Appellant's Brief

94-7322,7324

To Be Argued By
Michael D. Scherz

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SHIRLEY WILDER; THOMAS EDWARDS; SHARON RODWELL; BARRY PARKER, by his mother and next friend MADALYN BUTLER; ROBIN HERBERT, by her mother and next friend NANCY HERBERT; SHEDRICK ROBERTS, by his mother and next friend ANNIE ROBERTS; CHRISTOPHER TORIAN, by his mother and next friend LILLIAN TORIAN, on their own behalf and on behalf of all others similarly situated; DR. KENNETH CLARK; REV. HOWARD MOODY; DR. RICHARD CLOWARD; and MILDRID DAVIS,

Plaintiffs-Appellees,

MYSTIQUE F., MIRAJ F. and MAILENE F., by their next friend Ligia Rivers, each individually and on behalf of all other persons similarly situated,

Plaintiff-Intervenors-Appellants,

- against-

BLANCHE BERNSTEIN, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES; BEVERLY SANDERS, individually and as Administrator of SPECIAL SERVICES FOR CHILDREN; CAROL PARRY; ELIZABETH BEINE; LINDA MARINO, individually and as Director of the Office of Allocations and Accountability of Special Services for Children; HARRISON GOLDEN as Comptroller of the City of New York

Defendants-Appellants,

[Caption continued on the inside cover]

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-INTERVENORS-APPELLANTS

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Final Form with
Appendix Citations

[caption continued from the front cover]

LESTER KAUFMAN, individually and as Executive Director of Ohel Children's Home,

Defendant,

ABBOTT HOUSE, BERKSHIRE FARM CENTER & SERVICES FOR CHILDREN, BROOKLYN HOME FOR CHILDREN, BROOKWOOD CHILD CARE, EPISCOPAL MISSION SOCIETY, GREEN CHIMNEYS CHILDREN'S SERVICE, HEARTSEASE HOME, INC., INWOOD HOUSE, LAKESIDE SCHOOL, LOUISE WISE SERVICES, LUTHERAN COMMUNITY SERVICES, PUERTO RICAN FAMILY ASSOCIATION, ST. CHRISTOPHER-JENNIE CLARKSON CHILD CARE SERVICES, SHELTERING ARMS CHILDREN'S SERVICE, SOCIETY FOR SEAMAN'S CHILDREN SPENCE-CHAPIN SERVICES TO CHILDREN, TALBOT PERKINS CHILDREN'S SERVICES, THE CHILDREN'S AID SOCIETY, and THE CHILDREN'S VILLAGE,

Intervenors-Appellees.

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U.S. CONSTITUTION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 94-7322, 94-7324

SHIRLEY WILDER, et al.,
Plaintiffs-Appellees,

MYSTIQUE F., et al.,
Plaintiff-Intervenors-Appellants,

-against-

BLANCHE BERNSTEIN, et al.,
Defendants-Appellants,

ABBOTT HOUSE, et al.,
Intervenors-Appellees.

ON APPEAL FROM AN ORDER OF THE
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BRIEF FOR PLAINTIFF-INTERVENORS-APPELLANTS

PRELIMINARY STATEMENT

This is an appeal by plaintiff-intervenors, children placed in foster care with relatives ("kinship foster care"), from an Order dated February 23, 1994, by the United States District Court, Southern District of New York (Ward, D.C.J.). The court, in the context of a post-judgment contempt and enforcement proceeding, held that kinship foster care children are covered by the Stipulation of Settlement in Wilder v. Bernstein, 78 Civ. 957, and directed the New York City defendants ("City") "to take all appropriate steps to ensure the protections of the consent decree

are extended to children in kinship foster care." Opinion and Order, dated February 23, 1994 (A. 6079).[1]

JURISDICTION

This is a civil rights action alleging racial and religious discrimination in the operation of the New York City foster care system, in violation of the Establishment and Free Exercise Clauses of the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4) and 42 U.S.C. § 2000d.

This appeal is taken from an order of the District Court for the Southern District of New York, entered on February 23, 1994. A notice of appeal was timely filed on March 23, 1994. The order interprets a consent decree in a post-judgment proceeding and is appealable either under 28 U.S.C. § 1291 as a final order or under 28 U.S.C. § 1292(a)(1) as a grant or modification of an injunction. Appellate jurisdiction was the subject of a motion to dismiss the appeal, which, on June 21, 1994, was referred for decision to the panel hearing the appeal on the merits.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to decide this appeal pursuant to 28 U.S.C. §§ 1291 or 1292(a)(1)?

2. Whether the district court misinterpreted the terms of the stipulation of settlement to

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[1]References to the parties' joint appendix are denoted parenthetically as "(A. __)".

apply to children in kinship foster care?

STATEMENT OF THE CASE

A. Introduction

The current proceedings in this twenty-one-year-old discrimination case arise out of the plaintiffs' third attempt to enforce through contempt the provisions of the court-ordered stipulation of settlement executed in 1985. The focus of the lawsuit and of the stipulation was to eliminate racial and religious discrimination from the New York City foster care system by restructuring the process for selecting out-of-home placements for children.

The issue presented is whether the stipulation, which purports to cover all children placed in foster care with the New York City Commissioner of Social Services, encompasses the approximately 20,000 children now placed in foster care with relatives. The district court found that in its use of the term "all", the stipulation unambiguously applies to kinship care children. Yet the stipulation as a whole creates a comprehensive new placement process that makes sense in the context of placing children in homes and facilities with strangers but is inconsistent on its face with placing children with their own families.

