

THE WELFARE LAW CENTER
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MEMO

TO: NY and DC Library Files, Litigation/Cause of Action
FROM: Tim Casey
RE: *Suter v. Artist M.* Docket - September 29, 1994 edition

This docket is prepared as part of a cooperative effort with the organizations listed below to monitor the impact of Suter v. Artist M., 112 S.Ct. 1360 (1992) on the availability of 42 U.S.C. § 1983 as a cause of action for violations of federal statutes and regulations.¹ These organizations have agreed to maintain dockets listing cases in the areas they work on where Suter has been raised as precluding § 1983 availability.

Part One of this docket covers cases arising under Title IV-A (AFDC), Title IV-D (Child Support Enforcement-CSE), or Title IV-F (Job Opportunity and Basic Skills-JOBS) of the Social Security Act, the programs the Center is monitoring. It is intended to be a comprehensive list of all cases known to us in these three programs where Suter has been raised, whether or not there has yet been a decision in the case. Part One has separate sections for each of the three programs. Within each section the cases are listed by state.

Part Two of this docket covers cases in other areas where there has been a decision discussing Suter. Some of the cases are cases monitored by the other organizations and some are cases involving "uncovered" programs. Cases are listed by state. Part Two overlaps in part with the dockets prepared by the other organizations but their dockets may list cases that are not listed here.

¹Justice White, who joined the Court's opinion in Artist M., has described Artist M. as "not permitting a § 1983 suit under a Spending Clause statute when the ostensible federal right created was too vague and amorphous", in an opinion concurring in part and dissenting in part which was joined by Justices Blackmun and Stevens, the Artist M. dissenters. New York v. U.S., 112 S.Ct. 2408, 2445 (1992).

Preparation of each edition of the docket includes a Westlaw search to identify all cases citing Suter (performed September 24 for this edition), and then a review of each new case or case development identified by the search to decide whether it should be included in the docket. Cases are not included in the docket if they cite Suter but do not involve the availability of 42 U.S.C. § 1983 as a cause of action for violations of federal statutes and regulations.

This docket is revised periodically. A copy of each revision is automatically mailed to those on the distribution list, which among others includes the other participating organizations, Jim Weill at the Children's Defense Fund, and counsel in pending cases in the areas the Center monitors where Suter has been raised.

A "***" indicates a case which has been added to the docket since the prior edition; a "*" indicates a new development in a case which was included in the prior edition.

The other participants in the monitoring effort are as follows:

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PART ONE - AFDC, CSE, AND JOBS CASES

I. AFDC (including EAF and the "child care guarantee" provision)

California

California Homeless and Housing Coalition v. Anderson, No. 943705 (Ca. Superior Court, Cty. of San Francisco, Oct. 22, 1992, and June 1, 1993), CH# 48,213, appeal docketed A062250 (Ca. Court of Appeals, __ 1993).

Plaintiffs' Counsel: (among others) Melinda Bird, Western Center on Law and Poverty, 3535 W. 6th St., Los Angeles Ca., 90020, (213) 487-7211.

Substantive Issue: This case involves the federal AFDC statutory provision requiring states to reevaluate their need and payment standards at least once every three years. Plaintiffs claim that the state has failed to reevaluate its need standard. They ask the court to order the state to reevaluate the need standard by conducting a study of the actual cost of meeting the basic needs recognized by state law.

Decision: 1) On October 22, 1992 in a brief order without any detailed discussion the court denied defendants' motion to dismiss based on Suter stating that Suter had not overruled Rosado v. Wyman. 2) On June 1, 1993 the court ordered the state "to conduct an actual, good faith reevaluation" and to report the results to the public within 180 days.

Status of Case: The state has appealed the June 1, 1993 order.

Colorado

Johnson v. Beye, No. 93-1009, 17 F.3d 1437 (table, text in Westlaw) 1994 WL 64357 (10th Cir. March 3, 1994), affirming **Johnson v. Berson**, Civ. No. 92-S-1129 (D. Colorado, Nov. 10, 1992) (Bench ruling granting defendants' motion for summary judgment), CH# 48,256.

Plaintiffs' Counsel: (among others) Natalie Henlon-Leh, Faegre & Benson, 370 17 St., Suite 2500, Denver CO 80202, (303) 592-5900.

Substantive Issue: This case involves the federal AFDC statutory provision requiring states to reevaluate their need and payment standards at least once every three years and the federal AFDC regulation defining the standard of need as the

"money value assigned by the state to the basic and special needs it recognizes as essential." Plaintiffs allege that the state has failed to reevaluate its standards. They claim that the statutory provision requires the state to reevaluate its standards and that the regulatory provision requires the state to reset its need standard based on the results of the reevaluation.

District Court Decision. Citing Suter, the district court dismissed both the statutory reevaluation claim and the regulatory reset claim. The ruling is confusing as to whether the dismissal of the reevaluation claim was based on a conclusion that the state had in fact reevaluated its standards or on a conclusion that the statutory provision can not be enforced under § 1983. The dismissal of the reset claim appears to have been based on the reasoning that (1) the regulation did not implement a statutory provision creating a § 1983 enforceable right and (2) a regulation can not give rise to a § 1983 enforceable right unless it implements a statutory provision which creates a § 1983 enforceable right.

10th Circuit Decision. "[t]he district court properly relied upon Suter and Wright in dismissing appellants §1983 cause of action. ... Appellants complaint was, in essence, a request for a higher standard of need, a matter over which states have 'undisputed power'.... ". This opinion will not be published in a printed volume and "is not binding precedent" but "may now be cited if the opinion has persuasive value".

Status of Case: Plaintiffs' counsel advises that plaintiffs will not petition for rehearing or for certiorari.

District of Columbia

Feeling v. Kelly, No. 82-2994, 152 F.R.D. 670 (D.D.C. Feb. 25, 1994), CH #36,026.

Plaintiffs' Counsel: (among others) Lynn Cunningham, Neighborhood Legal Services, 701 4th St. N.W. Washington D.C. 20001, (202) 682-2711.

