threat to others.

The district court granted defendants' motion for summary judgment and dismissed the complaint. It held that there was no cause of action for monetary damages under a Section 1983 lawsuit based on provisions of AACWA. The court also found that, as of 1985, foster children had no clearly established right to protection from bodily harm while in a privately operated shelter home and that the defendants were therefore entitled to qualified immunity.[39]

On appeal the Tenth Circuit affirmed in part, reversed in part, and remanded. While sustaining the dismissal of the AACWA claims, it did not adopt the district court's holding that monetary damages are not available under AACWA because AACWA is a federal spending clause statute. Focusing upon the specific AACWA provision that formed the crux of plaintiffs' claim,[40] the Tenth Circuit found the provision to have "the type of vague and amorphous language . . . that cannot be judicially enforced."[41] However, it reversed the district court's holding on qualified immunity. Relying upon *Youngberg v. Romeo*,[42] *Doe v. New York City Department of Social Services*,[43] and *Milonas v. Williams*,[44] the Tenth Circuit held that in 1985, when Yvonne was injured,

> these cases clearly alerted persons in the positions of defendants that children in the custody of a state had a constitutional right to be reasonably safe from harm; and that if the persons responsible place children in a foster home or institution that they know or reasonably suspect to be dangerous to the children, they incur liability if harm occurs.[45]

[36] This right, whose parameters vary among the circuits, has now been recognized in the Second Circuit, Doe v. New York City Dep't of Social Servs., 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983) (Clearinghouse No. 27,877); the Sixth Circuit, Meador v. Cabinet for Human Resources, 902 F.2d 474 (6th Cir. 1990); the Eleventh Circuit, Walker v. Ledbetter, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989); and the Seventh Circuit, K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990). *See also* LaShawn A. v. Dixon, 762 F. Supp. 959 (D.D.C. 1991).

[37] A court may grant qualified immunity from liability for civil damages when a defendant's actions do not violate clearly established constitutional rights that would be known to a reasonable person. Harlow v. Fitzgerald, 457 U.S. 800 (1982). Earlier decisions held that foster children's right to be protected from harm had not been clearly established at the time the injury occurred. *Compare* Doe v. Bobbitt, 881 F.2d 510 (7th Cir. 1989), *cert. denied*, 495 U.S. 956 (1990), *with Murphy*, 914 F.2d 846 (7th Cir. 1990).

[38] Yvonne L. v. New Mexico Dep't of Social Servs., 959 F.2d 883 (10th Cir. 1992).

[39] *Yvonne L.*, 959 F.2d at 885.

[40] 42 U.S.C. § 671(a)(10).

[41] *Yvonne L.*, 959 F.2d at 889. Although the Tenth Circuit found that 42 U.S.C. § 671(a)(10) was not enforceable, it concluded that "individual causes of action may be appropriate, depending upon the particular section or violation involved." *Id. But see* previous discussion of *Artist M.*, 112 S. Ct. 1360 (1992).

[42] Youngberg v. Romeo, 457 U.S. 307 (1982).

[43] Doe v. New York City Dep't of Social Servs., 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983) (Clearinghouse No. 27,877).

[44] Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983) (Clearinghouse No. 26,472).

[45] *Yvonne L.*, 959 F.2d at 893.

**The Supreme Court will review the *en banc* decision of the Court of Appeals for the Ninth Circuit which upheld a district court ruling requiring the Immigration and Naturalization Service to expand its policy for releasing children from INS custody.**

Several months after the *Angela R.* settlement,[46] a district court in Arkansas, in *Norfleet v. Arkansas Department of Human Services*,[47] denied state officials' defense of qualified immunity in an action for damages brought by the mother of an eight-year-old boy who died while in foster care. Taurean Norfleet had suffered an asthma attack while in a neighbor's care and was given emergency treatment. Following treatment, he was placed in foster care. The caseworker who picked him up from the hospital failed to obtain adequate medical information about his condition, and his foster mother was given little information about his treatment. Two days later, when Taurean again experienced breathing difficulties, the foster mother failed to obtain prompt medical attention, and the boy died. In *Norfleet* the plaintiff alleged that the agency had a policy and practice of not adequately training foster parents and caseworkers to ensure that the medical needs of children under their responsibility are adequately met. This deliberate indifference, she asserted, violated Taurean's Fourteenth Amendment right to due process.[48]