Historically, and certainly at the time the settlement was negotiated and finalized, the allegedly discriminatory procedures being employed to place children with strangers did not operationally affect the placement of children with relatives. Although kinship homes were on occasion formally certified as

foster homes, kinship care was largely outside the foster care system and did not become a recognized legal entity until the post-settlement period when New York State created a special statutory and regulatory framework to govern placements with relatives. Kinship foster care, either by name or in concept, was not at any time the subject of bargaining among the parties, and it is inconceivable in light of the circumstances and the language of the stipulation that the agreement could have been intended to apply to relative placements.

The parties' conduct for several years after the stipulation went into effect did not reveal the slightest indication that they considered kinship foster care to be covered by the decree. In March 1990 the plaintiffs sought to hold the City in contempt for failing to implement the stipulation's child evaluation and placement requirements through a motion directed solely to the stranger foster care placement process. This motion ignored kinship care, although by that time the existence of the City's growing, and problematic, kinship care program was well-known. Only in late 1990, when the number of children placed in relative foster homes had increased sharply, did plaintiffs begin to assert that the stipulation applied to kinship care children. The City consistently maintained that kinship care was not within the scope of the agreement.

In July 1993 plaintiffs again moved for contempt, this time seeking a formal ruling that the stipulation pertains to kinship care. Plaintiff-intervenors moved to intervene to protect their

right to be placed with appropriate and qualified relatives and were granted intervention as of right for the limited purpose of addressing the question of the stipulation's applicability to kinship foster care children. In an Opinion and Order dated February 23, 1994, the district court found that it was the intention of the parties to include kinship foster care within the terms of the stipulation, based on the plain meaning of the phrase "all New York City children whose placement in foster care is the responsibility of the New York City Commissioner of Social Services." From this Order plaintiff-intervenors appealed.

B. Background: A Case Against Discrimination

Wilder v. Bernstein is a civil rights class action initiated in 1973 by black Protestant children alleging racial and religious discrimination in the New York City foster care system. Plaintiffs claimed that the statutory scheme for providing child care services unconstitutionally denied them access to those services, in violation of the First and Fourteenth Amendments to the United States Constitution and Title VI of the Civil Rights Act of 1964, and that New York laws providing for the placement of children in accordance with religious preference were facially invalid as a violation of the Establishment Clause of the First Amendment. Wilder v. Sugarman, 385 F. Supp. 1013 (S.D.N.Y. 1974). A three-judge panel convened in 1974 ruled that the statutes in question were valid on their face as "a fair and reasonable accommodation between the Establishment and Free Exercise Clauses of the Constitution," Wilder v. Sugarman, 385 F. Supp. at 1029, but left

open the issue of whether any of the statutes were unconstitutional as applied.

After extensive discovery and motion practice, the case was voluntarily dismissed and refiled in 1978 raising similar claims of discrimination against New York City and State officials and administrators of numerous religiously-affiliated agencies that contracted with the City to provide child care. It also directly challenged the unconstitutional implementation of the State's religious preference laws. Wilder v. Bernstein, 499 F. Supp. 981 (S.D.N.Y. 1980).

Upon the refiling of the case plaintiffs moved for certification of a class consisting of all New York City children who are black and who are Protestant or of other non-Catholic or non-Jewish faiths or of no religion and are in need of child-care services outside their homes; this class was certified in 1980. Wilder v. Bernstein, 499 F. Supp. at 992-95. In the documents supporting their class certification motion, plaintiffs provided a concise description of the child care system being challenged. Plaintiffs' Memorandum in Support of Class Certification (A. 109-14). It is a system in which children receive out-of-home care with strangers through foster family home or congregate care programs operated by authorized child care agencies. It in no way involves the placement of children in kinship homes.

Plaintiffs described how each child entering the system, either as a parental voluntary placement or through the Family Court, was referred to the allocations section of the City's child

welfare department, where a worker in turn referred the child to an appropriate child caring agency for placement. (A. 109, 110). These agencies were private, not-for-profit, predominately sectarian organizations that provided 85 percent of the City's foster care and received 80 to 100 percent of their operating funds from government sources. (A. 109). The City's uniform referral practice was to match the child with an agency of his own religion, regardless of whether that program was the most appropriate one. (A. 110). Many agencies gave preference to children of the religion with which the agency was affiliated, and neither the City nor the Family Court had the power to compel an agency to care for a particular child; nor did they have any control over the reasons given by an agency for rejecting a child. (A. 110). Because there were barely enough programs serving the number and needs of Catholic and Jewish children in the system, the religious channeling and religious discrimination in the admissions practices of sectarian agencies

> necessarily result[s] in non-Catholic and non-Jewish children having less of an opportunity than other children to receive appropriate services. Since most of the non-Catholic, non-Jewish children in need of placement in New York are black, the system as it presently operates also necessarily results in black children being denied equal access to the most appropriate services.

(A. 112-113).