Substantive Issue: In 1986 defendant agreed to a consent judgment governing the procedures for the administration of the District of Columbia Emergency Assistance for Families program which was entered sub nom Feeling v. Barry, (D.D.C. March 12, 1986). Citing Suter, the defendant has now filed a motion to vacate the consent decree.

Decision: The court denied the motion to vacate without deciding whether Suter had the impact defendant argued, reasoning that there were other grounds to support the consent judgment even if Suter had such impact. The court granted a motion to modify the consent judgment on other grounds.

Status of Case: It is not known whether either party plans to

appeal.

Fountain v. Kelly, 630 A.2d 684 (D.C. Ct. of App., 1993), CH #49,017.

Plaintiffs' Counsel: Stephen Harburg (among others), O'Melveny & Meyers, 555 13th St. N.W., Washington D.C. 20004, (202) 383-5300; Robert Hayes, O'Melveny & Meyers, Citicorp Center, 153 East 53 St., 54th Floor, New York, N.Y. 10022.

Substantive Issue: Plaintiffs seek to enforce compliance with provisions of a local statute setting minimum standards for emergency shelter. They apparently raised a state law claim that the defendants' use of emergency shelter which does not meet the minimum standards is contrary to the local statute; and a federal law claim that the federal EAF statute and regulations give them a right enforceable under § 1983 to have the District comply with its EAF state plan which, plaintiffs argue, includes the provisions of the local statute setting emergency shelter minimum standards.

Trial Court Decision: Based on the summary in the defendants' appeal brief, the trial court initially granted a preliminary injunction based on plaintiffs' state law claim; following an amendment to the local statute that it should not be construed to create an entitlement to emergency shelter, the trial court then vacated the injunction, apparently holding 1) that the amendment precluded plaintiffs' state law claim and 2) that plaintiffs had no federal law claim because the provisions of the local statute setting forth the minimum standards for emergency shelter were not part of the District's EAF state plan.

Appellate Court Decision: The D.C. Court of Appeals held that plaintiffs were unlikely to succeed on their claims in view of Suter. The Court reasoned that the federal EAF statute and regulations require only that a plan be filed, and do not create any rights enforceable under § 1983.

Status of case: ?

Washington Legal Clinic For The Homeless v. Kelly, No. 93-0691 (D.D.C. April 15, 1994), CH #48,908.

Plaintiffs' Counsel: Katherine McManus, Howrey & Simon, 1299 Pennsylvania Ave. N.W., Washington D.C. 20004, (202) 783-0800.

Substantive Issue: Plaintiff homeless families claim that various abuses in the administration of EAF shelter benefits deny them rights conferred by the federal EAF statute and regulations, the U.S. Constitution, and local law.

Decision: The court dismissed the claims based on the federal EAF statute and regulations, citing Suter in support of its holding that federal law does not create any rights enforce-

able under § 1983 except the right to a written EAF plan with certain provisions. The court also dismissed the claims based on local law but not the claims based on the Constitution.

Status of case: Relying on Lampkin v. District of Columbia, 27 F.3d 605 (D.C. Cir, July 1, 1994) (summarized in Part Two of the docket), plaintiffs have moved for reconsideration of the dismissal of their EAF statutory and regulatory claims.

Florida

Hall v. Towey, No. 93-1780 (N.D. Florida, filed Oct. 20, 1993).

Plaintiffs' Counsel: Rajjina Singh, Gulfcoast Legal Services, 314 South Missouri Ave., Clearwater Florida 34616, (813) 443-0657.

Substantive Issue: This case challenges the validity of the \$1,500 limit on the car exclusion prescribed by HHS and the state regulations implementing this limit. Both the state and HHS are defendants.

Decision: A motion for preliminary injunction was denied.

Status of case: The state defendant has filed a motion for summary judgment in effect asking to be dismissed as a party on the basis that HHS is the only appropriate defendant and citing Suter in support. The state's Suter argument appears to be that plaintiffs assert rights only under the statutory provision authorizing HHS to set a limit and this provision does not create any rights against the state.

Maynard v. Williams, No. TCA 92-40279 MMP (N.D. Florida, April 15, 1994), CH# 48,528.

Plaintiffs' Counsel: (among others) Cindy Huddleston, Florida Legal Services, 2121 Delta Way, Tallahassee, Florida 32303, 904-385-7900.

Substantive Issue: This case involves the Title IV-A provision, 42 U.S.C. § 602(g), saying that states must guarantee child care for AFDC recipients who are participating in JOBS or in another approved ET program. Plaintiffs claim the state has violated this provision by failing to provide child care solely for fiscal reasons to recipients who are or who wish to participate in an approved ET program.

Decision. The court held that the child care guarantee provision may be enforced under § 1983 and also held for plaintiffs on the merits. With respect to § 1983 enforceability, the court reasoned that the child care guarantee provision is enforceable even if Suter is read as holding that "state plan" requirements create only a right to have a provision included in the state plan, since the guarantee

provision is an independent requirement, not a state plan requirement.

Status of case: It is not known whether defendants will appeal.

Illinois

Dubose v. Bradley, 93 C 496 (N.D. Ill.) (Feb. 23, 1993, preliminary injunction), (March 19, 1993, summary judgment), CH # 48,754.

Plaintiffs' Counsel: John Bouman (and others), Legal Assistance Foundation of Chicago, 343 South Dearborn St., Suite 700, Chicago, Illinois 60604, (312) 341-1070.

Substantive Issue: This case involves the Title IV-A provision, 42 U.S.C. § 602(g), saying that states must guarantee child care for 1) AFDC recipients who are participating in JOBS or an another approved ET program and 2) for certain former recipients. Plaintiffs claim the state has violated this provision by failing to provide child care for certain recipients in non-JOBS ET.

Decision: The court first granted plaintiffs a preliminary injunction and then final judgment. The preliminary injunction opinion applies the Wilder test and concludes that § 602(g) creates rights under § 1983.

Status of case: ?

Maine

Stowell v. Ives, 976 F.2d 65 (1st Cir. 1992), CH# 47,988.

