S. HRG. 102-1028

IMPLICATION OF SUPREME COURT DECISION IN SUTER v. ARTIST M.

HEARING

BEFORE THE

SUBCOMMITTEE ON SOCIAL SECURITY AND FAMILY POLICY

OF THE

COMMITTEE ON FINANCE UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

SECOND SESSION

SEPTEMBER 17, 1992

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THURSDAY, SEPTEMBER 17, 1992

U.S. SENATE,
SUBCOMMITTEE ON SOCIAL SECURITY
AND FAMILY POLICY,
COMMITTEE ON FINANCE,
Washington, DC.

The hearing was convened, pursuant to notice, at 2:00 p.m., in room SD–215, Dirksen Senate Office Building, Hon. Daniel Patrick Moynihan (chairman of the subcommittee) presiding.

Also present: Senators Riegle and Durenberger.

[The press release announcing the hearing follows:]

[Press Release No. H–47, Sept. 9, 1992]

SENATE FINANCE SUBCOMMITTEE TO EXAMINE SUTER CASE, SENATOR MOYNIHAN CITES POTENTIAL RAMIFICATIONS

WASHINGTON, DC.—Senator Daniel Patrick Moynihan, Chairman of the Senate Finance Subcommittee on Social Security and Family Policy, announced a hearing to discuss a Supreme Court ruling that limits the right of beneficiaries under the Adoption Assistance and Child Welfare Act of 1980 to go to court to enforce its provisions.

The hearing will be at *2 p.m., Thursday, September 17, 1992* in Room SD–215 of the Dirksen Senate Office Building.

"The Supreme Court ruling in the *Suter* case presents the Congress with a critical choice that could have enormous ramifications for states, recipients of services and taxpayers alike. So it's imperative that we look at this carefully, and make the right decision," Senator Moynihan (D., N.Y.) said.

The House of Representatives responded to the Court's decision in the case of *Suter* v. *Artist M.* with legislation to ensure a private cause of action under all state plan programs of the Social Security Act, including Aid to Families with Dependent Children, Medicaid and other major social welfare programs.

The Subcommittee will hear from those on both sides of the issue to discuss their concerns about the impact of the *Suter* ruling and their recommendations for action.

OPENING STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, A U.S. SENATOR FROM NEW YORK, CHAIRMAN OF THE SUBCOMMITTEE

Senator MOYNIHAN. The hour of 2:00 o'clock having arrived, we will commence a regular hearing of the Subcommittee on Social Security and Family Policy, a hearing on the *Suter* case.

Our distinguished panelists will know that on the 25th of March the Supreme Court decided, in *Suter* v. *Artist M.*, that beneficiaries of the Adoption Assistance and Child Welfare Act of 1980 do not have a private right, under the act, to sue to enforce its provisions.

In effect, this means that the beneficiaries of the Federal law cannot sue States for failure to live up to the provisions of State

plans. This has something to do with the arcana of federalism in our system.

The Social Security Act of 1935 had a mix of provisions, but followed what was then a fairly standard understanding of federalism: that if the Federal Government were to lay down a national program of any particular kind, it would be administered by the States.

Some provisions of the Social Security Act let States set benefit levels, in contrast to the retirement provisions. Unemployment benefits were to be set at the State level, as were the Aid to Dependent Children benefits.

And then, inevitably, I suppose, this question arises, and it is well beyond the range of this Senator's understanding. In H.R. 11, the tax bill, called an Urban Aid Bill, for some reason—it has nothing to do with urban aid that I can tell, but that is what we call it—the House Committee on Ways and Means included language overturning *Suter*, saying this was not the law and giving recipients of all services—all services—under the Social Security Act the right to sue.

I have here from my respected colleague, Senator Offner, the suggestion that we need to determine whether the House position is correct. Is there such a thing as correct in the law? Is it sustainable, arguable, admirable, desirable, inevitable, probable? And if it is, whether the Ways and Means language goes too far.

In this bicentennial year, I will go back to my youth and tell you that I was in the United Kingdom on a GI bill and Fulbright Fellowship in the 1940's when the Oxford Union had a large debate in which the question was, resolved, Columbus went too far. [Laughter.]

Senator MOYNIHAN. And that will be the last merry note in this discussion. We are going to call our very able panelists who have very generously come from very far and near to speak. I would like you all to come forward and sort of be collegial in this matter. Professor Erwin Chemerinsky, you are the Legion Lex Professor of Law?

Professor CHEMERINSKY. Yes, I am.

Senator MOYNIHAN. Lex means law. Or is that a name?

Professor CHEMERINSKY. It is the name of the alumni group.

Senator MOYNIHAN. Oh. A Mr. Lex.

Professor CHEMERINSKY. Well, I think it comes from Latin, but they have donated the money for the chair that I am lucky enough to hold.

Senator MOYNIHAN. Well, we are very happy that you are here. And Mr. Howard Talenfeld, who will be speaking on behalf of the State of Florida. Ms. Christina Tchen, of Chicago, will be here on behalf of the State of Illinois. We welcome Mr. Talenfeld and Ms. Tchen. And, finally, Mr. James Weill, who is a friend of this committee, who is General Counsel of the Children's Defense Fund.

We will follow our practice, which is just to look at the list and see who comes first. Professor Chemerinsky, you do. We will proceed just as follows. Perhaps everyone could keep themselves in the range of 10 or 15 minutes, as elsewise we are having a busy afternoon and I do not want to miss the chance to hear what you think

of one another's views. So, welcome, and thank you for coming from Los Angeles.

STATEMENT OF ERWIN CHEMERINSKY, LEGION LEX PROFESSOR OF LAW, UNIVERSITY OF SOUTHERN CALIFORNIA LAW CENTER, LOS ANGELES, CA

Professor CHEMERINSKY. Thank you, Senator Moynihan, for the invitation to come here today. I am a law professor at the University of Southern California Law Center.

Senator MOYNIHAN. Excuse me, Professor. If you would not mind, my very learned colleague, Senator Durenberger, has arrived. I have just been making clear how little I know about this subject, and I wondered if you would not try to offset that imbalance.

Senator DURENBERGER. No. In fact, I would dig us both in deeper. Mr. Chairman, I do have a statement that may make up for some of that, but I, too, came here to hear the panel.

Senator MOYNIHAN. Well, your statement will be put in the record as if read.

[The prepared statement of Senator Durenberger appears in the appendix.]

Senator MOYNIHAN. Proceed, sir.

Professor CHEMERINSKY. Thank you. I specialize in the issues of Federal Court jurisdiction. Among other writings, I have written a textbook, Federal Jurisdiction, which examines the law concerning private rights of action and the use of Section 1983 to enforce Federal laws.

Although I am not an expert on the details of the Social Security Act, I am very familiar with the law concerning the ability of the courts to enforce its provisions.

This afternoon I would like to make two points. First, *Suter* v. *Artist M.* will have a devastating effect on the ability of the courts to ensure compliance with the Social Security Act. Second, amendment of the Social Security Act can restore the courts to their rightful place of enforcing the law without expanding the scope of the act or imposing new obligations on the States.

Long ago, the Supreme Court said that laws have little meaning unless they are enforceable. Two weeks ago, I had the wonderful opportunity to be in the Republic of Belasus, one of the newly-independent States of the former Soviet Union, as part of a American Bar Association delegation to help them draft a new constitution. Above all, what the American delegation emphasized was that, for the document to have any meaning, it must be judicially enforceable. Otherwise it would just be words on paper.

The effect of *Suter* v. *Artist M.* is to render many provisions of the Social Security Act—those found in the State plan sections—unenforceable words on paper.

Senator MOYNIHAN. Could you repeat that? What section did you say?

Professor CHEMERINSKY. Well, what I was saying is, the effect of *Suter* is to render those parts of the Social Security Act—the State plans sections—unenforceable.

Senator MOYNIHAN. State plan sections.

Professor CHEMERINSKY. Right.

Senator MOYNIHAN. Right.

Professor CHEMERINSKY. For more than 25 years the Supreme Court has said the courts can enforce the Social Security Act. In line with this tradition, in *Maine* v. *Thiboutot,* the Supreme Court said Section 1983 suits could be brought to enforce Federal laws, particularly the Social Security Act.

Section 1983 litigation has been indispensable in protecting the beneficiaries of the act—children, the elderly, and the disabled. *Suter* v. *Artist M.* is a radical change in the law.

The Supreme Court there did not just construe the Reasonable Efforts provision of the Adoption Assistance Act, the court went much further. It said that when a Federal law, such as the Adoption Assistance Act, requires a State plan, the only requirement is for the creation and approval of a State plan.

That is, once the State has written a plan and it is approved, then 1983 suits cannot be used even if the plan contravenes Federal law, or even if the State blatantly disregards Federal law. *Suter* v. *Artist M.,* thus, truly will have a devastating effect on litigation to enforce the Social Security Act.

No longer can beneficiaries—children, the elderly, the disabled—bring suits under Section 1983 to enforce any of the requirements and provisions that obligate States to draft plans. Already, numerous lawsuits through the country have been dismissed based on *Suter* v. *Artist M.,* and, in countless more cases, there are Motions to Dismiss pending.

Although the States are now arguing to Congress that *Suter* is a limited decision, the States' Attorneys throughout the country are vigorously urging courts to take the broadest possible interpretation. Indeed, the States of Florida and Illinois, represented here today, have, in briefs filed in courts, argued that *Suter* means that once a law requires a State plan and there is a State plan, no further Section 1983 enforcement is allowed.

All that is necessary to overrule *Suter* and to allow judicial enforcement again is for Congress to make clear that it believes that *Suter* was wrongly decided and that the courts should be able to enforce all of the requirements of the Social Security Act that were previously enforceable, even when they are in State plan sections.

Before *Suter,* some of the provisions of the Social Security Act were enforceable whether or not they were in sections requiring State plans. After *Suter,* any requirements that are found in State plan sections are no longer enforceable.

The goal of the amendment should be to restore the law to what it was before *Suter.* Because the proposed amendment would only restore the law to its pre-*Suter* state, there is no reason to fear a flood of new or meritless litigation.

Specifically, Section 7104 of H.R. 11 would accomplish this purpose. Creating an enforceable right would mean that the State plan sections are enforceable through Section 1983 suits and judicial enforcement would be possible. The legislative history to H.R. 11 makes clear that it is not meant in any way to expand the scope of the Social Security Act, and it does not impose any new obligations on the States. This is all that needs to be done; it is all that should be done.

Judicial enforcement of the Social Security Act, like judicial enforcement of all laws, is essential to ensure executive and State

compliance. The court should be restored to the classic and traditional position, especially here, so as to protect the beneficiaries of the Social Security Act: children, families, the elderly, the disabled; those most desperately in need of government assistance.

Senator MOYNIHAN. I think, for succinctness, you are well ahead of the average. But we will not make any decisions until we have heard the counter arguments.

[The prepared statement of Professor Chemerinsky appears in the appendix.]

Senator MOYNIHAN. I think we will do that in sequence. Mr. Talenfeld, you are going to speak on behalf of the State of Florida, and we welcome you, sir.

STATEMENT OF HOWARD M. TALENFELD, NORTH MIAMI, FL, ON BEHALF OF THE STATE OF FLORIDA

Mr. TALENFELD. Thank you very much, Senator Moynihan, Senator Durenberger, and staff. I have come here on behalf of the State of Florida as a litigator in these cases; a State that is extremely concerned about the fact that its child welfare system is on the brink of failure; a State that has been also subject to two Statewide class-action litigations—the case of *M.E.* v. *Chiles,* and also the case of *Children A through F* v. *Chiles.*

The State of Florida is not unique in being besieged by this type of class-action litigation. There are a number of other States, as well. In fact, a survey done by the Institute for Health and Human Services, which I understand has been provided here, it recounts 24 States that are exposed to this very same type of litigation. This is not a typical situation involving separation of powers in which one, or two, or three States are subject to these types of suits. And this is not a situation where the impact has been minimal.

In fact, States like Connecticut, Alabama, the State of New Mexico, and seven other States, have entered into consent decrees State-wide with respect to these actions that have been brought on a number of bases, including title IV, IV-B, IV-E, and also including the Due Process Clause, the Equal Protection Clause, and many other individual Federal statutes.

The reason I am describing this backdrop is because the impact of these cases are extraordinary on the States. They are extraordinary on the States because their sovereignty is very, very much at stake in the context of their ability to administer these child welfare programs. And the balance between having the State executive authorities administer this and the courts supervise this process has changed.

This balance means public policy in many States is being set by the courts. These consent decrees in 10 States, these permanent injunctions, in the States of Massachusetts, Maryland, and Illinois, mean the decisions of our human service leaders, our child welfare advocates from the inside, must turn to the plaintiff's counsel in these cases and turn to the Federal courts to try to implement their public policy.

They must obtain court permission, oftentimes, when these injunctions, these court orders, are entered. And they spend much of their time—a very large percentage of their time—dealing with

lawyers, both on the defense side, the plaintiff side, and court monitors, as well.

The problems that we are experiencing go far beyond the inability to implement good human services policy. They extend to the point that there are financial drains on these systems caused by this litigation. These financial drains are caused by pre-judgment attorneys' fees, which usually, in the child welfare arena, run from $500,000 to $600,000 pre-suit in many of these cases.

Similarly, the post-judgment impact is even more devastating. You have monitoring fees, and I have enclosed a reference to a mental health study that was done by the plaintiff's counsel in the *Pennhurst* case in which they range anywhere from as low as $20,000 a year to well up to $3 million per year for monitoring the *Wyatt* case out of Alabama.

In child welfare, the State of Connecticut has expended $600,000 to date with the Federal monitoring panel. And post-judgment enforcement actions are constantly seen in the State of New Mexico, where they were regular.

I realize that I am addressing the extreme cases, but I think they may be representative if the *Suter* Amendment is passed without close scrutiny in a way to restore to the pre-*Suter* status quo instead of to enlarge the rights.

These class-action litigations have been described by plaintiff's counsel in these cases as blunt instruments to effectuate systemic reform when, in fact, what is needed is good, sound policy, policy that emanates from this Congress and from the State legislatures, as well. That is what is needed: the policy and the programs.

The pre-*Suter* atmosphere was anything—was anything—but unconfusing. These rights were not clearly recognized, particularly in the areas of housing, the reasonable efforts clause.

Senator MOYNIHAN. Sir, would you just help me? Did you say, was anything but unconfusing?

Mr. TALENFELD. It was very confusing.

Senator MOYNIHAN. It was confusing.

Mr. TALENFELD. Very confusing. In fact, in the housing cases, there were a number of cases that were decided contrary to the children's advocates, in fact, in the area of placement in the least restrictive environment, which shows up in title IV-D as well.

In the area of damages, damages is a very big area. In Florida, damage cases are constantly brought against our department. And what I would suggest is that we have to be extremely careful in trying to return to this environment.

Because what we had under the *Pennhurst* test was an examination of each and every discrete right under title IV-B and IV-E, and then the courts would look at the entire statute and the entire legislative history to determine if it was enforceable so that the courts did not determine under the reasonable efforts clauses, in many instances, that the right to housing was enforceable, the right to placement in the least restrictive environment, that damages cases and other rights as well were enforceable.

I do not mean to sound cruel, because, if anything, we are fighting from the inside for our children. What we are asking is that, when you look at the rights that you create, that carte blanche, you

do not determine that every element of the State plan, some of which you did not believe were enforceable, are to be enforced.

The financial burden on the States will be extraordinary if you determine that every single right under title IV-E is enforceable, or under title IV-B is enforceable.

In Florida, for example, in the case of *M.E.* v. *Chiles,* the plaintiffs have used the provisions of title IV-D to try to argue the right to an adequate placement in the least restrictive environment and to adequate services. And we have estimated that, in general revenue, the State of Florida will have to spend $47 million, after deducting the Federal financial participation, if the plaintiffs have everything that they want.

We would ask that you consider that, in looking at a right and expanding a right, that it is necessary for you, there is a Federal/State partnership to consider as well. Returning to the pre-*Suter* environment, there are problems with the amendment. It says, "any service or benefit." It does not say, just the ones that existed prior to the *Suter* decision. These are regardless of Congressional intent.

Child welfare services are capped; attorneys' fees in individual cases can be draining. And it is the State court where you said that these cases should be heard in the first place. And the issue of sovereignty is at stake.

Finally, I would say to you that legislation like S. 4 amd H.R. 3603, are moving in the right direction. We want to see these rights, but we also want to see programs. We need rights and programs, not just empty rights. Thank you very much.

Senator MOYNIHAN. We thank you, sir.

[The prepared statement of Mr. Talenfeld appears in the appendix.]

Senator MOYNIHAN. Senator Riegle, would you like to make some opening remarks? We are just halfway through our panel.

OPENING STATEMENT OF HON. DONALD W. RIEGLE, JR., A U.S. SENATOR FROM MICHIGAN

Senator RIEGLE. I thank the Chairman very much. And, as always, his graciousness is manifest. I want to thank you for holding this hearing today and for giving me the opportunity to participate in the hearing. This is a matter of keen interest to me, and you are very kind to conduct this hearing.

I think this case, *Suter* v. *Artist M.,* reflects a certain insensitivity of the Supreme Court to the needs of some of the most vulnerable members of our society.

And, in effect, they have really kind of shut the door to low-income children in State custody who are denied the services called for in a State plan mandated by the Adoption Assistance and Child Welfare Program of the Social Security Act.

And I can remember the time—I think almost everyone here can—when the Supreme Court was really the place that you could finally hope to get a remedy of justice if it failed at every other point. So, it is troubling in that respect.

I think the court here has dealt a devastating blow to thousands of low-income children who are potentially being denied benefits and services that Congress intended for them to receive. But, what

is troubling now even more to me, is that the *Suter* holding is being used to dismiss lawsuits in other Social Security Act programs that have nothing to do with child welfare.

For example, there was a recent Court of Appeals case where *Suter* was used to dismiss an AFDC case—so we are starting to see this, I think, sort of expand out. I think the people who need our social welfare programs have to be able to have their rights protected under the system.

I think we have an important and necessary assignment here to see that that is done with respect to curing this problem. I know that we need reforms in a lot of these programs. I know that many of the difficulties the States have been having in running these programs has been caused by a lack of funding, so I am very sympathetic to the States in that regard, and there is really no excuse for why our National priorities are so far off-line in terms of really meeting our pressing human needs. And that is something that has got to be corrected a different way, and I am hopeful that, on November 3rd, we will take a big step in that direction.

I very much want to work with all of the groups that also have a concern in this area. But, until there is a solution, I do not think we can leave the people in these programs without any way to protect their interests.

So, I have appreciated what I have already heard of our witnesses, and I look forward to hearing from the rest. I would like to find an answer here that can be made to work. We need one. Again, I am very much in your debt for your leadership today on this issue.

Senator MOYNIHAN. Thank you, Senator. We are going to have the two States in the middle of the sequence, and Mr. Chemerinsky and Mr. Weill on either end. Ms. Tchen, we welcome you to this committee. I believe this is the first time you have appeared.

Ms. TCHEN. Yes, it is, Senator.

Senator MOYNIHAN. I observe that you are representing the State of Illinois, but you are with the firm of Skadden and Arps on Wacker Drive, a New York City law firm. I just had lunch with Chester Straub, whom I am sure you know, from New York. We welcome you. Please proceed.

STATEMENT OF CHRISTINA M. TCHEN, CHICAGO, IL, ON BEHALF OF THE STATE OF ILLINOIS

Ms. TCHEN. Thank you, Senator Moynihan and Senator Riegle. My name is Christina Tchen. I am a partner at Skadden, Arps, Slate, Meagher & Flom in Chicago. I am also a Special Assistant Attorney General of Illinois, appointed for the last 4 years to represent the Department of Children and Family Services, which is our State Child Welfare Agency in Illinois, in a series of eight State and Federal class-actions that have been brought during the last 4 years against DCFS.

These include six actions in Federal court alleging various violations of the Adoption Assistance Act, title IV-E, and the Federal Constitution.

Of those six, the other five, other than *Artist M.*, have all been settled or are in the process of being settled by way of consent decrees. *Artist M.* is the only case that we did not choose to settle.

We took it to the Supreme Court, and I am the person who argued it before the court.

Senator MOYNIHAN. Would you help me? Forgive my ignorance. You argued the case in the court, in this Illinois case.

Ms. TCHEN. Yes, I did.

Senator MOYNIHAN. The record should have that clear.

Ms. TCHEN. I am sorry. I meant to make that clear.

Senator MOYNIHAN. Forgive me for not knowing.

Ms. TCHEN. Senator, thank you. Yes, I did. I represented the State of Illinois.

Senator MOYNIHAN. All the more is the distinction of having you here today.

Ms. TCHEN. Thank you. I represented the State in the preliminary injunction hearing in 1989, before the Seventh Circuit in 1990, and last December, before the Supreme Court. The reason that we chose to appeal—and it is significant; this is the only case we did choose to appeal.

As Mr. Talenfeld said, we are very concerned about the state of Child Welfare Services in Illinois as well, and we have entered into a sweeping consent decree with the ACLU in another case, *B.H.* v. *Suter*, in order to effect reforms in the child welfare system. So, this is not a situation in which the State is simply trying to get out of Federal responsibilities or obligations that are clear.

The problem we had with the *Artist M.* case was that the reasonable efforts clause at issue there, Section 671 (a)(15), was anything but clear. Respectfully, Senator Moynihan, unlike the examples that you cited at our opening of specific monetary benefits that might be set by Congress or specific levels of AFDC benefits or unemployment benefits, this was not a monetary calculation of benefits.

This was a clause that said nothing more than, in each case, reasonable efforts must be made to keep abused and neglected children home with their parents or return them home to their parents, and that was it. There was no other definition anywhere in the statute, there was no definition in the implementing regulations from the secretary.

In fact, what the secretary promulgated were regulations that gave great discretion to the States to make choices in this very difficult area of services to abused and neglected children about what would constitute reasonable efforts.

Nonetheless, the District Court, despite the fact that there was no definition, held that there was a right to reasonable efforts, and, in this particular case, the State had violated that right by failing to assign caseworkers promptly to the plaintiffs' cases in Cook County. If the committee is interested in the particular background, we had a problem with caseworker assignment. We had been in the process of putting together a remedial plan during the course of the year while the preliminary injunction was pending.

The department had, in fact, made substantial progress towards resolving the case assignment problem. However, under the rubric of the reasonable efforts clause, the District Court found that we had not made a good enough improvement and that the efforts were not reasonable. It therefore issued an injunction that required

us, across the board, in each and every case, to assign a caseworker within three working days.

We appealed, to both the Seventh Circuit, which affirmed the preliminary injunction in a two to one decision, and we further appealed to the Supreme Court, I think, for two particular reasons that are of interest to this committee. The first was that we believed that the decisions below were, in fact, not consistent with the precedent that had been established since *Maine* v. *Thiboutot* by the Supreme Court.

And that is, in order to infer the existence of a Federal right that may be individually enforced in Federal court by plaintiffs in the case of a Federal spending clause statute, which the Social Security Act is, the court has said, since *Pennhurst* in 1981, that these Federal/State spending clause statutes are in the form of a contract between Congress and the States, and that, if Congress intends to create a Federal right that is going to be imposed on the States, that it must do so clearly and it must define those clearly so that the States understand when they accept Federal funds what the bargain is that they are in; what is the contract, and what are its terms that they will be held to.

And, further, in the cases since *Pennhurst* in *Wilder* and *Wright* and *Golden State Transit,* the court has fleshed out a test for determining on a case by case, provision by provision basis, as the cases arise, whether a Federal right was created.

And the test included consideration of whether the statute was intended to benefit the plaintiffs, whether it was written in mandatory terms, and whether it was too vague and too amorphous, however, to create a Federal right.

And then, in another prong, if it created a Federal right, it might, nonetheless, bar access to Federal courts if Congress had set forth an alternative remedial scheme to enforce the statute.

Here, we only challenged the vagueness aspect of the reasonable efforts clause. We conceded that it was mandatory; we conceded that it was there to benefit the children. However, we simply said it was too vague. Something that just says "reasonable efforts" is too vague for us or the courts to understand what kinds of services we are talking about and what kinds of obligations are to be imposed.

And, indeed, under that case by case analysis, this *Pennhurst* test, prior to the Seventh Circuit decision in our case, the courts of the Northern District of Illinois were evenly split as to whether the reasonable efforts clause created a Federal right.

So, respectfully to Professor Chemerinsky, it was not clear. And this split was scattered throughout the country as well. There was no clarity was to what rights, in fact, were created under the Adoption Assistance Act, or not under a case by case analysis.

Second, with respect to the reasonable efforts clause, there was real danger, we felt, in a Federal right to reasonable efforts. In the words of the dissent in the Seventh Circuit, there was the potential for an avalanche of cases of individuals who were unhappy with the result in their State Juvenile Court actions on whether they have received services or benefits coming to Federal court.

We, in fact, had such a case in Illinois in which three individual parents sued in Federal court and got individualized injunctions and determinations around cash assistance and housing.

Third, the avalanche of litigation will take a different form as well; not just individual actions, but, I think as Mr. Talenfeld referred to, class actions of a whole different nature. Peeling off one part of the child welfare system after another in piecemeal litigation and holding it up to this notion of, is that reasonable efforts or not.

Senator MOYNIHAN. This is not the Supreme Court. We do not get up and walk out.

Ms. TCHEN. Do not bring out the hook at the red light. Thank you. We had that happen in Illinois, as well. I mean, I currently have still got six different pieces of a class action. In one case, I have parental visitation being litigated; in yet another case, sibling visitation being litigated; in yet another case, the adequacy of foster care placements; in yet another case, cash assistance and housing; in yet another case, the adequacy of permanency hearings in Juvenile Court; all of these, raising reasonable efforts as the basis or one of the bases for their lawsuits.

And, again, as the dissent said in the Seventh Circuit, this would truly make the Federal courts the crisis administrators of child welfare. And, finally, I always want to remind, the reasonable efforts we are talking about are reasonable efforts to return abused and neglected children to their abusive and neglectful parents, and we really do not know very much.

We have been doing this now for a lot of years and we really do not know very much about what works and what does not work to keep children safe in these environments. We want to work towards that, and Illinois was committed to doing that.

We had a $20 million program we implemented in the last 3 years to do family prevention and family reunification services. But even the results from that $20 million investment is very sketchy.

We found, in fact, the control group had lower placement rates that did not receive services than the group that did receive the services. So, we do not know very much about that. The irony of the reasonable efforts clause——

Senator MOYNIHAN. Wait. The control group had lower placement?

Ms. TCHEN. That is right. The control group that did not receive services. I am not a statistician; I do not do that. But the $20 million——

Senator MOYNIHAN. Were you trying to increase services?

Ms. TCHEN. No. We were trying to reduce placements—keep children out of foster care placements. We were providing them services——

Senator MOYNIHAN. Oh. So that your control group had fewer placements, then you had a negative result.

Ms. TCHEN. That is right. That is right. What that underscores just is simply my point: we do not know a lot. It is very difficult to create a Federal right here when we do not even know what works to keep children at home or return them home.

And the irony of the reasonable efforts clause, as it has been used, is to force the allocation of scarce social services, in the form

of things like drug treatment services and cash assistance, and allocate them to the worst parents, the abusive and neglectful ones, as opposed to the struggling and yet caring parents who might not abuse their children, but may have need of those services as well.

I want to, just briefly, Senator, touch on the Supreme Court decision and in the *Suter* amendment. The Supreme Court decision, in its basic holding, I believe, is consistent with the *Pennhurst* approach, although it does not explicitly recite the catechism out of *Wilder, Wright,* and *Golden State.* We were only focused on the third prong of the *Pennhurst* test, which is whether the statute was vague or not. And that is recognized in the Chief Justice's opinion.

And he, again, as in the analysis laid out in *Wilder,* goes through the statutory structure, the legislative history, and the regulatory framework to conclude that the reasonable efforts clause does not unambiguously afford a right. And he was only ruling on the reasonable efforts clause, not on the Adoption Assistance Act as a whole.

And I recognize he does have very broad language in his opinion, which is akin to the approach he took in the *Wilder* dissent, which is, in the case of a State plan requirement, which Section 671(a) is, that State plan requirements should not just simply provide a right to the existence of a plan and the submission of a conforming plan and not a substantive right to the individual provisions below.

However, I do not think that that is the holding of the case. And, in fact, the holding of the case and the way we argued it before the Supreme Court was simply by applying, consistent with the prior precedent on the *Pennhurst* test, that, nonetheless, the reasonable efforts clause failed the *Pennhurst* test as to whether a Federal right was created.

Now, understanding the problem——

Senator MOYNIHAN. I think we had better just leave it there for the moment. We will come back.

Ms. TCHEN. All right.

Senator MOYNIHAN. And obviously you have prevailed.

[The prepared statement of Ms. Tchen appears in the appendix.]

Senator MOYNIHAN. Mr. Weill, on behalf of the Children's Defense Fund. You are well and favorably known to our committee. We welcome you back, sir.

STATEMENT OF JAMES D. WEILL, GENERAL COUNSEL, CHILDREN'S DEFENSE FUND, WASHINGTON, DC

Mr. WEILL. Thank you very much, Mr. Chairman, and Senator Durenberger. We greatly appreciate the opportunity to testify today on behalf of low-income children and other vulnerable Americans threatened with serious harm by the court's decision in *Suter*, and not just in the Title IV-E Child Welfare Program, but equally in AFDC, Medicaid, and other programs under the Act.

Our written testimony is accompanied by two letters that support restoration of the pre-*Suter* law. One, is from Elliot Richardson, former Secretary of HEW, and a number of other child welfare experts, and the other comes from over 50 organizations that represent the elderly, disabled, women's, religious, and other groups.

Senator MOYNIHAN. Do we have that letter, sir?

Mr. WEILL. Yes. It should be attached to our written testimony.

Senator MOYNIHAN. All right. May I just interrupt to say that the National Governors' Association has written us, and I would like to put all of these letters in the appendix to our hearing.

[The letters appear in the appendix.]

Mr. WEILL. Thank you. There is one other document that we would submit for the record that also is included with our written testimony, which is a memo responding to certain claims that the States have been making on the Hill. But we are happy to have the NGA letter, as well as our three documents, entered into the record.

Senator MOYNIHAN. Yes. We are very happy to do that.

[The memo appears in the appendix.]

Mr. WEILL. The Supreme Court's ruling in *Suter* totally upset the delicate balance that previously existed between the Federal Government, the States, and beneficiaries in the key Federal/State programs under the Finance Committee's jurisdiction.

We are seeking to restore, but not to alter that balance, through legislation that would reaffirm and restore the right to sue for beneficiaries of AFDC, Medicaid, foster care, and similarly structured Social Security Act State plan programs. We do not seek to reverse the other prong of *Suter*, that the reasonable efforts language of the foster care title is too indefinite to enforce.

I want to re-emphasize that, in light of the fact that Mr. Talenfeld and Ms. Tchen's testimony focused so much on the reasonable efforts issue. As the House legislative history says, the provision does not alter the rules of statutory construction that the courts used prior to *Suter*. The provision does not alter the finding in *Suter* that the reasonable efforts provision, without further direction, is too vague to be enforceable in such an action.

What we do seek is legislation that will overturn the part of the *Suter* opinion which says that beneficiaries of these programs cannot ever sue to remedy any illegal State policy or practice, no matter how crystal clear the statute is, so long as the State's paper plan is in compliance.

According to the Supreme Court, the State just has to have that paper plan, but owes no obligation to beneficiaries to follow Federal law in practice. This part of the *Suter* decision not only exalts form over substance, but wholly precludes the courts from ever reaching the substance. It ignores 25 years of precedent, and is contrary to the bedrock principle of American law and common sense that, in the long-run——

Senator MOYNIHAN. Could you help a non-lawyer? What principle?

Mr. WEILL. I said the basic principle of American law and of common sense that government agencies, as well as society as a whole, and beneficiaries, are better off if there is judicial review of those agencies' actions.

Senator MOYNIHAN. You did say the better off principle.

Mr. WEILL. The bedrock principle.

Senator MOYNIHAN. All right. Fine.

Mr. WEILL. *Suter* leaves States virtually unconstrained in their ability to harm beneficiaries by ignoring the mandates of Federal law. Those who will suffer are those who can least afford the loss of any accountability from the States: the low-income elderly, dis-

abled, and child beneficiaries of these programs. It is they who will see benefits, services and procedural protections erode if this legislation is not passed.

When Congress says, in no uncertain terms, that States must provide transitional child care to former AFDC recipients, or provide paternity determination services to all children born out of wedlock, or provide health screenings for Medicaid-eligible children, or provide Medicaid to poor, pregnant women, or subtract work expenses from countable income, States would be——

Senator MOYNIHAN. Mr. Weill, where are you on your testimony?

Mr. WEILL. I am sorry——

Senator MOYNIHAN. You are doing a very nice job. Just a page number there.

Mr. WEILL. Well, I am making an analogous point in the middle of the testimony where we talk about how these other programs, other than child welfare, are affected by the State plan language.

Senator MOYNIHAN. Right. Do you just have a page number?

Mr. WEILL. On pages three, four, and five.

Senator MOYNIHAN. Three, four, and five. Good. Please continue.

Mr. WEILL. In all of these instances, where there is no dispute that Congress has imposed mandatory obligations on the States, States will be free to take Federal funds and disregard these laws. This is not speculation. These are the types of past State practices that Federal courts stopped under pre-*Suter* law.

Alternative remedies—HHS enforcement of the statute, State administrative hearings, State judicial review—often are not available to beneficiaries at all, and, over a period of decades, have proven wholly inadequate in protecting their rights to remedy illegal State program administration. This is a point that was recognized repeatedly by the Supreme Court in cases prior to *Suter*.

The States argue here—I am on pages 7, 8, 9, and 10 of my written testimony, Mr. Chairman—and elsewhere that the legislation is not needed. But those arguments are belied by the positions that they are taking in courts around the country, seeking to use the State plan language of the *Suter* decision to dismiss pending challenges under Medicaid, AFDC, Child Support Enforcement, and title IV-B as well as IV-E programs.

As you can see from the quotes from State briefs on pages eight and nine of our written testimony, including briefs from both Florida and Illinois, the States are already arguing that *Suter* closes the courthouse doors on beneficiaries in all of these programs.

The States are telling the courts that they only have to submit a plan to the Secretary, and, that under *Suter*, the courts have no right to determine if the law is being followed in actual practice, no right to protect beneficiaries against actual State violations of Federal statutes.

We believe the Congress intended more in these multi-billion dollar programs than that the States get the paper correct, send it to HHS, and then be free to run the programs as they see fit.

Finally, Ms. Tchen has suggested that she believes that the language of the House amendment is just too broad. We do not agree that the language is too broad. But ever since we first approached State representatives in April with draft language, we have indicated—If I may have about 40 seconds to finish up.

Senator MOYNIHAN. Equal time with Ms. Tchen over there.

Mr. WEILL. We have indicated a desire to discuss language with them and tried to get a response, and there has been none. We still are willing and open to agreeing on language and open to appropriate changes. If Ms. Tchen, as suggested today, wants to write in a clause saying the "reasonable efforts" clause is not enforceable as currently written, we are more than willing to sit down and talk about that.

Our concern is, however, that the States' claim that they are primarily concerned about whether the House language is precisely tailored enough to overturn *Suter* and do no more, is, in fact, a smoke screen, a delaying action, because what they really want is to leave *Suter*, in its broadest implications, in effect.

That is the message of Mr. Talenfeld's testimony, that simply said: Free us of litigation, make our actions unreviewable, and do not return to the pre-*Suter* "environment."