Plaintiffs' fourth and last amended complaint, which was filed on April 27, 1983, to add allegations of contractual violations by the agencies and violations of state law by the City, continued to assert four basic claims: 1) the City's foster care placement and

referral practices were racially discriminatory in that Catholic and Jewish agencies accepted predominately white children into their programs, causing black children to wait longer for placements and to be placed more often in inappropriate programs or programs of inferior quality; 2) the foster care system discriminated on the basis of religion by making religion a primary criterion for the selection of placements and allowing Catholic and Jewish agencies to favor children of their own religions when accepting referrals, to the disadvantage of Protestant children; 3) the City's relationship with the sectarian agencies constituted an excessive entanglement amounting to an unconstitutional establishment of religion and 4) the religious practices and pervasive general environment of the sectarian agencies burdened the First Amendment Free Exercise rights of Protestant children whenever they were placed with Catholic or Jewish agencies. Wilder v. Bernstein, 645 F. Supp. 1292, 1301-03 (S.D.N.Y. 1986); Fourth Amended Complaint (A. 180-237).

In their proposed pretrial order, submitted to the court in 1983, plaintiffs stated their intention to prove essentially the same contentions at trial. Plaintiffs' Proposed Pretrial Order (A. 1174-1214). Nowhere in this document, nor in the recitation of factual and legal contentions in the various complaints, motion papers or other pre-trial submissions in this case, is there any reference to the placement of children with relatives.

In August 1983, shortly before trial was scheduled to begin, the plaintiffs and City defendants renewed their previously

unsuccessful attempts to settle the case.[2] These negotiations eventually proved fruitful, and the first of two proposed stipulations of settlement was produced on April 16, 1984. (A. 1253-1317).

C. The Stipulation

The parties articulated the purposes of their agreement in clear and unequivocal terms:

PURPOSES

> 4. The purposes of this Stipulation are: to ensure that all New York City children whose placement in foster care* is the responsibility of the New York City Commissioner of Social Services receive services without discrimination on the basis of race or religion and have equal access to quality services and to ensure that appropriate recognition be given to a statutorily permissible wish for in-religion placement in a manner consistent with principles ensuring equal protection and non-discrimination as defined in applicable New York State and federal laws, regulations and the Constitution.
>
> 5. Application of a wish for in-religion placement shall not operate to deny equal access to available quality services based upon a child's race or religion. A wish for in-religion placement shall not be deemed to deny or have denied equal access to the best available program to any child based on race or religion as specified in paragraphs ... (numbers omitted)
>
> *The term "foster care" as used in this agreement means out-of-home placement in a foster boarding home, agency

[2] The City defendants stated their reasons for entering these negotiations as 1) their view that the existing system was vulnerable on the claims of discrimination and that the City might not prevail at trial, 2) their belief that the dual principles of equal access to services and religious freedom were of major importance and should be protected and 3) plaintiffs' agreement, as a pre-condition, to abandon their staunchly-held position that the City discontinue the use of religiously-affiliated agencies to provide child care. Affidavit of F.A.O. Schwarz (A. 1343-45; Defendants' Brief in Support of the Proposed Stipulation (A.2016-18).

operated boarding home, group home, group residence or child care institution.

Proposed Stipulation of Settlement, 4/16/84 (A. 1254).

Contemporaneous statements of the settlement's proponents proclaiming these objectives as the exclusive purposes of their agreement are abundant in the record: "Every single section of the Stipulation has as its objective the implementation of our dual purpose: protection of the right of equal access to quality care and protection of religious freedom". F.A.O. Schwarz Affidavit (A. 1360). "Nothing in the Stipulation goes beyond remedying discrimination." Tr. 8/6/84 (A. 3074). "All of the provisions in this proposed settlement are provisions related to...how the discrimination operates in this system." Tr. 10/9/84 (A. 3528).[3]

The proposed stipulation of settlement contained an elaborate procedural scheme for placing children into foster care, in essence revamping the existing processes in order to eliminate discrimination. The key elements of the stipulation were the classification and ranking of all foster care programs by type and quality, ¶¶ 6-12 (A. 1254-59), and the placement of children on a first come, first served basis, ¶¶ 19, 23 (A. 1261, 1263), in the best available program appropriate for the child's needs, ¶ 16 (A. 1260), as determined by an evaluation of the child to be completed within 30 days of the child's placement, ¶ 43 (A. 1268). The best available program was to be chosen based on a list of vacancies

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[3] See also Tr. 8/6/84 (A. 2863-64, 2872, 2880, 3044; 8/7/84 (A. 3080; 8/17/84 (A. 3143); City Defendants' Memorandum of Law in Support, (A. 2004, 2017); Plaintiffs' Memorandum of Law in Support (A. 2082, 2103, 2104-5, 2135).

reported regularly to the City by child care agencies, ¶¶ 46-47 (A. 1269-70). Although any child care agency might submit a written "therapeutic objection" to what it considered to be an inappropriate referral for its program, ¶¶ 30-31 (A. 1264-65), the City was to have final authority over all placement decisions, ¶ 14 (A. 1259).