Plaintiffs' Counsel: James Crotteau, Pine Tree Legal Assistance, Inc., 12 Cooper Street, Machias, ME 04654, (207) 255-8656.

Substantive Issue: Unlike most AFDC cases, this case does not involve the enforcement of a provision in the Act's AFDC title (Title IV-A), but rather the enforcement of a provision in the Act's Medicaid title (Title XIX), 42 U.S.C. § 1396a(c)(1), which says that HHS shall not approve a state's Medicaid plan if the payment levels under the state's AFDC plan are less than the payment levels in effect on May 1, 1988. Plaintiffs claim that for certain individuals the state has reduced its AFDC payment levels below the May 1, 1988 benchmark.

Decision: In a pre-Suter decision, the district court had held that the Medicaid provision did not create a right enforceable under §1983, reasoning that the provision does not impose a "binding obligation" on states to refrain from AFDC cutbacks below May 1988 levels but merely provides for possible consequences (HHS disapproval of the Medicaid plan)

should they fail to do so. The First Circuit affirmed basically on this rationale, with a fairly extensive but confusing discussion of Suter. (See Albiston below for more on the Suter issue from the First Circuit).

Status of Case: Plaintiffs had filed a petition for rehearing based on the then pending federal legislation with an Suter curative provision. They have now moved to dismiss the petition based on the veto of that legislation.

Massachusetts

Avanzato v. Secy Of Health and Human Services, Civ. No. 91-30205-F (D. Mass. October 14, 1992), CH #47,193.

Plaintiffs' Counsel: (among others) Deborah Harris, Massachusetts Law Reform Institute, 69 Canal St., Boston Mass. 02114, (617) 742-9250.

Substantive Issue: Plaintiffs seek to enforce the same provision which was at issue in Stowell v Ives, summarized above. Plaintiffs claim that the state violated this provision by eliminating an AFDC clothing allowance. This allowance was subsequently restored, though prospectively only.

Decision: The court vacated a prior judgement favorable to plaintiffs and granted summary judgement to the state and federal defendants. The decision is based on the court's adherence to the law of the circuit established in Stowell v. Ives.

Status of Case: Amended Judgment entered on 1/4/93 granting state's motion for summary judgment for reasons stated in 10/14/92 opinion and dismissing the complaint against the federal defendant for mootness.

Healy v. Commissioner, 414 Mass. 18, 605 N.E. 2d 279 (1992) CH# 48,569.

Plaintiffs' Counsel: (among others) Deborah Harris, Massachusetts Law Reform Institute, 69 Canal St., Boston Mass. 02114, (617) 742-9250.

Substantive Issue: This case involves the Title IV-A provision, 42 U.S.C. § 602(g), saying that states must guarantee child care for 1) AFDC recipients who are participating in JOBS or an another approved ET program and 2) for certain former recipients. Plaintiffs claim the state has violated this provision by failing to provide child care for certain recipients.

Decision. The Massachusetts Supreme Court affirmed the grant of a preliminary injunction, citing Suter for the proposition that federal conditions must be imposed unambiguously.

Status of case: Final judgment by consent entered on May 12, 1993.

Johnson v. Department of Public Welfare, 414 Mass. 572 (1993).

Plaintiff's Counsel: Erin Kemple, Western Massachusetts Legal Services, 145 State Street, Springfield Mass. 01103, (413) 746-3221.

Substantive Issue: This case involves eligibility for benefits during a period the child is temporarily absent.

Decision: Plaintiff prevailed on the merits in the decision reported above and subsequently filed a motion for attorneys' fees. Defendants objected on a number of grounds including a Suter argument that appears to assert that the AFDC statute creates only a right to a plan which includes the federally required provisions.

Status of case: The attorneys' fee motion is pending before the Massachusetts Supreme Judicial Court.

Michigan

Audette v. Sullivan and **Babbitt v. Michigan**, 19 F.3d 254, 1994 WL 62545 (6th Cir., 1994), revising 12 F.3d 580 (6th Cir. Dec 17, 1993). (**Babbitt** was on appeal from 778 F. Supp. 941 (W.D. Mich. 1991), and is CH #46,619).

Plaintiffs' Counsel: (among others) Susan McParland, Michigan Legal Services, 220 Bagley Ave., Ste. 900, Detroit Michigan 48226, (313) 964-4130.

Substantive Issue: Plaintiffs seek to enforce the same provision which was at issue in Stowell v Ives, summarized above. **Babbitt** is a suit against the state and **Audette** is a suit against HHS. The two cases were consolidated on appeal.

District Court Decisions: In **Babbitt** the court ruled for the state on the merits, apparently concluding the statutory provision is not violated by an AFDC reduction unless the reduction is implemented in order to fund Medicaid. In **Audette** the court held that plaintiffs were collaterally estopped by the **Babbitt** decision.

Sixth Circuit Decision: In **Babbitt** the court accepted the argument suggested by the United States as Amicus Curiae based on Stowell that there is no § 1983 cause of action against the state on the grounds that the provision does not create a "binding obligation" for a state to maintain its May 1988 benefit levels. In **Audette** the court disagreed with the district court that plaintiffs were collaterally estopped; in the December 17, 1993 opinion it nevertheless affirmed the district court judgment on the basis that plaintiffs did not have a cause of action against HHS under § 1983; in its March

2, 1994 revision the court remanded to the district court for further proceedings.

Status of Case: In Babbitt, plaintiffs will not seek Supreme Court review.

Wisconsin

Clifton v. Schafer, 969 F.2d 278 (7th Cir. 1992), CH# 48,287.

Plaintiffs' Counsel: Chuck Krimendahl, Western Wisconsin Legal Services, P.O. Box 101, 202 N. Main St., Dodgeville Wisconsin 53533, (608) 935-2741.

Substantive Issue: This is an individual action in which plaintiff sued the Director of the County AFDC agency for failing to continue plaintiff's AFDC benefits unchanged when plaintiff timely requested a fair hearing to challenge a proposed reduction in benefits. Plaintiff claimed that this failure denied him due process and his right to "aid pending" under the federal AFDC hearing regulations. Plaintiff conceded that the regulations of the state AFDC agency required the County Director to continue his benefits unchanged and that the state agency had directed the County Director to continue his benefits unchanged.