We do not underestimate the difficulty of running these programs and these agencies at the State level. We know how difficult it is. But that argues in favor of the potential of outside review, not against it. Indeed, the consent decrees that Ms. Tchen referred to on other child welfare issues never would have happened if *Suter* had been the law, and never will happen again if this bill is not passed.

Our bottom line is that the ability to sue to enforce the mandates of Federal law should be restored immediately. Children and people who are older and disabled, the beneficiaries of these programs, need the restoration to occur this year as part of the Urban Aid Bill.

Senator MOYNIHAN. We thank you very much, again, Mr. Weill, as always, for your very thoughtful, and, in this case, collegial, testimony.

[The prepared statement of Mr. Weill appears in the appendix.]

Senator MOYNIHAN. I would just like, before turning to Senator Durenberger, just so the record will show and our panelists will know, if they do not, that you mentioned the number of persons writing on behalf of the Children's Defense Fund position. We have something like 38 Governors who have written us from the Governors' Association asking that we not proceed with H.R. 11. Senator Durenberger.

Senator DURENBERGER. Well, Mr. Chairman, I am better informed now than I was a half an hour ago.

Senator MOYNIHAN. I am better informed, but I am more confused. [Laughter.]

Senator DURENBERGER. I was about to get to that, but I was going to do that by an analogy of some kind. I was thinking, you are probably like I, a reader, at least periodically, of Andrew Greeley.

Senator MOYNIHAN. Yes, I am.

Senator DURENBERGER. You know Father Blackie, now Bishop Blackie, has these occasional periods of time when he can almost feel the mystery is being resolved but not quite, and he goes from one experience to the other and he gets very close, and then he misses it and so forth. That is sort of the way I have been over the last 30 minutes.

But that is not unusual when we are dealing with implementation of Federal legislation or Federal policy. What is difficult for me here, I think, is that we have had Federal and State child welfare policy for a long time, and this is one of the fields, as the Chairman knows only so well, that there is a lot of history in child welfare policy.

So, the difficulty that I have or that I am presented with, particularly after I try to understand the language in this long sentence which begins with a negative, this long sentence in H.R. 11 which is designed to overturn *Suter*, is that we ought to be able to do better. That is sort of the feeling that I get from each of the panelists.

Senator MOYNIHAN. I do not know why you are so unreasonable. It is perfectly clear to me. It says, "Each individual shall have the right not to be denied." [Laughter.]

Senator DURENBERGER. That is what I meant.

Senator MOYNIHAN. God have mercy. Strike that from the record.

Senator DURENBERGER. I wonder. It sounds as though each of you has been at this for awhile, and my first question, as I look at some of the comments from the Governors, from our dear friend, Elliott Richardson, and others, is to try to sharpen the focus between the cases in which the policy is fairly clear and the applicability of the policy to a specific case is fairly clear, as in some of the cases cited by Mr. Weill, and the deliberate selection by the State of Illinois of this particular case which has us dealing with the issue of reasonable effort.

And Ms. Tchen has already talked about this. Maybe Mr. Weill or Professor Chemerinsky can help me, from your side, just focus on these reasonable effort cases and tell us why, by adopting this language, and, in effect, overturning *Suter*, we are going to make the job of the Governors and all the rest of us a lot simpler in these reasonable efforts cases.

Mr. WEILL. Let me try and answer that. There are really two prongs to the Supreme Court's decision in *Suter*. The first says that the reasonable efforts clause of the statute is too vague to enforce; there is not enough specificity for a Federal court to enforce it.

That part of the opinion is consistent with longstanding principles of statutory construction, as well as a case that Ms. Tchen referred to, the *Pennhurst* case, which simply says, "if it is too vague to impose a binding obligation, the courts will not enforce it."

Nothing in this provision changes that, as the House history says, and if there are other similarly vague statutes—as there are all throughout the titles of the Social Security Act, a provision here, or an optional provision there—all those things will remain vague, will remain optional, will remain unenforced. That prong of the opinion is not being attacked. It is not being changed by the House bill.

Senator DURENBERGER. All right.

Mr. WEILL. And the Governors will no longer have to deal with reasonable efforts litigation.

But there are also many provisions throughout all of these titles that are clearly mandatory: All applications have to be processed within a certain time limit, or whatever.

Senator DURENBERGER. All right.

Mr. WEILL. In the second prong of the court's decision, a separate piece of it, the Court said that our holding that we are not going to enforce reasonable efforts is also valid because, as we look at the statute, when the statute says, "a State plan shall provide that," and then lays out all the requirements, all that requires is a State plan that provides that.

Senator DURENBERGER. Right.

Mr. WEILL. And the opinion says—and Illinois, and Florida, and other States are saying to the lower courts—that the courts can no longer look past the State plan on anything, no matter how clear it is, to actually enforce the clearest requirement in the Social Security Act.

You can pick out whatever provision in the act you think is clearest, and the States will tell you in court that that is no longer enforceable under *Suter*, in practice. The State only has to have a paper State plan. It is that second prong that the House is reversing in this bill.

Senator DURENBERGER. All right. Now, can we get a response to that?

Senator MOYNIHAN. Mr. Talenfeld, perhaps?

Ms. TCHEN. If I might.

Mr. TALENFELD. Ladies first.

Ms. TCHEN. I am the long-winded one here today. But, with respect to the *Suter* amendment, specifically, Senator Durenberger, I have the same problem. I mean, I just do not see what Mr. Weill gets there that preserves some piece of that first prong of the *Suter* decision, or, even more than that, the entire decade-long precedent of a case by case analysis of each of the various provisions under the *Pennhurst* test, applying the multi-prong test on whether that is specific enough, and mandatory, and does it benefit the plaintiffs. What this language says, is each individual has the right not to be denied any service or benefit in any of the plan provisions.

And the plan provisions range from things as vague as the reasonable efforts clause in title IV-E, as vague as many provisions in title XIX talking about simplicity of administration in the provision of benefits and wages, and the employment of low-income persons in providing medical services.

That, to me, basically short-circuits the test. It actually overturns the prior precedent, the language of the amendment itself, and says you do not have to do the test to say, is this specific enough, is this vague or mandatory. Because Congress has now said that every provision creates a right.

With one fell swoop, all of the plan provisions, even ones that previously had been held not to be rights, will now be rights. They have asked me to rely on the legislative history, and I will say, especially coming from Illinois in the Seventh Circuit and also in the Supreme Court, that legislative history is a weak defense, at best, in the face of very plain actual statutory language. I fear for what will happen if this particular amendment is adopted. I think what will happen is just a torrent of new litigation piled on top of the existing rights. It is not a return to pre-*Suter* law, it is, in fact, wiping out the pre-*Suter* case by case analysis.

Senator DURENBERGER. It sounds to me as though we are debating the House amendment language. And each of them, including

some of the people that have written us, have different interpretations of what that language will do.

Senator MOYNIHAN. Well, can I say that I am not one such person. I have not the slightest idea what this language means. [Laughter.]

Senator MOYNIHAN. It says, "Federal funds are paid under a title of this act that includes plan requirements to have a plan that meets such requirements." Now, that is a caricature. I mean, that is embarrassing. Mr. Weill, do not tell us that you had anything to do with drafting this.

Mr. WEILL. Senator, we did not write this.

Senator MOYNIHAN. Good. Say it again, sir.

Mr. WEILL. I think it is explicable, though.

Senator MOYNIHAN. Well, it is not. May I just say, that language may not be given to a citizen with any expectation that the citizen would understand what his/her rights are in that situation. Now, we cannot keep drafting like this.

It is one thing when we are drafting technical data and making cross references under Section F and so forth, but this is meant to tell a citizen, the mother of an abused child, what her rights are. It is inexplicable. If it is that badly written, it cannot be very well thought out. Now, Mr. Chemerinsky, I ask you to rebut that. Feel free to do so vigorously and robustly, if you would like.

Professor CHEMERINSKY. Thank you, Senator. The language is, admittedly, cumbersome. But I think what the House language does say, is the fact that a requirement is found in the State plan section of the act does not render it unenforceable just because it is in the State plan section of the act. This language does not say that all——

Senator MOYNIHAN. Then why can it not just put it like that. That was a sentence. Do you realize you just spoke a sentence?

Professor CHEMERINSKY. I think that that is what the sentence is trying to convey and the legislative history makes that clear.

Senator MOYNIHAN. In my youth I marked papers, and I never gave credit for "what I meant to say was."

Professor CHEMERINSKY. But what is important, I think, is——

Senator MOYNIHAN. And statutes are not to come under the undergraduate position, well, I really meant to say it that way, you see. You are right, but I did not say it that way. But you understand what I meant, do you not? Well, the answer is, no, you did not say it.

Professor CHEMERINSKY. I think the key, Senator, is that parts of the Social Security Act that create rights should not be unenforceable just because they are in parts of the law that require State plans. The House language does not, in any way, make parts of the Social Security Act that were unenforceable before *Suter* enforceable. It does not create any new rights.

Senator MOYNIHAN. Well, your colleague, Ms. Tchen, thinks otherwise. I am going to ask my colleague, Senator Durenberger, do you not have a feeling that all four of these learned attorneys have a sense that *Suter* is not quite what we want, but we do not quite want what we are being presented by the House? I get a feeling that if we ask them to collaborate on some alternative they might do better than we have now. Is that your impression?

Senator DURENBERGER. Well, my impression is that is what Mr. Weill was saying earlier, that they have been, since April, trying to——

Mr. WEILL. Right. We have been sitting waiting for somebody to talk to for 5 months, Senator.

Senator DURENBERGER. Yes.

Senator MOYNIHAN. All right. Now, let me just say here, make a further point and see whether any of you thinks this is relevant. We are dealing here with an area of the law which is singularly prone to court action, which is adoption, separation, maintenance.

If your ordinary citizen encounters the courts, they will do so more than anything, I should think, apart from misdemeanors, in cases of divorce, of separation, of adoption, of custody, of support. Is that not so, I ask the panel? Here is a situation where, when people have a problem, they think of going to court. So, it is not wrong to say you might have an explosion of litigation. It need not be an explosion, because this is a litigious area of social relations. Is that a fair category?

Mr. WEILL. Well, we would expect that a properly drafted restoration of the right to sue would not affect the amount of——

Senator MOYNIHAN. Properly drafted. So, we are not wrong to be careful here, because the way these matters are resolved in our society is you go to a court.

Mr. WEILL. Right.

Senator MOYNIHAN. And it seems a neutral venue.

Mr. WEILL. Right. And it would not affect the amount of litigation at all. There would not be an explosion, because it would simply restore matters to where they were before March.

Senator MOYNIHAN. We do not want to make it harder for people, do we?

Mr. WEILL. Right.

Senator MOYNIHAN. And I do not want to start out with the assumption that States do not mean well in this matter. I think all of the States are being overwhelmed by this problem and these are not problems they have created.

Ms. TCHEN. I would add, Senator, not only is it an area that is prone to litigation, it is an area that is uniquely not suited for Federal court as distinct from State courts in many instances.

Senator MOYNIHAN. Well, I would surely think the further you get away from the corner block, the block you live on, the more difficult it is to get these kinds of Solomonic judgments made. I am sorry. I did not mean to interrupt.

Senator DURENBERGER. Well, Mr. Chairman, I think, as I am looking back over a little of the history, from Pennhurst on, in particular, it seems to me that if the court is not asking us to deal with this issue in *Suter*, the Chairman of this committee is. I think that is why you were asked to hold this hearing.

Senator MOYNIHAN. Yes. I should have made this clear. Senator Bentsen asked that this hearing be held.

Senator DURENBERGER. And I think that it is, perhaps, imperative on us, particularly on you, you may disclaim the mind of a lawyer as applied to that kind of language, but you certainly have the heart of a person who can find an answer to this problem. I think we ought to try to resolve this issue, or to enlist the aid of these

people to do it. I agree with you, that I cannot buy this as a solution.

As you were suggesting that they all put their heads together, and I was suggesting that one side had tried since April, I could see body language coming from the panel, saying that maybe that was not totally true. There are plenty of people in this room, apparently, who are interested in coming up with a solution. Maybe we ought to try to facilitate that.

Senator MOYNIHAN. I wonder. We have a vote, and we are going to have to close down. The first bell has gone off. I wonder if we could ask. Obviously, you are all officers of the court; you are not officers of this committee. But I wonder if you could constitute yourselves for the rest of the day until you have to make your respective planes back, Mr. Weill, if you would be prepared to Chair an informal committee of your colleagues here to see if you can—and perhaps you cannot—give us some general advice about how we should proceed. The Chairman has asked us to do this.

Now, when 39 Governors, or something such, ask us to please do not do this, then we have to listen. They make a very important claim on us. Two Governors have sent representatives. The very learned Professor Chemerinsky, from California, and you, sir, are here on the spot.

Would you have a chance to sit down and talk with yourselves? Would that be agreeable to you? The back room is available to you and these learned colleagues of ours. Could you meet and see what you have to say?

Mr. WEILL. We would be delighted to, Senator.

Senator MOYNIHAN. All right. There is the bell. We are going to have to close this hearing for now. We will return if we have to. We are under a great deal of pressure. We will be taking this bill up on the Senate Floor next Wednesday, and the Congress is not going to be here much longer. You know what we want. I want to thank you very much for your testimony. We will put our senior sociologist in charge. You may convene in the back room. Thank you very much. This hearing is closed. We thank our audience. We thank, most particularly, our panel.

[The prepared statement of Senator Rockefeller appears in the appendix.]

[Whereupon, the hearing was concluded at 3:05 p.m.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED

PREPARED STATEMENT OF ERWIN CHEMERINSKY

I am a law professor at the University of Southern California Law Center and specialize in issues concerning federal court jurisdiction. In addition to many articles on the subject, I am the author of Federal Jurisdiction (Little, Brown & Co. 1989), which examines the law concerning implied rights of action in federal court and the use of 42 U.S.C. §1983 to enforce federal laws. Although I am not an expert on the details of the Social Security Act, I am very familiar with the law concerning the ability of the courts to enforce its provisions.

This morning, I wish to make two points. First, the Supreme Court's recent decision in Suter v. Artist M., 112 S.Ct. 1360 (1992), will have a devastating effect on federal and state court litigation to ensure State compliance with the Social Security Act. Second, statutory amendment of the Act, such as in §7104 of H.R. 11, would restore federal courts to their rightful place of enforcing the law without enlarging the scope of the Act or imposing any new burdens on State governments.

I. The Need for Legislative Action to Overturn Suter v. Artist M. and Restore Judicial Review

A. Judicial Enforcement of the Social Security Act

Long ago, the Supreme Court recognized that laws have little meaning unless they are enforceable. This reasoning, which was the basis for Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), also frequently has been applied to ensure judicial enforcement of federal statutes. For example, more than twenty years ago, in Rosado v. Wyman, 397 U.S. 397 (1970), the Supreme Court held that welfare recipients may sue to challenge alleged state violations of federal law. The Court explained that it is "peculiarly the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached." Id. at 422-23. In many other cases, both before and after Rosado, the Supreme Court recognized the need for judicial enforcement of the provisions of the Social Security Act. See, e.g., King v. Smith, 392 U.S. 309 (1968); Edelman v. Jordan, 415 U.S. 651 (1974); Wilder v. Virginia Hospital Association, 110 S.Ct. 2510 (1990).

In 1980, the Supreme Court held that individuals hurt by State or local government violations of the federal Social Security Act could bring suits in federal court pursuant to 42 U.S.C. §1983. In Maine v. Thiboutot, 448 U.S. 1 (1980), the Court said that §1983 authorizes suits when State or local

governments, or their officers, violate federal laws. Many federal laws do not expressly authorize judicial review and §1983 became an invaluable tool to enforce those statutes.

From Maine v. Thiboutot until 1992, the Supreme Court recognized only two narrow exceptions where §1983 could not be used to enforce federal statutes. First, §1983 is not available if Congress provides an alternative comprehensive enforcement mechanism that indicates a desire to preclude §1983 litigation. See, e.g., Middlesex County Sewage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981). In Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987), the Court explained that this is a limited exception and that §1983 litigation is permitted unless there is an "express provision or other specific evidence from the statute itself that Congress intended to foreclose [§1983 litigation]."

Second, §1983 cannot be used to enforce statutes which do not create substantive rights. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981). Just two years ago, in Wilder v. Virginia Hospital Association, 110 S.Ct. 2510 (1990), the Supreme Court declared that federal statutes create rights whenever "the provision in question was intended to benefit the putative plaintiff" and it creates a "binding obligation on the governmental unit." Id. at 2517.

Thus, under Maine v. Thiboutot and its progeny there was little doubt that §1983 could be used to ensure state compliance with those provisions of the Social Security Act that were designed to benefit individuals and which were mandatory by their terms. Maine v. Thiboutot itself was a suit to bring the State of Maine in accord with the federal law concerning the calculation of benefits for recipients under the Aid to Families with Dependent Children Program. Neither of the exceptions to Maine v. Thiboutot are applicable to most §1983 suits to enforce the Social Security Act. There is no comprehensive alternative enforcement scheme indicating a Congressional desire to preclude §1983 suits. Also, many sections of the Act are clearly designed to benefit individuals and create benefits or services that must be provided to those individuals.

Countless federal district courts and courts of appeals followed this reasoning and allowed §1983 suits to enforce various aspects of the Social Security Act which require that State governments create and enforce plans in compliance with federal law as a condition for receipt of federal funds. See, e.g., L.J. ex rel. Darr v. Massinga, 838 F.2d 118 (4th Cir. 1988); Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983); Norman v. Johnson, 739 F.Supp. 1182 (N.D.Ill. 1989). These courts recognized that no other mechanism exists to enforce the relevant provisions of the Act and that the law imposes duties on State governments which benefit specific individuals. Thus, this litigation has done nothing less than brought the rule of law to the administration of social welfare programs in this country. Such suits, among other things, have ensured the provision of cash and medical benefits that individual states denied to needy children, when Congress intended that such benefits be provided.

B. The Impact of Suter v. Artist M.

In March, 1992, in Suter v. Artist M., 112 S.Ct. 1360 (1992), the Supreme Court held that §1983 could not be used to enforce the State plan section of the Adoption Assistance and Child Welfare Act of 1980. Section 671 of that Act requires State governments to develop a plan for its federally funded child welfare programs, including a plan for assuring that

reasonable efforts will be made to prevent the placement of children in foster care. If placement is necessary, the State agency must have a plan for reasonable efforts to return the child to the home. The Adoption Assistance Act provides that State plans had to "be in effect in all" of a State's political subdivisions and "be mandatory upon them." 42 U.S.C. §671(a)(3).

Suter v. Artist M. was a class action law suit seeking injunctive and declaratory relief against the Illinois Department of Children and Family Services for its failure to make reasonable efforts to prevent removal of children from their homes and to facilitate reunification of families where removal had occurred. The Supreme Court held that §1983 could not be used to enforce the reasonable efforts clause of the plan section of the Adoption Assistance Act because of the second exception described above: the Act did not create an enforceable right.

In part, the Court focused on the vagueness of the "reasonable efforts" clause. The Court explained that unlike other laws which had used the term "reasonable" and had been deemed enforceable under §1983 (such as in Wilder v. Virginia Hospital Association), the Adoption Assistance Act did not provide "further statutory guidance . . . as to how 'reasonable efforts' are to be measured." 112 S.Ct. at 1368.

If this was all the Supreme Court did in Suter v. Artist M., it would be a lamentable decision because it ends successful judicial enforcement of an important federal statutory provision. The reasonable efforts clause was Congress' attempt to preserve families wherever possible. It was designed to assure that children not continue to be taken into foster care, away from their parents, unnecessarily. There is ample evidence of successful programs that can preserve troubled families. Although there might be some ambiguity inherent to a phrase like "reasonable efforts," courts had little difficulty in applying it, especially to egregious abuses present in many states.

However, the Supreme Court did much more in Suter than just to prevent judicial enforcement of this one provision of the Act. The Court indicated that federal laws which require State plans to be developed create only a requirement for the writing of approved State plans. Once the State has created a plan and it is approved, no §1983 litigation is allowed even if the plan is in total contravention to the federal statute or even if the State blatantly fails to comply with the plan. The Court said that "the Act does place a requirement on the States, but that requirement only goes so far as to ensure that the State have a plan approved by the Secretary." 112 S.Ct. at 1367. In footnote 10 the Court explained that a provision, §671(a)(9), which appears to require State government action against neglectful or abusive foster care providers, is "merely another feature of the state plan . . ., it does not afford a cause of action." 112 S.Ct. at 1368.

In other words, Suter v. Artist M. provides that federal courts cannot enforce federal statutes which mandate the development of State plans and impose requirements on their content. The Court explained that the only remedy to enforce such statutory provisions in the face of State government violations is for the Secretary of Health and Human Services to reduce or eliminate payments based on a finding that the State plan or the administration of the plan does not comply with federal law.

Suter v. Artist M. thus will have a devastating effect on judicial enforcement of these state plan sections of the Social Security Act. Much of the litigation to enforce the Social

Security Act's requirements -- including eligibility requirements, benefit levels, and notice and hearing requirements -- has come through §1983 suits. After Suter v. Artist M. none of these suits seemingly would be allowed because the state plans sections of the Act are deemed to create no enforceable right beyond the creation of a State plan. No longer can beneficiaries, primarily children and families, sue to enforce the Act's requirements concerning AFDC (section IV-A of the Act), child welfare (sections IV-B and IV-E), child support enforcement (section IV-D), and Medicaid (Title XIX).

Already Suter v. Artist M. has led to the dismissal of some law suits to enforce the Social Security Act and motions have been made to dismiss numerous cases throughout the country. See, e.g., Clifton v. Schafer, ___ F.2d ___ (7th Cir. July 16, 1992) (dismissal of a §1983 suit to enforce AFDC requirements in light of Suter v. Artist M.). Many state defendants have moved to dismiss cases based on Suter even where the cases include claims founded on clear, specific, non-vague provisions of the Act. For example, Timmy S. v. Stumbo, 916 F.2d 312 (6th Cir. 1990), involves a claim for administrative fair hearings as required by the state plan section of the Adoption Assistance Act and the defendants have moved to vacate based on Suter. Thus, these cases show that many states are seeking to persuade the courts that Suter does eliminate a cause of action for any "state plan" section of the Act. See, e.g., Baby Neal v. Casey (E.D. Pa.) (defendants have moved, based on Suter, to dismiss challenge to Pennsylvania child welfare system based on Suter); Sheila A. v. Finney (District Court of Shawnee County, Kansas) (defendants have moved, based on Suter, to dismiss challenge to Kansas child welfare system); B.H. v. Magnant (S.D. Ind.) (defendants have moved, based on Suter, to dismiss challenge to the Marion County, Indiana social welfare system); Washington State Coalition for the Homeless v. Department of Social and Health Services (Superior Court of Washington for King County) (defendants have moved to dismiss, based on Suter, challenge to failure of the State to provide shelter for homeless children and their parents); Brown v. Williams (Circuit Court for Dade County Florida) (defendants have moved to dismiss, based on Suter, suit concerning homeless families' right to housing as a family preservation/reunification service); Angela R. v. Clinton (Ark. 1991) (after proposed settlement was submitted to the district court for approval in a suit on behalf of abused and neglected children, defendants moved to dismiss, based on Suter).

Judicial enforcement of the Social Security Act is essential if Congress' will is to be implemented. The lack of judicial enforcement means that the Department of Health and Human Services could completely negate provisions of the Act by approving plans not in compliance with its terms. Moreover, even proper plans are meaningless if serious violations of their provisions are tolerated. Yet, without judicial enforcement there is no effective way to ensure State compliance.

In theory, the Department of Health and Human Services can cut off or reduce funds to non-complying States. In reality, though, such enforcement efforts are rare because federal officials are understandably reluctant to reduce or eliminate payments to the States. In the end, the cut off of funds, even temporarily, would seriously harm the program's beneficiaries. In fact, Congress has suspended the authority of the Secretary to cut off funds for violations of the child welfare statute. See Omnibus Budget Reconciliation Act of 1989, P.L. 101-239, §10406 (1989).

Moreover, there is no procedure by which program beneficiaries can obtain a federal investigation or enforcement proceeding for a State's failure to have a plan that meets the federal requirements or to administer the plan in accordance with the requirements. Only judicial enforcement can assure State plans that are in compliance with federal law and State administration which implements the plans. The tragic effect of Suter v. Artist M. is that countless children and their families, elderly persons, disabled persons, and others will be harmed by State noncompliance with the Social Security Act which could have been remedied by court actions.

II. The Proposed Statute Would Restore a Pre-existing Cause of Action

A simple statutory provision is all that is needed to overturn Suter v. Artist M. and ensure compliance with the Social Security Act. There needs to be an amendment to the Social Security Act which states that individuals have a right not to be denied benefits or services as a result of a State's failure to adopt a plan that meets federal requirements or a State's failure to administer such a plan in accordance with federal law.

Prior to Suter, some sections of the Act, whether contained in "state plan" sections or otherwise, were privately enforceable through §1983. The Social Security Act created the rights; §1983 gave individuals the ability to enforce those rights. Only those sections of the Act which met the test of Maine v. Thiboutot, 448 U.S. 1 (1980), Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987), and Wilder v. Virginia Hospital Association, 110 S.Ct. 2510 (1990), were enforceable.

After Suter, those rights previously thought to exist because they met the tests in these cases, but which are contained in "state plan" sections, would appear to no longer exist. The new provision would reinstate the pre-Suter rules. Any requirement of the Act, whether contained in a state plan section or not, would be enforceable to the extent that it was enforceable before Suter.

In other words, the new statutory provision makes it clear that the beneficiaries of State plans have an enforceable right to State compliance with plans that meet federal requirements. By clearly creating a statutory right, §1983 will be available as an enforcement mechanism. Suter's holding that the Act creates no rights beyond the creation of the plan will be overridden by statute.

The language in §7104 of H.R. 11 is admittedly cumbersome. However, it certainly serves the purpose of restoring judicial enforcement of the Social Security Act. The provision states that individuals have a right not to be denied any service or benefit required by federal laws that mandate the development of state plans as a condition for receipt of federal funds. Section 7104(a) provides that the right applies when a State receiving federal funds under the Act fails to have a plan that meets the requirement of the Act or fails to administer its plan in accordance with the requirements of the federal law.

What is most important is that the provision simply seeks to restore the judicial role to that which it was prior to the Supreme Court's decision in Suter v. Artist M. The courts again will have the power to enforce the Federal mandates of the State plan titles of the Social Security Act. The provision does not create any new duties for State governments nor give individuals

any additional rights to benefits or services. The legislative history to H.R. 11 clearly states that §7104 does not change any substantive requirements contained in the Social Security Act. Nor can the language in §7104 be construed as giving greater rights than existed before Suter.

Judicial enforcement of the provisions of state plan sections of the Social Security Act -- like judicial enforcement of all laws -- is essential to assure compliance with the law by both the Executive branch and state governments. When Congress enacts laws to benefit specific individuals, as it has done in the many provisions of the Social Security Act, it surely wants to make sure that its judgments and dictates are enforced. If state governments are violating the terms of federal laws, suits against them should be possible to provide a remedy and gain compliance. Allowing suits only against the federal government would not directly remedy the offending behavior and, at most, would lead to a cut off of funds.

There is little reason to fear adverse effects from such a change because the provision would return the law to what it was before March, 1992, when Suter v. Artist M. was decided. As explained earlier, at least since the Supreme Court's decision in Maine v. Thiboutot, §1983 has been used to enforce the Social Security Act. The proposed statutory provision would return litigants to this pre-Suter world and again allow judicial enforcement to ensure State compliance with Congressional mandates.

For example, there is no reason to fear that this provision will encourage a proliferation of litigation. Prior to Suter v. Artist M., there was no indication that litigation to enforce the State-plans provisions of the Social Security Act were unduly burdensome. Because the suits are usually class actions seeking broad based remedies, relatively few suits were filed before Suter under these programs. There is no reason to fear a large increase.

More importantly, the threat of litigation can help ensure that State plans and their administration are in compliance with federal law. Without a realistic enforcement mechanism, States often lack any incentive to comply with the dictates of federal law. The possibility of litigation creates an important check on State disregard of federal law.

Nor does the pre-Suter v. Artist M. experience justify concerns about suits against individual caseworkers. Some courts have found that some caseworkers have absolute immunity to suits for damages. See, e.g., Vosburg v. Department of Social Services, 884 F.2d 133 (4th Cir. 1989); Salyer v. Patrick, 874 F.2d 374 (6th Cir. 1989); Meyers v. Contra Costa County Dept. Social Serv., 812 F.2d 1154 (9th Cir. 1987). Other courts have found that caseworkers have qualified immunity to suits for damages. See, e.g., Snell v. Tunnel, 920 F.2d 673 (10th Cir. 1990); Babcock v. Taylor, 884 F.2d 497 (9th Cir. 1989); J.H.H. v. O'Hara, 878 F.2d 240 (8th Cir. 1989). Few courts are likely to approve suits for damages against individual workers where there is a disagreement about the course of action to be taken in an individual case or where the caseworker's failings were due to conditions beyond the control of the caseworker such as excessive caseloads or inadequate training.

For this reason, few cases have been brought against individual caseworkers and fewer still have been successful. Also for this reason, organizations of caseworkers, such as local and state National Association of Social Workers chapters and

unions, usually have been supportive of suits seeking to enforce mandatory requirements of the Act. Caseworkers, most of whom see themselves as advocates for the clients they serve, are among the most frustrated when a state ignores the clear, minimal mandates set by Congress for their clients. Because the litigation to enforce the Social Security Act is usually primarily addressed to systemic violations of the law and to the systemic impediments to compliance, many administrators admit that the litigation has been of benefit to the people they serve. For example, I have seen letters from state administrators Elias Cohen, Ruth Massings Douglas W. Nelson, and T. M. Jim Parham strongly supporting the proposed legislation to overturn the Suter decision.

There is also no reason to fear that this provision will allow applicants and beneficiaries to sue about aspects of the program, such as audit or quality control requirements, which are not directly related to their benefits. Section 7104 specifically creates a "right not to be denied any service or benefit." It is very unlikely that a court would be persuaded that audit or quality control requirements are "services" or "benefits" to individuals, as opposed to provisions regulating the funding stream between the federal and state governments.

Finally, the statute does not in any way change the law concerning judicial enforcement of vague provisions. Section 7104 only creates a right to enforce "requirements" in the Social Security Act. If a provision is vague and does not impose a clear obligation on the States, it cannot be a requirement. In Pennhurst v. Halderman, 451 U.S. 1 (1981), the Supreme Court held that Congress only can impose conditions on States receiving federal money if the federal law is clear as to what is required. A vague provision is not an enforceable requirement under §7104 or the Social Security Act.

In reality, most of the objections to §7104 are not directed at the content of that provision or at the desire to return to the pre-Suter law. The objections are to any judicial enforcement of the Social Security Act. But after more than 30 years of successful enforcement in the courts, it is simply too late to claim that judicial implementation is inappropriate or that it will doom the Social Security Act. Limiting judicial review, as Suter did, is the radical change in the law. The proposed bill simply seeks to restore the judicial role to what it has been for decades.

Conclusion

Numerous provisions of the Social Security Act mandate that State governments create and administer plans as a condition for receipt of federal funds. Invariably, the federal laws impose specific requirements on the States to assure proper use of the funds and especially to protect beneficiaries of the programs. Congress' goal in legislating these requirements undoubtedly is that they will be implemented to protect the most helpless and needy groups in society: abused and neglected children, the disabled, the elderly, and other beneficiaries under the Social Security Act.

But, in reality, compliance will be limited without the possibility of judicial enforcement. Court enforcement, especially via §1983 suits, was effective for many years before Suter v. Artist M. There were not serious complaints that the provisions of federal laws, like the Social Security Act, were too broad for States to implement. Nor was there evidence that litigation to ensure the compliance of State plans with federal law was unduly burdensome.

The proposed law would restore the power of courts to enforce federal law and assure that state plans are created and administered in accord with the Social Security Act. No more and no less is accomplished by the proposed provision. Yet, this change is essential to protect children and their families by assuring that courts will be there to enforce the law.

PREPARED STATEMENT OF SENATOR DAVE DURENBERGER

Mr. Chairman, I want to start by thanking you for holding this hearing today. Originally this hearing was supposed to have taken place before the August recess and it was pushed back not because of a lack of importance or interest in the subject, but because of other pressing business pending before the Finance Committee. As everyone knows, the period of time immediately prior to a recess, is an intense time for all of us up here, and I want to express my appreciation and congratulations to you for following through with the Finance Committee's commitment to hold hearings on this important matter.

I truly believe that there are no more important issues facing the Senate, than the challenges we face here on the Subcommittee on Social Security and Families. How this Subcommittee, the Senate as a whole, and our states and communities at home, deal with the multiple challenges of how to adequately help families in need, is crucial to the strength of this country.

Serving disadvantaged children and families in a time of severe budgetary constraints on both federal and state governments leads to some vexing public policy questions; and, we are here today to examine one of those problems: Who is responsible for enforcing the laws passed by Congress in regards to the Social Security Act programs which require state plans.

In recent months I have heard from many people in Minnesota about this issue ranging from Governor Carlson's office to numerous Minnesota welfare agencies including the Minnesota Children's Defense Fund, and the Minnesota Child Welfare League.

Although I am not unsympathetic to the state's concerns regarding the vagueness of much of the language passed by Congress in regard to state plans, and the fiscal realities which impede on the states ability to carry out these plans adequately, I must say that I have serious reservations and concerns about the ability of the Department of Health and Human Services to enforce these plans.

As good as the Department is at what they do, they simply do not have the authority or power to effect a state's enforcement of their plan. The only recourse the Department has is to reduce or withhold payments to the state for the program. We all know the reality of that actually happening, as well as the wisdom of the action, and it is dubious at best.

It seems to me, that if we are passing laws in this Committee that are impossible for states to comply with, then we need to revise the laws. Concurrently, this body needs to know that the requirements we attach to the money that is distributed to states for these programs, are enforceable.

I am aware that all involved with this issue, both in Congress, as advocates, and as representatives of state governments, are hoping that some kind of compromise can be struck between all interested parties. I share this hope as well.

We have a distinguished panel here today, and I look forward to hearing and learning from you all.

PREPARED STATEMENT OF SENATOR JOHN D. ROCKEFELLER IV

I commend my colleagues, Senators Moynihan and Bentsen, for holding this hearing in such a timely fashion.

The Supreme Court decision on the *Suter* case issued on March 25, 1992, has raised serious questions about the enforcement of state plans for child welfare and foster care.

Like most people, I have been shocked and deeply disturbed by newspaper accounts of children who are abused and even die while they are in the child welfare system. This should not happen, but it did recently in NYC, and I tragically suspect that it happens elsewhere.

The answers to such cases are never simple. But we must respond.

I believe a major priority is to enact *this year* Chairman Bentsen's legislation to dramatically strengthen family preservation efforts with an infusion of new federal funding for Title IV-B. I am a cosponsor of his original bill, S.4, and I am trying to create momentum for its enactment by promoting it as part of the Family Investment Act.

But we also need to respond to the issue raised by the *Suter* decision—what are states' obligations to meet their state plans and how can advocates ensure that they are enforced?

These are not easy questions, but they need to be addressed. This hearing is a good forum for all sides to be considered regarding the potential impact of the *Suter* issue.

Child advocates have understandably sounded alarm bells about the potential impact of the *Suter* decision.