In its initial form the proposed stipulation evoked strenuous opposition from many sectors of the child welfare community, including the State defendants, all but one of the defendant sectarian agencies and a host of concerned clinical and child care professionals and organizations.[4] The district court also found

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[4] The most frequently expressed objections were that the proposed stipulation violated statutory and constitutional free exercise of religion guarantees, substituted rigid classification of children and programs for professional judgment in the placement selection process, shifted all responsibility for decisionmaking to a grossly overburdened and incompetent City government and failed to remedy the primary deficiency of the system -- a lack of enough quality services for everyone. See e.g. State Defendants' Objections (A. 2175-83); Defendants' Objections (A. 2210-69); Affidavits of Jerome Goldsmith (A. 2722-46), Robert Arpie (A. 2545-60), Richard Nolan (A. 2562-77); Statement of Judith M. Mishne (A. 2643-53); Affidavits of Non-Defendant Agencies (A. 2293-2309); Tr.8/6/84-10/26/84 (A. 2854-3737), passim. In the words of one experienced clinical professional:

> The proposed settlement does not ask what we can learn from decades of knowledge with quality foster care that can be used to upgrade all foster care. It does not guarantee resources to improve foster care. It is not based on proven commitment of government to undertake and carry through the major changes in city agencies which are needed.... Some child-care advocates see Wilder v. Bernstein as the instrument for government to act responsibly in relation to improving the quality of foster care. But it is a blunt instrument that is harmful to quality care because it was not designed with the intention of improving foster care as such; rather it is a response to claims of discrimination in the

(continued...)

the stipulation "unacceptable on several levels". Wilder v. Bernstein, 645 F. Supp. at 1347.

In June 1984 the district court permitted a group of 19 non-sectarian child care agencies to intervene for the purpose of opposing the stipulation. Wilder v. Bernstein, 645 F. Supp. at 1303. In a comprehensive 41-paragraph list of objections addressed to specific provisions of the stipulation, these agencies contended, in summary, that the manner in which the stipulation proposed to reorganize the child placement system would discriminate against parents and children seeking in-religion placement, would impose insupportable burdens on the agencies and would actually reduce the overall quality of child care. Objections of Non-Defendant Agencies to Proposed Stipulation (A. 2279-91).

On August 6, 1984, the district court began a hearing on whether to approve the proposed stipulation as a fair and reasonable resolution of the lawsuit. Tr. 8/6/84 (A. 2855-3058). The hearing engendered a new round of negotiating sessions among the parties, which took place over the next two-and-a-half months and culminated in discussions on the record in open court in October 1984. Tr. (A. 3059-3737). The agreement was finalized, except for the name of an individual who would resolve disputes over placement decisions, in a document dated December 28, 1984.

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[4](...continued)
provision of services and not adequacy of services regardless of race or religion.

Affidavit of Donald J. Cohen, M.D. (A. 2676, 2684-5).

(A. 4172-1236). This agreement was the subject of a continued fairness hearing on March 4, 1985, Tr. (A. 3936-4141), and, after the selection of the dispute arbitrator and an alternate, was signed by the plaintiffs, the City defendants, one sectarian defendant agency and the non-defendant intervenor agencies on August 27, 1985. (A. 4217). It was approved by the district court in an opinion dated October 6, 1986, Wilder v. Bernstein 645 F. Supp. 1292, and entered as a final judgment on April 29, 1987. (A. 4260).

Although during the renewed negotiation process numerous changes in procedural detail were hammered out in response to nearly all of the intervenors' concerns as well as some of the criticisms of the State and agency defendants, the core principles did not change in the final agreement: "Although the settlement has been modified as the result of objections raised by the intervenor and state defendants, its thrust remains the same...." Plaintiffs' Second Memorandum in Support (A. 3853).

Not a single alteration or addition to the wording of the statement of the settlement's purposes in paragraphs 4 and 5 was made between the first and second versions. (A. 1254, 4173.) City defendants repeatedly confirmed that the revised version of the stipulation continued to be limited to the effectuation of the two constitutional principles on which it was based: the free exercise of religion and the right of equal access to services. Defendants' Second Brief in Support (A. 3748, 3750, 3753-54, 3760, 3761, 3763). Plaintiffs' pronouncements were virtually identical. Plaintiffs'

Second Memorandum in Support (A. 3856, 3870, 3891, 3914).

In addition, the Notice to the Class, ordered by the district court on January 8, 1985, in compliance with the requirements of the Federal Rules of Civil Procedure, informed class members that the purposes of the stipulation were "to ensure equal access to quality services regardless of race or religion" and to "permit[s] a parent's wish to have a child matched with an agency of the same religion to be operative so long as it is in the best interests of the child and it does not result in discrimination." (A. 4242).

Neither in the language of the stipulation nor in the context of its negotiation and ultimate approval by the court is there any indication that improving the substantive quality of child care services was per se a purpose of the parties or that the City consented to obligate itself to achieve that end. While the desirability of upgrading services was recognized by the parties, the critics and the court alike, see e.g., Tr. 8/17/84 (A. 3156), the final agreement, as the City repeatedly stressed, guaranteed "equal opportunity...not results." Tr. 3/4/85 (A. 4075, 4131-37).[5]

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[5] The City made clear that the settlement "is limited to protecting two constitutional rights and does not dictate to the agencies what kinds of foster care programs they must run or what kind of treatment they must provide...." Defendants' Second Brief in Support of the Proposed Stipulation (A. 3761). The parties concurred that there is no right to the highest quality care, but at most a right of equal access to the best available. Tr. 3/4/85 (A. 4131-35). The court: "But the issue...is equal access. And I have to keep that in focus." Tr. 3/4/85 (A. 4136).