Decision: The Seventh Circuit held with respect to the regulatory claim that plaintiff asserted no right enforceable under § 1983. Citing Suter it reasoned that the federal AFDC statute and regulations create at most a right to a state plan providing for aid-pending benefits, not a right to aid-pending, harmonizing Suter with Wilder by asserting that plaintiffs in Wilder challenged the state's Medicaid state plan, not the failure to comply with the plan in individual cases. With respect to the due process claim the Seventh Circuit citing Parratt held there was no due process violation on the basis that the failure to provide aid pending was a random unauthorized departure from state policy for which there was an adequate state law remedy. (Note - see Memisovski v. Bradley and Roloff v. Sullivan in Part Two of the docket.)

Status of Case: The case is over. Plaintiff did not petition for rehearing or for cert.

Jordan v. Whitburn, Case No. 93-CV-0607 (Dane Cy. Cir. Ct., Wisc., Oct. 18, 1993). CH 49,913.

Plaintiffs' Counsel: Patricia Delessio, Carol Medaris, Legal Action of Wisconsin, 230 West Wells St., Room 800, Milwaukee, Wisconsin 53203, (414) 278-7722.

Substantive Issue: This case involves the Title IV-A provision, 42 U.S.C. § 602(g), saying that states must guarantee child care for 1) AFDC recipients who are participating in

JOBS or an another approved ET program and 2) for certain former recipients. Plaintiffs claim the state has violated this provision by failing to provide child care for certain recipients.

Decision. Applying the Wilder test, the court holds that § 602(g) creates rights under § 1983.

Status of case: ?

Wyoming

Stanberry v. Sherman, No. 93-CV-0145J (D. Wyoming April 18, 1994).

Plaintiffs' Counsel: ?

Substantive Issue: Plaintiffs claim that federal AFDC rules require states to update their standard of need annually.

District Court Decision: The court concludes that federal law does not require annual updates of the standard of need and, citing **Johnson v. Beye**, No. 93-1009, 1994 WL 64357 (10th Cir. March 3, 1994) (summarized above), that the AFDC statute does not create rights which can be enforced under § 1983.

II. CSE

Arizona

Freestone v. Cowan, No. 93-16697 (9th Cir. appeal docketed 1993), appealing Freestone v. Cowan, No. Civ. 93-100 TUC ACM, (D. Az. Aug. 12, 1993).

Plaintiffs' Counsel: William Morris, Southern Arizona Legal Aid, Inc., 64 E. Broadway Blvd., Tucson AZ 85701, (602) 623-9456.

Substantive Issue: Plaintiffs seek to enforce compliance with federal requirements for the provision of child support enforcement services.

District Court Decision: Although federal child support requirements do create rights within the meaning of § 1983, custodial parents may not sue to enforce federal requirements based on the reasoning in Carelli v. Howser, 923 F. 2d 1208 (6th Cir. 1991).

Status of Case: Plaintiffs have appealed to the 9th Circuit.

Illinois

King v. Bradley, 829 F. Supp. 989 (N.D.Ill. 1993).

Plaintiffs' Counsel: John Bouman (and others), Legal Assis-

tance Foundation of Chicago, 343 South Dearborn St., Suite 700, Chicago, Illinois 60604, (312) 341-1070.

Substantive Issue: Plaintiffs seek among other things to enforce compliance with time frames and other requirements related to the service of income withholding orders established by the CSE statute and regulations.

Decision: Title IV-D does create a § 1983 enforceable right to child support services, but the right is only to a program which meets federal requirements in 75% of the cases. The latter conclusion rests on the reasoning that the federal statute provides for a reduction in federal matching funds unless there is "substantial compliance" with federal requirements, and the federal regulations defined substantial compliance as compliance in 75% of cases.

Status of Case: ?

Mason v. Bradley, 789 F. Supp. 273 (N.D. Ill. 1992), 1992 WL 80124.

Plaintiff's Counsel: Gary Palm, Mandell Legal Aid Clinic, University of Chicago Law School, 6020 South University Avenue, Chicago, Ill. 60637, (312) 702-9611.

Substantive Issue: This case involves federal CSE requirements that states take action to locate an absent parent with a specific time frame. Plaintiff in this individual action claimed the state had failed to take action within the time limit and sought to require the state to act.

Decision: The court held that there is no right to compliance with federal CSE child support services requirements. It cited Suter for the proposition that a federal statute (or regulation) does not create a right unless it provides "'unambiguous notice' of particular, mandatory obligations" and reasoned that the federal CSE rules do not require compliance because federal penalties apply only for "substantial non-compliance." (As noted in the decision, some pre-Suter cases had held there was no right to compliance with CSE requirements.)

Status of Case: The plaintiff will not appeal.

Maine

Albiston v. Maine Commissioner of Human Services, 7 F.3d 258 (1st Cir. 1993), 1993 WL 369570, CH# 46,688.

Plaintiff's Counsel: Mary T. Henderson, Pine Tree Legal Assistance, Inc., P.O. Box 2429, Augusta, ME 04338, (207) 622-4731.

Substantive Issue: Plaintiff AFDC recipients seek, inter alia, to enforce compliance with the federal regulatory time limits for distribution of "pass through" and "fill-the-gap" child support payments.

Decision: The federal statute and regulations create a § 1983 enforceable right to timely payment of the "pass through" and "fill-the-gap" payments. As to the effect of Suter on § 1983 jurisprudence: it "left the basic Wilder framework intact but .. " in "spending clause" cases 1) no enforceable rights will be found when the spending clause statute places the onus of compliance on the federal government rather than directly on the state as in Stowell v. Ives, 976 F.2d 65 (1st Cir. 1992) (summarized above); 2) plaintiff must demonstrate the congressional intent to impose binding obligations on the state, and 3) plaintiff must demonstrate that the obligation placed on the state is sufficiently unambiguous. As to defendant's argument that the statute's requirement for payment with "reasonable promptness" is too ambiguous, "the relevant question is whether the action or purpose whose 'reasonableness' is commanded .. is susceptible of judicial ascertainment" and promptness of payment "presents a straightforward identifiable standard".