States have raised legitimate questions about what constitutes "reasonable efforts" in providing care for children.

I believe our goal is to find a compromise—one that ensures that a child's rights are fully protected without encouraging excessive lawsuits that could drain precious, limited resources from services into legal fees. My questions today will focus on how we can do that. What is the right balance to fully protect children? How do we draft fair language to address the concerns of the states?

My profound hope is that this hearing will help bring the states and child advocates together in a cooperative effort to develop a fair compromise that will best serve our children without exposing state governments to excessive and unreasonable lawsuits.

I would like to submit for the record two letters I have received from former administrators of child welfare programs. One letter is from Ruth Massinga, who served with me on the National Commission on Children and as an administrator in Baltimore City, and who was named in a class action suit, brought prior to the *Suter* decision. The other is from Douglas Nelson, who served as an administrator in Wisconsin from 1978 until 1986. Both of them strongly advocate action to restore the rights of children that have been put in question following the *Suter* decision.

The welfare of our children should be our first priority. I want to note that there are many warm, loving foster parents who are providing admirable care for children. Many caseworkers and administrators provide caring support under difficult odds with too little money and not enough time. But despite such efforts, our foster care system faces severe problems. We all need to work together to fill in the gaps and ensure the protection of basic rights and that the needs of every vulnerable child is met.

Attachments.

63-580 O -93 - 2

The Casey Family Program.

August 21, 1992

Honorable John D. Rockefeller IV
United States Senate
Hart Senate Office Building, Suite #109
Washington, DC. 20515

Dear Jay:

Corporate Headquarters
2033 Sixth Avenue
Suite 1100
Seattle, Washington 98121-2536
(206) 448-4520
FAX (206) 448-4923

Thank you for asking for my views on language in the Urban Aid bill recently passed by the House (H.R. II) that would restore the private right of action in state implementation of federal law (P.L. 96-272) which sets forth national foster care and adoption policies and financing. As the principal defendant in a class action suit, L.J. versus Massinga, in 1984 brought on behalf of children maltreated while in foster care in Baltimore City, I urge your support of this provision.

There must be an enforceable means to assure accountability for children and families who are in legal custody of public child welfare systems when those systems fail to protect children and, despite my mixed feelings about unnecessarily protracted and contentious litigation, it is clear that long-term positive results for children are the direct result of such legal actions all across the nation.

Let me point out evidence from L.J. versus Massinga to support my view:

- **Multi-year commitments to a series of on-going remedies and improvements are sustained, even in a fiscally adverse climate.**

Over the last three years the State of Maryland has been in substantial compliance of the consent decree, improving service to youth who are out of their homes and shifting more finances to preventive efforts that avoid foster care and strengthen families. All of these investments have been made during a period when foster care caseloads were rising rapidly and when state revenues were declining as rapidly.

- **Bold child welfare system reforms such as those called for by the National Commission on Children have been "jumped started," largely because of the climate produced by positive response to litigation.**

Within three years of filing in the L.J. Suit, the State of Maryland had entered into an agreement with the Annie E. Casey Foundation for a multi-year collaboration focused on radical redesign of child welfare services in the state. Continued progress in implementation of these changes in the state is apparent, given enhanced foundation fiscal support and technical assistance for foster care reforms as well as significant legislative changes in state and local governance structures. Under girding the reform is the creation of new neighborhood based, family focused resources that are designed to strengthen families at risk of having children being removed from them.

Of course, I don't believe that all public child welfare systems hurt children. Often the care is very good, but much too often it is barely adequate. Even when child welfare systems need improvement, I don't believe litigation should be the main, or even the frequent vehicle to provide relief to children who are harmed. I simply want to assure a strong "last resort" and I am totally unconvinced that H.H.S. administrative remedies will be remotely adequate.

Many states, and organizations representing states, are opposing these provisions. I understand their need to do so. The current fiscal climate makes it difficult for state officials to support anything that has potential for costly legal judgments. I feel strongly that the broader interests of children as well as the overall public policy goal of providing for an effective national system of supports and protections for children ought to prevail.

I hope this is helpful. I look forward to see you soon.

Sincerely,

Ruth Massinga (hw)

Ruth Massinga

RM:hw

August 5, 1992

The Honorable John D. Rockefeller, IV
United States Senator
724 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Rockefeller:

During the years 1978 to 1986, I had the privilege of administering a broad range of human service programs for the state of Wisconsin, including programs for children authorized by the Social Security Act. My experience in discharging those responsibilities is what compels my writing you today.

As I'm sure you know, the Supreme Court has recently concluded, in the Artist M. v. Suter decision, that American children do not have a legal right of action to challenge states who fail to implement federal requirements in the provision of basic child welfare services. The Court instead determined that the enforcement of those critical rights and protections should be left to the notoriously slow, uneven and ineffectual administrative oversight functions of the Department of Health and Human Services.

This is not a defensible outcome. First and most obvious, it leaves children under the protection of state child welfare systems -- arguably the most vulnerable children in America -- without any clear recourse to enforce the minimum rights and services that Congress intended for them. Secondly, the decision puts at risk the enforceability of a host of parallel federal assurances to the elderly and the disabled under other federal-state programs authorized by the Social Security Act. Finally, the decision undermines the critical principle of accountability that gives integrity to the very structure of federal-state human services programs.

As a state administrator, I took seriously my obligation to manage child welfare programs, in conformity with both federal plan requirements as well as those established in state law. It was a frequently challenging responsibility, but always a proper one. Furthermore, it was duty the courts could hold us to should we at the state level fail to honor it.

At a time when greater public accountability is being urged from every quarter, the Suter decision -- if left unaddressed -- will actually reduce it. Inescapably, it will leave state officials, however well intentioned, with less reason and incentive to assure the level of assistance envisioned by federal law.

If the Congress really wants to allow key Social Security Act provisions to go unfulfilled, it should repudiate and repeal them. If, however, the commitments made to at-risk children, the disabled, the elderly, and the poor are in earnest, then meaningful mechanisms to enforce them are indispensable.

Fortunately, there appears to be an effort underway to remedy the confusion caused by the Suter decision. The House in its Urban Aid bill has included explicit language restoring the right of action under Title IV-E of the Social Security Act. I hope and trust that you will join the effort to support such a remedy on the Senate side.

Sincerely,

Douglas W. Nelson

Douglas W. Nelson

PREPARED STATEMENT OF HOWARD M. TALENFELD

I. The Backdrop for the Suter Amendment.

Senator Moynihan and Members of this Subcommittee, I appreciate the opportunity to testify today on behalf of the State of Florida, a state that has been besieged by two statewide class actions seeking federal court supervision of its child welfare system.

Since the filing of Wilder v. Sugarman, seven years prior to the Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272), the "AACWA", an unchronicled revolution was commenced in which child welfare advocates responded to this country's child welfare crisis. The battlefield was the federal courts, and since then, twenty-four states and the District of Columbia have endured these class action attacks. Alabama, Connecticut, Illinois, New Mexico, and six other states have surrendered their sovereignty by entering into consent decrees in which a federal court superintends the operations of their state child welfare system. Massachusetts, Maryland and the District of Columbia lost their battles in federal court, although Louisiana was able to prevail. Other states like Colorado, Texas and Virginia have recently been threatened with these statewide federal class actions.

The potential ill effects of federal injunctive relief, whether in the form of a voluntary consent decree or court ordered injunction, are manifold. Once a state is subject to injunctive relief, it must cede its freedom to manage and develop its own child welfare policies to the control of the federal courts. Consequently, the state can not effectuate policy changes and budgetary decisions without oversight of plaintiffs' counsel, federal monitors or masters, and the federal court. As members of the court's staff, monitors and masters report on compliance with the decree and may, along with plaintiffs' attorneys, pressure the state to commit resources in unanticipated ways. Time consuming monitoring procedures include extensive and intrusive investigation and regular reporting which may force state agencies to divert significant staff time exclusively to the tasks of analysing, documenting, and reporting compliance related issues. Often, plaintiffs' counsel or court monitors collect individual complaints and report them as widespread systemic shortfalls, leading to a destructive, prohibitive and crisis driven managerial policy. As officials and staff become obsessed with decree compliance, the state system becomes driven by the lingering threat of contempt proceedings. The worst aspect of "compliance

mentality" is the dangerous tendency to view the system as serving only the decree as opposed to the needs of the children who turn to the system for relief. Usually, these consent decrees and injunctions endure from 5-20 years.

The concurrent effect on state budgetary matters may also be devastating. To comply with a consent decree or injunction, states must divert precious child welfare dollars from children's programs to pay for counsel fees and long-term monitoring awarded pursuant to 42 U.S.C. §1988. Plaintiffs' attorneys' fees prior to consent decree or judgment frequently exceed half a million dollars. Defendants' attorneys' fees may be equally substantial. Court monitoring fees range from as low as $20,000.00 per year to $3 million dollars per year in analogous mental health litigation.

Indeed, a realization concerning this national child welfare phenomena of statewide federal court class actions must be acknowledged: the cost and loss of decision-making authority associated with a consent decree or injunctive relief may potentially paralyze a state's child welfare system. Even advocates speaking in support of child welfare class actions have recognized that "...lawsuits are blunt instruments for accomplishing systemic reform." Thus, the revolution of child welfare advocates across the country is raging. It is in this context that the Suter Amendment, their counter-attack to the Suter decision, must be viewed.

II. The Pre-Suter Legal Environment.

The claim that federal courts have unanimously recognized a private right of action to enforce state plan requirements of the AACWA prior to Suter v. Artist M. is erroneous. The pre-Suter courts were anything but in concordance as to what a litigant's substantive and procedural rights were under a §1983 action based upon the AACWA. Although the Supreme Court had recognized that a person could pursue a cause of action under §1983 for violations of a federal statute,[10] the Court had also limited such causes of actions to instances in which Congress had clearly and unequivocally imposed an obligation upon the states to fund such rights in return for federal monies.[11] Statutes, such as the AACWA, which were enacted pursuant to the spending power, are "much in the nature of contracts: in return for the federal funds, the States agree to comply with federally imposed conditions..."[12]

As a result of these Supreme Court requirements, the lower federal courts were regularly analyzing the discrete provisions of the AACWA and foreseeably generating divergent results. Hence, while some courts found substantive rights for the enforcement of a properly implemented case plan and case review system,[13] others seriously questioned the availability of

these rights,[14] or simply foreclosed the existence of such rights.[15] Not only was the pre-Sutar environment confusing, but it did not establish crystallized individual rights which were "swept away" by the Sutar decision. Previous attempts by advocates to engender individual rights to placement in the "least restrictive (home like) setting," to "minimal visitation rights" or to "specific housing services" had been invariably struck down by the courts.[16] And attempts at actions for damages, were, with one exception,[17] proven equally as futile.[18] Consequently, prior to the Supreme Court's pronouncement in Sutar, the only consensus among judges, advocates and lawyers emerged through a gradual acceptance that the state's implementation of a case plan and case review system could be secured through class action relief.[19]

The right to a cause of action for systemic failure of the state plan, did not wane with the Supreme Court's decree in Sutar. The advocates' battle cry, that Sutar stripped parents and children of their right to vindicate their wrongs in court and virtually did away with "one part of our system of checks and balances,"[20] is but an emotional stab in the dark at the underlying social services problem.[21] The Sutar court only disallowed individual action under the "reasonable efforts" provision of the AACWA, leaving open to enforcement other unambiguous provisions of the Act.[22] Thus, while Sutar may have changed the analysis, the underlying right to bring a claim for systemic failure to implement a case review system established in Lynch v. Dukakis and L.J. by and through Darr v. Massinga remains intact if brought under the provisions of §627(a)(2)(B) as defined by §675(5). Additionally, Sutar left untouched other methods of calling state plans into question.[23] Armed with the swords of substantive and procedural due process, equal protection, First Amendment rights to free association, and other statutory and constitutional rights, afflicted children and their parents are free to defend and conserve their Constitutional rights in both state and federal Courts.[24] They retain their most precious right created by the AACWA -- the right to judicial or administrative review of case plans.[25] Thus the contention that a legislative amendment is necessary to "return these rights to citizens" is misplaced.[26] In fact, upon close analysis, the fear that Sutar has left only "paper" enforcement of a state plan, is clearly unfounded.[27]

The Sutar Court merely interpreted the legislative language in one section of the Social Security Act in accord with Congressional intent. An overview of the legislative history makes apparent that Congress, by enacting

42 U.S.C. §627(A)(2)(b) as defined in 42 U.S.C. §675(5), intended the rights of individual foster children to be litigated within the state system.[,,] It was never Congress' intent to allow federal actions for private vindication when these rights can be raised within the state court system. It is only when the state system fails, i.e., when these rights cannot be raised through state judicial review or when the case plan and case review system is not being implemented, that the federal courts may be called into action. Thus, the Suter decision reaffirmed the initial Congressional design of creating a holistic state-run system, assuring judicial and administrative checks and balances.

III. The Suter Amendment Does Not Restore the Pre-Suter Landscape: It Creates Unlimited New Rights and Unquantifiable Entitlements.

As previously described, the pre-Suter environment was not marked by total clarity. Nonetheless, the Suter Amendment, billed as a return to a pre-Suter status, creates an express, unambiguous right to sue in federal and state court pursuant to 42 U.S.C. §1983 for any service and benefit covered by a state plan and all titles of the Social Security Act.[,,] Undoubtedly, the Suter Amendment would create an unprecedented, sweeping individual private right of action to enforce "any" state plan requirement for a service or benefit regardless of Congress' prior intent as to enforceable rights.[,,] Indeed, the Suter Amendment would permit a cause of action, new entitlements, pursuant to 42 U.S.C. §1983 for the enforcement of the "reasonable efforts" clause (42 U.S.C. §671(a)(15)), the case plan and case review provisions (42 U.S.C. §671(A)(16)),[,,] and the other fourteen case plan features. Without doubt, the extent of liability created by the Suter Amendment would vastly exceed any funding provided by Congress pursuant to the AACWA. For example, in M.E. v. Childs, one of Florida's class actions, the plaintiffs have claimed a right to therapeutic services and the elimination of all waiting lists for such services pursuant to Titles IV-B and IV-E of the AACWA.[,,] The State of Florida has estimated that an entitlement to therapeutic services of this type would cost the state in general revenue in excess of $47 million dollars after subtracting federal financial participation of only $7.7 million dollars.[,,] Although the Suter Amendment may create an entitlement to these services, it does not propose a funding solution commensurate with the right.

Surely, child advocates will also claim the Suter Amendment creates a right and an entitlement to child welfare services pursuant to the "case plan" requirement of 42 U.S.C. §671(A)(16) as defined by 42 U.S.C. 675(1).

However, Title IV-E does not provide for child welfare services and Title IV-B does not provide for an uncapped right to federal assistance in providing for child welfare services. Florida's IV-B funding for federal fiscal year 1991-92 is capped at $11,787,608 although its total unreimbursed IV-B expenditures are projected to be $70,955,320 by September 30, 1992. Indeed, the AACWA provides only paltry amounts for family preservation, parent skill training, homemaker and housekeeping services, parent aid services, respite services, developmental services, substance abuse, and miscellaneous transportation necessary to ensure that each child has a case plan designed to achieve placement in the least restrictive (most family like) setting available in close proximity to the parent's home, consistant with the best interest and special needs of the child.[34]

No less serious will be the diversion of substantial, scarce child welfare dollars to pay for damages and attorney's fees, which will no doubt be proliferated by both individual and class actions litigating the private right created by the Suter Amendment. Every state court dependency proceeding in Florida which is part of the case review system mandated by the AACWA will provide a forum for the litigation of civil rights claims with the potential for an award of attorney's fees pursuant to 42 U.S.C. §1988. The State of Florida estimates that a $1 million drain in its general revenue for plaintiffs' attorneys' fees, monitoring fees and other costs of litigation, which is sure to follow the adoption of the Suter Amendment, could pay for 2.5 family builder's programs.[35]

Indeed, in the face of prior Congressional intent in the AACWA not to create additional child welfare entitlements and to cap federal spending, the Suter Amendment would create virtually unlimited liability to the states without any additional federal participation and with no direct benefits to children. There is little doubt that armed with the Suter Amendment as their new weapon and with no promise for commensurate funding, child advocacy groups will prevail in their mission to subject other state child welfare systems to federal court supervision.[36]

IV. New Child Welfare Programs Are Needed, Not Expanded Rights.

The child welfare revolution which seeks to subjugate state child welfare systems to federal court supervision is aberrational. At best, it has been described as the use of a "blunt instrument" to effectuate systemic reform for want of any other solution. At worst, it presents the usurpation of state child welfare functions by lawyers and federal judges who have never

operated child welfare systems,[11] a phenomena which will most certainly be perpetuated and accelerated by the Suter Amendment.

Indeed, children and their families will not be saved by more litigation. To the contrary, they will be harmed if substantial, precious resources are wasted on endless litigation instead of appropriate solutions to the persistent problems which prompted the litigation. "...[U]ntil somebody comes up with a better way to deal with the very serious problems that we all see in these child welfare systems, these lawsuits are going to continue."[12] Congress must acknowledge that the Suter Amendment provides no benefits or programs to children and their families and is no more than another empty promise. H.R. 3603 and S.4 are a start, but still a long way from the entitlements which will be created if you now determine that every state plan requirement is enforceable by enacting the Suter Amendment.

The Suter Amendment will serve to ensure that many of the other twenty-six states will get sued, but it will not ensure a solution to the child welfare crisis. The Suter Amendment will proliferate the continuation of the child welfare revolution, but will not guarantee that children will be saved by solutions to the fundamental problems in these systems. But most significantly, the creation of a Congressional entitlement without an equal commitment to programs and funding will solidify federal court dominion over this nation's child welfare systems -- a vision which could not possibly have been contemplated in passing the Adoption Assistance and Child Welfare Act of 1980. Congress must intervene -- not by passing the Suter Amendment -- but by authorizing programs which will help children and their families. Congress must intervene and enable the states to extricate themselves from federal supervision over their child welfare systems.

ENDNOTES

1. In M.E. v. Childs, Case No. 90-1008 (S.D. Fla. 1990), plaintiffs' alleged that the state failed to provide adequate therapeutic services to emotionally disturbed and developmentally disabled children in the custody of the state in violation of the Adoption Assistance and Child Welfare Act of 1980, the Due Process Clause of the United States Constitution, the Rehabilitation Act, and the Medicaid Act. In Children A-F v. Childs, Case No. 90-2616 (S.D. Fla. 1990), plaintiffs challenged Florida's failure to remove children from foster care in a timely manner in violation of the AACWA and the Due Process Clause of the United States Constitution.

2. Wilder v. Sugarman, 73 Civ.2644 (MRT) (S.D.N.Y.). For a history of this litigation, see Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y. 1986).

3. See, "Directory of Child Welfare Lawsuits," The Institute of Health and Human Services, Inc., September 14, 1992. In addition to Florida, statewide federal court class actions have been filed in Alabama, Arkansas, Connecticut, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Mexico, North Carolina, Rhode Island, Texas, Louisiana and Vermont.

4. See, "Directory of Child Welfare Lawsuits," The Institute of Health and Human Services, Inc., September 14, 1992.

5. Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983); L.J. by and through Parr v. Massinga, 838 F.2d 118 (4th Cir. 1988); Lashawn A. v. Dixon, 762 F. Supp. 959 (D.D.C. 1991); Dal A. v. Edwards, 777 F. Supp. 1397, (E.D. La. 1991).

6. See, "The Cost of Injunctive Relief -- Florida's Opportunity to Build Futures for Its Children," State of Florida Department of Health and Rehabilitative Services (1992). In fact, even those decrees or court orders which specify a definite duration, are subject to judicial extension and resurrection, even after the courts active jurisdiction has ended. See, Anderson, L., "Release and Resumption of Jurisdiction over Consent Decrees and Structural Reform Litigation," 42 U. of Miami, L.Rev. 401 (1987).

7. In Juan F. v. O'Neill, plaintiffs' attorneys sought to collect from the State of Connecticut, $500,000.00 in attorneys' fees. By comparison, in R.C. v. Hornsby, the Alabama court awarded plaintiffs' attorney $600,000.00 in fees and costs for three years of similar litigation. In L.J. v. Massinga, a four year prosecution, resulted in an award to plaintiffs' attorneys of $595,000.00 by the time the state entered into a consent decree. Finally, plaintiffs' counsel often obtain awards of post-judgment attorneys' fees. In the case of Joseph A. v. Goldberg (New Mexico), regular enforcement actions resulted in fee awards ranging from approximately $170,000.00 to $390,000.00.

8. See, Perleger, "Monitoring Costs: Systemic Litigation Regarding Institutions and Community Services," 12 MPDLR 492 (1988).

9. See, Presentation of Christopher Dunn, Attorney for ACLU, Child's Right Project, National Child Welfare Partyline, National Child Welfare Resource Center for Management and Administration, "Using Class Action Lawsuits to Improve Child Welfare Practices," March 31, 1992.

10. Maine v. Thiboutot, 448 U.S.1, 4, 100 S.Ct. 2502, 2504, 65 L.Ed.2d 555 (violations of the Social Security Act enforceable under the "and laws" provision of §1983).

11. Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981) instructs that to serve as a basis of a claim for relief under §1983, a provision of a federal statute which establishes a scheme of cooperative federalism must 1) have been intended by Congress to impose "an obligation on the States to spend money to fund certain rights as a condition of receiving federal monies..." Id. at 18, 101 S.Ct. at 1540; and 2) give rise to "a private cause of action to compel state compliance with [the statutory] conditions." Id. at 27,28, 101 S.Ct. at 1545.

12. Id. at 17, 101 S.Ct at 1540.

13. L.J. by and through Parr v. Massinga, 838 F.2d 118 (4th Cir. 1988); Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983).

14. Pfoltzer v. County of Fairfax, 775 F. Supp. 874, 889 (E.D. Ca. 1991).

15. Del A. v. Roemer, 777 F. Supp. 1297 (E.D. La. 1991); Jensen v. Conrad, 570 F. Supp. 91, 113 (D.S.C. 1983).

16. B.H. v. Johnson, 715 F. Supp. 1387 (N.D. Ill. 1989)(no right to placement in least restrictive setting); Aristotle P. v. Johnson, 721 F. Supp. 1002 (N.D. Ill. 1989) (no right to placement in least restrictive environment or to meaningful sibling visitation); Wirgton v. Children and Youth Services of Delaware County, 948 F.2d 1380 (3d Cir. 1991)(no right to meaningful visitation); Scrivner v. Andrews, 816 F.2d 261 (6th Cir. 1987)(no right to meaningful visitation); Tilden v. Hayward, Civil Action No. 11297 (Del. Chancery Ct. September 10, 1990)(no right to housing services).

17. Massinga, supra.

18. Guardians Association v. Civil Service Commission, 463 U.S. 582, 602, n.23, 103 S.Ct. 3221, 3233, 77 L.Ed.2d 866 (1983)(opinion of White, J., joined by Rehnquist, J.) ("Damages indeed are usually available in a §1983 action, but such is not the case when the plaintiff alleges only a deprivation of rights secured by a spending clause statute."); Spielman v. Hildebrand, 873 F.2d 1377 (10th Cir. 1989)(court expressed considerable doubt whether AACWA confers rights that can be subject of action for damages under §1983); Harpole v. Arkansas Dept. of Human Services, 820 F.2d 923 (8th Cir. 1987) implied overruling on other grounds recognized in Dorothy J. on behalf of Brian B. v. Little Rock School District Centers for Youth & Families, __F. Supp. ___, 1992 WL 113728 (E.D. Ark. May 28, 1992)(no action for damages exists under AACWA); Lesher v. Lavrich, 784 F.2d 193 (6th Cir. 1986) (damages not available under §1983 alleging violation of AACWA); Pfoltzer v. County of Fairfax, 775 F. Supp. 874 (E.D. Va. 1991)(court expressed doubt as to whether cause of action under AACWA permitted recovery of money damages).

19. See Massinga supra; Lynch supra at note 14; B.H. v. Johnson, 715 F. Supp. 1387 (N.D. Ill. 1989)(narrow requirements of case plan and case review system were enforceable under AACWA).

20. Marcia Lowery, Director of the Children's Rights Project of the American Civil Liberties Union as told to the New York Times, Reported in "The Suter v. Artist M. Decision" W-Memo, Am.Public Welfare Assoc., June, 1992, p.23.

21. States and advocates alike agree that the child welfare systems throughout the nation are in dire need of funding and improvement. The unprecedented nationwide growth over the last decade of children under state care has placed many state systems in financial crisis. The size of the child substitute care population has increased 63.4% from 1982 through 1991 alone. See Teshara, Teshio, "Child Substitute Care Population Trends FY 82 Through FY 91 - A Summary" (Aug. 1992). By attempting to pass the Suter Amendment, advocates are diverting limited funds from children's programs to defend endless litigation. Ironically, in their stated attempt to "prevent children from dying" advocates may be hammering the nail to the coffin.

22. The Suter Court pointed to 42 U.S.C. §672(a) providing that "[n]o Federal payment may be made under this part for a child voluntarily placed in foster care for more than 180 days unless within that period there is a judicial determination that the placement is in the best interest of the child," as language which imposed precise requirements on the States in exchange for federal funding. Thus, the Court paved the way for private enforcement of a violation of this section. See Suter supra at 1369, n.12. Also See §627(a)(2) containing similarly worded mandatory language regarding requirements for case review system and §672(a) regarding foster care maintenance payments.

23. The State must still seek approval by the HHS which is enforceable through audits and disallowances in order to gain Federal Funding.

24. See, "Directory of Child Welfare Lawsuits," The Institute of Health and Human Services, Inc., September 14, 1992. These federal remedies can also be brought in State courts, Howlett by and through Howlett v. Rose, 110 S.Ct. 2430 (1990), along with actions for enforcement of state laws.

25. For example, under Florida law, §39.453, Fla. Stat. (1991), requires periodic judicial review of a foster child's status and compliance with the child's performance agreement and allows for review of the child's placement.

26. The inconsistency of this position on this point is most clearly illustrated by the concession that the proposed amendment would not affect

the "reasonable efforts" language which the Supreme Court in Suter rejected as being vague. If, as the proponents allege, the Suter amendment does not affect "reasonable efforts" or other not previously established "enforceable rights," then the amendment is but an exercise in futility.

27. See note 25 supra and accompanying text.

28. The "Senate Report shows that Congress had confidence in the ability and competency of State courts to discharge their duties under what is now §672(a) of the Act. ('The committee is aware of allegations that the judicial determination requirement can become a mere pro forma exercise in paper shuffling to obtain Federal funding. While this could occur in some instances, the committee is unwilling to accept as a general proposition that the judiciaries of the State would so lightly treat a responsibility placed upon them by Federal statute for the protection of children.')" S.Rep.No. 96-336 p.16 (1979). Suter at 1369, n.15.

Additionally, §627(a)(1) mandates that a state judicial determination be made ensuring the exercise of "reasonable efforts" by the state agency. To allow individual claims in federal court would be to allow a collateral attack on the preclusive adjudication of the state juvenile court.

29. "Each individual shall have the right not to be denied any service or benefit under this Act as a result of the failure of any state to which federal funds are paid under 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." (emphasis supplied).

30. If the drafter of the Suter Amendment intended that only unambiguous provisions of State plans be enforceable, the language "any" service or benefit would not have been chosen. If the Suter Amendment is passed as presently worded it would entirely obliterate any judicial analysis under Pennhurst supra regarding the precatory versus mandatory nature of a given section.

31. 42 U.S.C. §671(A)(16) requires that a state plan "provide for the development of a case plan...for each child receiving foster maintenance payments under the state plan and provides for a case review...for each child..." 42 U.S.C. §675(1) defines "case plan" as "...a written document which includes at least the following: a description of the type of home or institution in which a child is to be placed, including a discussion of the appropriateness of the placement..., a plan for ensuring that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan." A "case review system" means a procedure for ensuring that -- (A) each child has a case plan designed to achieve placement in the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interests and special needs of the child, (B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or administrative review..., and (C) with respect to such child, procedure safeguards will be applied, to assure each child in foster care under the supervision of the state of a dispositional hearing to be held, in a family or juvenile court or another court...of competent jurisdiction, or by an administrative body approved by the court, no later than eighteen months after the original placement..."

32. They allege "pursuant to Florida's state plans and express terms of Titles IV-B and IV-E, HRS is required to have in place a case plan and case review system that assures that each child in state care: (a) receives proper care; (b) receives appropriate services to address needs while in foster care; (c) receives services to facilitate permanent placement in the child's own home, in an adoptive home, or in a long term foster placement; and (d) is placed in the least restrictive and most family like setting available and close to the parents' home, consistent with the child's best interests and special needs." Paragraph 95, Amended Complaint for Declaratory and Injunctive Relief (Class Action), supra.

33. HRS Bill Analysis for Therapeutic Services Bill, HBCS/HB 227, dated February 11, 1992, proposed to create a state entitlement to the therapeutic services to respond to the plaintiffs' claims in M.E. v. Childs. Florida's

financial participation is disproportionately low because: (1) Many of the currently available resources for these therapeutic placements are for-profit programs and therefore ineligible for IV-E participation (42 U.S.C. §672(c)(2)); (2) Florida has a policy of encouraging home based and community based treatment rather than utilization of free-standing psychiatric hospitals under its Medicaid plan; and (3) a federal cap exists on Title IV-B child welfare services so that inequities exist in the federal-state funding partnership for child welfare services.

34. See, 42 U.S.C. §671(16) incorporating by reference 42 U.S.C. §675(5)(a).

35. At a cost of $403,000 each for twelve months, 2.5 family builders programs, with a minimal success rate of 87%, should divert 188 children from out of home placements.

36. Finally, these estimates relate to the impact of the Suter Amendment in Florida's child welfare system alone and do not consider the effect that the Suter entitlement would have on other State plan programs in which the Suter Amendment would create a cause of action under the Social Security Act.

37. The crucial task of evaluating children on an individual basis cannot be divorced from the social workers, agency clinicians and professionals who are most familiar with the agency's resources and the dynamics of the children currently in their care.

38. Presentation of Christopher Dunn, Attorney for ACLU, Child's Right Project, National Child Welfare Partyline, National Child Welfare Resource Center for Management and Administration, "Using Class Action Lawsuits to Improve Child Welfare Practices," March 31, 1992.

PREPARED STATEMENT OF CHRISTINA M. TCHEN

Chairman Moynihan and Honorable Members of the Subcommittee:

I am a Special Assistant Attorney General for the State of Illinois, appointed to represent the Illinois Department of Children and Family Services (DCFS) in a series of federal and state class actions brought against the state child welfare system. One of these class actions is Suter v. Artist M., 112 S. Ct. 1360 (1992), which I argued before the Supreme Court. Thank you for the invitation to testify today to provide you with the States' perspective on the proposed "Suter" amendment to the Social Security Act.

I. The Supreme Court Decision in Suter v. Artist M.

A. Background of the Case

Suter v. Artist M. was brought by the Cook County Public Guardian on behalf of children who were the subject of abuse and neglect petitions filed in Cook County Juvenile Court, alleging that DCFS failed to promptly assign caseworkers to their cases (Sue Suter was sued in her official capacity as the Director of DCFS).[1] The plaintiffs contended that this failure violated Section 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980 (AAA), generally referred to as the "reasonable efforts clause." 42 U.S.C. §671(a)(15).[2] Under the "reasonable efforts" clause, States receiving Title IV-

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1 Artist M. was one of six federal class actions alleging AAA and constitutional violations by DCFS. See B.H. v. Suter, No. 88 C 5599 (N.D. Ill.) (Grady, J.) (alleging foster care system as a whole had violated AAA and constitutional rights); Norman v. Suter, No. 89 C 1624 (N.D. Ill.) (Hart, J.) (alleging DCFS failed to make reasonable efforts before removing children from their homes due to poverty); Aristotle P. v. Suter, No. 88 C 7919 (N.D. Ill.) (alleging right under AAA and constitution to sibling placement and visitation) (Williams, J.); Bates v. Suter, No. 84 C 10054 (N.D. Ill.) (alleging DCFS failed to provide parental visitation in violation of AAA and constitution) (Plunkett, J.); Dana W. v. Suter, No. 90 C 3479 (N.D. Ill.) (Shadur, J.) (alleging failure to conduct judicial dispositional hearings within 18 months after placement). With the exception of Artist M., DCFS has settled or is in the process of settling all of these cases.

2 Claims brought by plaintiffs under the Fourteenth Amendment and other provisions of the AAA were dismissed by the district court. Artist M. v. Johnson, 726 F. Supp. 690 (N.D. Ill. 1989).

E funds are required to have a State plan which, among other things,

> provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home . . .

A three-day preliminary injunction hearing was held in January 1989, at which DCFS presented evidence that long before the lawsuit was filed, the Department had already begun implementing a remedial plan to assign caseworkers more quickly. DCFS also presented evidence as to the inadvisability, in the professional judgment of its child welfare administrators, of an across-the-board case assignment rule because of the need to ensure that the assigned caseworker can meet the particular needs of each child. In March 1990 the trial court ruled that although DCFS had made major improvements in its assignment system, they were not enough, and he issued an injunction requiring DCFS to assign a caseworker in all cases in Cook County within three days. DCFS appealed these rulings to the Seventh Circuit Court of Appeals, which upheld the injunction in a 2-to-1 decision.

B. The Appeal by Illinois to the Supreme Court

Illinois appealed the Seventh Circuit ruling in Artist M. because the ruling failed to properly apply the existing Supreme Court precedent that vague and amorphous federal funding statutes, such as the "reasonable efforts" clause, cannot create individually enforceable federal rights. Contrary to the assertions by the proponents of the Suter Amendment, it was anything but clear prior to the Suter decision that the AAA created individual rights. In fact, prior to the Seventh Circuit's ruling, the district courts in the Northern District of Illinois were evenly split as to whether the "reasonable efforts" clause created individual federal rights. Compare B.H. v. Johnson, 715 F. Supp. 1387, 1401-02 (N.D. Ill. 1989) (Grady, C.J.) ("reasonable efforts" clause too "amorphous" to create enforceable rights) and Aristotle P. v. Johnson, 721 F. Supp. 1002, 1012 (N.D. Ill. 1989) (Williams, J.) (same) with Norman v. Johnson, 739 F. Supp. 1182, 1187 (N.D. Ill. 1990) (Hart, J.) ("reasonable efforts" clause creates enforceable rights) and Artist M. v. Johnson, 726 F. Supp. 690 (1989) (same).[3]

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[3] This split was reflected in other circuits as well. Compare In re Scott County Master Docket, 672 F. Supp. 1152, 1202-03 (D. Minn. 1987) ("reasonable efforts" clause does not create enforceable rights), aff'd sub nom. Myers v.

(Footnote continued)

Illinois was joined in its appeal by thirty-eight other states, the District of Columbia and the Solicitor General of the United States. The arguments made by Illinois to the Supreme Court, of principal concern to the issues facing this Subcommittee were that (i) the decisions by the courts below in Artist M. were a departure from existing case law governing the creation of new federal rights and (ii) a vague federal right to "reasonable efforts" would federalize child welfare decision-making and set back efforts to improve services to abused and neglected children.

(Footnote 3 continued from previous page)
Scott County, 868 F.2d 1017 (8th Cir. 1989) (adopting district court opinion and analysis) and Scrivner v. Andrews, 816 F.2d 261, 263 (6th Cir. 1987) (AAA creates no right to meaningful visitation) with Winston v. Children & Youth Servs., 948 F.2d 1380, 1388 (3d Cir. 1991) (AAA does create rights to "reasonable efforts" but not "meaningful visitation") and R.C. v. Hornsby, No. 88 D-1170-N, slip op. (M.D. Ala. Apr. 19, 1989) ("reasonable efforts" clause creates enforceable rights).