At two points the stipulation does make brief reference to improving the lives of children and families, ¶ 2 (A. 4172), and to the City's continuing its efforts to improve the quality of foster care services, ¶ 69 (A. 4207). Neither of these provisions was ever mentioned by the stipulation's proponents, even as a secondary

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At most, the stipulation was viewed as affording a potential, a hope or an opportunity for improvements in child care.[6]

D. Kinship Foster Care

In contrast to stranger foster care, the placement of children with relatives was never subject to the traditional placement mechanisms being challenged by the lawsuit. Although in the past there have always been a few relatives who were formally certified as foster parents for their kin, Barrios-Paoli Affidavit (A. 5934), Stupp Affidavit (A. 6030), children did not go through the City's

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[5](...continued)
purpose of their agreement. The sole reference in the record to ¶ 69 came from Mark Bunim, counsel for the only defendant sectarian agency to sign the settlement, who characterized the single-line provision as "a very unspecific...empty promise and certainly not a commitment to remedy the real ailment of [the] child care system, which is a [lack] of quality beds available to all children" Tr. 8/6/84 (A. 2887).

Professionals recognized that "[q]uality care for all will require the commitment of adequate resources...." Mishne Statement (A. 2653). See also, e.g., Goldsmith Affidavit (A. 2722-46). However, the City flatly refused to pledge resources to the admittedly "desirable goal" of improving services or to accept a proposal by plaintiffs during settlement to include a quality section in the stipulation. Nolan Affidavit (A. 2564); Arpie Affidavit (A. 2558); Tr. 8/6/84 (A. 2937). The only resources the City agreed to commit, as a pre-condition to final court approval, were funds to cover administrative, technical and personnel costs necessary to implement seven specified requirements of the stipulation; this did not include upgrading the quality of child care services. Brettschneider Affidavit (A. 4253-58).

[6] The City conceptualized systemic improvements as a possible "side benefit" to ending discrimination. Tr. 8/6/84 (A. 3047), 10/9/84 (A. 3527); Defendants' Second Brief in Support (A. 3765-6). It expressed "hope" that the process for classifying agencies would pressure the whole system to improve. Tr. 9/19/84 (A. 3342), 3/4/85 (A. 4103). In plaintiffs' words, the settlement "may also have a substantial likelihood" of improving quality. Plaintiffs' Second Memorandum in Support (A. 3933). The district court, in approving the final agreement, observed that it "offers several opportunities" for systemic improvements. Wilder v. Bernstein, 645 F. Supp. at 1351.

allegedly discriminatory allocations process to reach relatives' homes. Typically, relatives received certification post hoc to care for children who were already living with them due to parental death or disappearance or the wishes of the parent. See, e.g., Matter of Gravina, 89 A.D.2d 534, 452 N.Y.S.2d 612 (1st Dept. 1982). Kinship homes were virtually unknown to the system until a related child was identified as needing out-of-home care; hence, such homes have never been part of the network of foster boarding homes described by Wilder that were certified in advance to care for non-related children and selected from a child care agency's list of program vacancies. Little Affidavit (A. 5949-50, 5952-53); Stupp Affidavit (A. 6030). The overwhelming majority of children in the custody of the Commissioner of Social Services who resided with relatives at the time the settlement was being negotiated were not in foster care at all. For decades New York law has excused close relatives from the requirements of certification or licensing, N.Y. Soc. Serv. L. § 375, and the predominant City policy was to seek out related caretakers as alternatives to foster care. Barrios-Paoli Affidavit (A. 5933-34); New York City Human Resources Administration Memorandum (A. 5514-19). The New York State Department of Social Services ("NYSDSS"), which oversees the practices of local social services districts, was aware of hundreds of such cases in the early 1980's. Stupp Affidavit (A. 6032).

In late 1985, approximately one year after the stipulation of settlement was finalized, the NYSDSS created by regulation a new category of "approved relative foster homes", establishing special

standards for qualifying relatives as foster parents and fundamentally different procedures for placing children in their homes. Stupp Affidavit (A. 6031); Little Affidavit (A. 5948-51); N.Y. Comp. Codes R. & Regs., tit. 18, §§ 443.3, 444.1, 444.2, 444.6, and 444.8 (effective 12/11/85). In order to maintain the child's continuity of experience and avoid the trauma of placement with strangers pending full approval of the relative's home, regulations permit immediate placement of the child with the relative upon a "24-hour" emergency expedited assessment of the home, an arrangement impossible in the stranger care situation. Little Affidavit (A. 5949); Stupp Affidavit (A. 6031); NYSDSS 86 ADM 33 (A. 5523-42); N.Y. Comp. Codes R. & Regs., tit. 18, § 443.7. In 1989 the New York State legislature went further and, in recognition of the uniqueness and vital importance of in-family placements, enacted a statutory preference for kinship foster care, imposing an affirmative duty on the Commissioner and the Family Court to identify suitable relatives and place children with them where appropriate. Little Affidavit (A. 5948-49); Stupp Affidavit (A. 6032-33); N.Y. Fam. Ct. Act § 1017; N.Y. Soc. Serv. L. § 384-a(1-a).

That those negotiating the stipulation of settlement never considered placements with relatives to be included in their agreement is further buttressed by the fact that the evils of systemic bias that the agreement aimed to correct never existed in kinship care. Barrios-Paoli Affidavit (A. 5934). Racial and religious discrimination was simply not a factor in deciding to

place children with their own families, whose members, except in the rarest circumstances, were of the same racial and religious background as their related children. Little Affidavit (A. 5947). The district court recognized the absence of any race or religion issue in kinship care. Tr. 11/5/92 (A. 4913). The fundamental purposes of the Wilder remedies would not have been advanced by extending provisions of the stipulation to in-family placements.