Status of Case: The state will not seek Supreme Court review.

South Dakota

Howe v. Ellenbecker, 8 F.3d 1258 (8th Cir. 1993), cert denied 62 LW 3637 (March 29, 1994), CH #45,531.

Plaintiff's Counsel: (among others) B.J. Jones, Dakota Plains Legal Services, P.O. Box 507, Fort Yates, North Dakota 58538, (701) 854-7204

Substantive Issue: Plaintiffs challenge the state's refusal to provide child support enforcement services to children whose absent parents reside on South Dakota Indian reservations and HHS' policy that federal matching funds are not available for such services except in specified circumstances.

District Court Decisions: On September 18, 1991 the court granted plaintiffs a declaratory judgment that the state policy was contrary to the CSE statute. The court also held that the CSE statute conferred rights which may be enforced

under § 1983. On August 11, 1992 the court denied the state's motion for reconsideration based on Suter without reaching its merits, saying that the court considered the merits a matter the state should raise in the appeal of its earlier order.

Court of Appeals Decision: The court holds that the federal Title IV-D Child Support Enforcement statute creates a § 1983 enforceable right to child support services and affirms the order of the district court requiring the federal government and the state to negotiate with certain Native American tribes to reach an agreement to make child support services available to Native American children.

Status of case: The Supreme Court has denied review.

Tennessee

Davis v. McClaran, No. 01A101-9304-CH-00164 (Tenn. Court of App. Dec. 10, 1993).

Plaintiffs' Counsel: David Ettinger, Russell Overby, Legal Services of Middle Tennessee, 800 Stahlman Bldg., 211 Union St., Nashville, TN 37212, (615) 244-6610.

Substantive Issue: Plaintiffs seek to enforce compliance with federal requirements for the provision of child support enforcement services.

Decision: Following **King v. Bradley**, summarized above, the court holds that Title IV-D does create a § 1983 enforceable right to child support services, but the right is only to a program which meets federal requirements in 75% of the cases.

Status of case: An appeal is pending before the Tennessee Supreme Court.

III. JOBS

(As of yet, there are no known JOBS cases in which Suter has been raised.)

PART TWO - OTHER CASES

Arkansas

Angela R. v. Clinton, 999 F.2d 320 (8th Cir. 1993), CH# 48,193. Defendants had appealed a district court order denying a motion based on Suter to amend a consent decree arising from AACWA and CAPTA claims. The Eight Circuit holds that Suter did not deprive the courts of jurisdiction over plaintiffs federal statutory claims, since even if Suter might ultimately compel the conclusion that the federal statutes create no § 1983 enforceable rights, it does not inescapably render the claims frivolous. However, the consent decree is vacated on other grounds.

Arkansas Medical Society v. Reynolds, 6 F.3d 258 (8th Cir. 1993), 1993 WL 341165. The Medicaid "equal access" provision gives providers an enforceable right under § 1983. In reaching this conclusion, the court followed the Golden State/Wilder analysis "bearing in mind the additional considerations mandated by Suter", which the court says emphasized that rights must be unambiguously conferred and that each statute must be examined on its own basis.

California

Sobky v. Smoley, 855 F.Supp. 1123 (E.D. Ca. June 14, 1994), 1994 WL 271976. The court holds that a number of Medicaid provisions may be enforced under § 1983, but that the provision requiring a "single state agency" does not create an enforceable right because it is not intended to benefit Medicaid recipients.

Martinez v. Wilson, No. 92-56458 (9th Cir. Aug. 22, 1994), 1994 WL 447775. The requirement in the Older Americans Act that states "take into account" and give "particular attention" to certain factors in distributing OAA funds among the state's localities does not give rise to a § 1983 right to challenge the weight assigned these factors in the state's distribution formula.

District of Columbia

Kelly v. Parents United for District of Columbia Public Schools, 641 A. 2d 159, 1994 WL 144663 (D.C. App. April 21, 1994). There is an implied right of action to enforce the DC Nurse Assignment Act. Suter distinguished on the basis that the holding that there was no implied right of action to enforce the reasonable efforts provision rested on the fact that HHS could enforce the provision.

Lampkin v. District of Columbia, 27 F.3d 605 (D. D.C. July 1, 1994). This case involves McKinney Act provisions concerning the education of homeless children, including a provision requiring states to select a school for a homeless child in accordance with the child's "best interests". Holding that the McKinney Act creates rights which may be enforced under § 1983, the D.C. Circuit has now reversed the district court, which had held that the McKinney Act does not create rights enforceable under § 1983 because of the perceived "similarity between the McKinney Act ... and the Adoption Act in Suter", and which had characterizing Suter as a "break from" the Supreme Court's earlier § 1983 approach. The Circuit Court appears to treat Suter as generally just applying the vagueness prong of the Golden State/Wilder analysis, and specifically rejects the argument that "state plan" statutes create only the right to have a provision included in the written state plan. The Circuit Court also rejects the argument that a child's "best interests" is too vague to be enforceable.

LaShawn A. v. Kelly, 990 F.2d 1319 (D.C. Cir. 1993). The court avoids the question of whether various AACWA and CAPTA provisions create § 1983 enforceable rights by holding that local law creates a right to sue to enforce the provisions at issue. (The ACLU reports that defendants' petition for cert has been denied.)

Wellington v. District of Columbia, 851 F.Supp.1 (D.D.C. March 31, 1994), 1994 WL 162355. Suter did not effectively overrule Wilder but does require that obligations on states be set out in detail in order to create a § 1983 enforceable right. All but one of the Medicaid provisions relied on by plaintiffs are sufficiently detailed. The exception is the statute/regulation requiring an opportunity to apply without delay, which is not sufficiently detailed because "opportunity" and "delay" are not defined.