The courts were also split as to whether other provisions of the AAA created individual rights. Compare L.J. ex rel Darr v. Massinga, 838 F.2d 118, 123 (4th Cir. 1988) (finding that defendants are not immune from suit because AAA creates enforceable right to case plan and case review), cert. denied 488 U.S. 1018 (1989); and Lynch v. Dukakis, 719 F.2d 504, 510-511 (1st Cir. 1983) (AAA creates enforceable rights to case plans and case reviews); and Joseph A. by Wolfe v. New Mexico Dept. of Human Services, 575 F. Supp. 346, 353 (D.N.M. 1983) (Titles IV and XX of Social Security Act create enforceable rights); and LaShawn A. v. Dixon, 762 F. Supp. 959, 988-989 (D.D.C. 1991) (AAA creates enforceable rights) with Spielman v. Hildebrand, 873 F.2d 1377, 1386 (10th Cir. 1989) (no enforceable right under AAA); and B.H. v. Johnson, 715 F. Supp. at 1392 (no enforceable right to placement in least restrictive setting); and Aristotle P. v. Johnson, 721 F. Supp. at 1008 (no right under AAA to placement in least restrictive setting or to meaningful visitation); and Del A. v. Roemer, 777 F. Supp. 1297, 1309 (E.D. La. 1991) (no enforceable rights under AAA).

(i) Existing Case Law Prior To The Suter Decision Applied a Case-by-Case Analysis to Determine Whether Individually Enforceable Rights Were Created

Under a decade of existing Supreme Court case law, beginning with Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), the Supreme Court has held that federal funding statutes like the AAA are in the nature of "contracts" and as such Congress' powers to legislate under its spending authority "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" Id. at 17. If Congress wishes to impose an individually enforceable obligation upon the State, Congress must express those rights clearly, so the States may fully comprehend the contours of the bargain they into enter when accepting federal funds. Id. at 17, 23-25. "The crucial inquiry . . .[is] whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." Id. at 25.

In cases following Pennhurst the Supreme Court further explained that in order to create federal rights under Section 1983, a statutory provision must be intended to benefit a plaintiff, written in mandatory language, and not be too vague and amorphous that it is beyond the competence of the judiciary to enforce. Wilder v. Virginia Hosp. Assoc., 110 S.Ct. 2510, 2517 (1990); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989); Wright v. Roanoke Redevelopment & Housing Auth., 479 U.S. 418, (1987). The Supreme Court also held that private enforcement of a statute in federal court may be foreclosed if the federal law at issue contains an alternative enforcement scheme to remedy violations. See, e.g., Smith v. Robinson, 468 U.S. 992 (1984); Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n., 453 U.S. 1 (1981).

A court construing a federal funding statute must conduct an inquiry into the context, statutory structure, legislative history, and regulatory framework of that statute in order to ascertain whether Congress has clearly defined the purported federal rights. Wilder, 110 S. Ct. at 2518-23. Thus, if Congress intends to impose a condition on the grant of federal monies, the Pennhurst test requires that Congress do so unambiguously, so that "the States may exercise their choice knowingly, cognizant of the consequences of their participation." Pennhurst 451 U.S. at 17.

DCFS contended that the lower courts had misapplied the Pennhurst test. In the absence of any statutory definition, DCFS argued on appeal that although the "reasonable efforts" clause was a mandatory obligation imposed on the States,

it was simply too vague and undefined to create an individually enforceable federal right.

(ii) A Vague "Reasonable Efforts" Right Would Undermine Rather Than Improve Services to Abused and Neglected Children

The "reasonable efforts" clause states that such efforts to keep or return abused and neglected children home to their parents must be made "in each case." Without further definition from Congress, this vague and amorphous language would open the door to a flood of litigation by individuals seeking to impose their own definition of what constitutes "reasonable efforts." The federal courts would be inundated with a torrent of litigation challenging the minutiae of child welfare decisions made daily in individual cases. Indeed, abused and neglected parents unhappy with state court determinations focusing on the "best interests of the child," could bring suit in federal court to enforce their right to "reasonable efforts" to facilitate the return of their child.[4]

This undefined right also would result in plaintiffs peeling off one piece of the child welfare system after another to challenge whether "reasonable efforts" were being made. This explosion of piecemeal litigation had already occurred in Illinois and elsewhere, with caseworker assignments challenged in one case (Artist M.), sibling visitation in another (Aristotle P.), parental visitation in another (Bates), housing and cash assistance in another (Norman), and the adequacy of foster care placements in yet another (B.H.). With this federalization of child welfare decision-making, the federal courts truly would, in the words of the dissenting Seventh Circuit judge in Artist M., become the "crisis administrator of child welfare." Artist M. v. Suter, 917 F.2d 980, 996 (7th Cir. 1990), rev'd, 112 S. Ct. 1360 (1992).

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[4] DCFS had already faced one such case where the federal court acted as a "super-juvenile court" second-guessing specific state decisions and actions in the cases of three individual parents. Norman v. Johnson, 739 F. Supp. 1182 (N.D. Ill. 1990). The district court engaged in a detailed review of the circumstances and services provided to these parents and ordered that the "reasonable efforts" clause entitled the parents to beds, monetary assistance and housing. DCFS's abstention and collateral estoppel arguments based on the pending state juvenile court actions in these cases were rejected by the federal court. Id. at 1189-90.

In addition, in the absence of any clarity as to what the "reasonable efforts" clause requires, States would become reluctant to start any new innovative programs because each States' actions to develop programs and provide services could be used to determine liability under the "reasonable efforts" clause. The AAA would create wholly different enforceable rights from state to state. Such an outcome would create a disincentive for states to develop and expand existing services and programs, thereby undermining the very purposes for which Congress enacted the AAA.

Finally, it is important to bear in mind that the "reasonable efforts" called for under the AAA are "reasonable efforts" to keep or return abused and neglected children to their abusive and neglectful parents. The level of our understanding about what works and what does not in these highly volatile and individualized situations is not enough to hold with any certainty that any given set of services or "efforts" are "reasonable" or sufficient to ensure that children can be returned home safely. Even the plaintiffs' counsel in Artist M. recognized the dangers in a bias focused solely on keeping children at home.[5] Indeed, the irony inherent in a right to "reasonable efforts" is that it forces the allocation of scarce social services to the worst parents, rather than struggling, caring parents who do not abuse or neglect their children.

C. The Supreme Court's Decision

On March 25, 1992, in a 7-2 decision, the Supreme Court reversed the lower court rulings and held that the "reasonable efforts" clause does not create an individual right enforceable in federal court. 112 S. Ct. 1360. Citing Pennhurst, the Court stated that the question to be resolved was whether Congress "unambiguously confer[red] upon the child beneficiaries of the Act a right to enforce the requirement that the State make 'reasonable efforts' . . ." Id. at 1367. Noting that all parties and courts below agreed that the AAA was mandatory in its terms, the Court then turned to the final third of the Pennhurst test to determine whether the provision at issue unambiguously created a federal right. Id.

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[5] See, e.g., Gratteau, When Do Bad Parents Lose Rights?, Chicago Tribune, Apr. 21, 1991, at 1, col. 1 (noting that "[a]t the core of the controversy over the state of child welfare is the concept of family reunification," and quoting the Cook County Public Guardian as observing that "judges and DCFS are working under the assumption that there are no bad biological parents.").

Following the inquiry outlined in Wilder, 496 U.S. 498 (1990), the Court then examined the terms of the statute itself (id. at 1367-69), the implementing regulations (id. at 1369) and the legislative history (id.). Distinguishing both Wilder (which found a right to reasonable Medicaid rates under the Boren Amendment) and Wright (which found a right to reasonable rent allowances for utilities under the Brooke Amendment to the Housing Act of 1937), the Court concluded that under the AAA, "[n]o further statutory guidance is found as to how 'reasonable efforts' are to be measured. . . This. . . is a directive whose meaning will obviously vary with the circumstances of each individual case. How the State was to comply with this directive, and with the other provisions of the Act, was, within broad limits, left up to the State." Id. at 1368.

Although the majority opinion does not recite the catechism from prior cases outlining each prong of the Pennhurst test as applied in Wright, Golden State and Wilder, contrary to the assertions by the dissent, the analytical framework used by the Court is entirely consistent with this precedent. In Suter, the focus was on the third prong, examining whether a federal funding statute unambiguously creates an individually enforceable right. As maintained by Illinois, no such right could exist in the absence of a statutory and regulatory definition of what constitutes "reasonable efforts" to keep and return abused and neglected children home.

Proponents of the Suter amendment state that they do not seek to overturn this central holding of the Suter decision. Report of the Comm. on Ways and Means, House of Reps. [to accompany H.R. 11], June 30, 1992 at 366 ("House Report") ("The provision does not alter the finding in Suter v. Artist M., that the "reasonable effort" provision, without further direction, is too vague to be enforceable in such an action."). Instead, the amendment is intended to be directed at the Court's statement that the requirement of Section 671 of the AAA "only goes so far as to ensure that the States have a plan approved by the Secretary which contains the 16 listed features." 112 S. Ct. at 1367. The fear is that the courts will short-circuit the Pennhurst analysis in cases involving State plan requirements and hold that no substantive right exists, notwithstanding the Supreme Court's analysis of the "reasonable efforts" clause as contained in Suter.[6] The proposed Suter amendment, however, goes far beyond that fear and will radical-

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[6] The Chief Justice advocated such a short-circuit in his dissent in Wilder. 110 S. Ct. at 2526-27. However, the Court did not take the opportunity presented in Suter to overturn the ruling in Wilder.

ly alter the manner in which the Social Security Act as a whole is interpreted and enforced.

II. The Proposed Suter Amendment

As I have outlined, prior to the Suter decision, unless a private right of action was specifically authorized by Congress, the federal court applied a case-by-case analysis to infer whether Congress intended to create a federal right by enacting a statute that benefited the plaintiffs, was mandatory on the States, was unambiguous and did not have alternative enforcement mechanisms. This applied to the provisions of the Social Security Act, which includes in its various State plan provisions enumerable hortatory provisions intended only to set goals or encourage the movement of programs in certain directions. With one fell swoop, the Suter amendment passed by the House would make all State plan requirements of every title in the Act individually enforceable rights.

A. The Dangers of the Proposed Amendment

(i) The Case-by-Case Analysis Previously Used by the Courts Will Be Eliminated and As a Result States Will Be Sued Under Enumerable New Rights

The language of the amendment plainly states that "each individual shall have the right not to be denied any service or benefit" as set forth in any State plan requirements under any title of the Social Security Act. (emphasis added). Thus, every plan requirement throughout the entire Act would, under the amendment, create an individual federal right. This was not the landscape of the law prior to the Suter ruling, where the case-by-case analysis dating back to Pennhurst resulted in specific decisions pinpointing where federal rights existed and where they did not.

Contrary to the notion that the proposed amendment does nothing more than confirm the past two decades of Federal jurisprudence, the Suter amendment will in fact wipe out all of the prongs of the Pennhurst test and will overturn a substantial body of case law holding that various provisions of the Social Security Act do not create individual federal rights.[7] The

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[7] The list of precedent that will be overturned is lengthy, including, for example, Scrivner v. Andrews, 816 F.2d 261 (6th Cir. 1987) (no right to "meaningful visitation" under the AAA); Lesher v. Lavrich, 784 F.2d 193 (6th Cir. 1986) under Title IV-B); B.H. v. Johnson, 715 F. Supp. 1386 (N.D. Ill. 1989), (precluding individual enforcement of Titles IV-B and IV-E); Winston v. Children and Youth Ser-

(Footnote continued)

result will be a flood of litigation going well beyond any obligations that were recognized prior to the Suter decision, asserting new rights that Congress never intended to create.[8]

Proponents of the amendment contend that such a sweeping application will not result because of the legislative history. The House Report states that "This provision is not intended to expand upon enforceable rights created under the State plan titles of the Social Security Act," nor is it supposed to "alter the rules of statutory construction that the courts used prior to Suter v. Artist M." House Report at 365-66. However, such assertions are not consistent with the language of the amendment, and legislative history is a weak defense at best in the face of the plain language of the statute itself. See, e.g., United States v. Ron Pair Enterprises, Inc., 109 S. Ct. 1026, 1030 (1989); Davis v. Michigan Dep't. of Treasury, 109 S. Ct. 1500, 1504 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute.").

(ii) More Piecemeal Lawsuits Will Not Improve Services But Instead Will Divert Scarce Resources to Litigation

As Illinois has experienced over the past four years, the States already are facing countless lawsuits, with claims for both injunctive relief and money damages, due to alleged violations of federal statutory rights. These claims are on top of existing federal Constitutional rights to safe and adequate treatment in foster care and mental health institutions. E.g., B.H., 715 F. Supp. 1386; Youngberg v. Romeo, 457 U.S. 307 (1982). Piecemeal litigation over one issue at a time, or one piece of the service system at a time, leads to band-aid responses rather than systematic, well-planned improvements.

(Footnote 7 continued from previous page)
vices of Delaware County, 948 F.2d 1380, 1388 (3d Cir. 1991) (Title IV-E does create right to "reasonable efforts" which does not include right to "meaningful visitation"); Aristotle P. v. Johnson, 721 F. Supp. 1002 (N.D. Ill. 1989) (no right for siblings to be placed "in least restrictive, most family-like setting"); Harpole v. Arkansas Dep't. of Human Services, 820 F.2d 923 (8th Cir. 1987) (no wrongful death damages action for under Title IV); Hickey v. Duffy, 827 F.2d 234 (7th Cir. 1987) (parents owing child support cannot sue under Title IV-D).

[8] For example, under Hickey v. Duffy, 827 F.2d 234 (7th Cir. 1987) the Seventh Circuit held Title IV-D could not be individually enforced by parents owing child support. Yet the Suter amendment provides that "every" person denied "any service or benefit" may sue.

Moreover, the financial cost of such litigation is enormous, at a time when the States are facing serious fiscal crises. The attorneys' fees (for both sides, since the States generally wind up paying plaintiffs' fees) and costs of monitoring court orders alone are in the millions of dollars, which are precious funds that are not being used to actually provide necessary services. Because of these concerns, advocacy groups may be judicious in their use of class action litigation; however, there is nothing in the Suter amendment that limits its scope to only certain plaintiffs or certain kinds of reform litigation. The sweeping new rights created could be asserted by individual plaintiffs as well as class action plaintiffs, and for money damages as well as systemic injunctive relief.

B. The Proposed Amendment Does Not Accomplish The Goals of Its Proponents

The proponents seek a narrow purpose to avoid a broad interpretation of the Suter decision to overturn the prior precedent of statutory construction. However, the amendment itself overturns that precedent. The proponents also seek improvements in the child welfare and other service systems. But that will come from increased support for existing and new programs, and the ability of States to flexibly and responsibly respond to the needs of children and their families, not further litigation.

With respect to the Suter decision, the better approach would be to clearly legislate what the proponents desire, meaning neutralizing any change that might result from the opinion in construing provisions other than the "reasonable efforts" clause. This might be accomplished either through a provision-by-provision analysis and enactment by Congress as to which sections of the Act are intended to create individually enforceable rights, or a codification of the rules of statutory construction as reflected in Pennhurst and its progeny.

In order to improve the provision of social services, the better approach is to provide substantive support and assistance to the States, rather than broadening the potential for costly and adversarial court actions.

PREPARED STATEMENT OF JAMES D. WEILL

Good morning, Mr. Chairman. Thank you for inviting us to testify today. I am James D. Weill, the general counsel of the Children's Defense Fund.

We are very pleased that the Finance Committee is conducting this hearing. It is absolutely essential that the final version of the urban aid bill include a provision restoring the law regarding the ability to sue to enforce the provisions of the Social Security Act state plan titles to its condition prior to the Supreme Court decision this past March in Suter v. Artist M., 112 S.Ct. 1360 (1992).

My message here today is very simple:

First, prior to the Suter ruling, it had been clear for more than two decades that applicants for and beneficiaries of Social Security Act state plan programs have a right to sue states when states violate the federal statutes -- and not just when the state plans on paper vary from federal law, but when state policies and practices vary from federal law. Indeed, it is rare that a state plan on its face is improper, particularly since the Department of Health and Human Services preprints most of the plans. But often the states' policies (written or unwritten) and practices bear no relation to the plan or to federal law. It is in these situations that most section 1983 suits have been brought by plan beneficiaries.

This pre-Suter right to sue to enforce federal law was not some unique or unusual right available to low-income beneficiaries of these programs. It is no more than the right given to business and middle class and affluent individuals to challenge arbitrary and illegal government actions in programs that benefit them.

The second key point of my message is that in the Suter decision the Supreme Court clearly signalled that this long-standing principle that beneficiaries can sue is gone or will be gone soon if it follows its Suter reasoning.

Third, this Congress has the authority to and must reaffirm and restore that right to sue. We seek no more than such a reaffirmation and restoration, and the House language does no more than that. Indeed, we seek and the House provided less than full restoration, since the specific statutory section at issue in Suter, the "reasonable efforts" provision of the federal foster care law, was ruled by the Court to be too unclear to enforce, and no one is seeking to reverse that ruling. What we seek is to restore the understanding of the rest of the Social Security Act/Section 1983 law to its status before Suter -- so it will be clear again that state paper plans are not enough; states must also comply in practice with enforceable provisions of federal statutes.

In the absence of such legislation -- the House bill or equivalent language -- the Suter decision will alter dramatically and in very negative ways the relationships between the Congress, the federal executive branch and the states in the Social Security Act state plan titles, and, more important, will allow states to place themselves above the law and be virtually unaccountable to beneficiaries or the taxpayers. By opposing such legislation, the states are saying that they want to be left free to ignore federal law while taking billions of federal dollars to fund these programs.

* * *

From the early 1970's through the early 1980's, I represented plaintiff classes of children and their parents, elderly people, and people with disabilities in cases challenging violations of the federal statutory requirements in the AFDC, Medicaid, and child support enforcement programs by the Illinois Department of Public Aid. I was the Litigation Director and Deputy Director of the Legal Assistance Foundation of Chicago. And, while the Children's Defense Fund is not currently actively involved in representing plaintiff classes in similar cases, it did so until the mid-1980's. I have also provided advice to attorneys across the country on jurisdictional issues in these types of cases on numerous occasions over the past two decades.

CDF's work as a voice for America's children and their families, especially those children who are poor, minority or handicapped; CDF's research on the impact these programs have in meeting the needs, however inadequately, of low-income children and their families; and CDF's and my first-hand knowledge of the the sometimes recalcitrant reactions of states to federal mandates in these programs all serve to fortify our belief that restoration of the ability to sue in Social Security Act state plan programs is absolutely essential both to the integrity of the system and to maintaining the rights of those intended to be helped by these programs.

I have attached three documents to my written statement. I would appreciate it if they were included in the record of this hearing. The first is a copy of the letter which 45 child welfare experts--professors, judges, lawyers, and former HEW officials--sent to Senator Bentsen urging passage of the House provision. The second is a copy of the letter which more than 50 national organizations sent to Senator Bentsen urging immediate action and expressing support for the House provision. The impressive list includes organizations which represent women, children, the elderly, people with disabilities, religious, labor, and social services providers. The third document is a response which the Children's Defense Fund prepared to an anonymous document which we understand some states have circulated to Senators' offices. The CDF response refutes, point by point, each assertion made.

There are three areas I want to elaborate on in this testimony:

First, it is essential that the Committee understand the types of cases that have been filed by applicants and beneficiaries under section 1983 and their role in improving program administration, as well as the lack of alternatives, so that it has a clear sense of the importance of including the Suter restoration provision in the conference bill.

Second is the importance of acting now. Congress must act now to pass a provision which restores the ability of applicants and beneficiaries to sue to challenge state violations of the requirements of the state plan titles of the Social Security Act.

Third, while there is room for discussion about what the precise language of the provision should look like, the House version does the job--it restores the ability to sue to enforce requirements of the state plan titles of the Social Security Act. Nothing more and nothing less. We do recommend that parallel language be added to cover Title III, the unemployment compensation program.

I. The ability to sue to enforce state plan requirements has been essential to assuring that the rights, benefits and protections that Congress included in these programs for the beneficiaries are actually in place.

Bureaucracies at any level of government are not self-regulating. They need oversight and they need to be subject to outside judicial review.

Over the years, applicants and beneficiaries have sued to end a variety of state policies and practices that were clearly illegal under the Social Security Act and that were continuing even though state plans were facially in compliance. For example, some states were taking six months or a year to process the initial applications of destitute families and elderly and disabled individuals for AFDC or Medicaid assistance, even though federal statutes and regulations set 30 to 60 day processing limits. Some states would limit check-ups and immunization schedules to levels far below those intended by Congress in the EPSDT program and necessary for children's health. Some states would limit AFDC work expense deductions to amounts below those mandated by federal law, thereby discouraging recipients from working and ending their welfare stays. Many states have attributed income to the elderly and to children in order to disqualify them from Medicaid or cash programs when such income was not in actuality available to meet their expenses.

In all these instances the question is not what the state plan says -- it typically is in compliance. The question is what is the state actually doing in the program, often in total

disregard of the state plan and the federal statutes. A few specific examples help to explain the fundamental importance of the ability to enforce Social Security Act provisions:

In Shea v. Vialpando, 416 U.S. 251 (1984), plaintiffs successfully challenged the state of Colorado's failure to disregard recipients' reasonable work expenses as then required by the federal statute.

In Stenson v. Blum, 476 F.Supp. 1331 (S.D.N.Y. 1979), affd. mem., 628 F.2d 1345 (2d Cir.), cert. denied, 449 U.S. 885 (1980), plaintiffs successfully sued to stop the state from terminating from Medicaid people who were losing cash benefits but who the state knew or had enough information to determine were eligible for Medicaid.

In Smith v. Trainor, 665 F.2d 172 (7th Cir. 1981), Illinois' Medicaid program required prior approval by the state before it agreed to pay for certain types of medical and dental care for people who were elderly or disabled, children and parents, but it did not provide: prompt responses to requests or any agency time limit for deciding upon requests; written criteria for ruling on requests; administrative hearings to review the merits of denials of requests; or written notice of denial, the reason for the denial and the right to a hearing. Plaintiffs successfully challenged all these practices.

In Miller v. Youakim, 440 U.S. 125 (1979), plaintiffs were needy foster children in Illinois in state custody and placed by the state in the homes of non-parental relatives. Although the state regulated the relatives' homes as if they were unrelated foster homes and required those homes and foster families to meet certain higher standards, the state refused to provide foster care program-linked services or to make foster care payments to the homes on behalf of the children. The Supreme Court unanimously held that this violated the foster care statute.

In many cases, the result of litigation has been not only correction of the violation but improved administration of a state's program. For example, in Peterson v. Rahm, (D. Wash.), plaintiffs challenged the state welfare agency's failure to furnish AFDC benefits with reasonable promptness -- within the state-specified time standards not in excess of 45 days -- as required by federal statute and regulation. There were application backlogs across the state. Each of the named plaintiffs had waited more than 90 days for AFDC benefits; one had waited more than 140 days. Delays until the first interview were as long as 40 working days. During the course of the litigation, it became clear that the state had been unaware of the magnitude of the problem largely because it had no data control system. The case was ultimately resolved by a consent order which included a streamlined application process to avoid

unnecessary delay to the recipient and unnecessary administrative burdens on the state agency. The state also now has a monitoring system so that it can maintain better information on the extent of application delays. Overall, the results of the lawsuit have been improved services to AFDC applicants and better administration of the application process.

In most of these cases, the plaintiffs have represented classes of applicants or beneficiaries who have had a common legal problem. The result has been efficient recourse in the courts for violations of the federal statute. There is no other mechanism available which is able to address as effectively or efficiently the common legal claims of applicants and beneficiaries in government benefit programs.

Nor is enforcement by the federal government an adequate remedy. The Supreme Court itself has recognized over the years that HHS monitoring of the states is not in any way an adequate substitute for the ability of beneficiaries to sue in federal court, pointing out that program beneficiaries do not have the power to trigger or participate in the administrative compliance action that a federal agency might bring against recalcitrant states. Rosado v. Wyman, 397 U.S. 397 (1969). Moreover, while HHS can cut off federal funds, after a very prolonged process, it has no power to protect program beneficiaries against illegal action while the proceedings are ongoing. And for numerous reasons -- some good and some bad -- HHS is slow and reluctant to confront states, begin proceedings, or cut off funds. It acts only in extraordinary circumstances, and even then does so slowly. Nothing has changed in this regard.

Suits are critical to assuring that applicants and beneficiaries secure reasonably prompt relief from illegal state policies. They also serve another function. They are, without question, the most effective mechanism currently in existence for assuring that states actually follow the federal law. HHS's record on enforcement is abysmal. These suits provide the only clear-cut mechanism for enforcing federal law.

As Wayne State Law School Professor William Burnham wrote to Senator Riegle about Suter:

> "The fact is that **suits by recipients are the only practical incentive that states have to comply with the law.** Certainly compliance proceedings before HHS have never worked. They are, in any event, ill-designed to do what needs to be done in most every situation where a state is not complying with federal law: to order the state to do what it should have been doing all along, to come into compliance. It is a gratuitous insult to the federal judiciary to suggest, as the state's argument does, that federal judges will not listen to the states' arguments that they are in compliance. If they are, the suit will end quickly. The fact is that in most cases they clearly are not....The pending bill to overrule Suter would go a long way toward eliminating what is

> the most truly wasteful part of the public benefits litigation: procedural wrangling over the power of the federal court to entertain the suit." (Letter to Senator Donald Riegle, July 24, 1992)(Emphasis in original.)

And, as former Secretary of HEW Elliot Richardson, former Undersecretary of HEW Hale Champion, David Elwood, David Jones, Dr. Donald Cohen, Martha Minow, Bernice Weissbourd, Lee Schorr, William Julius Wilson, Harold Howe II, and thirty-five other child welfare experts wrote to Senator Bentsen, HHS enforcement of these titles:

> "...has been so weak, so erratic and so administratively cumbersome that additional legal safeguards are essential. The State plan mechanism is not a viable accountability or enforcement mechanism for insuring individual rights. It is unconscionable that it would be the only mechanism available to assure that basic, minimally adequate care is provided to children." (Letter to Senator Lloyd Bentsen, July 22, 1992)

II. It is critical that Congress act now to reaffirm and restore the ability to sue in cases arising under Social Security Act state plan titles.

There are two parts to the Suter decision. One part ruled that the language in Title IV-E requiring states to make "reasonable efforts" to prevent family break-up and to return children to their families is too vague to be enforceable through 42 U.S.C. section 1983. As a result, no child in foster care in any state can enforce this one state plan provision.

But it is essential not to confuse the specific finding on the statutory provision, uncontested here, with the sweeping second part of Suter, which is at issue here. That second part, whether children in foster care can ever sue to enforce other, clearer and more specific provisions of Title IV-E -- and whether beneficiaries can sue to enforce provisions of other Social Security Act state plan titles, no matter how clear and mandatory they are -- is the only issue in this hearing.

This second part of the Supreme Court's decision is fairly read to say that beneficiaries may be able to sue to correct facial deficiencies in the state plan, but not to require a state in practice or in its written policies to actually comply with the plan or with the federal statute. The Court said, in response to plaintiffs' argument that the law should be enforced in practice:

> "...[T]he Act does place a requirement on the States, but that requirement only goes as far as to ensure that the State have a plan approved by the Secretary which contains 16 listed features." 112 S.Ct. at 1367 (Emphasis added.)

When plaintiffs argued that the state was ignoring, in practice, a second statutory provision, the Court brushed aside that argument as well on the grounds that the plaintiffs' claim sought more than the paper adequacy of the state plan:

> "Respondents also based their claim for relief on 42 U.S.C. section 671(a)(9) which states that the state plan shall: 'provide [] that [when the state suspects] neglect, abuse or exploitation of such child [in a foster home or institution], it shall bring such condition to the attention of the appropriate court or law enforcement agency...'
>
> "As this subsection is merely another feature which the state plan must include to be approved by the Secretary, it does not afford a cause of action..." 112 S.Ct. at 1368 n.10. (Emphasis added)

It is this unprecedented language that turns more than two decades of court decisions on their heads. While it would be nice to think that this radical about-face in section 1983 jurisprudence would be limited to "reasonable efforts" cases or, at worst, IV-E cases, all indications are to the contrary. The statutory structure of the IV-E program is identical or very similar to the statutory structure of AFDC, Medicaid, child support enforcement, and child welfare. In each title, the language begins: "A state plan for [name of program] must...," followed by a list of requirements.

- In **AFDC**, Section 402 of the Act, 42 U.S.C. section 602, provides "(a) A State plan for aid and services to needy families with children must--"
- In **Medicaid**, Section 1902 of the Act, 42 U.S.C. section 1396a, provides "(a) A State plan for medical assistance must--"
- In **child support enforcement**, Section 454 of the Act, 42 U.S.C. section 654, provides "A State plan for child and spousal support must--"
- In **child welfare**, Section 422(a) of the Act, 42 U.S.C. section 622(a), provides "In order to be eligible for payment under this part, a State must have a plan for child welfare services...which meets the requirements of subsection (b)."

Unfortunately, it is very likely that many lower courts, when faced with motions to dismiss from states, will apply the Court's decision to all of these titles. There will also be some courts which will reject this analysis, at least until the Supreme Court speaks again. However, even in those cases, precious time will have been lost before plaintiffs secure much-needed relief. And, in both types of cases, substantial resources, of the judges and of plaintiffs and defendants,

will be wasted in addressing at the trial and appellate levels an issue that previously had been settled.

The Congressional Research Service, in a report to the Ways and Means Committee, recognized that Suter has this very broad implication:

> "The Suter v. Artist M. decision appears to result in the elimination of the ability of beneficiaries of Social Security Act programs, primarily children and families, which have state plan requirements to sue to enforce the Act's programs. The implications are far reaching. The decision in Artist M. appears to affect not only the enforceability of the Adoption Assistance and Child Welfare Act but also conceivably all other federal programs that have state plan requirements (including Aid to Families with Dependent Children, Medicaid, Unemployment Compensation, and Child Support)." CRS American Law Division Memo to the House Ways and Means Committee, May 11, 1992, at p. 5 (Emphasis added.)

The states' claims to the contrary are belied by the use of Suter that many states already are making in motions to dismiss actions brought under section 1983 and state plan titles of the Act. For example, in Maynard v. Williams, Case No. 92-40279 MP (N.D.Fla.), the plaintiffs are challenging the state's failure to provide child care services to participants in the state's JOBS program. The state's memorandum in support of its motion to dismiss provides a sobering example of how Congress should expect that the states will use Suter in the courts. The state argues:

> "...42 U.S.C. section 602(g)(1)(A)(i)(II), which constitutes the basis of the Plaintiffs' claim of an entitlement, is nothing more than part of the numerous 'state plan' requirements that are to be included in a submittal for approval by the United States Secretary of Health and Human Services (HHS) in order to receive federal financial participation. Plaintiffs' complaint contains no allegation that HRS's [the state welfare agency] State plan has not been filed and approved.
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> * * *
>
> "The Supreme Court in Suter, after examining the statute and the regulations promulgated by the Secretary, concluded that the only requirement placed upon the state for receipt of federal funds was the requirement that the state submit a plan to be approved by the Secretary...." (Emphasis added)

This is the states' candid assessment of how they view their obligations in the state plan programs as a result of the Suter decision.

Similarly, the State of Illinois is relying upon Suter in

seeking dismissal of Medicaid and child support enforcement as well as foster care cases. In King v. Bradley, No. 92 C 1564 (N.D.Ill.), plaintiffs challenged violations in the state's child support enforcement program. In its brief in support of its motion to dismiss, Illinois stated:

> "...Suter...guides this court....The [Suter v.] Artist M. Court reasoned that the Act and its implementing regulations 'do not provide notice to the States that failure to do anything other than submit a plan with the requisite features, to be approved by the Secretary, is a further condition on the receipt of funds from the Federal Government.' Id. at 1369. Consequently, the Court concluded that the language of the Act only imposed a generalized duty on the State, to be enforced not by private individuals but by the Secretary of HHS. Id. at 1370." (Emphasis added.)

In a second case, challenging a violation of the Medicaid statute, Illinois is arguing that, "Suter also diminished the force of Plaintiffs' argument that enforceable rights could be inferred from the fact that compliance with the elements which must be contained in the State plan was a condition of the State's receipt of federal funds. Suter v. Artist M., ___U.S.___, 112 S.Ct. 1360, 1367-1368 (1992)." Memisovski v. Bradley, No. 92 C 1982 (N.D.Ill.), Defendant's Reply to Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss.

The State of Ohio, in Ward v. Keller, Case No. C2-87-1448 (S.D.Ohio), relies on the language from Suter that we quoted earlier to argue that the Suter decision applies to other Social Security Act titles as well as IV-E: "[A] close reading of the Court's decision indicates that its logic applies to all state plan requirements under Title IV-E, and by implication to the state plan requirements of Title IV-B as well....[Suter] has effectively replaced the previously-existing statutory framework for determining whether a federal statute creates privately-enforceable rights." (State's Reply Brief on its Motion to Dismiss, pages 16, 24.)

The states' representations to the federal courts in these and other cases belie their representations to members of Congress that Suter is unclear or too narrow to worry about, or that Congress should wait to act. As their statements to the courts reflect, Suter is a radical departure from past Supreme Court precedent and the states are moving quickly to exploit that. Children and their families and people who are elderly or disabled have every reason to fear that Suter will be applied to all Social Security state plan programs and they will be left unable to remedy any state violations of federal law, no matter how egregious. The states' representations to the federal courts reflect why it is so important that Congress act this year, in H.R. 11, to restore the ability to sue.

III. The House provision properly reaffirms and restores the ability to sue to challenge violations of the state plan requirements.

Section 7104 of the House version of H.R. 11 adds a new section 1123 to the Social Security Act. It provides:

> "Each individual shall have the right not to be denied any service or benefit under this 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."

As the legislative history indicates, this provision accomplishes one and only one goal -- it restores the ability to sue to enforce the state plan requirements. It puts applicants and beneficiaries of these programs back in the position they were in prior to the Suter decision (except it does not restore the right to enforce the "reasonable efforts" provision). It gives no greater rights.

There have been assertions made by state representatives that the language is too broad. However, the nature of the alleged breadth problem never has been explained. As the House legislative history says several times in several ways, the provision only makes enforceable that which was enforceable before. It does not, for example, make newly enforceable those provisions previously not enforceable because they were too unclear to enforce. They will still be unenforceable. This provision makes no change in the judicial rules of statutory construction. It tells judges to act as they acted before March 25, 1992 when Suter was decided.

There have also been assertions that applicants and beneficiaries have adequate state court remedies to address the state's violations of federal law. That is not true.

First, the Supreme Court's ruling that there is no 42 U.S.C. section 1983 cause of action in these state plan cases is an interpretation of the enforceability of substantive federal law that state courts as well as federal courts will follow. Second, while a few states might have created their own, separate causes of action to enforce federal law (or, where they exist, state laws that incorporate federal rules), they are very few, and the state causes of action or rules of civil procedure come with all sorts of procedural barriers that Section 1983 and the Federal Rules of Civil Procedure do not entail. Many states don't allow class actions at all or in this type of case. In some there is no meaningful pretrial discovery of facts. In others the state generally need not comply with any court decision until all appeals are exhausted. In general, state courts will be no more able or willing than federal courts to enforce federal state plan requirements in suits filed by applicants and beneficiaries if Suter is allowed to stand.