Nor did the key principle of the Wilder remedial plan -- assignment of children on a first come, first served basis to the best available program -- make any sense in the context of placing children with relatives, whose homes were unavailable to non-related children. The program classification procedures prescribed by the stipulation were meant to differentiate and rank programs by level of care and type of services offered, with foster boarding homes being treated as one broad category rather than individually. Little Affidavit (A. 5946-47). First come, first served in the best available program was only meaningful in the stranger foster care placement system where eradication of discrimination was the objective.

Similarly, the 30-day child evaluation process, which is central to the non-discriminatory placement of children under the stipulation, was by its terms intended to identify a child's need for services, level of care and program type and not for a particular foster home. ¶ 48 (A. 4198). The foster home was to be chosen from the vacancy roster of the agency or program designated as the best available based on its classification and the child's

evaluation information. ¶ 53 (A. 4200). The stipulation made no provision for the concurrent evaluation of a relative's home, which would not have existed as a foster home prior to the child's placement. Little Affidavit (A. 5947-48).

The inclusion of kinship foster care children in the stipulation of settlement was never the subject of bargaining among the various parties. Representatives of the State and City defendants in the negotiation process have sworn that relative placements were never discussed or contemplated by the settlement. Stupp Affidavit (A. 6030); Morgenroth Affidavit (A. 5167-68). The district court affirmed that placement with relatives, or "kinship care", was never mentioned during any settlement discussions to which it was privy. Tr. 11/5/92 (A. 4913), 10/15/93 (A. 5782); Opinion and Order, dated February 23, 1994 (A. 6069). Plaintiffs' counsel conceded as much. Tr. 10/15/93 (A. 5816).

E. Enforcement of the Stipulation with Regard to Kinship Care

For several years in the post-settlement period plaintiffs' conduct in enforcing the decree did not in any way manifest a belief that children placed with relatives were covered by the agreement. On March 6, 1990, without any reference whatever to kinship care, plaintiffs moved for contempt against the City, alleging its failure to implement the evaluation, vacancy control, first come, first served and best available program provisions of the stipulation. Notice of Motion for Contempt and Enforcement,

(A. 4651-55).[7] Plaintiffs' evidence of the City's noncompliance consisted of the results of a court-authorized six-month investigation by plaintiffs' expert of the child placement process as it pertained to stranger foster care. Report of Dr. Theodore J. Stein (A. 4710-4839). Plaintiffs' motion ignored kinship care even though the state's regulations establishing different procedures for kinship placements had already been in effect for more than four years, Stupp Affidavit (A. 6031), the legislative preference for kinship placements had been enacted the previous year (Chap. 744, N.Y. Laws of 1989) and serious shortcomings in the City's kinship foster care program were being litigated in the state courts. Eugene F. v. Gross, Docket No. 1125/86 (Sup. Ct., N.Y. Co.).

During the same period there was not the slightest suggestion in the City's behavior that the stipulation's mandates applied to placements of children with relatives. In October 1989 the district court directed the City to furnish a report on its specific efforts and plans to place children in the best available program on a first come, first served basis in accordance with the stipulation. Lowry Affidavit (A. 4662). The City's response addressed only stranger foster care. Verified Report on the Placement of Children (A. 4292-4352). Although the report's averments of fact regarding the City's accomplishments were flatly

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[7] Plaintiffs' first motion for contempt, dated 12/28/89, (A. 4354-61) addressed alleged noncompliance with "access to family planning" requirements of ¶ 70 (A. 4207-09). This provision was designed to curb the influence of religious beliefs or practices on children in the care of sectarian agencies.

contradicted by the findings of Dr. Stein, Lowry Affidavit (A. 4662-63), plaintiffs never criticized, or even noted, that kinship placements were not accounted for.

Plaintiffs first formally raised the issue of the applicability of the stipulation to kinship care in a May 31, 1991 letter to the district court. (A. 5024). By that time the foster care population had grown dramatically, from under 17,000 in 1985 to more than 49,000 in 1991, with the number of children residing in relatives' homes rising from an estimated few hundred to over 20,000. Barrios-Paoli Affidavit (A. 5935); Task Force on Permanency Planning for Foster Children, Inc., "the Double Edged Dilemma", October 1990, (A. 5387). Plaintiffs' belated interest in kinship care coincided with debate in the child welfare community as to whether the City might be utilizing the kinship system in order to circumvent its obligations under the stipulation. Tr. 11/5/92 (A. 4977-78). The City responded that kinship care children were not within the scope of the stipulation. Letter of Joel Berger, dated July 11, 1991 (A. 6511-17). It has never wavered from that position. See, e.g., Tr. 11/5/92 (A. 4941-42, 4919); Memorandum Decision, dated January 28, 1994 (A. 6023).

On July 14, 1993, plaintiffs again moved for contempt against the City regarding the performance of child evaluations and certain other provisions of the stipulation. Notice of Motion for Contempt and Enforcement (A. 5027-31). In contrast to their 1990 motion plaintiffs now alleged that the City had failed to implement the stipulation with respect to children placed with relatives and

requested a ruling that children in kinship care were covered by the decree. The City defendants opposed the motion. Defendants' Memorandum of Law in Opposition (A. 5170-94).