Florida

Brown v. Chiles, No. 91-54813 (Fla. Cir. Ct. Dade County, filed Dec. 6 1991), CH# 47,856. The court denied defendants' motion for judgment on the pleadings in this child welfare case, rejecting arguments that plaintiffs' federal claims are precluded by Suter. (Summary based on National Center for Youth Law docket.)

Hawaii

Price v. Akaka, 3 F.3d 1220 (9th Cir., as amended Nov. 2 1993), 1993 WL 316043. Suter does not require overruling of prior holdings that the Hawaii Admissions Act creates enforceable rights.

Illinois

***City of Chicago v. Lindley**, No. 92 C 4666 (N.D. Ill. Oct 5, 1992), 1992 WL 308702. Citing Suter, the court holds that a provision of the Older Americans Act requiring states when allocating funds to give "preference" to certain specified individuals and "particular attention" to others is too vague to create an enforceable right except perhaps when the state fails to give any preference or particular attention to these groups.

(N.D. Ill. September 9, 1994), 1994 WL 495857. (The September 9 opinion corrects and replaces an August 3 opinion.) Neither Suter nor Clifton v. Schafer hold that the only § 1983 enforceable right in "state plan" programs is the right to an approved plan. Applying the Golden State/Wilder framework, the court concludes that some of the Older Americans Act rules governing the state formula for distributing funds among its localities are too vague to be enforceable and some are not.

Doe v. Johnson, No. 92 C 7661 (N.D. Ill. Feb. 24, 1993). None

of the provisions of the AACWA in 42 U.S.C. § 671(a) create enforceable rights.

Marie O. v. Edgar, 5 A.D.D. 965, No. 94 C 1471 (N.D. Ill. June 13, 1994). The Individuals with Disabilities Education Act creates rights which may be enforced under § 1983.

Hill v. Richardson, 7 F.3d 656 (7th Cir. 1993). A case where plaintiffs prevail by consent is a case to enforce § 1983 for attorney fee purposes so long as it is at least "debatable" that plaintiffs had a claim under § 1983, which it was in the instant public housing case. § 1983 may be used to enforce federal regulations implementing a federal statute.

Frances J. v. Bradley, No. 92 C 5190 (N.D. Ill. Dec. 15, 1992), 1992 WL 390875. Claiming reliance on Suter and Clifton v. Schafer (see Part One), the court holds that a Medicaid provision requiring "evaluation" of the need for nursing home services does not create a right to an adequate evaluation but at most a right to an evaluation, and therefore dismisses a statutory challenge to the adequacy of the state evaluation procedures.

Memisovski v. Bradley, No. 92 C 1892 (N.D. Ill. Oct. 20 1992). Plaintiffs claim among other things that the state has failed to enlist sufficient obstetrical and pediatric care providers to meet the Medicaid "equal access" requirement. In a bench ruling, the transcript of which is available, the court denied the state's motion to dismiss based on Suter and Clifton v. Schafer (see Part One) among other grounds, distinguishing Clifton on the basis that it did not involve a challenge to the state plan itself, whereas plaintiffs in this case do challenge the state plan itself.

Procopio v. Johnson, 994 F.2d 325 (7th Cir. 1993). In this individual action challenging the state's failure in one particular instance to comply with an AACWA requirement for a timely dispositional hearing, relying on Clifton v. Schafer (see Part One) the court holds that there is no § 1983 right to a timely hearing but only a right to a state plan providing for timely hearings.

R.M. v. Ryder, 93 C 3740 (N.D. Ill. Mar. 14, 1994). In view of fact that the AACWA provision codified at 42 U.S.C. § 673 gives states such broad discretion, it does not confer any § 1983 enforceable rights.

Roloff v. Sullivan, No. 91-3198 (7th Cir. Sept. 11, 1992). In this Medicaid case decided two months after Clifton v. Schafer (see Part One) by a panel which included one member of the Clifton panel, the court reached the merits of plaintiffs' claims of a conflict between the state policy and the federal Medicaid statute without any discussion of the "cause of action" or citation to Suter or Clifton.

Indiana

Hill v. Richardson, 7 F.3d 656 (7th Cir. 1993). The court held that a case where plaintiffs prevail by consent is a case to enforce § 1983 for attorney fee purposes so long as it least "debatable" that plaintiffs had a claim under § 1983, which it was in the instant public housing case. § 1983 may be used to enforce federal regulations implementing a federal statute.

Noland v. Wheatley, 835 F.Supp. 476 (N.D. Ind. 1993). The ADA creates rights which may be enforced under § 1983. In reaching this conclusion, the court applies the Wilder framework, and cites Suter as an application of that framework.

The Methodist Hospitals v. Sullivan, No. CIV. 2:93-CV-357-RL (N.D. Ind. July 8, 1994), 1994 WL 363093. Generally applying the Golden State/Wilder framework, the court concludes that some Medicaid provisions confer § 1983 enforceable rights on health care providers but that some do not because they are too vague or are not intended to benefit providers.

Iowa

Warren v. Palmer, District Ct. No. CE 039 22862 (Iowa District Court, ___ County, August 4, 1992). This case challenges Iowa's policy on Medicaid coverage for organ transplants. The court denied defendant's motion for summary judgment based in part on Suter and granted plaintiff preliminary relief allowing the operation to go forward. (Summary based on NHELP docket).

Kansas

Sheila A. v Whiteman, 89-CV-33 (Kansas District Court, Shawnee County, Division 12 Oct. 20, 1992). Motion based on Suter to dismiss all Adoption Assistance Act claims granted in unclear opinion that apparently concludes that Suter overruled Maine v. Thiboutot. (Summary based on ACLU docket; the ACLU reports that the parties subsequently negotiated a settlement based on the remaining claims.)

Kentucky

Doe v. Knauf, Civ. No. 91-187 (E.D. Ky. Aug. 24, 1992). Plaintiffs sued to enforce various provisions of the Juvenile Justice and Delinquency Prevention Act. The Court denied defendant's "Suter" motion to dismiss, reasoning that Suter was simply an application of the Golden State/Wilder analysis, and that the provisions plaintiffs sought to enforce were sufficiently specific.