States have also said that applicants and beneficiaries have adequate recourse because they can seek administrative review of a negative action in a fair hearing in the state administrative agency (in some states, they can then seek review of the hearing decision in state court). This position reflects a misunderstanding of both the way in which state agencies function and the purpose of the section 1983 suits that have been filed in federal court. When plaintiffs file a suit under section 1983 challenging a state's violation of the federal statute, they are typically challenging the state's failure, on a systemic basis, to comply with federal law in a large number of cases. States do not change their policies based upon claims raised by individuals at administrative hearings. In some cases they don't even let recipients raise legal or policy issues at such hearings.

The only practical and effective mechanism for challenging systemic state violations of federal statutes for over two decades has been a complaint filed under section 1983, typically a class action, and typically in federal court. These cases are a very efficient use of resources for the courts, the state and plaintiffs' counsel. The House was correct in reaffirming and restoring such suits, and the language it used to do so is wholly appropriate.

Additional language is needed to cover the unemployment compensation program.

In the unemployment compensation program, the statutory language is slightly different. There, instead of setting out state plan requirements, the federal statute uses an analogous structure of laying out requirements that the state must have its state laws reflect. See Section 303(a) of the Social Security Act, 42 U.S.C. section 503(a). The structural problem created by Suter is the same: Suter can lead to the result that it is enough to have facially compliant state laws (like state plans), but that there is no right to sue for actual adherence to the federal law. We are already aware of one case in which it appears that the state of California will be pressing a Suter argument in a challenge to delays in its unemployment compensation program. And the Congressional Research Service memo we quoted earlier also recognizes the threat to unemployment compensation, as does the House legislative history.

We recommend that the conferees amend the House language to clearly cover Title III, unemployment compensation. This can be accomplished very simply by inserting specific references to Title III in the House language:

> "Each individual shall have the right not to be denied any service or benefit under this 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, in Title III, requirements

to have state laws which meet such requirements), or to administer such a plan (or, in Title III, such state laws) in accordance with such requirements.

Conclusion

Congress established AFDC, Medicaid, foster care, unemployment insurance, and child support enforcement to assist people in need--children and their families, the elderly, people with disabilities, and people who are unemployed. It is these least powerful Americans who are hurt most by this Supreme Court decision. It is the people who have the least clout to make themselves heard in the executive branch and legislatures -- state and federal -- on whom Suter is closing the courthouse doors.

By deciding to participate in these programs and take federal funds, the states have agreed to follow the requirements of these programs. If they disagree with a rule, they can ask you, the Congress, to change it. They can not -- and should not be allowed to -- simply to violate the rules at will. But this is what they effectively will be able to do if Suter's "state plan" language prevails. That is what they are seeking by their opposition to this provision -- license to ignore the federal statutory requirements of these programs.

In order to assure that these programs work for the people they are intended to benefit, we urge you to accept the House provision in conference, with the technical unemployment compensation change we have suggested.

Thank you.

Center
for the
Study
of
Social
Policy

July 22, 1992

The Honorable Lloyd Bentsen
United States Senate
Hart 703
Washington, DC 20510

Dear Senator Bentsen:

We are writing to urge your support for restoring an important legal right to some of the nation's most vulnerable children.

Specifically, we are asking you to pass in the Senate a provision identical to H.R. 11, The Urban Aid package, which gives abused, neglected, and dependent children in public custody the ability to sue public agencies when adequate care and services are not provided as specified in existing federal law and paid for in part by federal funds.

Here's why this action is needed now.

A recent Supreme Court decision, Artist M. v. Suter, found that abused, neglected, and dependent children in public custody cannot enforce their claims for adequate care and services through legal action. The Court's interpretation of current law (P.L. 96-272, The Adoption Assistance and Child Welfare Act of 1980) was that children must rely solely on federal and state agency enforcement of the protections that were provided by Congress in th t statute.

This puts hundreds of thousands of children at risk -- children in state and locally-funded foster care and/or residential institutions around the country. While some of the care they receive is very good, many other services are barely adequate. And in some communities, care is still of such poor quality that it is harmful to children.

Tom Joe, Director

1250 Eye Street, NW
Suite 503
Washington, DC
20005-3922
Fax 202 371-1472
Voice 202 371-1565

We are not talking here about subtle issues of program quality. We are concerned instead for those children who remain in "emergency placements" for years at a time; foster children in limbo with no plans and no action to return them to their families or to other permanent homes; children moved to 6 or 8 different "homes" in the course of a year; or children who wait so long for adoption that chances for a permanent home are lost.

Until now, when these flagrant abuses were discovered and state and local agencies did not, or could not, correct them on their own, litigation has been a "last resort" strategy for the children being harmed. Children and their advocates have been able to bring suit to enforce the basic guarantees that Congress provided in the 1980 federal law. Class action lawsuits under Title IV-B and Title IV-E of the 1980 statute have helped improve state and local systems when all other efforts failed.

The Supreme Court's decision may make this no longer possible. The strategy that the Court cited as an alternative -- enforcement of protections by the U.S. Department of Health and Human Services through a "state plan" process -- is virtually non-existent. HHS' enforcement of P.L. 96-272 to date has been so weak, so erratic, and so administratively cumbersome that additional legal safeguards are essential. The State plan mechanism is not a viable accountability or enforcement mechanism for insuring individual rights. It is unconscionable that it would be the only mechanism available to assure that basic, minimally adequate care is provided to children.

Those of us signing this letter come to this position from different backgrounds, perspectives, and experiences. For some of us, our day-to-day work makes us partners with state officials in trying to improve state and local systems. Others among us have spent years conducting research on these services, with the aim of improving them. We all share the common belief that many children in the current child welfare system will be irreparably hurt if Congress does not restore to them the right to enforce provisions of federal law th. ugh the courts.

Congress has helped to ensure that other groups, such as the mentally ill, the developmentally disabled, students with handicapping conditions, the elderly in publicly funded nursing care, have enforceable rights. These groups have stronger constituencies than the children we are concerned about here. We are asking you to act now to guarantee that these children are not left without the bare minimum protections that they have had to date.

We would be glad to provide any additional information that you or your staff may need on this issue.

Sincerely,

Tom Joe
Director
The Center for the Study of Social Policy

The Honorable Elliot Richardson
Former Secretary of the
U.S. Department of Health,
Education, and Welfare
Former U.S. Attorney General
Milbank, Tweed, Hadley and McCloy
Washington, District of Columbia

Hale Champion
Former Executive Dean
Kennedy School of Government
Harvard University
Cambridge, Massachusetts

Harold Howe II
Former U.S. Commissioner of Education
Former Vice President of the
Ford Foundation
Cambridge, Massachusetts

John Kramer
Dean
Tulane Law School
Tulane University
New Orleans, Louisiana

Harold Richman
Executive Director
The Chapin Hall Center for Children
University of Chicago
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Director
Child Study Center
Yale University School of Medicine
New Haven, Connecticut

David Ellwood
Academic Dean
Kennedy School of Government
Harvard University
Cambridge, Massachusetts

Lizabeth B. Schorr
Director
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Washington, District of Columbia

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Director
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and Federal Relations
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Director
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Shepard Broad Law Center
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Director
Child and Family Studies
Florida Mental Health Institute
University of South Florida
Tampa, Florida

Ralph Smith
Executive Director
The Philadelphia
Children's Network
Philadelphia, Pennsylvania

Charles Bruner, Ph.D.
Executive Director
The Child and Family Policy Center
Des Moines, Iowa

Lynn Usher, Ph.D.
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Research Triangle Institute
Research Triangle Park,
North Carolina

Marcia Allen
Director
National Resource Center on
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University of Iowa
School of Social Work
Iowa City, Iowa

Judith Jones
Director
National Resource Center for
Children in Poverty
School of Public Health
Columbia University
New York, New York

Michael Wiseman
Professor of Public Affairs
La Follette Institute
University of Wisconsin-Madison
Madison, Wisconsin

Judith McKenzie
Director
National Resource Center
Spaulding for Children
Southfield, Michigan

Bernice Weissbourd
President, Family Focus
President, Family Resource Coalition
Chicago, Illinois

Anne Gruenewald
President, Board of Directors
National Association of
Family Based Services
Iowa City, Iowa

The Honorable Leon Edwards
Chairperson of the Juvenile
Court Judges of California
Santa Clara County Superior
Court Judge
San Jose, California

The Honorable Richard Fitzgerald
District Court Judge
Jefferson District Court
Louisville, Kentucky

The Honorable Edward P. Gallogly
Judge
Family Court
State of Rhode Island and
Providence Plantations
Providence, Rhode Island

The Honorable Andrew J. Shookhoff
Judge
Juvenile Court of Davidson County
Nashville, Tennessee

David R. Jones
President and Chief Executive Officer
Community Service Society of New York
New York, New York

July 22, 1992

Dear Senator Bentsen:

The undersigned organizations represent people who are older, disabled, women, and children, religious organizations, social services organizations, service providers, and labor. We believe that it is essential that applicants and beneficiaries of programs such as Medicaid, Aid to Families with Dependent Children, Unemployment Compensation, foster care, and child support enforcement continue to have the ability to sue in federal court to enforce state plan requirements if a state fails to meet these requirements---a 25 year old right that is currently threatened.

The Supreme Court's decision in Suter v. Artist M. slammed shut the courthouse doors to children in foster care injured by a state's failure to comply with state plan requirements of Title IV-E of the Social Security Act. The Supreme Court shut these doors not just by relying on the merits of the particular statute at issue (a part of the decision we do not address) but also by suggesting in a sweeping way that beneficiaries may never be able to sue to enforce federal statutes in any "state plan" program. We fear that federal courts will soon apply the decision broadly to all Social Security Act state plan programs: the courthouse doors will be closed to all children and their families, people who are disabled, and older people who rely upon Medicaid, AFDC, and the other state plan programs under the Social Security Act. The Congressional Research Service, in its report to the Ways and Means Committee, agrees with this analysis.

In section 7104 of H.R. 11, the House of Representatives restores the ability of applicants and beneficiaries to sue to enforce the state plan requirements in the Social Security Act to the extent that it existed prior to Suter. This is a straight restoration. The provision does not make any federal law litigable now if it was not litigable before Suter.

This bill passed the House on July 2, 1992. We urge you to include a similar provision in the Finance Committee's enterprise zone/urban aid package.

We understand that there are those who seek to delay action by stating there is no need to move at this time. However, without action now, pending cases across the country are in jeopardy. Indeed, states are now filing motions to dismiss saying Suter prevents beneficiary enforcement of the state plan

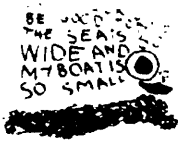
requirements of federal law. And, it will be difficult, perhaps impossible, to secure critically needed injunctive relief in the future when states fail to implement the requirements as Congress wrote them.

We urge you to protect poor people, those who are young, disproportionately women, disabled or old, and often most vulnerable, by including a similar provision in the Finance Committee's package. Help them to secure the benefits Congress intends them to have.

Sincerely,

AIDS Action Council
Alliance for Justice
American Academy of Pediatrics
American Association of Retired Persons
American Association for Marriage and Family Therapy
American Association on Mental Retardation
American Federation of State, County and Municipal Employees
American Foundation for the Blind
American Psychological Association
American Public Health Association
American Speech-Language-Hearing Association
American Society on Aging
Americans for Democratic Action, Inc.
Catholic Charities USA
Center for Law and Social Policy
Center for the Study of Youth Policy, School of Social Work, University of Michigan
Center for Women Policy Studies
Children's Defense Fund
Church Women United
Citizens for Better Care (Michigan)
Families U.S.A.
Fund for the Feminist Majority
Goodwill Industries of America, Inc.
Gray Panthers
Jesuit Social Ministries, National Office
Lutheran Office for Governmental Affairs
Mental Health Law Project
National Alliance for the Mentally Ill
National Association of Counsel for Children
National Association of Private Residential Resources
National Association of Protection and Advocacy Systems
National Association of Rehabilitation Facilities
National Black Child Development Institute
National Center for Law and Deafness
National Citizens Coalition for Nursing Home Reform
National Council of Community Hospitals

National Council of Community Mental Health Centers
National Council of Jewish Women
National Council of Senior Citizens
National Mental Health Association
National Parent Network on Disabilities
National Women's Health Network
National Women's Law Center
NOW Legal Defense and Education Fund
Older Women's League
The Arc (formerly Association for Retarded Citizens of the U.S.)
United Auto Workers
United States Catholic Conference
Women's Legal Defense Fund
Youth Law Center
YWCA of the USA



Children's Defense Fund

RESPONSE TO STATES' ASSERTIONS ABOUT THE SUTER AMENDMENT
July 17, 1992

The purpose of this memo is to respond to the points asserted as the basis for opposition to the provision (section 7104 of H.R. 11) that restores to beneficiaries of federal-state Social Security Act programs the access to the courts they had for at least two decades until a recent Supreme Court ruling. The points to which we are responding appear in an unsigned and unattributed memo, being circulated by certain state representatives, with the title, "The Case Against the Suter Amendment."

The report which the Congressional Research Service (CRS) prepared for the Ways and Means Committee and the Ways and Means Committee legislative history are helpful in understanding the scope of the Supreme Court's decision and the legislative response. These documents are attached.

Introduction

Since at least 1969, applicants and beneficiaries of state plan programs under the Social Security Act have been able to sue to enforce the state plan provisions of the Act. For more than two decades, the federal courts have stepped in when a widespread pattern or practice of ignoring or violating the federal statute was occurring at the state level.

In the past, the Supreme Court has held that such cases were properly in the federal courts. It recognized that program beneficiaries did not have the power to trigger or participate in any administrative compliance action by a federal agency against recalcitrant states, and that the beneficiaries needed their own means of enforcing the provisions of the programs. Rosado v. Wyman, 397 U.S. 397 (1969). In 1980, the Court held explicitly what it had assumed and suggested in earlier cases: beneficiaries of federal-state programs could seek to enjoin state violations of federal statutes by suing under 42 U.S.C. section 1983. Maine v. Thiboutot, 448 U.S. 1 (1980).

In Suter v. Artist M., the Supreme Court developed a radical and unprecedented approach to these challenges: applicants and beneficiaries can only sue to assure that the state has a paper plan approved by the Secretary. They can not sue to remedy any

violations of the plan or the federal statute, in policy or practice, no matter how egregious the violations.

On July 2, 1992, the House of Representatives passed a provision which restores the ability to sue to enforce the state plan requirements of the Social Security Act state plan titles. As is clear from the language and the legislative history, the provision does nothing more than restore the law to its position prior to the Suter decision.

The concerns raised by certain states about this provision fall into two categories:

(1) Those which essentially say, "We like the fact that the Supreme Court deprived people of their ability to enforce state plan requirements and want to keep it this way."

(2) Those which assert that the current provision is drafted incorrectly, that it may be too broad.

CATEGORY 1: Points which essentially reflect an attitude that the Supreme Court ruling depriving people of their ability to enforce federal law should be left undisturbed.

This approach is fundamentally flawed: poor people, whether young, old, or disabled, need to be able have access to the federal courts to seek relief when a state fails to meet the requirements of the federal law.

A. Claim that restoration of pre-Suter law will encourage proliferation of litigation.

This is simply wrong. This provision only restores the right to sue to the extent that it existed prior to Suter. for at least 25 years. The number of suits filed in the future will be no greater than in the past. As in the past, there will be no proliferation of litigation. Fewer than 100 suits per year were filed prior to Suter under these programs.

In 1990, the Federal Courts Study Committee completed a major study of the federal courts. This study was commissioned by the Congress in the "Federal Courts Study Act," Pub. L. No. 100-702, 102 Stat. 4642. Members of the Committee included Senators Grassley and Heflin. One focus of the study was recommendations for reducing the caseloads of the federal courts. Civil actions against states under section 1983 were not mentioned as a concern. [See: Report of the Federal Courts Study Committee, April 2, 1990]

B. Claim that lawsuits hurt, rather than help, children.

Congress establishes the state plan requirements of these programs. By enacting these provisions, Congress has indicated what the states must do in order to participate in the programs and receive federal funds. By alleging that enforcement of clear federal requirements hurts children, the states are attacking federal laws.

A state opts to participate in these programs. By so opting, it agrees to follow the requirements of federal law in order to receive the federal funds. In suits filed to enforce state plan requirements, the role of the courts is to assure that the state is meeting the requirements which the Congress has enacted--to assure that the people whom Congress intended to benefit from the program are actually receiving the benefits to which they are entitled based upon the rules which the Congress prescribed. Children--and the elderly and other adults--are only helped by these lawsuits.

C. Claim that any action of a caseworker will be subject to litigation.

These suits challenge broadly applied state policies or practices which violate the federal law, not the action of one caseworker in one case.

Prior to Suter these lawsuits did not occur. They will not occur after restoration of pre-Suter law. Suits in federal court are not about individual factual determinations such as the contents of one child's case plan. Such a question or dispute basically would be handled through the state's fair hearing appeals process. Rather, the cases in federal court challenge a policy or practice of the state.

D. Claims that the provision is "unnecessary" because the Supreme Court's decision is narrow, applying only to provisions which are vague or only to the Title IV-F program.

Both claims are incorrect. In its decision, the Supreme Court clearly stated that plaintiff children were only entitled to have the state have a written plan, not to enforcement of that plan, and it did not distinguish in this part of the holding between vague and clear provisions:

> "...[T]he Act does place a requirement on the States, but that requirement only goes as far as to ensure that the State have a plan approved by the Secretary which contains the 16 listed features.

* * *

"10. Respondents also based their claim for relief on 42 U.S.C. section 671(a)(9) which states that the state plan shall: 'provide [] that [when the state suspects] neglect, abuse, or exploitation of such child [in foster home or institution], it shall bring such condition to the attention of the appropriate court or law enforcement agency....'

"As this subsection is merely another feature which the state plan must include to be approved by the Secretary, it does not afford a cause of action...."

As to the claim that Suter only implicates the IV-E program, the Congressional Research Service (CRS) has concluded that the Supreme Court's decision has far broader implications.

In its report on the Suter decision, CRS states:

"The Suter v. Artist M. decision appears to result in the elimination of the ability of beneficiaries of Social Security Act programs, primarily children and families, which have state plan requirements to sue to enforce the Act's programs. The implications are far reaching. The decision in Artist M. appears to affect not only the enforceability of the Adoption Assistance and Child Welfare Act but also conceivably all other federal programs that have state plan requirements (including Aid to Families with Dependent Children, Medicaid, Unemployment Compensation, and Child Support)." (emphasis added, page 5)

The House report reaches the same conclusion. (page 365)

The fact that the states are already filing motions to dismiss relying on Suter in cases under other titles of the Social Security Act suggests that they do not even believe what they are telling the Congress.

This is a good case of actions speaking louder than words. States are already filing motions to dismiss cases filed to enforce provisions of other Social Security Act state plan programs. And, courts have already begun dismissing cases on the basis of Suter. For example, the state of Illinois has already filed a motion to dismiss a challenge under the child support enforcement program, citing Suter. See King v. Bradley, No. 92 C 1564 (N.D. Ill.).

E. Claim that children (and, presumably, people who are older or disabled) have other ways to sue or seek review of their claims.

In virtually all states, there is no other way to secure the relief sought in federal court actions to enforce provisions of state plan titles.

The states claim that there are "ample avenues for redress in instances when services and benefits are not forthcoming." They suggest that other remedies exist, including "federal administrative and state court remedies, as well as constitutional rights under Section 1983."

Of course, if these routes were truly comparable to the relief and process available in federal court, states would not be opposing the restoration of the right to sue as it existed pre-Suter. In fact, for many reasons, the alternatives mentioned fall far short:

1. It is true that one can still sue for a violation of a constitutional right under section 1983. But that is irrelevant when it comes to enforcing the state plan requirements of the Social Security Act. These are specific statutory rights that need to be enforced. It is rare that there is a closely overlapping constitutional claim that can be enforced.

2. Federal administrative procedures are not intended to be the way in which applicants and beneficiaries secure the benefits to which they are entitled. There is no way for an individual to trigger such a proceeding, as the Supreme Court prior to Suter pointed out in explaining why beneficiaries could bring suits in federal courts. E.g., Rosado v. Wyman, 397 U.S. 397 (1970). As CRS notes: "The importance of the existence of a private remedy for program beneficiaries to enforce the federal statute is heightened by the fact that presently there is no process by which beneficiaries can trigger an investigation by DHHS for a state's failure to implement state plan requirements" (pages 5-6).

   Even if such a trigger existed, the ability to seek enforcement of federal requirements in federal court would remain critical. First, political judgments often interfere with decisions about whether to impose sanctions (or even investigations) upon states. Second, the federal agency is not in the position to require that the states apply the provision to those specific individuals who first were hurt by the failure to follow federal law and who filed the challenge. The ability of federal courts to provide declaratory and injunctive relief is a key remedy.

3. Most states do not allow the procedures (e.g., class actions in these types of cases) that make federal court enforcement of federal law effectual. Also, the Supreme Court opinion knocks out claims based on the federal statutes in either federal or state court. Few states have substantive statutes broadly paralleling the federal statutes.

F. Claim that the provision is too "sweeping."

The only purpose of this provision is to restore the ability to sue in federal court to enforce state plan requirements under the Social Security Act. Not only is it not sweeping, it adds nothing new to what previously existed.

G. Claim that action is "premature."

States are already beginning to file motions to dismiss actions under other state plan titles of the Social Security Act. See, discussion above. For the states at the same time to tell Congress that this provision is premature is akin to the fox at the henhouse door telling the farmer to come back in the morning.

H. Claim that provision would "cede to the courts responsibilities that now rest with the Congress and the federal and state agencies."

Nothing in this provision changes the relationships between Congress and the federal and state agencies from how they have always been. In fact, the failure to enact this provision this year will result in changes in these relationships, resulting in irreparable harm to applicants and beneficiaries.

Congress should be just as concerned as applicants and beneficiaries of these programs that, without the Suter amendment, the relationships between Congress and the federal and state agencies will suffer dramatically. The programs will move farther and farther in practice from the federal statutory requirements passed by the Congress because there will be no broad remedial or enforcement mechanism. Official lawlessness will increase. Over the years, when Congress has enacted improvements or changes in these programs, it has expected that the federal and state governments would properly implement the programs. However, Congress has also known that, if the agencies fail to meet its requirements, applicants and beneficiaries who were hurt by the state's failure to properly follow federal law would be able to challenge the state in court. This process has provided an absolutely necessary check to assure that the federal requirements, as Congress intended them, are actually implemented.

I. Claim that Congress is considering other legislation that would address the same concerns.

The Suter amendment on when people can sue has nothing to do with the amendment of the substance of the "reasonable

efforts" provision. We support other legislation's proposal to create a panel to make recommendations on this important issue. Suggesting that the laws overlap, however, is like suggesting that a Supreme Court decision saying the Bill of Rights provisions could not be enforced by citizens in court could be fixed by a balanced budget amendment to the Constitution. They are apples and oranges.

J. Claim that "equity" should prevent such suits because the federal government has not provided adequate guidance to states.

The Supreme Court has held repeatedly that requirements which are not sufficiently explicit can not be enforced. Thus, the courts already provide the restraint and the "equity" which the states seek. "Equity," as applied under these circumstances, requires that the courthouse door not be slammed shut on applicants and beneficiaries of federal state plan programs under the Social Security Act.

Category 2: Concerns about the alleged breadth of the provision.

The states have indicated their concerns that the provision is "too broad." We do not believe that as drafted it is. As the legislative history says:

> "This provision is therefore intended to restore to an aggrieved party the right to enforce, as it existed prior to the Suter v. Artist M. decision, the Federal mandates of the State plan titles of the Social Security Act in Federal courts. This provision is not intended to expand upon enforceable rights created under the State plan titles of the Social Security Act..."
>
> * * *
>
> "The provision does not alter the rules of statutory construction that the courts used prior to Suter v. Artist M. The provision does not alter the finding in Suter v. Artist M., that the 'reasonable efforts' provision, without further direction, is too vague to be enforceable in such an action. It only alters that portion of Suter v. Artist M. suggesting that failure of a state to comply with a state plan provision is not litigable as a violation of federal statutory rights." (pages 365-366)

However, as our only goal is to restore the ~~rights~~ which existed prior to the Supreme Court's decision in Suter, if there is language which the states can propose which will address their concerns, while assuring that program applicants and beneficiaries again can to sue to enforce state plan requirements in federal court, such language should be considered.

COMMUNICATIONS

STATEMENT OF THE AMERICAN PUBLIC WELFARE ASSOCIATION

Mr. Chairman, members of the Subcommittee on Social Security and Family Policy, the American Public Welfare Association is very appreciative of the opportunity to present our views today on the policy, program, and fiscal implications of the *Suter* v. *Artist M.* decision of March 25, 1992. We especially thank Senator Bentsen and you, Mr. Chairman, for agreeing to hold this hearing in a midst of this hurried legislative session. We realize there is much to be done before Congress adjourns, and it would have been much easier for Congress to dispense with a formal hearing on this important issue.

APWA is a 62 year old nonprofit bipartisan organization representing all the state human service departments as well as local public welfare agencies and individuals concerned with social welfare policy and practice. Mr. Chairman, the state and local human service administrators we represent not only administer a wide range of health and human service programs, they are also strong advocates for protecting the health and well-being of the children and families they serve. This includes ensuring that there are avenues for redress in instances when services and benefits to children and their families are not forthcoming.

The recognition of our role as advocates by some individuals and organizations seems to have been lost during the discussion and debate thus far on the so-called "Suter amendment" contained in the House version of H.R. 11. We point to APWA's leadership and advocacy on the Family Support Act, the Child Care and Development Block Grant, and child welfare and family preservation legislation now pending before Congress, as examples of APWA's commitment to poor children and families. In fact, APWA's recommendations for welfare reform were the foundation for the Family Support Act Mr. Chairman, and the recommendations of APWA's National Commission on Child Welfare and Family Preservation serve as the cornerstone of the child welfare provisions contained in H.R. 11 and H.R. 3603.

The policy, program, and fiscal implications of the *Suter* v. *Artist M.* are extremely complicated and easily misunderstood. Because of the complexity of the case there has been substantial disagreement and debate over what the Supreme Court decided, what that decision means, and even what existed prior to the ruling. There is also disagreement over the intent and impact of the amendment to Title XI of the Social Security Act contained in H.R. 11 and passed by the House in July. APWA, the National Governors' Association, and the states requested a hearing in the hope that the testimony and discussion will help to begin to clarify many of these issues. Wiping out a significant history of case law is an extreme action and this is what would occur if the House provision is adopted. Thus, these consequences need to be examined very carefully. APWA and the states stand ready to fully participate in this examination.

While it is not the intent of this written testimony to provide a thorough legal analysis of the Supreme Court's decision (our analysis is enclosed as an attachment to this testimony, see "*Suter* v. *Artist M.* Decision") or the House provision, we would like to summarize what we believe the Court decided and our concerns with the House provision.

The Court found that neither the legislative history nor the language concerning the Adoption Assistance and Child Welfare Act, P.L. 96-272 created individual federally-enforceable rights through its requirement of "reasonable efforts" to prevent removal from the home or to return a child to his or her home. The Court held that the "reasonable efforts" provision is too vague to provide a private cause of action and that the requirement may be "plausibly read to impose only a rather generalized duty on the State" that would be enforced by the Secretary. The Court also concluded that the respondents had not demonstrated that an implied right of action

under the "reasonable efforts" clause existed, and that Congress did not intend to create a private cause of action to enforce the Civil Rights Act, Sec. 1983 42 U.S.C.

The Court did find that "other sections of the (Child Welfare Act) provided mechanisms to enforce the 'reasonable efforts' clause." Most important in the current context, the decision *did not eliminate any existing avenue for litigation on behalf of children.* The Court did *not* conclude that Section 1983 cannot be used in future litigation. The high court's decision continues to permit enforcement of state plan requirements under the Social Security Act on a case-by-case basis as was the situation prior to the decision.

It is important to underscore that Congress has recognized the lack of federal guidance on implementation of the "reasonable efforts" requirement. Both the House and Senate, via H.R. 3603 and H.R. 11 respectively, contain provisions establishing advisory committees to develop a uniform definition of reasonable efforts. APWA and the states fully support this approach and are committed to working closely with the advisory committee and the Congress to clarify the requirement.

The intent of the House-passed amendment according to its proponents was to take the current legal and human service system to a pre-Suter landscape by: (1) preserving private rights of action; and (2) reaffirming that the state plan titles under the Social Security Act impose binding obligations on participating states to comply with requirements of the act *(Report of the Committee on Ways and Means to accompany H.R. 11,* June 30, 1992). But as indicated above, already existing private rights of action were not affected by the decision, nor did it impinge upon the enforceability of state plan requirements.

In our view what the amendment would do is *create a new and express right to sue in federal court for all services and benefits covered by a state plan in all titles of the Social Security Act.* It would thus radically expand state exposure to lawsuits under provisions of the act that have never been enforceable previously and, more importantly would completely undermine the structure of the Social Security Act. The language is so broad that it could be interpreted as establishing an enforceable entitlement to all of the services and benefits authorized under the applicable titles of the Social Security Act even those provisions where it was not the intent of Congress to provide an enforceable right.

For example, Mr. Chairman, as you may recall, there is a provision in the Family Support Act requiring that as a condition of receipt of federal funds a state agency administering the JOBS program must ensure "that all applicants and recipients of AFDC are encouraged, assisted, and required to fulfill their responsibilities to support their children by preparing for, accepting, and retaining such employment as they are capable of performing ." (Section 482 (C) (1)). Under the House amendment, states could be subject to litigation if, in the view of a court, the state did not adequately encourage, assist, or require applicants to fulfill their responsibilities. We do not believe it was the intent of Congress, that a private cause of action be provided under this state plan requirement; rather, HHS through federal oversight would assume responsibility for ensuring compliance.

The cost of litigation as a result of the amendment could have a far reaching fiscal impact in the states. In Kansas, the cost of defending against one lawsuit was nearly $600,000 in FY 1992. Alabama spent nearly $1 7 million over the past three years in connection with or defending against a recent lawsuit. And, as stated in written testimony provided by Howard Tellenfeld for this hearing, "The State of Florida estimates that a $1 million drain in its general revenue for plantiffs' attorneys' fees, monitoring fees and other costs of litigation, which is sure to follow the adoption of the Suter Amendment, could pay for 2.5 family builder programs."

Mr. Chairman, the *Suter* amendment would cede to the courts responsibilities that now rest with the Congress and the federal and state agencies. Leaving aside the question of the already overburdened federal court system, states have enacted laws and promulgated regulations to ensure compliance with P.L. 96-272 and other titles under the Social Security Act (SSA). Any alleged failure to comply with these requirements can be, and will continue to be, litigated in federal or state courts through either individual or class actions. The federal government continues to have ample authority to cause compliance with statutory and regulatory requirements. Individuals who participate in SSA programs also have protections via administrative hearings.

Mr. Chairman, if the goal of the *Suter* amendment is better services and protection for children, better services and protection can be much more efficiently—and directly—achieved by promoting sound policy and programs rather than through litigation. The Senate is now considering child welfare reform legislation in H.R. 11 that would provide additional resources for family preservation services for families at risk of losing their children. The latter legislative approach is clearly a step in the right direction of improving services for children.

In closing, Mr. Chairman, APWA and the state human service agencies we represent strongly encourage the Senate to oppose adoption of the House language should H.R. 11 go to conference. If there is a desire to take positive action with regard to the legal and human service delivery system in the wake of the *Suter* decision, we would be happy to continue to work with the Finance Committee.

Thank you again for holding this hearing today and for the opportunity to submit written comments on this important issue.

Attachments.

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The *Suter v. Artist M.* Decision

Summary

In a 7 to 2 decision, the U.S. Supreme Court (March 25, 1992) ruled the "reasonable efforts" requirement of the Title IV-E Foster Care Program did not create individual federally enforceable rights for children in state custody. The Court said the dictate of Sec. 671(a)(15) of P.L. 96-272 that states make "reasonable efforts" to keep children at home and to reunite them with their families is merely one of 16 features that must be included in state plans. The means of complying with that provision is "left up to the state." Noncompliance, however, could be addressed through the enforcement mechanism in the act, e.g., reduction or elimination of federal funds by the secretary. The two man dissent charged the Court with ignoring 22 years of precedent. The dissent said the Court has denied plaintiff children their right to hold state and local officials accountable to a binding obligation under P.L. 96-272. This *W-Memo* article discusses the basis for the Court's decision in *Suter v. Artist M.*

Background

Advocates for children recently were dealt a set-back by a U.S. Supreme Court ruling that likely will limit the use of litigation as a means to compel reform of state and local child welfare systems. On March 25, 1992 the Supreme Court in a 7 to 2 ruling found that the Adoption Assistance and Child Welfare Act, P.L. 96-272, did not create individual federally enforceable rights through its requirement of "reasonable efforts" to prevent removal from the home or to return the child to his home. This requirement is one of 16—and has been the source of the most debate—that must be included in state plans for the operation of foster care programs receiving federal funding.

The plaintiffs in the original suit (respondents in this action) were Artist M., other named plaintiffs, and the class they represented, namely abused and neglected children in the custody of the Illinois Department of Children and Family Services (DCFS). In *Artist M. v. Johnson*, 726 F. Supp. 690; they sought declaratory and injunctive relief due to the alleged systematic failure of DCFS to "meet its obligation to have a plan in effect to provide reasonable efforts to preserve or reunite them with their families." This alleged failure was said to leave the children at risk of further abuse and indefinite terms of foster care. In the suit, filed on Dec. 14, 1988, in the United States District Court for the Northern District of Illinois, the plaintiffs alleged that "defendant's failure to assign caseworkers to them promptly violated their rights, and those of similarly situated children, under the Act."

Plaintiffs also filed a motion for a preliminary injunction, seeking assignment of a caseworker within 24 hours any temporary custody order. At that time, the court deferred action on the motion. In the interim DCFS was given time to implement a reorganization plan intended to address the problems caused by the delayed assignment of caseworkers. On March 2, 1990 the District Court determined that the reorganization was not achieving the results anticipated and, as a consequence, issued a mandatory preliminary injunction that required DCFS to:

(1) Assign caseworkers capable of providing child welfare services to each of the plaintiffs in the class and their families within three working days of a Juvenile Court order assigning custody to DCFS; and
(2) when necessary to reassign cases to other caseworkers within three working days.

The District Court stated in its order that "[w]ithout a caseworker, defendants cannot put into place the services and protections to which plaintiffs are entitled under" the 1980 legislation.

The defendants—the director of the Illinois DCFS and the Guardianship Administrator—filed an appeal with the Court of Appeals for the Seventh Circuit. The Appeals Court affirmed the District Court's orders on Oct. 29, 1990, ruling that the reasonable efforts clause created federal enforceable rights and that the clause created an implied private right of action and a federal right to services for children living at home under DCFS supervision. In reviewing the District Court order, the Court of Appeals said, "the three day requirement fits the estimate given by the DCFS itself of how quickly it would assign caseworkers under its promised reforms" and that this standard was a less "stringent remedy" than the 24 hours originally requested by the plaintiffs.

The defendants argued that the court was relying only on Illinois' own actions to assign meaning to the term "reasonable efforts." Faulting the court's analysis, DCFS said prior cases concerning other federal funding statutes directed the courts to "conduct a crucial inquiry into the context, statutory structure, legislative history, and regulatory framework in order to ascertain whether Congress has provided the necessary 'objective benchmark' clearly defining the purported federal rights."