Although the Supreme Court and the Eighth Circuit had not addressed the specific rights of foster children, the district court cited cases from the Second, Sixth, Seventh, Tenth, and Eleventh Circuits to reject the immunity claims of the agency director, the caseworker, and the foster parent. The district court concluded that this body of case law "clearly alerted persons in positions such as the defendants that children in state custody have a constitutional right to reasonable care and protection, especially in the case of a serious medical need."[49]

In *Williams v. Coleman*[50] Michigan's Child Protection Act provided the basis for a verdict against a foster care worker and her supervisor for the wrongful death of a victim not in foster care. The plaintiff in *Williams* alleged that her 23-month-old sister, Nicole, was left in the home of her chronically schizophrenic mother despite repeated reports that she was being neglected. Plaintiff and a foster mother had reported the neglect to the foster care worker for Nicole's four siblings who had been removed from the mother's care. The foster care worker failed to relay these reports to the agency's child protective services division for investigation, and Nicole died of starvation — or failure to thrive. Nicole weighed just 20 pounds at the time of her death.

The Michigan Court of Appeals held that the provisions of the Child Protection Act superseded any common-law governmental immunity the caseworkers might have had. Under the Act, foster care workers are required to submit a report whenever they have reasonable cause to suspect child abuse or neglect. The Act explicitly provides for a civil cause of action against persons under the duty to report, and damages proximately caused by a failure to report are compensable. In denying governmental immunity, the court concluded that the legislature prioritized the safety of children over the need to provide caseworkers with immunity.[51]

[46] Angela R. v. Clinton, No. LRC-91-415 (D. Ark., filed July 8, 1991) (Clearinghouse No. 48,193).

[47] Norfleet v. Arkansas Dep't of Human Servs., 796 F. Supp. 1194 (E.D. Ark. 1992).

[48] *Norfleet*, 796 F. Supp. at 1196-97.

[49] 796 F. Supp. at 1201.

[50] Williams v. Coleman, 194 Mich. App. 606, 488 N.W.2d 464 (1992).

[51] *Williams*, 488 N.W.2d at 464.





## SSI Children's Disability Benefits

SSA has continued to implement *Sullivan v. Zebley*,[52] in which the Supreme Court mandated changes in the disability standard for children and permitted many more children to qualify for benefits. *Zebley* also requires SSA to make retroactive payments to children who had been denied benefits improperly on or after January 1, 1990. SSA estimates that more than four hundred twenty-five thousand children were denied benefits under the old disability rules. During the past year thousands of children received retroactive benefits, and advocates have been assisting families in determining how to use these awards for their children's best interests.[53] In addition, the Children's SSI Campaign, headed by the Mental Health Law Project (MHLP),[54] has been working to inform families, and professionals who work with children, about the SSI program and the new disability standards. Local outreach projects in California,[55] Pennsylvania,[56] and Tennessee[57] are also under way. MHLP has published a manual, *The Advocates' Guide to SSI for Children*, which explains the Children's SSI program, including the disability standards, financial criteria, and interaction of SSI with other benefits, as well as the special rules that apply to *Zebley* retroactive benefits.

## III. Children Detained by INS

The Supreme Court granted certiorari in *Barr v. Flores*[58] to review the *en banc* decision of the Ninth Circuit[59] which upheld a district court ruling requiring the Immigration and Naturalization Service (INS) to expand its policy for releasing children from INS custody. At the commencement of litigation, INS refused to release children unless a parent or legal guardian appeared at INS offices to obtain custody. To comply with subsequent rulings, INS changed its policy to permit release of children to certain close relatives. In 1988 the district court ordered INS to release children otherwise eligible for release to parents, guardians, custodians, conservators, or other responsible adult parties. The court also ordered INS to give children administrative hearings for determining probable cause for their arrest and the need for any restrictions upon release. The case was argued in October 1992.

## IV. Juveniles in Institutions

In *John L. v. Adams*[60] the Sixth Circuit upheld a district court decision requiring states to take affirmative steps to provide incarcerated juveniles with meaningful access to the courts. The court found no reason why the right of access for incarcerated adults, recognized by the Supreme Court in *Bound v. Smith*,[61] should not be applied to juveniles. In fact, the Sixth Circuit acknowledged that juveniles require more substantial remedies for lack of access than adults because they are young and inexperienced with the criminal system. For example, although the provision of access to a law library for adults may be sufficient, the remedy would not be adequate for juveniles.