Horn v. Madison County Fiscal Court, 22 F.3d 653, 1994 WL 138168 (6th Cir. April 21, 1994), petition for cert. filed, No.

94-164, 63 LW 3092 (Aug. 9, 1994). The Juvenile Justice Act creates rights which may be enforced under § 1983. The decision generally treats Suter as simply applying the vagueness prong of the Golden State/Wilder analysis.

Northern Kentucky Welfare Rights Association v. Jones, 985 F.2d 561 (6th Cir. 1993) (unreported decision whose text is available on Westlaw), cert. denied, 62 L.W. 3842 (June 20, 1994), No. 92-1831, CH# 45,508. Relying on its earlier decision in Cabinet For Human Resources v. Northern Kentucky Welfare Rights Association, 954 F.2d 1179 (6th Cir. 1992), the court holds that the federal LIHEAP statute does not create rights enforceable under § 1983. (While opposing cert, the Brief for the United States as Amicus Curiae filed in the Supreme Court appears to take the position that even after Suter § 1983 remains broadly available as a cause of action to enforce federal requirements in so-called "state plan" programs. The brief indicates that the "usual rule" is that "federal rights that are stated in sufficiently specific and mandatory terms in the statute ... are subject to enforcement under Section 1983", page 15.)

James v. Jones, Civ. No. C89-0139-P(H) (W.D. Ky. May 5, 1993), 148 F.R.D. 196, 1993 WL 146694. Plaintiffs sued to enforce various provisions of the Juvenile Justice and Delinquency Prevention Act. The Court denied defendant's "Suter" motion to dismiss, reasoning that Suter was simply an application of the Golden State/Wilder analysis, and that the provisions plaintiffs sought to enforce were sufficiently specific.

Timmy S. v. Stumbo, 12 F.3d 214 (6th Cir. 1993) (table, text in Westlaw), 1993 WL 492305. In this AACWA case, defendant had appealed a district court order denying a motion based on Suter to reopen a pre-Suter order. Without deciding the scope of Suter, the Sixth Circuit has now affirmed the district court denial of the motion to reopen in an opinion which is available on Westlaw but which will not be published.

Louisiana

****Blanchard v. Forrest**, No. Civ. A. 93-3780 (E.D. La. Sept. 6, 1994), 1994 WL 495857. Suter did not overturn Wilder or the Wilder framework. The Medicaid statute creates § 1983 enforceable rights.

Travelers Health Network of Louisiana v. Orleans Parish School Board, 842 F. Supp. 236 (E.D. La. 1994). An HMO does not have a right to enforce a provision of the HMO Act of 1973 requiring certain governmental entities to offer employees the option of HMO participation because the provision is intended to benefit consumers not HMO's and because the provision is too vague. The conclusion that the provision is too vague seems to take the meaning of vagueness to the extreme.

Maine

Fulkerson v. Commissioner, Civ. 92-238-P/DMC (D. Me. Aug. 13, 1992) (magistrate's decision). Plaintiffs challenged state Medicaid co-payment policies as contrary to the federal statute's requirement for reimbursement systems which are "consistent with efficiency, economy, and quality of care" and "sufficient to enlist enough providers ... ". The decision applies the "Golden State" test without any citation to Suter and finds the former language too vague to create an enforceable right but the latter language sufficiently specific.

Maryland

Dorsey v. Housing Authority of Baltimore City, 984 F.2d 622 (4th Cir. 1993). Reversing the district court, the Fourth Circuit holds that the "procedural" requirements of the HUD regulations implementing the Brooke Amendment give rise to § 1983 rights. The court seems to read Suter as a "vagueness" case which did not alter the preexisting analytical framework.

Massachusetts

Burke v. Nordberg, No. 92-7030-C (Mass. Superior Court, December 18, 1992). In this challenge to delays in the processing of unemployment compensation appeals, the court granted plaintiffs a preliminary injunction, distinguishing Suter.

Michigan

****Loschiavo v. Dearborn**, Nos. 92-1515, 92-1558 (6th Cir. September 8, 1994), 1994 WL 481964. The FCC "satellite antenna" regulations create rights which may be enforced under § 1983. "Although some believe that ... Suter superseded the well-established framework set forth in Wilder, this Circuit has joined other Circuits in concluding that the two opinions may be harmonized ... " (fn. 2). "A regulation is not rendered impermissibly vague simply because it calls for a judicial determination of 'reasonableness' ".

Ottis v. Shalala, No. 1:92-CV-426 (W.D. Mich. Jan. 27, 1994), 1994 WL 443469. The Nursing Home Reform Law amendments to the Medicaid statute create § 1983 enforceable rights.

Minnesota

McMaster v. State of Minn., 819 F. Supp. 1429 (D. Minn. 1993). A federal statute prohibiting interstate transportation of goods manufactured by prisoners unless the prisoners were paid prevailing wages does not give prisoners enforceable rights to the prevailing wage because it was not enacted for their benefit.

Mississippi

E.F. v Scafidi, 851 F. Supp. 249, 1994 WL 182892 (S.D. Miss. April 21, 1994). None of the AACWA provisions relied on by plaintiffs creates enforceable rights. The only right created by the AACWA is the right to have certain provisions included in the written state plan.

New Hampshire

Belanger v. Nashua, 856 F.Supp. 40 (D. N.H. May 11, 1994), 1994 WL 314372. The Family Educational Rights and Privacy Act creates rights which may be enforced under § 1983.

Eric L. v. Bird, 848 F. Supp. 303, 1994 WL 112093 (D. N.H. March 31, 1994). The AACWA confers no § 1983 enforceable rights except to have certain provisions included in the written state; CAPTA confers no § 1983 enforceable rights except to have certain provisions included in a written state law.

New York

Chan v. City of New York, 1 F.3d 96 (2d Cir. 1993). This case involves a claim of underpaid wages based on a provision in the Housing and Community Development Act which requires wages in accordance with the Davis-Bacon Act. The court holds that this provision creates an enforceable right "under either the Wilder analysis or, to the extent that it differs, the Suter analysis .. ". The court does not discuss how Suter might have modified the Wilder analysis and appears to simply apply the Wilder analysis.