Thus, the Appeals Court was said by the defendants to have reached its conclusion without the required inquiry —relying on an individual states' law and policy rather than specific direction from Congress.

Supreme Court Appeal

On appeal to the Supreme Court, the following two questions were presented by DCFS concerning the underlying legal basis for the claims of *Artist M. et al.*:

1. Whether the vague and amorphous terms of the Sec. 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980 (the "AAA"), 42 U.S.C. Sec. 671(a)(15), which requires that states have a plan to ensure that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home," created individual federally enforceable rights in the complex area of child welfare; and
2. Whether Sec. 671(a)(15), codified in Title IV-E of the Social Security Act, 42 U.S.C. Secs. 670-79a, which does not provide any federal funds for services to children living at home, nonetheless creates a federal right to such services

DCFS did not contest the general proposition that timely and continuous assignment of case workers plays an important role in the disposition of child welfare cases. Instead, it contended that there are many valid approaches to address the needs of children in foster care or those who are at-risk of being removed from their home. "Reasonable efforts" was said to stand for one theory or approach and the statutory and regulatory background of the Act does not provide any "indication that Congress intended not only to express a preference for one such theory but also to elevate it to a status of a federal right." The Supreme Court agreed with this view

Statutory Background

The litigation was based upon two statutes. The Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272) was the source of the substantive rights claimed by plaintiffs—the right to reasonable efforts to preserve and reunite families. The second statute, the Civil Rights Act, Sec. 1983 42 U.S.C. (Sec. 1983), was the means by which plaintiffs sought to secure enforcement of P.L. 96-272.

Congress enacted P.L. 96-272 in 1980, amending the Social Security Act by creating an adoption assistance program and initiating reforms to the foster care program. The federal government contributes financially to the costs incurred in the operation of the foster care program for such items as maintenance payments, training, and individual case work. The amendments of 1980 were a response to evidence of problems in the foster care system and followed congressional hearings and investigations disclosing that children were precipitously placed in foster care instead of given services that might have allowed families to stay together. In response to such findings Sec. 671 of Title IV-E of the Social Security Act details the contents required in state plans to govern the operation of foster care and adoption assistance programs as part of the laws reform scheme.

Sec. 671(a)(3), (15) states:

(a) In order for a state to be eligible for payments under this part, it shall have a plan approved by the Secretary which—

(3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

(15) effective Oct. 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home . . . .

In order to contest DCFS's record with regard to the dictates of Sec. 671, plaintiffs relied upon 42 U.S.C. Sec. 1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia

In 1980, the Supreme Court in *Maine v. Thiboutot*, held that the intended beneficiaries of rights conferred by federal statutes as well as the constitution may look to Sec. 1983 to secure a remedy. Thus, individuals may seek to obtain compliance by states with the dictates of the Social Security Act. The Court, however, also has applied two general exceptions to this rule: (1) "where Congress has foreclosed such enforcement of the statute in the enactment itself and (2) where the statute did not create enforceable rights, privileges, or immunities within the meaning of section 1983" (*Wright v. City of Roanoke Redevelopment and Housing Authority*). These limits on the reach of Sec. 1983 were central to the Court's decision in *Suter v. Artist M.* although not in the manner employed in prior cases.

The Court's Suter Decision

Writing for the majority, Chief Justice William Rehnquist said this case asked "whether private individuals have the right to enforce by suit a provision of the Adoption Assistance and Child Welfare Act of 1980 . . . either under the Act itself or through an action under 42 U.S.C. 1983." He concluded, "We hold that the Act does not create an enforceable right on behalf of the respondents."

Petitioners had argued and the Court's opinion reflects agreement that the principals of an earlier case—*Pennhurst State School and Hospital v. Halderman*, (1981)—should be controlling in Suter. In *Pennhurst* as in the present case, a cooperative federal-state program created by Congress pursuant to its taxing and spending power was the focal point of the inquiry. The statute in question for *Pennhurst* was the 1975 Developmentally Disabled Assistance and Bill of Rights Act (DDA). The "bill of rights" section stated:

"Congress makes the following findings respecting the rights of persons with developmental disabilities:

(1) . . . a right to appropriate treatment services and habilitation for such disabilities.
(2) The treatment, services, and habilitation . . . should be provided in the setting that is least restrictive of the person's personal liberty."

Respondents in *Pennhurst* had complained that the state failed to provide treatment in the least restrictive environment under the terms of the DDA and sought to enforce the law through Sec. 1983. The Supreme Court rejected their claim, concluding that the context of the statute indicated a congressional preference, not a mandate for a certain treatment environment. The Court said cooperative funding statutes create a contract-like relationship and, as a consequence, any requirements that would be imposed on states in exchange for federal money must be mandatory and unambiguous. Only in this way would a state be able to make an informed choice and voluntarily and knowingly enter into the contract; these conditions were not satisfied in *Pennhurst*. Quoting its *Pennhurst* opinion, the Court in *Suter* restated the standard for assessing the federal-state relationship under such funding statutes:

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

It is worth noting that the Court of Appeals in its decision upholding the District Court orders found a distinction between *Pennhurst* and the case before it. The Appeals Court seemed to suggest that the relevant flaw in the DDA was the gap between funding and the rights claimed which was not the case with regard to P.L. 96-272. The reasonable efforts provision is "located in the section setting forth in mandatory language the features a state plan must possess before funding will be provided . . . . When the right asserted is tied explicitly to the funding provision, the Supreme Court has found the requisite Congressional intent," the Appeals Court said. Petitioners argued, however, that under the analysis and standards of *Pennhurst* and its "progeny" cases—namely *Wilder v. Virginia Hospital Association*, (1990) and *Wright v. Roanoke Redevelopment & Housing Authority* (1987)—P.L. 96-272 would fail.

In the 1987 *Wright* decision the Supreme Court considered regulations promulgated by the Department of Housing and Urban Development (HUD) concerning the calculation of public housing rents and found Sec. 1983 actions appropriate to enforce a requirement that rents include a reasonable allowance for utility costs. The *Wright* Court said the HUD regulations satisfied the tests for enforceability under Sec. 1983. The Court explained that two conditions would prevent plaintiffs from

relying on Sec. 1983 to enforce laws: when Congress has written a law that clearly forecloses enforcement of it through Section 1983; or if the statute in question "did not create enforceable rights, privileges, or immunities within the meaning of section 1983."

Three years later in *Wilder*, the Court reaffirmed the limits on Section 1983 stated in *Wright*. The issue in *Wilder* was a requirement by the Boren Amendment that health care reimbursement rates for Medicaid providers be "reasonable and adequate." In light of its earlier decisions in *Pennhurst* and *Wright*, the Supreme Court concluded that "the Boren Amendment imposes a binding obligation on states . . . enforceable under section 1983 by health care providers. The Boren Amendment is cast in mandatory rather than precatory terms . . . provision of federal funds is expressly conditioned on compliance."

The Supreme Court in *Wilder* held that "simply because a provision gives the state great latitude in promulgating a 'reasonable and adequate' rate does not render the provision unenforceable for vagueness. Instead, once the state exercises its discretion to select a method of calculating rates a court is still capable of determining whether the rate itself is reasonable in light of the method chosen." The Court of Appeals found this reasoning persuasive. DCFS has the discretion to select a "method it will use to implement the requirements" of P.L. 96-272—caseworkers—to provide the services necessary to prevent removal from the home and for reunification. In the opinion of the Appeals Court, a court may later "evaluate the reasonableness of the efforts to secure those services by looking to the caseworker assignment process."

Petitioners, however, argued to the Supreme Court that the lower court panel did not conduct the necessary inquiry as required by the *Pennhurst* progeny, and also misapplied *Wilder*. "The Court below merely applied the result in *Wilder*, despite the material differences in context, statutory structure, legislative history, and regulatory framework," the petitioners said. They contended that, "contrary to the majority's suggestion, *Wilder* does not stand for the proposition that any statute using the term 'reasonable' or 'adequate' by definition creates enforceable rights."

The Supreme Court acknowledged the rather "prominent" position held by the word "reasonable" in the statutory provisions at issue in *Wilder* and *Wright*. Clearly, responding to the arguments advanced by petitioners, the Court indicated that the fact that these prior cases confirmed the enforceability of a reasonableness requirement was not the "end of the matter." Rather, something more was said to be involved in and demanded by those cases:

> The opinions . . . in both *Wright* and *Wilder* took pains to analyze the statutory provisions in detail, in light of the entire legislative enactment, to determine whether the language in question created "enforceable rights, privileges, or immunities within the meaning of Sec. 1983." And in *Wilder*, we caution that "[s]ection 1983 speaks in terms of 'rights, privileges, or immunities,'" not violations of federal law." (Emphasis added.)

The Decision

After presenting an analytical framework, the Court asked whether Congress "unambiguously confer[red] upon the child beneficiaries of the Act a right to enforce the requirement that the State make "reasonable efforts" to prevent a child from being removed from his home, and once removed to reunify the child with his family." To answer this question, the Court proceeded to "examine exactly what is required of States by the Act . . . . in light of the entire legislative enactment." The majority's examination revealed a statutory mandate for a state plan containing "16 listed features" one of which is for "reasonable efforts." And, the Court determined that the Sec. 671(a)(3) requirement that the state plan "be in effect" should be understood as directing that the state plan "apply to all political subdivisions . . ." In a note, the Court also addressed and disposed of one of the bases for relief claimed in the original suit, namely Sec. 671(a)(9) that requires states to report the neglect, abuse or exploitation of children by foster care providers to the proper authorities. This claim was dismissed by the District Court in the earlier proceedings. The Supreme Court took the opportunity to point out that "this subsection is merely another feature which the state plan must include to be approved by the Secretary, it does not afford a cause of action to the respondents any more than does the 'reasonable efforts' clause of sec. 671(a)(15)."

The Court said the Medicaid state plan requirement for "reasonable and adequate" reimbursement for services in *Wilder* was distinguishable from the *Suter* case. The language of the Boren Amendment and its regulations "set forth in some detail the factors to be considered in determining methods for calculating rates." The court referred to examples of factors that

would affect rates that were identified in a note in *Wilder*, such as the unique situation of a hospital serving disproportionate numbers of low income patients. Congress did not provide such assistance to understand or define "reasonable efforts" under P.L. 96-272 and, as a consequence, compliance with this subsection the Court finds is "within broad limits, left up to the state." Moreover, regulations to carry out Sec. 671 "are not specific" and do not suggest that receipt of federal money is contingent upon anything other than submitting "a plan with the requisite features." Here the Court makes reference to regulations at 45 CFR 1356.21(d)(4) requiring individual case plans describing the services offered to prevent removal of the child and later to return custody to the parents. Also found wanting are regulations at 45 CFR 1357.15(e) (1) and (2) that require state plans to specify the universe of services available to children and families to prevent removal and to facilitate reunion, and the list of 20 possible services that could be included in the state plan. In contrast, the Court notes that congressional intent to impose precise requirements is clear in another section of the law. Sec. 672(e) would deny federal financial participation if a judicial determination of a child's best interest is not made within 180 days of a voluntary foster care placement. Making a comparison with other provisions of the Act, the Court said this: "That the 'reasonable efforts' clause is not similarly worded buttresses a conclusion that Congress had a different intent with respect to it."

Congressional intent to avoid the creation of a private right of action was also gleaned from the methods articulated in P.L. 96-272 to enforce its provisions. For example, the Court identified as enforcement provisions: the authority of the secretary to reduce or eliminate federal payments under the program for noncompliance with the Sec. 671(a); and the fact that reimbursement for program costs is contingent upon a judicial determination that it would "be contrary" to the child's "welfare" to remain in the home and the state had made reasonable efforts. The Court acknowledged the fact that such enforcement mechanisms are not "comprehensive" and do not "manifest Congress' intent to foreclose remedies under Sec. 1983. The existence of a comprehensive enforcement scheme within the statute in question is one of the exceptions to the use of Sec. 1983 as cited in *Wright* and *Wilder*. The *Suter* Court does not reach this issue as would be expected because the question of congressional intent to foreclose use of Sec. 1983 did not need to be examined here since the law in question did not "create the federally enforceable right asserted by respondents." Instead, such provisions (e.g., secretary's authority to sanction states for noncompliance) "show that the absence of a remedy to private plaintiffs under Sec. 1983 does not make the reasonable efforts clause a dead letter."

In its review of the "entire legislative enactment," the Court found no support for the respondent's claims in either the legislative history or language. Concerning the history of P.L. 96-272, the decision noted that respondents argued that the petitioners did not provide evidence that Congress did not intend beneficiaries of the act to enforce reasonable efforts. In their brief, respondents claimed that the law's history "shows not only the paramount importance of the Act's family preservation and family reunification requirements... (but) also Congress' intent that Sec. 671(a)(15) be judicially enforceable." The Court dismissed this contention saying that "to the extent such history may be relevant," its own review of the legislative background led to a contrary conclusion—"that Congress was concerned that the required reasonable efforts be made by the States, but also that the Act left a great deal of discretion to them."

Turning briefly to the legislative language, the Court found further confirmation for its conclusion that there is no enforceable right under Sec. 671(a)(15). In the absence of a compelling message to the contrary, the Court held that the "reasonable efforts" requirement may be "plausibly read to impose only a rather generalized duty on the State" that would be enforced by the secretary.

Finally, the Court concluded that the respondents had not demonstrated that an implied right of action exists under P.L. 96-272. Since the major question was answered in the negative—that is, the "reasonable efforts" clause did not unambiguously confer on beneficiaries rights subject to Sec. 1983—the Court also held that Congress did not intend to create a private implied cause of action to enforce that provision.

The Dissent

Justice Harry A. Blackmun wrote the dissenting opinion for himself and Justice John Paul Stevens. Like the Appeals Court, the dissent relied on *Wilder* and compared the outcome in that case to the majority's holding in *Suter*. In his opinion, Blackmun asserted that the *Suter* ruling was plainly inconsistent with *Wilder* and that in reaching its conclusion the Court failed to apply well-established precedents. As a consequence of this failure, he wrote that the right of child beneficiaries to seek to enforce P.L. 96-272 was not recognized.

According to the dissent, the appropriate analytical framework set forth and satisfied in *Wilder* was disregarded without explanation by the *Suter* majority. As noted earlier, two general exceptions to the use of Sec. 1983 are recognized: the law does not create enforceable rights under Sec. 1983 and/or the law itself forecloses enforcement. In *Wilder* a three part inquiry was used to determine whether the Boren Amendment created rights, privileges, or immunities necessary to overcome the first exception. That inquiry follows:

(1) whether the Act was intended to benefit the plaintiff; (if so, then, an enforceable right is created, unless);
(2) the provision does not create a binding obligation on the state; or unless
(3) the interest asserted by the plaintiff is so vague and amorphous that it would be incapable of enforcement by the judiciary.

Justice Blackmun found that the "reasonable efforts" provision met the test articulated in *Wilder* for several reasons:

> First, and most obvious, the plaintiff children in this case are clearly the intended beneficiaries of the requirement . . . Second, the "reasonable efforts" clause imposes a binding obligation on the state because it is "cast in mandatory rather than precatory terms,". . . . (and) Further, the statute requires the plan to "provid[e] that, in each case, reasonable efforts *will be made*." Moreover, as in *Wilder*, the statutory text expressly conditions federal funding on state compliance with the plan requirement.

The dissent took direct issue with DCFS's arguments concerning the third part of the inquiry—that the reasonable efforts requirement was so vague and amorphous as to defy judicial enforcement. It is upon this point that the dissent suggests there was a clear divergence of opinion and understanding between petitioners (and amicus) and the result dictated by *Wilder*. Because the *Suter* majority did not expressly address these issues, the dissent speaks solely to petitioners in this portion of the opinion.

With regard to both *Wilder* and *Wright*, petitioners said "market rates, in addition to the objective benchmarks set forth in the statutes themselves, provided guidance as to what rate was 'reasonable' . . . By contrast, there is not a market for 'reasonable efforts'. . . " It should be noted that the Supreme Court's opinion did not specifically note the absence of an 'objective benchmark' in P.L. 96-272, but did indicate that the statute and regulations governing the Boren Amendment provided specific factors on which to base reliable reimbursement rates. P.L. 96-272 was said by the Court to lack similar and necessary detail that would permit measurement (and hence enforcement) of state efforts under Sec. 671(a)(15).

The dissent complained that the petitioners' focus on a quantifiable benchmark failed to acknowledge "the sense in which the 'benchmark' in *Wilder* is 'objective.'" The language of the Boren Amendment directs attention to the actions of a "hypothetical" facility providing "reasonable access" to its services for the eligible population. Thus, the dissent asserts, the definition or measurement of reasonableness is not more exact with regard to Medicaid than it is with regard to the foster care program. Furthermore, Blackmun wrote, the fact that the *Wilder* Court found the Boren reasonableness provision "judicially enforceable" demonstrates that "an asserted right is not 'vague and amorphous' simply because it cannot be easily 'calculated or quantified.'"

The dissent also disagreed with the petitioners' notion that "substantial disagreement" in the child welfare field about what would constitute reasonable efforts renders the provision unenforceable. Such a conclusion was said to be contrary to *Wilder* in which the Court found that the method of calculating reimbursements and rates varies from state to state. Inexactitude in measurement, thus, would not doom the provision according to the dissent. *Wilder* and *Wright* concerned the reasonableness of rates paid to health care providers and utility allowances, respectively. The dissent therefore rejected the notion that in those two cases, the Court was "working at the outer limits of what is judicially cognizable."

In its review of the majority opinion, the dissent said the Court adopted in this case the arguments it had rejected in *Wilder* that the rights claimed by respondents are procedural and that after the secretary approves the required Medicaid plan no more would be required. Justice Blackmun found no explanation for this deviation from the "settled three-part test for determining the enforceability of an asserted right." This dissent argues that the *Suter* majority opinion is consistent with the *Wilder* dissent (written by Chief Justice Rehnquist for himself and Justices O'Connor, Scalia, and Kennedy) while contradicting the Court's ruling in that case.

In construing the Boren Amendment, the *Wilder* minority

suggested an alternative approach to the one employed by the majority to answer the question of enforceability under Sec. 1983. That approach was based on case law that preceded the 1980 *Maine v. Thiboutot* decision establishing Sec. 1983 (and refined in later cases) as a means to challenge alleged violations of rights conferred by federal statutes.

Cort v. Ash (1975) articulated the standard under which an implied right of action would be maintained. The "crucial" first of four steps in the *Cort* analysis was to demonstrate that the "plaintiff is one of the class for whose special benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff." *Maine* was portrayed as serving to eliminate the need to satisfy the last three prongs of *Cort* because the first consideration in the former is whether the statute in question conferred a right protected by Sec. 1983. The *Wilder* dissent maintained that "a significant area of overlap remained" between the two causes of action. "For relief to be had under either section 1983 or by implication under *Cort v. Ash*, the language used by Congress must confer identifiable enforceable rights," Rehnquist wrote in the *Wilder* dissent.

Building upon another decision rendered before *Maine*, the *Wilder* dissent also noted that the "traditional rule" employed in construing the "right-or-duty-creating language of [a] statute" is to "look to the statutes' text and to stop there if the text fully reveals its meaning." Applying this rule to the Boren Amendment, the *Wilder* dissent did not find that the measure conferred identifiable substantive rights. Instead, the provision was described as merely one of thirteen elements required in state plans.

The dissent contends that the distinctions drawn by the majority between its *Suter* opinion and the *Wilder* minority are not persuasive. Specifically, Blackmun disagreed with the basis offered for distinguishing the statute and regulatory situations in *Wilder* from P.L. 96-272 and the relevance of other enforcement mechanisms. The lack of specificity and guidance in P.L. 96-272 when contrasted with the Boren Amendment led the Court to conclude that "reasonable efforts" were not identifiable and enforceable rights. The dissent, however, maintains that the issue of specificity was raised in *Wilder* to "reinforce our conclusion that the provider's interest was not so 'vague and amorphous' as to be beyond the competence of judicial enforcement." Moreover, the minority points out, the last step in the three part inquiry used in *Wilder* asks whether the interest claimed suffers from vagueness. After finding that there is a binding obligation (and not merely a preference for particular conduct) "to do more than simply file a paper plan" that obligation is assessed with regard to its enforceability by the judiciary.

The dissent also takes issue with the Court's interpretation of the significance of the P.L. 96-272 enforcement mechanism. The Court found that the scheme for enforcement fails to provide evidence that states are obliged to act beyond submitting a plan in order to receive funds. The issue of enforcement would not arise for the dissent until the second exception to Sec. 1983 is considered—whether Congress precluded enforcement of the asserted right through Sec. 1983 in the law itself, according to the three-part initial inquiry discussed above.

The Court's discussion of enforcement mechanisms followed its review and conclusion that Congress failed to provide reliable and consistent guidance to permit measurement of reasonable efforts. In noting tools in the law to compel state compliance (the secretary may reduce or cut off funds, for example), the majority found that these provisions, while not comprehensive, would also not create a presumption in favor of a Sec. 1983 action to compel states to make "reasonable efforts." In saying this, the minority contends that the Court "has inverted the established presumption that a private remedy is available under Sec. 1983 unless 'Congress has affirmatively withdrawn the remedy.'"

Outlook

The *Suter* decision does not rule out litigation as a means to challenge state compliance with child welfare laws or other statutes containing state plan requirements. It does make litigation as an avenue of reform less inviting. In his dissent, Justice Blackmun said the Court "has contravened 22 years of precedent by suggesting that the existence of other 'enforcement mechanisms' precludes section 1983 enforcement. At least for this case, it has changed the rules of the game." The actual impact of *Suter* on child welfare and other cooperative federal-state programs is ripe for speculation.

Marcia Lowery, director of the Children's Rights Project of the American Civil Liberties Union, told the New York Times, "With the Court refusing to give effect to this law, we've lost one part of our system of checks and balances." Support for that statement is to be found in Rehnquist's reference to another required state plan "feature" as not creating an enforceable right "any more than does the 'reasonable efforts'" clause of Sec. 671(a)(15).

In its broadest sense, the ruling may be viewed as paving the way for states to ignore activities contemplated under state plans for programs such as food stamps, child support enforcement, or AFDC. It should be noted, however, that the majority also observed that "each statute must be interpreted by its own terms." If the broad stroke reading prevails, some advocates would argue, the end result could be inconsistency in the management, services, or benefits presumably intended. The 38 states that submitted a brief as *amicus curiae* for DCFS were concerned that letting the Appeals Court decision stand also would contribute to inconsistent practice. In their brief the states said:

> Because Congress did not define "reasonable efforts," and because the term is too vague and amorphous to be defined except by state courts with juvenile jurisdiction on a case by case basis, the Seventh Circuit looked to the practices that Illinois had voluntarily implemented to provide reasonable efforts to determine the services to which children in that state were entitled. This approach, if applied in other states, would lead to the incongruous result that children in different states would have different federal rights under (P.L. 96-272). Such an outcome inevitably subjects states with more extensive welfare programs to more extensive obligations under federal law.

For many years litigation that held the promise of system reform has been a double-edged sword for administrators. At a recent meeting of state human service administrators on the subject of class action suits, one complained about the need to devote a consistent and substantial amount of time each week to handle issues associated with a four-year-old consent decree. The time, effort, and money devoted to implementing the decree, plus returning to court to challenge aspects of the monitor's vision are now viewed as counter-productive. At the same time, many administrators confirm that a number of reforms have been instituted because of the very real threat of litigation or as the actual end product. Elected officials are less likely to resist appropriations to fund program improvement if a court order is the source of the request.

The decision in *Suter* signals the beginning of a new phase in this process in which federal oversight becomes more important as do both clarity and precision in drafting legislation to ensure the health and well-being of the nation's children.

—Ellen M. Wells

Cases cited in this article:

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Wilder v. Virginia Hospital Association, 496 U.S. 498, 110 S.Ct. 2510 (1990).
Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987).

IN COMING ISSUES OF THE *W-MEMO:*

- Child Welfare Legislation
- Title IV-E Audit and Disallowances
- Medicaid Managed Care
- Budget and Appropriations Update

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Child Welfare Litigation

Background

In recent years child welfare caseloads and the number of children placed in foster care have increased. So, too, have the lawsuits initiated against public agencies related to foster care programs. In 1973 the American Civil Liberties Union (ACLU) began pursuing litigation against public agencies in major child welfare cases. Since that time lawsuits have proliferated, including those brought by Legal Services as well as the ACLU and other advocacy organizations.

APWA Response

At the request of constituent and affiliate organizations and in response to state and local interest in sharing information and experience on the impact the litigation is having on children and families as well as public agencies, APWA sponsored a special seminar on child welfare litigation at the July meeting of the National Council of State Human Service Administrators. Attendance that exceeded expectations signaled the high level of interest in the issue on the part of public human service agencies.

The July session identified fundamental issues related to how lawsuits and consent decrees affect state and local child welfare systems. Speakers represented a wide range of perspectives including defendants and plaintiffs. One direct result was compilation of the chart published here including those states currently involved in foster care class action suits.

Litigation

The chart on pages 12 through 17 identifies states that are parties to consent decrees, injunctions, and litigation, and focuses in particular on the subject matter of the suit, the plaintiff's attorneys, and the outcomes of litigation to date. All of the suits included here involve foster care class actions. The lawsuits were filed because of alleged state violation of the 14th Amendment, the Civil Rights Act of 1971 (42 U.S.C. Section 1983), or the Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-242). The results to date in a majority of these lawsuits have been consent decrees specifying reforms the agencies will undertake. Consent decrees establish Children Services Commissions, Citizen Review Boards, fair hearing procedures, and time frames for administrative review. Regulations and policies mandating additional staff, reduced caseload ratios, and information tracking systems have also been negotiated.

Related lawsuits or lawsuits in abeyance also cite violation of the 14th Amendment, the Civil Rights Act of 1971 (Section 1983), and P.L. 96-242, but also address the Social Security Act, the Federal Education for Handicapped Children Act of 1975, and the Federal Rehabilitation Act of 1973.

Outlook

It has been a growing concern of state and local human service administrators that child welfare policy has been, by default, developed by and through the courts. To assist states by providing a forum for information-sharing, APWA is planning a second in a series of special workshops on child welfare litigation issues on Dec. 9, 1991, in conjunction with the winter meeting of the National Council of State Human Service Administrators in Santa Fe, New Mexico. That meeting will examine the current status of child welfare litigation across the nation, provide opportunities for information exchange, and will explore various strategies and courses of action for public agencies.

—Cathleen Tucker

IN COMING ISSUES OF THE *W-MEMO:*

- Electronic Benefit Transfer Programs
- Labor-HHS Appropriations
- Older Americans Act Reauthorization

Foster Care Class Action Litigation (October 1991)

	14th Amdt	Civil Rights Act Sec. 1983	Adop Assst. & C.W. Act	State Court	Fed. Court	Damages Awarded-Requested	Caseworker Qualified Immunity	Plaintiff's Attorneys	Outcomes of Litigation	Monitoring of Decree
CONSENT DECREES										
Kentucky *In re P*			✓	✓				ACLU	• Consent decree specifying reforms • Two contempt orders before compliance • Reduced time in foster care • Increased appropriations for staff in '93 turned back by executive branch	• State found to be in 100% compliance with decree • Case remanded from docket
Missouri *G.L. v. Zumwalt*	✓	✓			✓	$1 million originally requested		Legal Services and ACLU	• Consent decree specifying reforms • Some new staff • Children Services Commission established	• Monitoring Committee since 1985 with regular court reports to plaintiff's attorneys and legislature
Maryland *L.J. v. Massinga*	✓	✓	✓		✓	Yes, for some plaintiffs	Denied	Legal Services and National Center for Youth Law	• Consent decree specifying reforms • Reduced caseloads (1-29) • 25% incr. case in staff • Statute change proposed to codify terms of consent decree • More suits expected • Attorney fees awarded	• Regular reports to court and plaintiff's attorneys
New Mexico *Joseph A. v. New Mexico Department of Human Services*	✓	✓	✓		✓		No good faith immunity since official's conduct not objectively reasonable No immunity in individual capacities	ACLU	• Consent decree specifying reforms • Use of citizen review boards • Additional staff every year since decree	• Compliance monitor selected jointly by plaintiff and defendant • Reports to plaintiff's counsel
Pennsylvania *O'Dell v. Reese*	✓	✓			✓			Legal Services	• Tentative settlement 1981 with ongoing discussion • Consent decree 1989 extending requirements to 1991 • Weekly parental visits required • New regulations responsive to consent decree	• Monitored by plaintiff's counsel • No court report required
Ohio *Rios v. Staples*	✓	✓	✓		✓			Legal Services	• Consent decree specifying reforms • New state regulations mandating county compliance • Some new legislation • New information tracking system • Changes in personnel in department	• State to monitor county compliance • Plaintiff's counsel has access to information

Foster Care Class Action Litigation (October 1991)

	14th Amdt.	Civil Rights Act Sec. 1983	Adop Asst. & C.W. Act	State Court	Fed. Court	Damages Awarded-Requested	Caseworker Qualified Immunity?	Plaintiff's Attorneys	Outcome of Litigation	Monitoring of Decree
Georgia *J.J. v. Lefkoter*	✓	✓	✓		✓			Legal Services	• Consent decree specifying reforms • Fair hearing process required with pre-cedural due process when services to parents are denied/ reduced	• Plaintiff's counsel will monitor
Arkansas *R.T. v. Patterson*		✓	Filed under similar state law	✓		None sought		Legal Services	• Consent decree (on appeal) • Policy and regulation change • Same reunification services must be provided to families of children placed with relatives and in foster care • Attorney's fees $18,000	• Court-appointed independent advocacy agency to monitor and report • Plaintiff's counsel will also monitor
Illinois 91 *B.H. v. Suter*	✓	✓	✓		✓			ACLU	• Caseload ratio of 20/1 for intact families and 25/1 for child welfare cases • Establish time frames for administrative review	• Independent monitor
Illinois 92 *Norman v. Suter*	✓	✓	✓		✓			Legal Assistance Foundation of Chicago	• Provide housing assistance where it is the only obstacle to reunification	• Court-appointed monitor
Illinois 89 *Bates v. Johnson*	✓	✓			✓			Legal Assistance Foundation of Chicago	• On appeal for contempt	• Court-appointed Special Master
INJUNCTION										
Massachusetts *Lynch v. Dukakis*		✓	✓		✓			Legal Services	• Injunction specifying caseloads of 20/1 and 24-hour case assignment requirements • 18/1 caseload requirements now in caseworker collective bargaining • Increased appropriations geared to number of abuse complaints and number of children in foster care • Caswork staff increase to 2,042 in FY 90 from 1,437 in FY 82	• Court-ordered monitor • Plaintiff's attorney will monitor

Foster Care Class Action Litigation (October 1991)

	14th Amdt.	Civil Rights Act Sec. 1983	Adop. Asst. & C.W. Act	State Court	Fed. Court	Damages Awarded-Requested	Caseworker Qualified Immunity	Plaintiff's Attorneys	Outcomes of Litigation	Monitoring of Decree
Illinois *Artist v Johnson*		✓	✓		✓	None sought	State not immune from suit for injunction relief under Sec. 1983	Public Guardian Cook County Juvenile Court	• Injunction specifying agreement reforms related to assignment of caseworker within 3 days either initially or when caseworker leaves • No statutory or budget change	• Plaintiff counsel will monitor
IN LITIGATION/ON APPEAL									**Focus of Suit**	**Final Order**
Washington, D.C. *LaShawn A. v. Barry*		✓	✓		✓			ACLU	• Violation of the Adoption Assistance and Child Welfare Act • Violation of federal Child Abuse Prevention and Treatment Act	• On appeal
Kansas *Shalit A. v. Hayden*		✓	✓	✓				ACLU	• Failure to provide services to foster children due to high caseloads • Failure to provide medical care to foster children	
California *Timothy J. v. Chaffin*				✓				Legal Services	• Filed against L.A. County • Children in foster care are denied regular caseworker contacts/ supervision • State of California joined as defendant because visiting requirements are state regulations and because state funding is at issue	
Indiana *B. M. v. Maynard*		✓	✓		✓			Legal Services	• General lack of services to children in foster care • Pending legislation for 20/1 caseloads	
Louisiana *Dale v. Edwards*		✓	✓		✓		Not entitled to immunity	ACLU	• Violations of Adoption Assistance Act for case planning and review • High caseloads	
Pennsylvania *Baby Neal v Casey*		✓	✓		✓			ACLU	• Inadequate investigation, planning, and care of foster children • Failure to provide permanent homes for children	

Foster Care Class Action Litigation (October 1991)

	14th Amdt.	Civil Rights Act Sec. 1983	Adop. Asst. & C.W. Act	State Court	Fed. Court	Damages Awarded-Requested	Caseworker Qualified Immunity	Plaintiff's Attorneys	Focus of Suit	Final Order
New York *Marisol A. v. Gross*			✓	✓			Provision of services is mandatory, not discretionary, so state not immune	ACLU	• No preventive services being provided to avoid foster care placement • Preliminary injunction issued • Failure to provide other prevention or reunification services to homeless families	
Connecticut *Juan F. v. O'Neill*		✓	✓		✓			ACLU	• High caseloads, inadequate services, insufficient and poorly paid foster parents • Governor proposed $5 million budget increase for children's services	
Arkansas *Angela R. v. Clinton*	✓	✓	✓	some state law claims	✓	Plaintiffs reserved issue of damages		National Center for Youth Law Legal Services	• Training and staff worker qualifications • Develop practices and policies in compliance with 96-272	
Tennessee *Rico v. Gomez et al.*	✓	✓		✓				Legal Servi[illegible]	• Declaratory and injunctive relief against policies and practices that allegedly permit social workers to practice law in juvenile court	
Illinois *Dana W. v. Suter*		✓	✓		✓			Cook County Public Guardian	• Seeking timely completion of dispositional hearing	

Foster Care Class Action Litigation (October 1991)

	Legal Basis for Suit	State Court	Fed. Court	Damages Awarded-Requested	Caseworker Qualified Immunity?	Plaintiff's Attorneys	Focus/Outcome of Litigation	Monitoring of Decree
LITIGATION IN ABEYANCE								
Virginia						ACLU	• Joint case reading project between state and ACLU now in progress	
Illinois #1 *Aristotle P. v. Suter*	• 14th Amendment • Violation of Civil Rights Act, Sec. 1983 • Adoption Assistance and Child Welfare Action dismissed		✓			Cook County Public Guardian	• Sibling visitation and placement	
Ill. #2 *Hill v. Suter*	• 14th Amendment • Violation of Civil Rights Act, Sec. 1983	✓				Legal Assistance Foundation of Cook County	• Delivery of services to pregnant and parenting wards	
RELATED LITIGATION								
Illinois *Fields v. Johnson*	• 14th Amendment • Adoption Assistance and Welfare Act • Social Security Act		✓			Legal Services	• Failure of state to provide reunification services or placement prevention services to families who are homeless	
Vermont *Jane T. v. Morse*	• Federal Education for Handicapped Children Act • Civil Rights Act, Sec. 1983 • Federal Rehabilitation Act • State issue					Office of Juvenile Defender Center for Law and Education Developmental Disabilities Law Project	• Lack of services for handicapped children in state custody • Lack of coordination of educational, mental health, residential, etc., services	
New Hampshire *Edward B. v Morton*	• Civil Rights Act, Sec. 1983 • Federal Education for Handicapped Children Act • Federal Rehabilitation Act		✓			Disability Rights Project	• Lack of educational services for children placed by juvenile court • State reimbursement for educational services. (Law now changed.) • Law clarifying parental responsibility for children's educational needs whi[illegible] • New state regulations re educational planning before foster child placed/moved	

Foster Care Class Action Litigation (October 1991)

	Legal Basis for Suit	State Court	Fed. Court	Damages Awarded-Requested	Caseworker Qualified Immunity	Plaintiff's Attorneys	Focus/Outcome of Litigation	Monitoring of Decree
RELATED LITIGATION (Continued)								
North Carolina *In re Willie M.*	• 14th Amendment • State statutes		✓			Private Center for Legal Assistance to Mentally Handicapped	• Lack of mental health services for emotionally disturbed children in state custody who are involuntarily institutionalized or in a residential program • $80,411 cost per year per child	• Court-established review/monitoring panel
New York: 01 *Wilder v. Bernstein*	• 14th Amendment • Civil Rights Act		✓			ACLU	• Suit based on racial and religious discrimination against certain minority foster children and their families • Consent decree requiring the development of a comprehensive system of services and quality assurance • City of New York resisting implementation so motion for contempt filed	• Plaintiff's counsel monitoring
02 *Palmer v. Cuomo*	• State Statutes	✓				Legal Services	• Failure of state to meet statutory obligation to prepare older foster children for independent living • Permanent injunction; state is to promulgate regulations requiring local governments to create system for discharge preparation and post-discharge support	

IHHS

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September 14, 1992

Dear Colleague:

Last year, The Institutes for Health & Human Services (IHHS) compiled the first "Directory of Child Welfare Class Action Lawsuits" and distributed copies to child welfare agencies and Attorneys General offices across the country. This revised "Directory" updates the information that was contained in the original version and corrects errors brought to our attention during the past year.