However, the Sixth Circuit did modify the district court's remedy. The original remedy had required the state to hire four attorneys, who were each to provide specified

[52] Sullivan v. Zebley, 110 S. Ct. 885 (1990) (Clearinghouse No. 43,127).

[53] *See, e.g.*, Sterling L. Ross, Jr., *Sheltering "Zebley" Retroactive SSI Benefits in Trust*, 25 CLEARINGHOUSE REV. 1335 (Feb. 1992).

[54] Contact Rhoda Schulzinger, Mental Health Law Project, 1101 15th St., N.W., Suite 1212, Washington, DC 20005, (202) 467-5730.

[55] Contact Martha Matthews, National Center for Youth Law.

[56] Contact the Zebley Implementation Project, Community Legal Services, 1324 Locust St., Philadelphia, PA 19107-5697, (800) 523-0000.

[57] Contact SSI Project, Rural Legal Services of Tennessee, Inc., P.O. Box 5209, Oak Ridge, TN 37831, (615) 483-8454.

[58] Barr v. Flores, 112 S. Ct. 1261 (1992) (Clearinghouse No. 39,665).

[59] Galvez-Maldonado *ex rel.* Flores v. Meese, 942 F.2d 1352 (9th Cir. 1990) (withdrawn).

[60] John L. v. Adams, No. 91-6241, 1992 WL 166099 (6th Cir. July 17, 1992) (Clearinghouse No. 45,569).

[61] Bound v. Smith, 430 U.S. 817 (1977) (Clearinghouse No. 16,775).

**SSA estimates that more than 425,000 children were denied benefits under the old disability rules.**

types of legal assistance of up to eight hours per week. The court limited the kinds of services available to juveniles by exempting assistance with Section 1983 claims that are unrelated to detention, and with civil matters purely involving state law, from the remedial order. Under this modification, attorneys would not be required to assist juveniles who seek education and medical treatment through state-law-based claims. The court did not address whether constitutional claims for education and treatment required representation.

Reform efforts to limit the number of children and types of offenders in Colorado juvenile institutions suffered a setback when the Colorado Supreme Court ruled in *In re J.E.S.*[62] that a statute prohibiting judges from incarcerating juveniles for contempt, in compulsory school attendance cases, was invalid. The court held that the statute usurped the inherent contempt power of the judiciary and therefore violated the principle of separation of powers under the state statute.

## V. Fair Housing for Families with Children

### A. Government Enforcement

Implementation of the Fair Housing Amendments Act of 1988 (FHAA),[63] which extended fair housing protections to families with children, continued this year, but behind schedule. Under FHAA, HUD is required to refer fair housing complaints to agencies that operate under local and state laws certified as being "substantially equivalent" to FHAA.[64] FHAA granted temporary certification (until January 1992) to

over 120 state and local jurisdictions whose fair housing laws predated FHAA, in order to give the jurisdictions an opportunity to make their laws comparable to FHAA.[65] FHAA also granted HUD the authority to extend temporary certification for up to eight months if "exceptional circumstances" prevent the jurisdictions from becoming substantially equivalent before the January 1992 deadline.[66]

By mid-January 1992 only 9 jurisdictions, including 7 states, were certified as substantially equivalent.[67] HUD elected to extend temporary certification to 111 jurisdictions, including 28 states, by expansively interpreting "exceptional circumstances" to include good-faith efforts to enact substantially equivalent legislation.[68] As of August 1, 1992, only 14 jurisdictions, including 9 states, had been certified as substantially equivalent.[69]

HUD's use of state agencies is an integral part of its enforcement efforts. In 1991 substantially equivalent jurisdictions handled 40 percent of fair housing complaints received by HUD.[70] In light of the small number of

[62] *In re* J.E.S., 817 P.2d 508 (Colo. 1991).

[63] Fair Housing Amendments Act of 1988 (FHAA), Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3601 *et seq.*). *See also* 24 C.F.R. §§ 100.1 *et seq.* (1991) (final regulations implementing FHAA).