Evelyn V. v. Kings County Hosp. Center, 819 F. Supp. 183 (E.D. N.Y. 1993). The Medicaid provisions relied on by plaintiffs do not give Medicaid recipients enforceable rights against the defendant Medicaid provider.

Greenstein v. Bane, 833 F.Supp. 1054 (S.D.N.Y. 1993), 1993 WL 394647. "Applying the three-part Wilder test, and following the guidelines set out in Suter", the court concludes that Medicaid recipients may enforce under § 1983 the Medicaid corrective payment regulation.

Marshall v. Switzer, 10 F.3d 925 (2d Cir. 1993), CH #48,744. Reversing the district court, the Second Circuit holds that Title I of the Rehabilitation Act of 1973 creates rights which may be enforced under § 1983. Noting that the district court appeared to read Suter as standing for the proposition that federal statutes which require a "state plan" do not create § 1983 enforceable rights, the court observes that "the significant point in Suter was not that the statute in question only required a state to submit a state plan to the federal agency but that the statute provided no guidance for measuring 'reasonable efforts.'" .

Thomas v. New York City, 1993 WL 36123 (E.D.N.Y. Feb. 5,

1993). In this case involving alleged abuse of children while in foster care, the "defendants next argue, and plaintiffs concede, that there is no private right of action under the " AACWA, and therefore the AACWA claims are dismissed.

Watson v. Dowling, No. 93 Civ. 5839 (PKL) (S.D. N.Y. June 29, 1994), 1994 WL 319295. 42 U.S.C. § 5106a, a federal statute providing grants to States for child abuse prevention programs, does not create § 1983 enforceable rights.

Ohio

Ford v. Kreachbaum, No. C-2-92-352 (S.D. Ohio Oct. 21, 1992). Plaintiffs challenged various state agency policies regarding fraud disqualification as contrary to the Food Stamp statute and regulations. Defendants moved to dismiss based on Suter. The court ruled for plaintiffs, holding that the Food Stamp statute and regulations create rights enforceable under § 1983.

Martin v. Voinovich, 840 F. Supp. 1175 (S.D. Ohio Dec. 14, 1993), 1993 WL 542170. Plaintiffs persons with disabilities claimed that defendants had denied them community housing and other services in violation of rights under various federal statutes, including the Medicaid statute, and the Constitution. After describing efforts by other courts to harmonize Suter with earlier cases, the court seeks to do so in a manner which suggests that Suter did not change the analytic framework but requires a stricter standard for when a provision is sufficiently specific to create an enforceable right. The court finds certain of the provisions at issue sufficiently specific but others too vague.

Ward v. Neal, No. C2-87-1448 (S.D. Ohio Feb. 23, 1993). Plaintiffs sued to enforce the AACWA requirement that the state agency either administer the state AACWA program or "supervise" its administration by local agencies, claiming that the state agency had failed to adequately supervise the local agency. Although agreeing that Suter "does not represent a radical departure" and that it did not per se preclude enforcement of AACWA requirements, the court holds that a requirement to "supervise" administration is too vague to create a right enforceable under § 1983.

***Wood v. Tompkins**, No. 93-3684 (6th Cir. Aug. 29, 1994), 1994 WL 462382, affirming **Wood v. Wallace**, 825 F. Supp. 177 (S.D. Ohio 1993). Certain provisions in the Medicaid statute for a Home and Community Based Waiver Program gives rise to § 1983 enforceable rights. "Defendant contends that Suter significantly changed the law such that the district court erred by applying the Wilder framework. .. because .. Suter .. is entirely consistent with Wilder, this contention is without merit." "Were we not [bound by **Audette v. Sullivan**, 19 F.3d 254, (6th Cir., 1994)] we would prefer to avoid the seemingly artificial distinction created by [**Stowell v. Ives**, 976 F.2d

65 (1st Cir. 1992)] between statutes that place the 'onus of compliance' directly upon the [federal agency] and those that place a direct obligation on the states". (fn. 18)

Pennsylvania

Mahe v. White, No. 90-4674, 1992 WL 122912 (E.D. Pa. June 2, 1992). This case involves notice rights of natural parents with respect to the Title IV-E "placement maintenance benefits" and the Title XIX Medicaid benefits for their children who are in foster care. The court held, inter alia, that plaintiffs could not enforce under § 1983 notice provisions in the state Title IV-E plan which Title IV-E did not require the state to include in the state plan. The court reasoned that *Suter* had in effect implicitly overruled Barnes v. Cohen, 749 F.2d 1009 (3d Cir. 1984). Barnes was an AFDC case in which the court held that the violation of any provision of the state plan, including provisions which federal law does not require, was a violation of federal law, reasoning that the AFDC state plan requirement that the plan "be in effect in all political subdivisions of the state.." made it a federal law violation for a state not to adhere to the provisions of the state plan.

Neal v. Casey, 821 F. Supp. 320 (E.D. Pa., 1993). Reading *Suter* very broadly, the court holds that the federal provisions governing three separate child welfare programs do not create enforceable rights.

Texas

Residents Council v. HUD, 980 F.2d 1043 (5th Cir. 1993). A provision prohibiting use of federal housing funds for a particular purpose does not create a § 1983 right because the provision is in a HUD appropriations and, the court reasons, therefore imposes a binding obligation only on HUD. The court expressly declines to decide whether *Suter* altered the preexisting analytical framework, stating that the provision at issue failed to create a right under that framework.

Virginia

Ankers v. Jackson, C.A. 93-1113-A (E.D. Va. October 25, 1993). *Suter* does not preclude use of § 1983 to enforce the AACWA "fair hearing" requirement.

Wisconsin

Miller v. Whitburn, 10 F.3d 1315 (7th Cir. 1993), vacating and remanding 816 F. Supp. 505 (W.D. Wis. 1993). Neither *Suter* nor Clifton (summarized above) preclude use of § 1983 to challenge a state Medicaid decision denying coverage for a liver transplant procedure on the ground that the procedure is "experimental".

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