Our interest in preparing the "Directory" stems from our role as expert witnesses in three of the states that have been named as defendants in this type of lawsuit (i.e., Louisiana, Alabama, and Indiana). During the course of our work, we discovered just how difficult it was to determine the status of a case and to learn the underlying problems that were at issue. We also began to question whether the toll that these lawsuits take on child welfare systems might not outweigh the positive changes that they can attain.

In the past twelve (12) months, there have been some important legal developments with regard to child welfare class action lawsuits. Of utmost importance was the U.S. Supreme Court's decision in the Artiste M. v Suter case which found that the "reasonable efforts" requirement of P.L. 96-272 did not create a private cause of action. Although this decision has obviously affected a number of lawsuits in terms of how the issues are being framed, it has not changed the overall picture nationally.

To date, twenty-four (24) states and the District of Columbia have been defendants in child welfare class action lawsuits (Note: Cases with major developments in the past few months include: Arkansas, Florida, Illinois, Indiana, and Pennsylvania). With the prospect of continuing budgetary pressure at the state and local level and the concomitant need for increased services, it is likely that this type of lawsuit will continue to be filed (Note: Several states that are not listed in the "Directory" have indicated to us that they expect lawsuits to be filed against them in the near future).

Hopefully, you will find the information that is contained in the "Directory" to be useful and objective -- and please feel free to contact us if you have any questions and/or suggestions regarding how we can further improve this document.

Sincerely,

Joseph J. O'Hara
President

Randall S. Block
Project Director

A DIRECTORY OF CHILD WELFARE CLASS ACTION LAWSUITS

(as of 9/1/92)

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Alabama Department of Human Resources	R.C. v Hornsby	Mental Health Law Project (Washington, D.C.), Ira Burnim	11/88	6/91	James Long (205) 242-9330	Nix & Holtsford H.E. (Chip) Nix (205) 262-2006	Paul Vincent, Dir. Div. of Children & Family Services (205) 242-9500

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children who are emotionally disturbed and/or developmentally disabled from their homes and/or to rehabilitate families so that children can return home; and (2) that the Plaintiffs' constitutional right to "due process" under the 14th amendment and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: Non-proximity of childrens' out-of-home placements to their families; inappropriate use of psychotropic medication, locked isolation, mechanical restraint, and physical restraint; inadequacy of initial assessments; inadequacy of educational plans; non-availability of therapeutic foster homes to avoid residential treatment or psychiatric hospitalization.

STATUS: Settlement proposal has been agreed upon requiring the Department to significantly expand its preventive and reunification services. A consultant is being selected by the parties to assist in developing an implementation plan.

Arkansas Department of Human Services	Angela R. et al v Clinton et al	National Center for Youth Law (San Francisco) William Grimm	7/8/91	4/92	Debby Nye (501) 682-8934 Bruce Hurlbut (501) 682-8934	N/A	Judith Faust, Director, Division of Children and Family Services (501) 682-8772

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: Inadequacy of case plans; excessive replacement of children in out-of-home care; excessive caseload size; inadequate foster home recruiting; inadequate training for foster parents and foster care staff.

STATUS: Settlement proposal was agreed to and submitted to the court for approval. Before approval was granted, the Supreme Court's decision in the Artiste M. v Suter was announced. The State filed a petition challenging the court's jurisdiction and asking that the case be dismissed. The court rejected the state's petition and issued the settlement agreement. The State is appealing the court's order. Simultaneously with the legal activity, the Governor called a special session of the legislature which passed the Arkansas Child Welfare Reform Act. The settlement agreement is contained in Act I of the statute. The State's position is that the settlement agreement is enforcable in state court but not federal court.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Connecticut Department of Children and Youth Services	Juan F. et al v O'Neill et al	Connecticut CLU Martha Stone and ACLU Children's Rights Project, Marcia Lowry	12/19/89	1/7/91	Susan Pearlman (203) 566-3696	N/A	Rose Alma Senatore, Commissioner, Department of Children and Youth Services (203) 566-3536

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: The lack of quality regarding the of health and mental health services provide by the Department.

STATUS: A settlement proposal has been negotiated and accepted by the court. A court appointed panel must approve all changes in policy prior to implementation by the Department. Planning and implementation efforts have begun.

District of Columbia Department of Human Services	LaShawn A. et al v Dixon et al	ACLU, Children's Rights Project, Marcia Lowry	1989	7/91	T. Britt Reynolds (202) 727-1913 Charles Reischel Donna Muraski (202) 727-6252	N/A	Elizabeth Parker Acting Administrator Family Services Administration (202) 727-5947

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: The lack of quality and timeliness of child protective investigations; establishment of a Fatality Review Committee; expansion of placement prevention services including the establishment of an "intensive family preservation" program; changes to the placement process including new rules designed to limit the stay of "boarder babies" in hospitals; improved case review and case planning process; establishment of caseload standards; and increased recruitment of foster and adoptive homes.

STATUS: A settlement proposal has been agreed upon. An independent court monitor has been selected who will be responsible for preparing and ensuring the implementation of an Implementation Plan and reporting to the court regarding the District's progress in complying with the settlement. Although the settlement remains ineffect, the District has filed an appeal based in part on the Supreme Court's decision in the Artiste M. v Suter case. Oral arguments are scheduled for November, 1992.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Florida Department of Health and Rehabilitation Services	M.E. v Chiles et al	Legal Services of Greater Miami Chris Zawisza	1990	N/A	Linda Harris (904) 488-2381 Charles Finkel (904) 487-1573	Colodny, Fass & Talenfeld Howard Talenfeld (305) 891-0066	V. Sheffield Kenyon Deputy Secretary (904) 487-1111

PRIMARY ALLEGATION: The Department failed to provide mental health services to children in out-of-home care as mandated by Title IV-B, Title IV-E, and Title XIX of the Social Security Act and by the Rehabilitation Act and by the "due process" clause of the 14th amendment.

ISSUES EMPHASIZED BY PLAINTIFF: The illegality of waiting lists for therapeutic residential services.

STATUS: The class has not been certified and defendant's motions for summary judgement are pending. The parties have agreed to a stay of the litigation pending implementation of the Governor's new children's services initiatives.

Florida Department of Health and Rehabilitation Services	Children A-F v Chiles et al	Karen Gievers	1990	N/A	Linda Harris (904) 488-2381 Charles Finkel (904) 488-1573	Sheridan Weisen-born (305) 446-5100	V. Sheffield Kenyon Deputy Secretary (904) 487-1111

PRIMARY ALLEGATION: The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to rehabilitate families so that children can return home.

ISSUES EMPHASIZED BY PLAINTIFF: The illegality of maintaining children in out-of-home care more than 18 months.

STATUS: The class has not been certified and defendant's motions for summary judgement are pending. The parties have agreed to a stay of the litigation pending implementation of the Governor's new children's services initiatives.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Florida Department of Health and Rehabilitation Services	In the Event of E.H. v Williams et al	Legal Services of Greater Miami	1991	N/A	Linda Harris (904) 488-2381 Charles Finkel (904) 488-1573	N/A	N/A

PRIMARY ALLEGATION: This case is technically not a class action lawsuit because the issue was raised by the Guardian Ad Litem assigned to represent the child at a "dependency" hearing brought in state court. However, the Department expects that it will eventually be refiled as a class action lawsuit alleging the Department's failure to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home.

ISSUES EMPHASIZED BY PLAINTIFF: Children placed in out-of-home care or at risk of being placed in out-of-home care have a legal right to housing and related services.

STATUS: The case was dismissed on procedural grounds.

Florida Department of Health and Rehabilitation Services	Helen Brown v Chiles et al	Legal Services of Greater Miami Bernard Perlmutter	11/91	N/A	Linda Harris (904) 488-2381 Charles Finkel (904) 488-1573	N/A	John Perry (904) 488-9440

PRIMARY ALLEGATION: The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act and the "due process" clause of the 14th amendment to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home. (Note: Although this case is technically not a class action lawsuit, it raises issues that could lead to a change in policy that would have a system-wide impact on child welfare services.)

ISSUES EMPHASIZED BY PLAINTIFF: Children placed in out-of-home care or at risk of being placed in out-of-home care have a legal right to housing and related services.

STATUS: The department agreed to pay the housing costs in this case but has not agreed to provide this service to all cases in which lack of housing is a significant problem. The state has filed a motion for summary judgement. A hearing is scheduled for October, 1992.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Georgia Department of Human Resources	J.J. v Ledbetter		1984	1985	Linda Jones (404) 894-6386	N/A	

PRIMARY ALLEGATION: The Department failed to provide fair hearing rights as required by Title IV-B of the Social Security Act to those parents of children in foster care whose services are being reduced or terminated.

ISSUES EMPHASIZED BY PLAINTIFF: The primary issue was whether parents whose children were removed in order to provide "protective services" had a right to a fair hearing to contest services that were being reduced or terminated.

STATUS: The court ruled in favor of the plaintiffs that parents "are entitled to procedural due process when their social services and visitation rights to their children are terminated..." The Department has implemented the court order.

Illinois Department of Children and Family Services	Artist M. v Johnson	Office of the Public Guardian		Beverly Klein (312) 814-4650

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: The untimeliness of assigning Department staff to cases "with Juvenile Court involvement."

STATUS: The court issued an injunction requiring the Department to assign caseworkers within three working days of court involvement. The Department appealed to the federal district court, arguing that the case should be dismissed because Title IV-B and Title IV-E do not permit individual causes of action. The federal district court ruled against the Department. This decision was appealed to the U.S. Supreme Court which overturned the lower court's ruling by ruling by declaring that Title IV-B and Title IV-E did not create a private cause of action.

Illinois Department of Children and Family Services	Aristotle P. v Johnson	Office of the Public Guardian		Beverly Klein (312) 814-4650

PRIMARY ALLEGATION: Alleged violation of constitutional rights.

ISSUES EMPHASIZED BY PLAINTIFF: Failure to place siblings together in foster care and insufficient frequency of visitation between siblings when they are placed apart.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Illinois Department of Children and Family Services	B.H. v Suter	Illinois Civil Liberties Union, Benjamin Wolf	1988	9/91	Beverly Klein (312) 814-4650		

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: The caseloads of caseworkers are too large thereby resulting in children "languishing" in out-of-home care; and appropriate educational, medical, and mental health services are not being provided.

STATUS: Settlement proposal has been agreed upon and implementation efforts have begun.

Illinois Department of Children and Family Services	Bates v Johnson	Legal Assistance Foundation	1986	Beverly Klein (312) 814-4650	

ISSUES EMPHASIZED BY PLAINTIFF: Failure of the Department to ensure weekly parent/child visits.

STATUS: Consent decree remains in effects.

Illinois Department of Children and Family Services	Burgos v Johnson		1977	Beverly Klein (312) 814-4650	

ISSUES EMPHASIZED BY PLAINTIFF: Failure of the Department to provide Spanish-speaking caseworkers and foster parents to Spanish-speaking children placed in out-of-home care.

STATUS: Order remains in effect.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Illinois Department of Children and Family Services	Dana W. v Johnson	Office of the Public Guardian			Beverly Klein (312) 814-4650		

PRIMARY ALLEGATION: Alleged violations of the Title IV-B and Title IV-E of the Social Security Act (Note: This action was brought in state court).

ISSUES EMPHASIZED BY PLAINTIFF: The failure of the Department to obtain timely 18-month dispositional hearings in Juvenile Court for all children who are placed in out-of-home care.

Illinois Department of Children and Family Services	Hill v Erikson	Legal Assistance Foundation			Beverly Klein (312) 814-4650		

PRIMARY ALLEGATION: Alleged constitutional and statutory violations (Note: This action was brought in state court).

ISSUES EMPHASIZED BY PLAINTIFF: The failure of the Department to provide adequate services to pregnant and/or parenting teenagers who are placed in out-of-home care.

Illinois Department of Children and Family Services	Reid v Johnson	Office of the Public Guardian and Northwestern Legal Clinic			Beverly Klein (312) 814-4650		

ISSUES EMPHASIZED BY PLAINTIFF: The failure of the Department to inform relatives caring for children who are in the Department's custody that the relatives may become "relative foster parents" rather than private guardians.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Illinois Department of Children and Family Services	Norman v Johnson	Legal Assistance Foundation			Beverly Klein (312) 815-4650		

PRIMARY ALLEGATION: Alleged violations of the Title IV-B and Title IV-E of the Social Security Act.

ISSUES EMPHASIZED BY PLAINTIFF: The failure of the Department to provide housing and other services to reunify families in poverty whose children are placed in out-of-home care.

Indiana Department of Public Welfare	B.M. v Magnant et al	Legal Services Organization of Indiana, Kenneth Fulk	9/29/89	7/92	Gordon White (317) 232-6307 Rachel McGeever (317) 4641	N/A	Suzanne Turner, Dir. Division of Family & Children (317) 232-4705

PRIMARY ALLEGATIONS: The Marion County (Indianapolis) Department of Public Welfare failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: The caseloads of caseworkers are too large to allow the provision of adequate care; preventive services are not being provided resulting in the unnecessary removal of children from their families; and the safety of children is not being assured when they are placed in foster homes (Note: The State Department of Family and Social Services Administration is a co-defendant in the case).

STATUS: A settlement proposal has been agreed upon requiring Marion County to limit child protective caseloads to 25 new cases per month and foster care caseloads to an average of 35 cases. The proposal is being circulated for public comment prior to consideration by the court.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Kansas Department of Social and Rehabilitative Services	Sheila A. et al v Haden	ACLU, Children's Rights Project, Chris Hanson and Chris Dunn	2/20/90	N/A	Michael George Roberta Sue McKenna (913) 296-3967	Debra Purse Jones (913) 235-3961	Caroline Hill Acting Commissioner, Commission on Youth Services (913) 296-4653

ALLEGATIONS: The Department failed to make a "reasonable effort" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes or to rehabilitate families so that children can return home and that the Plaintiffs' constitutional right to "due process" under the 14th amendment and constitutional right to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: The plaintiffs are attacking the entirety of the child welfare system.

STATUS: A trial date has been scheduled for April, 1993.

Kentucky Department for Social Services	Prewitt v Cabinet for Human Resources	ACLU, Children's Rights Project, Chris Hanson	1981	1982 1986	Stanley Stratford (502) 564-7900	N/A	John Karman Division of Family Services (502) 564-6852

ALLEGATIONS: The Department failed to provide adoption services in a timely manner as required by state and federal law (Note: This case originated in state juvenile court and was never refiled in federal court as a class action case).

ISSUES EMPHASIZED BY PLAINTIFF: The length of time a child remained in the Department's care and custody after parental rights had been terminated.

STATUS: A settlement was agreed upon in 1982 that established specific time frames for the Department to meet regarding various steps in the adoption process. A contempt petition was filed in 1986 that led to a renegotiation of the settlement. The Department was required to make quarterly reports to the court. After four consecutive quarters in which the Department was in compliance with the settlement, the court terminated the consent decree in 1990.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Kentucky Department for Social Services	Timmy S. v Cabinet for Human Resources	ACLU, Children's Rights Project, Chris Hanson	1979	1990	Stanley Stratford (502) 564-7900	N/A	Peggy Wallace Deputy Commissioner (502) 564-4650

PRIMARY ALLEGATION: The Department failed to provide fair hearing rights to foster parents as required by Title IV-B of the Social Security Act.

ISSUES EMPHASIZED BY PLAINTIFF: The sole issue was the fair hearing rights of foster parents to contest the removal of a foster child from their care.

STATUS: A settlement was never negotiated. The court ruled in favor of the plaintiffs and the Department amended its fair hearing procedure to allow foster parents the right to contest the removal of a child from their care. This policy remains in force.

Kentucky Department for Social Services	Lambert v Austin	Central Kentucky Legal Services, Steven Sanders	1987	1989	Stanley Stratford (502) 564-7900	N/A	Peggy Wallace, Deputy Commissioner (502) 564-4650

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: After numerous amendments to the original complaint, the plaintiffs focused on the Department's fair hearing rights available to foster parents (Note: This issue was already under litigation in the Timmy S. case described above).

STATUS: A settlement was never negotiated. The court ordered the Department to adopt new regulations concerning the fair hearing rights of foster parents and it did so.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Los Angeles County Depart-ment of Social Services	Timothy J. v Chaffee	National Center for Youth Law (San Francisco) Carol Shauffer	1988			Baker, MacKenzie	Bruce Ruben-stein, Deputy Director (213) 351-5626

PRIMARY ALLEGATION: The Department violated the rights of foster children under state child welfare statutes and regulations.

ISSUES EMPHASIZED BY PLAINTIFF: The failure of the County to meet the home visitation requirements of state regulation (Note: The State of California is a co-defendant in the case).

STATUS: The court never certified the class. Discussions are continuing between the County and the State regarding the County's compliance with the visitation requirements. No settlement discussions are currently being held with the plaintiffs.

Louisiana Department of Social Services	Del A. et al v Edwards et al	ACLU, Children's Rights Project, Chris Hanson Steven Schackman	1985	N/A	Mary Whidman (504) 342-1125	Lemann, O'Hara & Miles, Buddy Lemann, (504) 522-8104	Brenda Kelly, Assistant Secretary (504) 342-4000

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: The court accepted testimony regarding only the named plaintiffs thereby limiting the case to services provided to children in out-of-home care.

STATUS: Trial was completed in March, 1991. In October, 1991 the court ruled in favor of the state and dismissed the lawsuit "with prejudice."

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Maryland Department of Human Resources	L.J. et al v Massinga	Legal Aid Bureau Gail Haffner	12/84	4/88 6/91	Katherine Schultz (301) 333-0019	N/A	Charlotte King, Executive Director Social Service Administration (301) 333-0102

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: The main issue related to the manner in which the Department investigated in-care abuse/neglect reports, the actions which the Department took when the reports were indicated, and who was informed of the results of the investigation. A secondary issue was the adequacy of medical care provided to children in out-of-home care.

STATUS: A trial was held in 1987. The court ruled in favor of the plaintiffs and ordered the Department to adopt specific caseload standards for all social work functions and to alter many policies and procedures of the Department including: social worker training requirements; visitation requirements; rescreening of all foster homes where there had been allegations of abuse or neglect; and providing reports of abuse and neglect in foster homes to the childrens' attorneys. An amendment to the original settlement covering children placed with relatives was developed based on a separate study of this population and is awaiting court approval.

Massachusetts Department of Social Services	MacFarland (formerly Lynch) v Dukakis	Greater Boston Legal Services, Daniel Manning	2/80 10/82 12/88 10/89	9/82	Alexander Gray (617) 727-0900 Ruth Bourquin (617) 727-2200	N/A	Gerald Robinson Commissioner (617) 727-0900

PRIMARY ALLEGATIONS: The most recent amended Complaint alleged that the Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: The Department's failure to provide housing services; to place siblings together and in close proximity to their home; to place children in appropriate and safe foster homes; to locate adequate placements for adolescents, thereby resulting in multiple replacements; to free children for adoption in a timely manner when indicated; to provide adequate prevention and reunification services; and to maintain reasonable caseload levels.

STATUS: A preliminary settlement concerning caseloads remains in effect. The merits of the case remain to be litigated.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Michigan Department of Social Services	Committee to End Racism in Michigan's Child Care System and Quinn v Mansour	Robert Sedler	10/85	4/86	Stephen Gerrard (517) 373-7700	N/A	Richard Hoeckstra (517) 373-4021

PRIMARY ALLEGATION: The Department violated the constitutional rights of foster parents by removing foster children in their care solely because they were of a different race than the foster children.

ISSUES EMPHASIZED BY PLAINTIFF: Criteria and circumstances under which children in out-of-home care can be replaced.

STATUS: A settlement was agreed upon requiring the Department to specify the factors that would determine the replacement of foster children. It required the Department to report to the court for three years regarding implementation of the policy. The consent decree has expired.

Missouri Department of Social Services	G.L. v Zumwalt	Legal Aid of Western Missouri, Chris Hanson Robin Dahlberg	1977	1985	William Rapps (314) 751-3229 Robert Presson (314) 751-3321	N/A	Fred Simmen Division of Family Services (314) 751-4329

PRIMARY ALLEGATION: The Jackson County (Kansas City) Department of Social Services failed to provide the services to children placed in out-of-home care as required by federal law (Note: this lawsuit applied only to Jackson County).

ISSUES EMPHASIZED BY PLAINTIFF: The caseloads of caseworkers are too large to permit sufficient child visits, thereby resulting in children "languishing" in out-of-home care; and appropriate medical not being provided.

STATUS: Consent decree remains in force and implemented. A court appointed Monitoring Committee makes periodic reports to the court. The court held a hearing in January, 1992 regarding a contempt motion that was filed by plaintiffs. The motion argued that the State had violated the settlement agreement in the areas of caseload size, the training of foster parents, preplacement and postplacement visitation requirements, and the matching of foster children with foster homes. The State in response has filed a motion to modify the original settlement.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
New Hampshire Department of Health and Human Services	Eric L. v Harry Bird et al	Franklin Pierce Law Center, Civil Practice Clinic Bruce Friedman	8/91	N/A	Dan Mullen (603) 271-3658	N/A	Paul Sanderson (603) 271-4684

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home as required by the Adoption Assistance and Child Welfare Act ; (2) the Department violated the Child Abuse and Neglect Treatment Act; (3) the Department has violated the Americans with Disabilities Act and Section 504 of the Rehabilitation Act; and (4) the Department violated the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: The plaintiffs are attacking the entirety of the child welfare system. Issues which have been emphasized are the Department's practice of screening out certain reports of child abuse or neglect without initiating a formal investigation and the failing to place children in close proximity to their home including the excessive use of out-of-state placements.

STATUS: A motion for class certification is pending which the State has opposed.

New Mexico Human Services Department	Joseph A. et al v Goldberg et al	ACLU Children's Rights Project, Marcia Lowery	1980	1983 1988	Rob Booms (505) 827-6020	Wayne Bingham Steven Looney (505) 881-4545	Angela Adams, (505) 827-7444

PRIMARY ALLEGATION: The Department failed to provide the following services which are required by Title IV-B and Title IV-E of the Social Security Act: achieve permanency for children in a timely manner; terminate parental rights in a timely manner; and locate adoptive placements for children freed for adoption in a timely manner.

ISSUES EMPHASIZED BY PLAINTIFF: The plaintiff's focused on the timeliness of the permanency planning and adoption process and the length of time children remained in out-of-home placements.

STATUS: The first consent decree was issued in 1983. A trial was held in 1988 in which a Special Master found the State in substantial compliance with the consent decree. The judge ordered that further evidence be presented to the Special Master and a subsequent trial was held in March, 1991. Settlement negotiations have not led to an agreement. The court process has been reinstituted and both parties are awaiting the judgement of the Special Master regarding the March, 1991 trial.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
New York City Department of Social Services	Wilder v Bernstein et al	ACLU Children's Rights Project, Marcia Lowery	1978	1987	Carol Marcus (212) 274-6174	N/A	Beth Meador, Wilder Coordinator (212) 266-2626

PRIMARY ALLEGATIONS: The New York City Department of Social Services violated the constitutional rights of black, protestant foster children by placing foster children according to their religion (Note: This case was preceded by Wilder v Sugarman which argued that the Department's placement practices violated the separation of church and state. The plaintiffs lost the original case but the court suggested that there might be a constitutional violation if the effect of the Department's practices were discriminatory. The plaintiffs then refiled the case as Wilder v Bernstein).

ISSUES EMPHASIZED BY PLAINTIFF: The plaintiffs argued that New York City's policy of placing children with private agencies operated by the same religion as practiced by the child's family had the effect of discriminating against black, Protestant children because they were systematically prevented from being placed with Catholic or Jewish agencies. The plaintiffs argued that because Catholic and Jewish agencies were, on average, wealthier than Protestant agencies that the effect of the Department's placement practice was discriminatory. The plaintiffs also argued that the Catholic agencies' policy of withholding information and services regarding family planning and abortion from children placed with them violated the children's constitutional rights (Note: The State Department of Social Services and all Catholic and Jewish operated child care agencies are co-defendants in the case).

STATUS: Consent decree remains in effect. A court-appointed panel monitors agency compliance with the consent decree. Consultants have been hired to conduct feasibility studies and to assist with implementing changes to the City's placement practice.

New York City Department of Social Services	Martin A v Gross	ACLU Children's Rights Unit Lucy Billings	1984	N/A	Martin Baron (212) 274-6006	N/A

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabili ate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: The plaintiffs are attacking the entirety of the child welfare system (Note: The State Department of Social Services is a co-defendant in the case).

STATUS: A preliminary injunction was granted but was partially reversed at the Appellate Court and has been returned to the trial judge for reconsideration.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
New York City Department of Social Services	Constantino v Perales	Legal Aid Society, Housing Litigation Unit, Steven Banks	1986	N/A	Martin Baron (212) 274-6006	N/A	

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: The plaintiffs argued that children were being removed from their families solely because of inadequate housing, and that the Department was required to provide housing services to prevent such placements (Note: Although the State Commissioner of Social Services, Cesar A. Perales, is the first named defendant in the case, the primary defendant is the New York City Department of Social Service).

STATUS: Negotiations and trial preparation are proceeding simultaneously.

New York City Department of Social Services	Eugene F. v New York City DSS	Legal Aid Society, Juvenile Rights Division, Kay McNally	1986	N/A	Martin Baron (212) 274-6006	N/A	Ruth Barrantine (212) 266-2475

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: The plaintiffs argued that children removed from their families and placed with relatives (i.e., a "kinship" foster home) should receive the same services and payments that they would receive if they were placed in a regular foster home. Plaintiffs also argued that the Department failed to provide appropriate reunification services to all children who are placed in out-of-home care (Note: The State Department of Social Services is a co-defendant in the case).

STATUS: The Department has agreed to treat children placed in kinship homes in the same manner as if they were placed in regular foster homes, and has been in the process of implementing this policy since 1988. No consent decree has been entered into and discussions regarding other issues raised in the case are continuing.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
New York City Department of Social Services	Doe v New York City DSS	Legal Aid Society, Rose Fierstein	5/20/86	1990	Fran Winter (212) 274-6167	N/A	Steven Hornberger "Doe" Project Manager (212) 266-2597

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated. Plaintiffs also alleged violations of New York State statute and constitution.

ISSUES EMPHASIZED BY PLAINTIFF: The plaintiffs argued that children were being placed in out-of-home care for extremely short stays (i.e., one or two nights) many times before the Department located a regular placement.

STATUS: A trial was held in 1987 resulting in a preliminary injunction to end the practice of "overnight placements". A contempt petition was filed in 1988. A settlement agreement was reached in 1990 which is currently being implemented.

New York City Department of Social Services	Anna R. v Sobol	Brooklyn Legal Aid Society, John C. Gray, Jr.	6/7/90	N/A	Charles Hollander (212) 433-4533	N/A	Terry Weiss, Director of Quality Assurance (212) 266-2658

PRIMARY ALLEGATIONS: The Department and various public and private hospitals in New York City violated the Plaintiffs' constitutional right to "due process" under the 14th amendment and THEIR constitutional rights to privacy under the 1st, 9th, and 14th amendments by removing children from their parent's care solely on the basis of a toxicological test at birth.

ISSUES EMPHASIZED BY PLAINTIFF: The plaintiffs argued that the Department removed children from their parent's custody solely because of toxicological tests that were released without the patient's permission (Note: Several public and private hospitals in New York City as well as the State Department of Social Services are co-defendants in the case).

STATUS: The Department has altered its policy so that positive toxicological tests are grounds for making a child abuse/ neglect report but that a child's removal can occur only after an investigation into the family's ability to care for the child.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
New York City Department of Social Services	Jose E. v New York City DSS	Legal Aid Society, Rose Fierstein	1991	N/A	Carol Marcus (212) 274-6174	N/A	

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated. Plaintiffs also alleged violations of New York State statute and constitution.

ISSUES EMPHASIZED BY PLAINTIFF: The plaintiffs argued that siblings have a right to be placed together whenever possible and that they have a right to reunification services while in foster care (Note: The State Department of Social Services is a co-defendant in the case).

STATUS: Plaintiffs are conducting discovery in preparation for trial.

North Carolina Department of Human Resources Administrator	Willie M. et al v Hunt et al	Sandra Johnson	1979	1980	David Parker (919) 733-4618	N/A	Marci White Review Panel (919) 733-0696

PRIMARY ALLEGATION: The Department failed to provide educational services as required by the federal and state constitutions to children who have a history of mental, emotional, or neurological disorders or who are a danger to themselves or others.

ISSUES EMPHASIZED BY PLAINTIFF: The plaintiff's argued that the Department was required to provide various mental health and social services in order for the class of children to be able to be educated.

STATUS: Consent decree remains in effect. Implementation is being monitored by a court-appointed review panel.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Ohio Department of Human Services	Roe v Staples	Cincinnati Legal Aid, Frank Wassermann	1983	1986	Randy Louis (614) 466-4605 Alan Schwepe (614) 466-8600	N/A	David Schwertfager (614) 466-1213 Jan Flory, Hamilton County DHR (513) 632-6111

PRIMARY ALLEGATIONS: (1) The Department of Human Services of Hamilton County (Cincinnati) failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14t, amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: The absence of rules on the part of the Ohio Department of Human Services to define what counties must do to comply with federal requirements (e.g., the "reasonable efforts" language of PL 96-272); the inadequate manner in which the state Department of Human Services monitors the adequacy of services provided by the counties; and the absence of a state-wide needs assessment especially regarding preventive and reunification services.

STATUS: The consent decree remains in effect. A contempt motion filed in 2/90 is pending.

Ohio Department of Human Services	Ward v Keller	Southeastern Ohio Legal Services, Gary Smith	12/87	NA	Randy Louis (614) 466-4605 Karen Lazorishak (614) 466-8600	N/A	David Schwertfager Assistant to Deputy Director, Child Care and Family Services (614) 466-1213

PRIMARY ALLEGATIONS: (1) The Department of Human Services of Jackson County (a rural county in southeastern Ohio) failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: The absence of a fair hearing process for parents and others to contest the termination or inadequacy of services; the inadequate manner in which the state Department of Human Services monitors the adequacy of services provided by the counties; and the inadequate manner in which the state supervises the provision of children's services.

STATUS: The court has ruled that parents have no "fair hearing" rights with respect to the termination or reduction of services. All other issues are under discussion.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Philadelphia Department of Public Welfare	Baby Neal et al v Casey et al	ACLU, Children's Rights Project Marcia Lowery	5/90	N/A	Doris Leisch (215) 560-2192 Lorray Brown (215) 686-5257	Wolf Block Assoc. Jerome Shestack (215) 231-4000	Thomas Jenkins Ann Schenberger Office of Children Youth & Families (717) 787-6292

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated. Plaintiffs also alleged violations.

ISSUES EMPHASIZED BY PLAINTIFF: The plaintiffs are attacking the entirety of the child welfare system but especially the absence of permanency plans and sibling visits (Note: The State of Pensylvania is a co-defendant in this case).

STATUS: In January, 1992, the judge refused to certify the class. His reasoning was that the needs of each named plaintiff were so individualized that a case-by-case review was necessary to determine whether services were inadequate or unconstitutional. The defendants have filed a motion for summary judgement based on the U.S. Supreme Court's Suter decision and on the absence of any violations of constitutional rights. Plaintiffs have opposed the motion and filed a separate motion for the certification of seven sub-classes.

Pennsylvania Department of Public Welfare	O'Dell v Reeves	Community Legal Services (Philadelphia), Cindy Rosenthal Alba Martinez	1979	1987 1989	Doris Leisch (215) 560-2192	N/A	Maxine Tucker, Deputy Commissioner (215) 560-2900

PRIMARY ALLEGATION: The Philadelphia Department of Public Welfare failed to provide placement prevention services and family reunification services as required by Title IV-B of the Social Security Act and by the State and Federal constitutions.

ISSUES EMPHASIZED BY PLAINTIFF: Reunification services to parents of children in out-of-home care and weekly social worker/child visits.

STATUS: Immediately upon signing a consent decree in 1987, the plaintiffs filed a contempt motion which led to an amended consent decree in 1989. Plaintiffs were permitted to monitor the Department's compliance with the consent decree until September, 1991. The consent decree has lapsed in part because the case has been superseded by the Baby Neal case (see above).

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Rhode Island Department for Children and Their Families	Office of Child Advocate v State of Rhode Island	Laureen D'Ambra	1986	9/88 10/89	Kevin AuCoin (401) 457-4719	N/A	Thomas Bohan Executive Director (401) 457-4702 Steven Lieberman Assistant Director Division of Community Resources (401)457-4550

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-E and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated. Plaintiffs also alleged violations (Note: The Office of Child Advocate is a state funded office established as an independent agency authorized to monitor services provided to children by various state departments and, if necessary, to bring lawsuits against them).

ISSUES EMPHASIZED BY PLAINTIFF: Excessive replacement of children in out-of-home care (in this case, referred to as "night-to-night placements").

STATUS: The consent decree remains in effect.

Texas Department of Human Services	Griffin v Texas DHR	Neil Cogan	3/88	NA	Rick Garza (512) 450-3114	N/A	Patsy Sanders (512) 450-4986

PRIMARY ALLEGATION: The Department failed to provide services as required by Title IV-E of the Social Security Act to adoptive parents of "special needs" children.

ISSUES EMPHASIZED BY PLAINTIFF: The plaintiffs argued that adopted children have a right to the same services as children in out-of-home care, including medical services, room and board payments, etc.

STATUS: Federal district court has ruled that there is no constitutional basis for the "equal protection" argument of the lawsuit. Negotiations are continuing regarding the rules that govern the determination of the adoption subsidy for "special needs" children.