[64] 42 U.S.C. § 3610(f).

[65] 42 U.S.C. § 3610(f)(4); 7 Fair Hous.-Fair Lending (Bull. 8) (Prentice Hall) 3 (Feb. 1, 1992). Copies of materials cited from Fair Hous.-Fair Lending are available from the National Center for Youth Law.

[66] 42 U.S.C. § 3610(f)(4).

[67] 7 Fair Hous.-Fair Lending (Bull. 8) (Prentice Hall) 3 (Feb. 1, 1992).

[68] *Id.*; 8 Fair Hous.-Fair Lending (Bull. 2) (Prentice Hall) 9 (Aug. 1, 1992).

[69] 8 Fair Hous.-Fair Lending (Bull. 2) (Prentice Hall) 9 (Aug. 1, 1992). The 14 jurisdictions are Arizona; Florida; Indiana; Montana; Nebraska; North Carolina; South Carolina; Texas; West Virginia; Asheville, Charlotte, and Winston-Salem, North Carolina; Shaker Heights, Ohio; and Dallas, Texas.

[70] 7 Fair Hous.-Fair Lending (Bull. 3) (Prentice Hall) 3 (Sept. 1, 1991).









jurisdictions that have attained certification, the slow certification rate, the danger exists either that HUD will be overwhelmed by the number of complaints that it can no longer refer to state and local agencies or that it will relax its standards for certifying state laws. Either scenario could deny victims of discrimination the comprehensive administrative remedies intended by FHAA.

HUD also addressed the problem of unequal treatment of discrimination victims within jurisdictions with temporary certification.[71] Since state and local laws of several such jurisdictions did not provide coverage for the FHAA's two newly protected classes — families with children and persons with disabilities — HUD could not refer complaints from these classes to state and local agencies until the jurisdiction was certified as substantially equivalent. As a result, a two-tiered system was created: the Act's originally protected classes did not have access to federal remedies, while the newly protected classes did.

HUD responded to concerns about this system by implementing new procedures that guarantee access to federal rights for all complainants in these jurisdictions. While most complaints would still be referred to state and local agencies, the agencies are required to inform complainants that they have access to federal rights. If a complainant asks for federal enforcement, HUD will review the agency's "reasonable cause" determination and will assist the agency in its efforts to conciliate the complaint. If conciliation is unsuccessful, the case will be returned to the HUD system.

### B. Judicial and Administrative Actions

In *Seniors Civil Liberties Association v. Kemp*[72] the Eleventh Circuit upheld the constitutionality of the familial status provisions

of the FHAA amendments. The court ruled that the amendments did not violate senior citizens' rights to privacy or to free association, were not unconstitutionally vague, and offended neither the Tenth Amendment, the Commerce Clause, nor the due process protections of the Fifth and Fourteenth Amendments.

Recent decisions have clarified the scope of actions proscribed by the statute. In *HUD v. Wagner*[73] an ALJ held that limiting the number of children who can live in an apartment, while imposing no limitations on the number of residents, violates the statute. The ALJ ruled that "refusing to rent a two-bedroom apartment to a parent and two children is unlawfully discriminatory when the landlord will rent the same apartment to two adults and one child."[74] In *HUD v. Properties Unlimited*[75] a single mother and a child successfully challenged a policy that prevented them from renting a one-bedroom apartment but permitted two adults to share an apartment of the same size. In *HUD v. Edelstein*[76] an advertisement that included the phrase "one child, one pet" was found to be illegal.

[71] 7 Fair Hous.-Fair Lending (Bull. 8) (Prentice Hall) 3 (Feb. 1, 1992).

[72] Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030 (11th Cir. 1992) (Clearinghouse No. 47,228).

[73] HUD v. Wagner, 8 Fair Hous.-Fair Lending (Prentice Hall) ¶ 25,032, at 25,331 (HUD Office of ALJs, June 22, 1992).

[74] *Wagner*, 8 Fair Hous.-Fair Lending (Prentice Hall) ¶ 25,032, at 25,335.

[75] HUD v. Properties Unlimited, 7 Fair Hous.-Fair Lending (Prentice Hall) ¶ 25,009, at 25,142 (HUD Office of ALJs, Aug. 5, 1991).

[76] HUD v. Edelstein, 7 Fair Hous.-Fair Lending (Prentice Hall) ¶ 25,018, at 25,236 (HUD Office of ALJs, Dec. 9, 1991).

**The parties to a lawsuit challenging Alabama's child welfare services and foster care system for emotionally disturbed children are working on an implementation plan, to be completed in late 1992 in six pilot counties.**

In *Edelstein* the ALJ also ruled that a landlord may not "steer" families with children away from an apartment complex by groundlessly suggesting that the complex was unsafe for children. The ALJ concluded that "[a]s a general rule, safety judgments are for informed parents to make, not landlords."[77]

In *Soules v. HUD*[78] the Second Circuit held that standing alone, inquiries regarding the number and ages of a prospective tenant's children, and whether the children are noisy, do not violate the Fair Housing Act. Although the court found no violation on the presented facts, the court did indicate that in another context, such inquiries might suggest an impermissible preference.

Recent decisions have also addressed the issue of when children may be legally excluded from housing, based on the FHAA exemption for housing for persons who are aged 55 or older.[79] In *HUD v. TEMS Association*[80] an ALJ ruled that the defendant homeowners' association failed to meet its burden of showing that it satisfied the "for the 55 and over" exception. In *Massaro v. Mainlands Section 1 and 2 Civic Association*,[81] however, a district court found that the requirements for the "55-years or older" exemption were satisfied in a residential area that barred children under age 16, even though the defendant had not passed written rules showing an intent to reserve at least 80 percent of the housing for persons aged 55 or older, until the day after the plaintiffs filed suit. In addition, the district court failed to delineate how defendant's facilities differed from those ordinarily available to residents of all ages and improperly shifted to plaintiff the burden of showing that the exemption does not apply once it has been raised as a defense. The case is being appealed to the Eleventh Circuit.

A federal court jury awarded over $2.4 million in punitive and compensatory damages after finding that a property management company made discriminatory statements that indicated a policy of excluding families with children.[82] This verdict is believed to be the largest amount of damages ever awarded in a fair housing case, and far exceeds the amount (which had never been greater than $70,000) of previous settlements and awards in lawsuits involving discrimination based on familial status. ❑

[77] *Edelstein*, 7 Fair Hous.-Fair Lending (Prentice Hall) ¶ 25,018, at 25,239.

[78] Soules v. HUD, 967 F.2d 817 (2d Cir. 1992).

[79] 42 U.S.C. § 3607(b)(2); 24 C.F.R. §§ 100.300 *et seq.*

[80] HUD v. TEMS Ass'n, 8 Fair Hous.-Fair Lending (Prentice Hall) ¶ 25,028, at 25,303 (HUD Office of ALJs, Apr. 9, 1992).

[81] Massaro v. Mainlands Section 1 and 2 Civic Ass'n, 8 Fair Hous.-Fair Lending (Prentice Hall) ¶ 15,754, at 16,922 (S.D. Fla. June 5, 1992).

[82] Robert Pear, *Accusation of Bias against Children Leads to Big Award in Housing Suit*, N.Y. TIMES, July 16, 1992, at A18.

➤ This material was posted in electronic form in the LegalAid/Net forum, on the HandsNet information and communications network, on January 12, 1993.





# Veterans Law Developments

*Summary.* Primarily due to the decisions of the U.S. Court of Veterans Appeals (CVA), there has been a dramatic change in veterans law. In the past year, important CVA case law involved VA's failure to follow its own laws and regulations and the determination that the Equal Access to Justice Act does not apply to proceedings before CVA. Unrepresented appellants are a continuing problem; more than two-thirds of all appellants appearing before CVA are proceeding pro se. To help solve the problem, Congress passed legislation in late 1991 to provide representation for some pro se appellants. VA has slowly accepted the reality of judicial review and, with some prodding from CVA, has begun the task of implementing the court's decisions. This implementation process has caused VA to change parts of its adjudication process significantly. In another area, VA's "Agent Orange" rulemaking process slowly progressed in 1992 to establish new presumptions that certain medical conditions experienced by veterans are related to military service based on exposure to Agent Orange. The rulemaking also seeks to establish that other medical conditions are not. Finally, the Board of Veterans' Appeals (BVA) published its final rules in 1992 that implement the Veterans' Judicial Review Act.

*by the National Veterans Legal Services Project*

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