STATE/ AGENCY	NAME OF LAWSUIT	PLAINTIFF/ REPRESENTATIVE OF PLAINTIFFS	DATE OF COMPLAINT	DATE OF SETTLE-MENT or JUDGEMENT	LEGAL CONTACT AT AGENCY	DEFENDANT'S OUTSIDE LAW FIRM or LEGAL REPRESENTATIVE	ADMINISTRATIVE CONTACT AT AGENCY
Vermont Department of Social and Rehabilitation	Jane T. et al v Morse et al	Vermont Legal Aid Developmental Disabilities Project Judy Dickson	1986	N/A	Michael Dwayne (802) 241-2821	N/A	Steven Dale, Director of Social Services (802) 241-2136

PRIMARY ALLEGATIONS: (1) The Department failed to make "reasonable efforts" as required by Title IV-B and Title IV-E of the Social Security Act to prevent the removal of children from their homes and/or to rehabilitate their families so that the children can return home; and (2) the Plaintiffs' constitutional right to "due process" under the 14th amendment, and their constitutional rights to "liberty and family integrity" under the 1st, 9th, and 14th amendments have been violated.

ISSUES EMPHASIZED BY PLAINTIFF: The plaintiffs argued that an inadequate system existed for coordinating educational services and educational placements for disabled individuals in the custody of the Department.

STATUS: Settlement discussions are continuing.

Westchester County Department of Social Services	Beck et al v County of Westchester	George Akst	2/89	10/91	Marilyn Slaatten (914) 285-2660	N/A	Nancy Walsh, Director of Children's (914) 285-5451

PRIMARY ALLEGATION: The Department violated state and federal constitution protections in the manner via which they investigate child abuse/neglect reports (Note: This case was brought as an individual action but it has the effect of a class action lawsuit because the changes mandated by the settlement must be implemented on a system-wide basis).

ISSUES EMPHASIZED BY PLAINTIFF: The plaintiffs argued that a case of mistaken identity with respect to the alleged perpetrator of a child abuse/neglect report had the effect of an unconstitutional invasion of privacy.

STATUS: A settlement has been agreed to that will require the Department to alter in procedures during an investigation of a child abuse/neglect report.

STATEMENT OF THE KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

Gentlemen;

I understand the scheduling of a hearing on a provision of a bill after mark up is not a normal procedure. Thank you for the opportunity to address this issue.

This proposal is an attempt to reverse a recent U. S. Supreme Court decision in which the Court upheld the integrity of the provisions of the Social Security Act. This case arose out of an allegation that a State human services agency did not exercise "reasonable efforts" to retain an abused or neglected child in the home, although a local court had found that the efforts in the case were reasonable, as required by the Social Security Act. The court held that there is no cause of action under this section of the Social Security Act because there is no statutory or regulatory definition of "reasonable effort" to which a State can expect to be held. Instead, the Social Security Act requires that a State court make a finding that the State has taken "reasonable efforts" in that specific case "... to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home ..." 42 U.S.C. 671(a)(3), (15).

I believe this proposal, although well intentioned, is poor public policy. There are two primary reasons for this position. 1) This proposal is an inappropriate court intervention into legislative and administrative matters. 2) This language inappropriately expands the conditions under which an individual has standing to seek damages under 42 USC 1983.

1) Kansas and many other States have been sued to increase the level of services provided to children. The result in many States has been a dramatic increase in child welfare services at the expense of other State programs. The Court, ordering services be delivered at specified levels - including staffing levels - sets the budget, replacing their judgement for the policy and priority setting function of the Legislative branch. Because these services are typically matched with Federal funds, the Courts effectively budget both Federal and State funds.

If implemented, this proposal replaces the decision making process of the Executive branch (approving State plans) with the judgement of the Judicial branch each time an applicant for or recipient of assistance disagrees with a decision made or the level of benefits provided. When a court makes these decisions they effectively budget whatever resources are necessary to implement their orders. The result is a reduction of resources available for all government activities other than those covered by the court order. Thus in adopting this proposal, Congress has transferred another portion of the Legislative power to the Judicial branch.

2) The statute anticipates that there is no single definition of "reasonable effort" because of the uniqueness of the situations which child abuse and neglect cases present. Therefore a judicial check is built into the process to compensate for the inability to set universal standards which balance the needs of the State and the public. The Suter decision did not close the courthouse doors on children who have been harmed, it only said that 42 USC 1983 is not the appropriate avenue for redress.

AFDC recipients are given a cause of action under this proposal to sue to have benefits increased by alleging that benefits in the State are not "reasonable". If one such plaintiff succeeds, the effect would be to set a national AFDC benefit level. When a State with higher benefits than this court established standard attempts to lower benefits to the new standard, it can anticipate being sued for reducing benefits because it isn't reasonable to reduce the incomes of people who are already poor, and if successful a new higher standard is established. This same scenario applies to all Social Security Act programs which include State plan requirements. (If the same requirements were applied to the Federal Government all social security recipients would have the right to sue because their disability checks are not sufficient to cover their needs and retirees could sue because their checks are not a reasonable return on the investment they have made through witholding from their checks over the years.)

The Court has stated before that when the statute or regulations establish a measurable performance standard there is a right to sue under 42 USC 1983. This proposal establishes that private cause of action in cases where the State has no standard against which to determine if their actions are reasonable. This is like writing speeding tickets on a stretch of highway where there is no speed limit posted.

Typically litigation is considered a last resort, not a statutorily recommended means of changing public policy. Litigation is an expensive and protracted means of establishing public policy. Kansas has spent nearly $1 million defending an ACLU lawsuit alleging that we do not meet reasonable standards of care in spite of passing all Federal audits. That is $1 million which otherwise could have gone to providing care to children.

Why is it so important to have access to the courts through 42 USC 1983? There are other legal remedies available to children and families who believe they have been harmed. The arguments for this legislation ignore the fact that before removing a child from the home a court must make a finding that reasonable efforts have been made to prevent the removal. The court must also find within 18 months and periodically review the child's case. Administrative appeals are required to be available by the Social Security Act. Could the primary reason that 42 USC 1983 access to the courts is so important is that this statute is commonly referred to as the "attorneys' full employment statute" because under 42 USC 1983 prevailing attorneys are guaranteed their fees?

Enriching attorneys from the public purse is neither the best or the only course of action available to remedy what the groups proposing this legislation perceive to be a problem of inadequate services to children. There are a number of proposals before Congress right now to provide additional services to children. All, however require additional resources, and are predicted to not be enacted because they are too expensive. Increasing funding of Title IV-B programs under the Social Security Act would be a much more effective way of providing additional services to children. Instead of siphoning millions of dollars per lawsuit from the child welfare system, this would allow the States to invest all available funds in the additional services the Children's Defense Fund and other advocates believe are necessary.

If, in fact, what is needed is a private cause of action to enforce State plans, modify the statute to establish standards which put the States on notice of the level of service they must provide. This change to the statute would provide to citizens the right to sue under 42 USC 1983 by making the statute meet the test promulgated in the Suter decision.

Another option is to provide additional enforcement mechanisms for the Department of Health and Human Services to determine if plans will result in "reasonable" services and to force States to abide by the plans they have submitted. This avoids the proliferation of lawsuits, making it a less expensive and more effective alternative, even if less flamboyant.

If courts are certifying efforts which are not reasonable, the solution is not to encourage more lawsuits against state human service agencies, but rather for Congress to better define what its policy directives mean. Reasonable efforts in child protection cases are different for each case and differ according to one's philosophy of government. Even within the field of child welfare there is much disagreement on what constitutes reasonable service.

I encourage this body to remove the Suter amendment language from this legislation and give more careful consideration to either continuing current methods of having the State courts define reasonable efforts for each case or to more explicitly define the expectations of Congress in the legislation. In the alternative, I offer the following additional language as an acceptable compromise:

If a court of competent jurisdiction is exercising jurisdiction over individuals alleging a violation of rights under this act and concerning matters related to said alleged violations, then any action alleging violation of rights secured by this act shall be filed in the same court. No action shall be filed without first exhausting all administrative remedies. Only prospective injunctive relief may be granted and under no circumstances shall additional attorneys fees be awarded.

Thank you again for the opportunity to address this important issue.

STATEMENT OF THE NATIONAL CHILD SUPPORT ENFORCEMENT ASSOCIATION

Mr. Chairman, distinguished members of the Committee: I am pleased to have the opportunity to comment upon the proposed *Suter* Amendment to the Social Security Act.

My name is Ellen M. Alvine and I am President of the National Child Support Enforcement Association (NCSEA). NCSEA is a national organization dedicated to the enforcement of children's rights to adequate parental support. NCSEA is comprised of over 1,500 individuals and agencies representing the entire spectrum of the child support enforcement community.

NCSEA opposes the *Suter* Amendment, as indicated by the attached Resolution of the Board of Directors. NCSEA's objections revolve around neither the significance of Supreme Court precedent nor Congressional intent; other individuals have eloquently provided scholarly testimony on those topics, indicating that there is little consensus on either subject. Instead, NCSEA has four key concerns about the impact that the *Suter* Amendment will have on the child support enforcement program established by Congress under Title IV, Part D, of the Social Security Act.

First, NCSEA questions the wisdom of responding to the Supreme Court decision in *Suter* by simultaneously creating a private right of action for *all* State plan programs under the Social Security Act. *Suter* involved State administration of foster care and adoption services under the Adoption Assistance and Child Welfare Act of 1980. NCSEA is concerned that the sweeping nature of the proposed amendment overlooks the distinction between the purposes and mandates of the individual State plan programs, especially the child support enforcement program, and seeks to cure the problems raised by *Suter* with too strong a remedy.

Second, NCSEA is concerned that a tide of litigation will be unleashed if Congress enacts the *Suter* Amendment. To the detriment of children and their families, scarce resources will be diverted from the IV–D agencies' essential duties of establishing paternity and establishing, enforcing and modifying child support obligations.

Third, child support enforcement is inextricably intertwined with issues of custody, alimony and property division—areas of the law traditionally reserved to the States. The *Suter* Amendment will create a major new infringement upon State sovereignty and increasingly subject State law to interpretation by the federal courts.

Last, the *Suter* Amendment will greatly expand the superintendence power of the federal courts. NCSEA believes that it would be inappropriate for the federal judiciary to become a monitor of the wisdom and soundness of State executive action. Instead, NCSEA believes that auditors from the Executive Branch of the federal government, using carefully developed performance indicators and evaluation standards, are better suited to monitor the compliance of State IV–D agencies with the provision and terms of their State child support enforcement plans.

Instead of holding State IV–D agencies accountable in a federal judicial forum for deficiencies which may, in part, be attributable to a lack of adequate funding, it would be more constructive for Congress to improve the existing state-based system; that issue, moreover, is the focus of yet another critical debate now pending in Congress.

In closing, NCSEA does not contend that the Congressional creation of a private right of action in response to the Supreme Court's holding in *Suter* is inappropriate for every program under the Social Security Act; rather, NCSEA cautions that if Congress enacts the *Suter* Amendment, it will have misdiagnosed the problems associated with child support enforcement—and applied the wrong remedy.

Attament.

National Child Support Enforcement Association

NCSEA BOARD OF DIRECTORS RESOLUTION (OPPOSING HR 11, SECTION 1123 AMENDMENT)

WHEREAS, the National Child Support Enforcement Association (NCSEA) is the organization which represents the nationwide child support community, including state and local IV-D administrators, case workers, judges, hearing officers, court administrators, legislators, prosecutors, private attorneys, profit and non-profit private sector corporations, state family support councils, and advocates, all joined by a common interest to improve the lives of children through the equitable, efficient and effective enforcement of parental responsibility for support; and

WHEREAS, the United States Supreme Court recently held in the case of *Suter v. Artist M.* that the "reasonable efforts" provision of the Adoption Assistance and Child Welfare Act of 1980 creates neither an enforceable right for individuals to sue in federal court nor an implied cause of action to obtain services specified in the law; and

WHEREAS, the House of Representatives responded to the *Suter* decision by proposing, in H.R. 11, Section 1123, an amendment to Title XI of the Social Security Act that creates a new and express right to sue in federal court for all services and benefits covered by all State plans under all titles of the Social Security Act; and

WHEREAS, the Section 1123 amendment to Title XI of the Social Security Act was passed by the House on July 2, 1992; and

WHEREAS, NCSEA's Board of Directors believes that:

- the amendment is unnecessary since Title IV, Part D, of the Social Security Act already embodies a comprehensive remedial scheme for individuals who seek redress;
- the amendment will be detrimental to the interests of children, custodial parents and non-custodial parents seeking child support services because it will divert the scarce resources of IV-D agencies to costly and time-consuming litigation and away from the provision of essential services;

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- the amendment will create a major new intrusion into State sovereignty insofar as child support law is inextricably linked to custody, alimony and property division - areas of the law historically reserved to the States;

- federal auditors from the Executive Branch, using the elaborate system of performance indicators developed by the federal Office of Child Support Enforcement and contained in the federal regulations, are in a better position than federal judges to monitor the compliance of IV-D agencies with State plan requirements;

- several comprehensive proposals to improve child support enforcement are currently pending in Congress; and

WHEREAS, the United States Senate has not yet acted on the proposed amendment;

BE IT THEREFORE RESOLVED that the Board of Directors of the National Child Support Enforcement Association hereby opposes the Section 1123 provision in H.R. 11 and urges the United States Senate not to enact the amendment.

NATIONAL GOVERNORS' ASSOCIATION

Roy Romer
Governor of Colorado
Chairman

Raymond C. Scheppach
Executive Director

Hall of the States
444 North Capitol Street
Washington, D.C. 20001-1572
Telephone (202) 624-5300

PERSONALIZED LETTER SENT TO:
HOUSE LEADERSHIP
HOUSE WAYS AND MEANS
FULL SENATE SEN. MOYNIAN

August 7, 1992

The Honorable Thomas S. Foley
Speaker of the House
of Representatives
The Capitol, Room H-204
Washington, D.C. 20515-4705

Dear Mr. Speaker:

We are writing to convey our support for hearings to provide a public and thorough airing of the issues surrounding the Suter v. Artist M. Supreme Court decision and the potential advantages and disadvantages of a legislative response at this juncture. Specifically, the Governors:

- Ask that Congress conduct a thorough review of the complicated implications of the Court's decision before far-reaching legislation is enacted. We must have a more workable alternative than the provision included in the House urban aid package, and pledge to work with you as we mutually strive to serve our neediest citizens.

- Support provisions included in S. 4 and H.R. 5600 to create an advisory committee to study and make recommendations on the reasonable efforts requirement in the Adoption Assistance and Child Welfare Act.

The House included in its urban aid bill (H.R. 11) a provision referred to as the "Suter amendment." Involving the Illinois child welfare system, the Suter v. Artist M. case related to whether the Adoption Assistance and Child Welfare Act of 1980 creates a right to sue the state in federal court to enforce the provision requiring "reasonable efforts" in preventing out-of-home placement and returning foster children to their families. The State and Local Legal Center filed an amicus brief with the Supreme Court on behalf of NGA, the National League of Cities, the National Association of Counties, the National Conference of State Legislatures, and others in support of Illinois.

While its proponents contend that the purpose of the provision is to restore individual rights of action to a "pre-Suter" status, we believe that in fact the amendment goes well beyond the scope of that ruling. While it is difficult to predict with certainty the full implications of this complex provision, we believe that it would create a new and express right to sue in federal court for all

services and benefits covered by a state plan in all titles of the Social Security Act, regardless of whether the underlying statutes or regulations were intended to create enforceable rights or sufficiently define state requirements. We fear that the Suter amendment would radically expand state exposure to law suits. We oppose the House language for a number of reasons:

- Suter v. Artist M. still protects families and children by retaining strong avenues for redress. Beneficiaries continue to have opportunities for redress in instances when services and benefits are not forthcoming. These include federal administrative and state court remedies, as well as actions brought on constitutional grounds. The federal government has broad authority to cause compliance with statutory and regulatory requirements; individuals have protections through administrative hearings; and individuals may also continue to bring suit when Congress has provided clear guidance on program performance. It is important to note that in Suter, the Supreme Court did not rule out the use of Section 1983 of the Civil Rights Act in future litigation. Prior to Suter, the enforceability of Social Security Act plan requirements was determined on a case-by-case basis. The high court's decision still permits this case-by-case analysis to continue.

- There are no direct benefits to children assured by this action. By encouraging the proliferation of litigation, the provision could actually harm, rather than help, the children it is designed to protect. It could undermine the capacity of state and federal governments to serve children. The threat of exposure to litigation of this magnitude will require states to be more cautious in their state plans to provide services for children and other needy individuals. Additionally, time and money spent on litigation are resources not spent on providing direct services to children.

- The provision would cede to the courts responsibilities that now rest with Congress and state and federal agencies. Although we recognize that state and federal courts have an important role to play, we fear that this provision would abrogate to the courts responsibilities that presently rest with Congress and state and federal governments.

- The provision undoubtedly will have very significant fiscal impacts to both state and federal governments. House Ways and Means Committee staff noted in a table on the budget impact of H.R. 11 that "it is difficult to estimate the magnitude of the potential effects" of the Suter amendment on both state and federal spending since the provision could influence the way in which states administer such programs as Medicaid, AFDC, foster care, child support, and all other Social Security Act programs that are matched with federal funds.

We look forward to continuing to work with you to ensure that our combined efforts result in genuine improvements in services for our country's children in need.

Sincerely,

South Carolina

Colorado

Washington

Massachusetts

Maine

Michigan

Missouri

Mississippi

Delaware

Alabama

Illinois

New Jersey

Hawaii

Oklahoma

Ohio

Iowa

Indiana

Arkansas

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West Virginia

Nevada

Minnesota

Utah

New Mexico

Texas

Georgia

Wisconsin

Rhode Island

South Dakota

Arizona

Nebraska

North Dakota

Florida

Wyoming

Montana

Vermont

Kentucky

Maryland

New Hampshire

Virginia

STATEMENT OF THE TEXAS OFFICE OF THE ATTORNEY GENERAL

The Texas Office of the Attorney General administers the child support enforcement program mandated by Title IV, Part D of the Social Security Act. As the state program administrator, we are concerned about calls to mandate or create private causes of action under the Social Security Act. Any judicial or legislative mandate in this regard may have unintended consequences that should be carefully considered.

Currently, Congress is considering legislative language that would clearly mandate a private cause of action under all titles of the Social Security Act. We believe that this provision would create new causes of action; that this extension is not necessary to protect the rights of program beneficiaries; and that no private cause of action should exist for the effective enforcement of child support. Furthermore, the program can't afford it; the judiciary should not be expected to work out detailed specifics of program operation by court decision; and the program is not designed for a private cause of action. Finally, litigation brought under private causes of action in IV-D cases have historically failed to bring about program improvements.

We are providing this testimony to the Congress to illustrate the effects that extending a private cause of action may have on the Title IV-D child support enforcement program of the Social Security Act. This testimony is limited solely to the effects on the IV-D program. We cannot speak to the effects that a private right of action might have on programs of the other titles of the Social Security Act. However, we would ask that any and all possible consequences be considered carefully so that we can concentrate on delivering services to children instead of defending against a proliferation of litigation which may not serve any worthwhile purpose.

BACKGROUND

In a majority opinion in Suter v. Artist M. (112 S. Ct. 1360), delivered March 25, 1992, the Supreme Court held that the "reasonable efforts" provision of the Adoption Assistance and Child Welfare Act of 1980 (94 Stat. 500, 42 USC §§ 620-628, 670-679a) could not be enforced through an action brought under 42 USC § 1983 and that the Act itself did not create an implied right of action entitling the respondents in the case to bring suit.

42 USC § 671 (a) (15) requires, as part of a state plan, state agencies administering foster care and adoption services under Title IV-E of the Social Security Act make "reasonable efforts" to prevent removal of children from their homes and to facilitate reunification of families where removal has occurred.

The Court found that, lacking statutory guidance as to how to measure "reasonable efforts," compliance with the directive was left, within broad limits, to each state. Moreover, because other sections of the Act provide mechanisms whereby the Secretary of Health and Human Services may enforce "reasonable efforts" by the states under their state plans, through a finding of "substantial failure" in the administration of the plan, it cannot be said that the Act conveys an implicit cause of action for private enforcement.

The decision dealt **solely** with Title IV-E of the Social Security Act.

In response to the Suter decision, the United States House of Representatives passed a provision in H.R. 11 amending the Social Security Act to permit private individuals to sue in federal court for any and all services and benefits identified in a state plan funded under any title of the Social Security Act.

THE LANGUAGE OF H.R. 11 CREATES NEW CAUSES OF ACTION

The provision in HR 11 goes well beyond overturning Suter. New causes of action are created by the legislative provision in HR 11. The Suter decision dealt solely with Title IV-E of the Social Security Act. If the decision was wrong, its legislative reversal should be limited solely to Title IV-E of the Social Security Act.

In point of fact, the text of H.R. 11 would go much further than the negation of the Suter decision. Whereas courts have, hitherto, determined on a case-by-case basis the enforceability of state plan requirements, the proposed provision would make all state plan requirements in all programs enforceable by private cause of action. The language of the amendment clearly creates a private cause of action for all titles of the Social Security Act whether or not they existed prior to the Suter decision. Whereas the Suter decision applied only to Title IV-E, the text of H.R. 11 would apply to all titles of the Social Security Act.

Proponents of overturning the Suter decision are contending that "this amendment does not create any new rights." The proponents argue that, if the language of the proposed provision is imprecise, legislative history will be sufficient. This confusion and conflict can be corrected now by simply clarifying that a private cause of action exists under Title IV-E of the Social Security Act. Clearly, this would be sufficient if all the proponents of this provision want to do, as they claim, is "to assure that individuals who have injured by a state's failure to comply with the state plan requirements are able to seek redress in the federal courts to the extent they were able to prior to the decision in Suter v. Artist M." (Our testimony does not deal with what a private cause of action would do to the Title IV-E program, because we are not familiar enough with that program to comment. We would like to make it clear that we are not suggesting that an extension of a private cause of action to the IV-E program is appropriate.).

Despite claims to the contrary, it is not true that courts have held that there is a private cause of action against the IV-D program. Numerous cases including Wehunt v. Ledbetter decided in 1989 and Carelli v. Howser decided in January of 1991, have held that Title IV-D of the Social Security Act did not create any enforceable private rights of action.

Congress should be very careful when it considers new causes of action. It must consider all of the program implications and only extend a private cause of action when no other alternatives exist. Clearly, there are more appropriate alternatives for the child support enforcement program.

CREATION OF A PRIVATE CAUSE OF ACTION IS NOT NECESSARY TO PROTECT THE INTERESTS OF CHILD SUPPORT PROGRAM BENEFICIARIES

The interests of Title IV-D beneficiaries are appropriately protected by the Congressionally-mandated federal audit and penalty process administered by the U.S. Department of Health and Human Services.

•Protection Through the Audit and Penalty Process

A) Congress has provided a rigorous audit process to ensure compliance by state IV-D agencies with federal statutory and regulatory requirements.

Title IV-D is unique among programs under the Social Security Act in having its own triennial audit process especially created by Congress to evaluate the effectiveness of state IV-D programs against performance standards created and administered by a special audit section of the Office of Child Support Enforcement.

The Title IV-D audit is not a pro-forma process. It is a rigorous evaluation of state IV-D program performance, taking upwards of 24 months to complete and employing dozens of criteria and subcriteria to measure the full range of state agency activity. Failure in any one of the 36 "plan-related" or program administration criteria can result in a finding of substantial non-compliance for the entire program.

Moreover, the failure of a state IV-D agency to take appropriate actions within the audit period for 75 percent of the cases reviewed in each of the 22 "performance-related" or program services criteria can also result in a finding of substantial non-compliance for the entire state program. Such finding carries severe sanctions, including a loss of federal funds for the state's IV-A program.

The history of the triennial IV-D audit clearly shows that states have not been dealt with lightly by the federal government. For the audit year 1985, 19 states out of the 23 audited received notices of substantial non-compliance. In 1986, 13 out of 16 state agencies audited that year received notices of non-compliance. In 1987, 8 out of 12 states audited received such notice. In 1988, 10 states were found out of compliance; in 1989, nine states; and in 1990, six states were informed that their programs were not in substantial compliance with federal requirements. Cumulatively, since 1984, only four out of the 54 states or territories operating IV-D plans have escaped notice of non-compliance following the federal audit

The penalty for a finding of non-compliance is held in abeyance for a period of up to one year to allow a state the opportunity to implement corrective action to remedy the program deficiency. The corrective action must follow a plan approved by the Office of Child Support Enforcement. At the end of the corrective action period, a follow-up audit is conducted, and, if this audit is passed, the penalty is rescinded. However, if the state is still found out of compliance, a graduated penalty, as provided by acts of Congress, is assessed with the actual amount of the penalty depending upon the severity and duration of the deficiency. In Fiscal Year 1990, half of the states for which a follow-up audit had been conducted were still found to be out of compliance, and penalties were assessed for these states.

This federal audit process serves as the statutory procedure to ensure compliance with statutory and regulatory requirements. Although state child support programs believe that this compliance process may be substantially improved, it is generally recognized as the type of process best designed to enforce compliance without seriously obstructing the program's continuing delivery of enforcement services.

B) A more appropriate legislative remedy than a private cause of action would be reform of the audit process.

If the audit and penalty process is flawed, then it should be legislatively reformed instead of being complicated by the addition of a federal judiciary overseer role that a private cause of action would entail. Such a duplication of effective authority over program operations would split the authority over program requirements and inevitably lead to increased inconsistency in the federal direction of the program. IV-D programs across the country have been advocating

improvements to the audit process that would increase the accountability of state programs; clarify what state programs are supposed to accomplish; and shift the emphasis from regulatory process to program results.

Reform of the audit process in this manner would promote the program performance hoped for by the Congress. Merely legislating a private right of action without reform of the audit process will guarantee program failure. Clearly, with regard to the IV-D program, reform of the audit process is the only necessary, potentially successful and sufficient solution to the concerns about program accountability.

The notion that "widespread violations of federal law will increase and go unredressed" and that "States will be relatively free to take federal funds... while ignoring federal rules" is not correct. Procedures exist to prevent this and the states are taking the lead in advocating a process which will make state IV-D programs more effective in responding to the needs of the children of this nation.

C) The Congressionally mandated audit and penalty process is inconsistent with a private cause of action.

The provision by Congress of the triennial audit of Title IV-D state programs forecloses a private enforcement of federal requirements for the program. Moreover, the application of the quantitative 75 percent substantial compliance standard effectively undercuts a cause of action by a private individual. If Congress were to apply the proposed amendment to the operation of the Title IV-D program, it would have the effect of requiring 100 percent achievement of compliance with the minute detail of operational procedure. Without discussing the realism of such an expectation of perfection, suffice it to say that operation of the program at the 100 percent level would necessitate a massive infusion of additional resources. Operation of the program at the present 75 percent level has been viewed for years by state program operators as seriously underfunded.

•The Right of Private Petition Still Exists

Perhaps, the most basic misunderstanding about the Suter decision is the belief that it foreclosed a private cause of action under § 1983. This is not the case. The Supreme Court in Suter did not foreclose future litigation under § 1983; indeed, it made clear that there have been, and will continue to be, cases in which private individuals could enforce state plan requirements of programs under the Social Security Act (See, e.g. Wilder v. Virginia Hospital Assn., 496 U.S. 498 (1990); also, Wright v. Roanoke Redevelopment and Housing, 107 S. Ct. 766 (1987)). However, there has never been, as this amendment would provide, a blanket enforceable right of action for the state plan requirements of all titles of the Social Security Act.

The Supreme Court has established two exceptions to the general rule that § 1983 is the vehicle for bringing a cause of action for an alleged violation of federal statutes. A plaintiff will not be permitted to sue under § 1983 if Congress has precluded private enforcement either explicitly or implicitly by failing to create enforceable rights, privileges or immunities in the relevant statutory provision according to Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981). Also, a plaintiff will not be permitted to sue under § 1983 if Congress intended to foreclose such action by providing an exclusive remedy or enforcement scheme with the federal statute according to Wilder v. Virginia Hospital Association, supra; Middlesex County Sewerage Authority v. National Sea Clammer Association, 453 U.S. 1 (1981). See also Wright v. Roanoke Redevelopment and Housing, supra; Smith v. Robinson, 468 U.S. 1, 20 (1981).

The decision in Suter has not abrogated the right of private petition in the federal courts under § 1983 for alleged violation of rights, privileges and immunities with respect to titles of the Social Security Act. Nor has the Court qualified in any manner the right of access to protection offered through administrative and state court remedies. Finally, Suter does not abridge the authority and power of the federal government to cause compliance with statutory and regulatory requirements imposed upon state agencies charged with responsibility to administer programs under titles of the Social Security Act.

WHY THERE SHOULD BE NO PRIVATE CAUSE OF ACTION FOR THE CHILD SUPPORT ENFORCEMENT PROGRAM

Title IV-D is clearly one of the programs under the Social Security Act for which no private cause of action was intended or designed. Improving the administration of child support enforcement can only be accomplished in a cooperative atmosphere between legislators, administrators, advocates and the public, not through a proliferation of lawsuits that a private right of action would create.

The proposed amendment to the Social Security Act has the potential of exposing the child support enforcement program to a proliferation of litigation. This would result in a waste of limited resources, confusion about program requirements and a needless delay in the delivery of the services for which the program was created.

The resources available to the program are too scarce; a private cause of action will lead to operational confusion; and a private right of action is inimical to the program nature and operation

1) Resources are too Scarce

The problems that the child support enforcement program encounters are caused by lack of resources and the burden of over-regulation. Litigation will not solve this. Only legislative reform that provides sufficient resources and proper regulation will.

IV-D programs have become overwhelmed by the increasing caseloads and diminishing resources provided to the program. Congress has cut program funding levels from a level of 75 percent Federal Financial Participation (FFP) to 70 percent in 1982 to 68 percent in 1988 and, finally, to 66 percent in 1990. All the while, Congress and the federal regulatory agencies have required more and more of the state IV-D agencies in terms of the types of services to be offered and the procedures to be followed. For example, IV-D programs are being given the added burden of conducting periodic review and modifications of support orders for both custodial and non-custodial parents without additional financial support.

During this same time period, child support caseloads have been increasing at an explosive rate due to the changing demographics of our society. During the last year, Texas alone has seen its caseload grow from 580,000 to almost 800,000 cases. The caseload will top one million by the end of 1994.

In effect, states are being forced to do more tasks for more people with fewer resources.

Congress can and should increase the percentage of the FFP. For example, there can be no doubt that the Congress wishes the states to increase the states' automation capacity. Congress is funding development of a New Systems automated project for all states at a rate of 90 percent FFP, and state participation in the project has been good.

It is our position that the child support enforcement program should be fully federally funded at a FFP rate of 100 percent. The largest problem we face in the program is our lack of resources. States simply lack adequate financial resources to do all the tasks required by federal statute. By fully funding the program with federal funds, the provision of resources will become a much more simplified process. By mandating a FFP of 100 percent, states would no longer have to gear the design of their programs to the method of finance. States would be able to concentrate on improving the delivery of services. It is clear that no significant enhancement of the program can take place without a new funding structure and that is why we believe in full federal funding of the program.

States should not be held liable for the effective administration of a federal program that the federal government has been unwilling to adequately fund.

2) Operational Confusion

The proposed amendment would have the effect of forcing state IV-D agencies to comply with, not only a great number of federal regulations, but also, with an ever-expanding body of case law exhibiting diverse and divergent opinions among the federal courts. The result would not be more effective delivery of services, but a confusion of directives to state IV-D agencies.

Child support enforcement does not lend itself to judicial administration for several reasons. The need for swift action to allow the program to adapt to ever-increasing caseloads will make any judicial ruling moot by the time it is finally decided. Courts also tend to look at program administration in the micro sense. Child support enforcement has become, by necessity, a macro administrative program.

This is reflected in the court case of Carelli et al v. Howser et al, (6th Circuit, January 18, 1991) where the Sixth Circuit Court of Appeals found that the comprehensive triennial federal audit of state IV-D programs clearly demonstrated that:

> "Congress intended to foreclose a private right of action... notwithstanding that it was brought by a 'beneficiary'.... Simply stated, plaintiffs seek to have a federal court interpret Section 1983 in a manner that will enable the court to order state and local officials to do a better job of enforcing child support orders in the State of Ohio.
>
> "We conclude that the nature of the relief sought by the plaintiffs here would cause a federal court to carry out an oversight function beyond that intended by Congress, given the comprehensiveness of the remedial scheme provided in the statute."

The child support program runs best when the legislative branch develops innovations and the executive branch administers operations.

3) A Private Right of Action is Inimical to the Program Nature and Operation

The child support enforcement program is not, sensu stricto, an entitlement program. It was created by Congress for the dual purpose of "cost-recovery" and "cost-avoidance" so that state and federal agencies could recover public expenditures for welfare assistance; help families on welfare to leave the public assistance rolls; and help families not on welfare avoid turning to public assistance.

A review of all legislative enactments concerning the child support enforcement program indicates that the intent of Congress was primarily to save public monies. The program was originally intended to recover welfare expenditures and to get people of AFDC. When the program was expanded to include non-public assistance cases, it was done so with the intent of cost avoidance by preventing these families from having to turn to welfare.

The court has found that Title IV-D is in the nature of a contract between the state and federal governments, pursuant to the spending powers of Congress. Because the participation of the states in Title IV-D is voluntary, the funding statute did not condition the receipt of federal funds in a manner which created a privately enforceable entitlement. If Congress wants to create a new purpose of the program, it must provide for their change. Otherwise, there can be no expectation of the program being administered in an effective manner.

LITIGATION FAILS

Where it has been used, litigation has not proven to be an effective way to improve the performance of state and local IV-D agencies, nor does it remedy the conditions which tend to prevent IV-D agencies from performing at their optimal levels.

At best, law suits brought against state and local IV-D agencies under § 1983 have accomplished no more than what is achieved through the federal regulatory process or by the defendant agency itself in the course of fully implementing federal mandates. The injunctive relief gained is usually no more than a "hurry up" order of the court. Thus, in assessing the nature of the relief sought by the plaintiffs in the Carelli case, the court observed:

> "Since the plaintiffs seek no monetary relief, there would be no particularized individual relief forthcoming, if this lawsuit were to go forward. What we envision happening would be an order coming from the court directing the State of Ohio to increase staff size, do a better job of establishing priorities, and setting time limits for performing required tasks as well as responding to calls for service. In short, the court's order would address all the shortcomings the Secretary has already ordered [as a result of the triennial audit]."

At worst, law suits cost the tax-paying litigant and the tax-supported respondent valuable time and resources, with little good effect. The fact is that litigation in the federal judicial system is time-consuming and costly for both the plaintiff and state defendant.

CONCLUSION

In conclusion, legislatively mandating a private cause of action for all of the provisions of the Social Security Act would be a very dangerous public policy decision with potentially disastrous unintended consequences. It is not needed; it will go much further than intended; it will be detrimental to the programs of the Social Security Act; and it will ultimately fail to achieve its objective. The disadvantages of such an action are very severe and the advantages will not materialize. The costs far outweigh the benefits.

Simply put, creating this new cause of action will keep children from getting the support and assistance that we are striving to provide for them.

Instead of trying to solve the problems of Social Security Act program administration through the creation of a judicial fiat, we urge the Congress to look at providing full resources and establishing innovations to improve the programs. This would truly help the children of this country and we are more than willing to serve as a resource to the Congress in providing information from the front lines of child support enforcement.

We want to thank the Senate Finance Committee for the opportunity to present our perspectives on this issue. Please feel free to contact us if you have any questions regarding our testimony.

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