On September 29, 1993, plaintiff-intervenors Mystique, Miraj and Mailene F. moved to intervene as of right on behalf of themselves and a class of similarly situated children in the custody of the New York City Commissioner of Social Services who were placed in approved kinship foster homes or had suitable relatives with whom they could appropriately reside. Notice of Motion for Intervention (A. 5599-5600). They opposed the extension of the stipulation to kinship care or, in the alternative, sought a modification of the terms of the decree to protect their right to be placed with suitable relatives. Plaintiff-intervenors argued that the stipulation did not apply to kinship care children. They contended that they faced the risk of substantial harm should the terms of the stipulation be imposed upon them, because the stipulation's placement process conflicts with state statutory and regulatory procedures favoring kinship placements and threatens to impair their right to live with appropriate family members. McNally Affidavit (A. 5602, 5607-8, 6510-11, 5613-14, 5619).

Oral argument on the portion of plaintiffs' contempt motion seeking the inclusion of kinship care took place on October 15, 1993, followed by the further submission of affidavits and documents by the parties. (A. 5744-5831). City defendants requested an evidentiary hearing to determine the intent of the parties in forming the agreement; but the district court did not

consider such a hearing to be necessary. Opinion and Order, dated February 23, 1994 (A. 6060). Proposed plaintiff-intervenors, not yet parties to the action, were denied the opportunity to be heard at the oral argument, but were given permission to make a written submission in opposition to the kinship portion of plaintiffs' motion. Tr. 10/15/93 (A. 5826-28).

In a memorandum decision dated January 28, 1994, the district court granted plaintiff-intervenors' motion to intervene as of right for the limited purpose of addressing the question whether the stipulation pertains to kinship foster care children. (A. 6016-25.) The court ruled that plaintiff-intervenors had "for seven years, every reason to believe they were excluded from the Wilder Stipulation because the defendants openly refused to extend its provisions to kinship foster care children." (A. 6023.) The court also found that plaintiff-intervenors possessed "a direct, legally protectable interest in avoiding the provisions of the Wilder Stipulation" that was not adequately represented by the existing parties. (A. 6018-19, 6020-21.)

F. Decision on the Kinship Question

In an Opinion and Order dated February 23, 1994, the district court ruled that "the provisions of the Wilder Stipulation unambiguously apply to children in kinship foster care." (A. 6056). The court rested its decision on the parties' use of broad language in paragraph 4 of the stipulation: "all New York City children whose foster care is the responsibility of the New York City Commissioner of Social Services." (A. 6068). The court found

that because the City was aware at the time that some children were residing in officially certified kinship homes and also presumably knew or had reason to know of the State's plan to regulate kinship care as a formal foster care program, it was on notice that the stipulation would cover kinship care children. In the court's view, the City was obliged to restrict the scope of the agreement in explicit terms if it wished to exclude them. (A. 6069-71).

Although the purposes of the agreement were clearly stated in paragraphs 4 and 5 of the stipulation, the district court found the purposes to be broader than merely ending discrimination, stating that paragraphs 2 and 69[8] facially "tend to support" plaintiffs' argument that a dual purpose of the stipulation was to improve the quality of foster care services for all children. Even if that were not the case, the court held, kinship care children would still be covered because of the sweeping reference to all children included in ¶ 4.

The court further found that the stipulation "is not hostile to kinship foster care." (A. 6073). It characterized defendants' and plaintiff-intervenors' view of the affect of applying the stipulation to kinship children as overly simplistic. The court noted that there were certain specified exceptions to first come, first served in the stipulation and suggested that one provision might possibly be construed to take kinship placements into

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[8] One sentence of ¶ 2 (A. 4172) reads: "The Stipulation of Settlement is being signed ...to improve the lives of children and families who are part of the foster care system." Paragraph 69 (A. 4207) reads: [The City] will continue its efforts to improve the quality of care available to all children."

account. (A. 6074).

In conclusion, the district court directed the City "to take all appropriate steps to ensure that the protections of the consent decree are extended to children in kinship foster care." (A. 6079).

G. Appellate Proceedings

Plaintiff-intervenors filed a notice of appeal of the district court's order on March 23, 1994 pursuant to 28 U.S.C. §§ 1291 or 1292(a)(1). (A. 6870). At the suggestion of the district court and upon the certification of the order for appeal on March 4, 1994 (Hon. Thomas Kevin Duffy, D.C.J.), they also petitioned for permission to appeal under § 1292(b). On May 3, 1994, this court denied the petition for permission to appeal on the sole ground that an appeal may exist as of right. Plaintiffs then brought on a motion to dismiss the appeal for lack of jurisdiction on May 26, 1994, which was referred without decision on June 21, 1994, to this panel hearing the appeal on the merits.

POINT I

THE COURT OF APPEALS HAS APPELLATE JURISDICTION BECAUSE THE DISTRICT COURT'S INTERLOCUTORY ORDER GRANTED OR MODIFIED AN INJUNCTION OR BECAUSE THE DISTRICT COURT'S POST-JUDGMENT ORDER WAS A FINAL DECISION.

Pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1), plaintiff-intervenors-appellants, children in kinship foster care, have appealed the district court's February 23, 1994 order, which, in the context of a post-judgment contempt and enforcement motion, concluded that "kinship foster care children are covered by the

terms of the Wilder Stipulation" and directed the City defendants "to take all appropriate steps to ensure the protections of the consent decree are extended to children in kinship foster care." The district court's order is appealable either as a final decision under § 1291 or as an interlocutory order granting or modifying an injunction under § 1292(a)(1).[9]

Under 28 U.S.C. § 1292(a)(1), an appellate court has jurisdiction to hear an appeal from a district court's interlocutory order that grants or modifies an injunction. It also has jurisdiction to decide whether a district court's misinterpretation of a consent decree modified an injunction or constituted an injunction itself. Crumpton v. Bridgeport Education Association, 993 F.2d 1023, 1027 (2d Cir. 1993); United States v. O'Rourke, 943 F.2d 180, 186 (2d Cir. 1991). In this case, the district court seriously misconstrued the scope of the stipulation to include kinship foster care children, vastly expanding the legal obligations imposed on the City defendants and requiring thousands of kinship foster care children to be subject to the stipulation's evaluation and placement procedures. The district court's order constituted a modification of the stipulation's injunctive mandates

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[9] After having received voluminous documents in support of and in opposition to a motion to dismiss the appeal on the ground of a lack of appellate jurisdiction and after having heard oral argument, on June 21, 1994, a panel of this court "referred [the motion to dismiss] to the panel hearing the appeal." Given the extensive papers previously submitted by plaintiff-intervenors-appellants concerning the issue of appellate jurisdiction, we will summarize our position in this brief. For a fuller analysis of the jurisdictional issues, we respectfully refer this court to our memorandum of law and supporting papers in opposition to the motion to dismiss.

or was itself in the nature of an injunction. In either event, the district court's order is an immediately appealable interlocutory order.

Alternatively, the district court's order is a final decision that is immediately appealable as of right pursuant to 28 U.S.C. § 1291. Plaintiffs-appellees' motion for contempt and enforcement of certain provisions of the stipulation sought extensive relief, including a finding of contempt and various forms of injunctive relief, such as an order requiring City defendants to provide the stipulation's evaluations to children in foster care placement with relatives. No monetary sanctions were sought. While the district court has not found the City defendants in contempt, it has granted a major portion of the relief sought, definitively resolving the rights of the parties with respect to the discrete kinship foster care issue and conclusively deciding that the stipulation covered kinship foster care. The court also imposed a non-economic coercive sanction on the City defendants, directing them "to take all appropriate steps to ensure that the protections of the consent decree are extended to children in kinship foster care." Under these circumstances, in the post-judgment context, where this court has endorsed a pragmatic and flexible, rather than a technical, approach to determining finality, the district court's decision is final and appealable. United States v. International Brotherhood of Teamsters, 931 F.2d 177 (2d Cir. 1991).

POINT II

THE DISTRICT COURT MISINTERPRETED THE STIPULATION OF SETTLEMENT TO APPLY TO CHILDREN IN KINSHIP FOSTER CARE.

Consent decrees are construed as contracts. United States v. ITT Continental Baking Co., 420 U.S. 223 (1975). Accordingly, "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it," United States v. Armour, 402 U.S. 673, 682 (1971). In interpreting the terms of a consent decree, a court may rely on customary aids to construction:

> Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree. Such reliance does not in any way depart from the "four corners" rule of Armour.

United States v. ITT Continental Baking Co., 420 U.S. at 238; United States v. International Brotherhood of Teamsters, 998 F.2d 1101 (2d Cir. 1993); Huertas v. East River Housing Corp., 992 F.2d 1263 (2d Cir. 1993).[10]

A. The Language of the Stipulation Does Not Apply to Kinship Foster Care

Contrary to the district court's conclusion, the stipulation does not unambiguously apply to kinship foster care. From the very

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[10] On appeal, a district courts' interpretation of a consent decree is subject to de novo review. United States v. International Brotherhood of Teamsters, 931 F.2d at 182, n. 1.

beginning twenty-one years ago, Wilder v. Bernstein was and has remained a case about racial and religious discrimination in the selection of placements for children in the New York City foster care system. It challenged the constitutionality of pervasive procedures that gave preference to Catholic and Jewish, and predominately white, children for the best quality foster family home or congregate care program operated by religiously-affiliated child care agencies, relegating black Protestant children more frequently to inappropriate, inferior programs. The 1985 stipulation of settlement constituted an integrated scheme for restructuring this system in order to eradicate discriminatory practices. This system involved the provision of out-of-home care by individuals who were strangers to the children. It had nothing to do with placing children with their own families.

Under the traditional "four corners" analysis, the district court misinterpreted the stipulation to apply to kinship foster care. Nowhere in the 46-page, 84-paragraph stipulation is kinship or relative foster care mentioned. The stipulation never addresses specifically the concept of placing children with relatives. In its decision, the district court concedes this. Opinion and Order, dated February 23, 1994 (A. 6069). Nevertheless, the district court interpreted the stipulation expansively to include approximately 20,000 kinship foster children for whom the terms of the stipulation make no sense. Although the stipulation purports, in a single phrase, to cover all children placed in foster care with the New York City Commissioner of Social Services, when

analyzed in its entirety, the terms of the stipulation could only apply to the placement of children in foster care with strangers.

The historically distinctive treatment of kinship placements strongly supports the conclusion that the parties could not remotely have intended to incorporate kinship care into their agreement. Racial and religious discrimination never played a role in placing children with family members, who were, except in rare circumstances, of the same racial and religious backgrounds as their related children. Procedurally, in contrast to placements with strangers, children never entered the home of relatives through the discriminatory placement mechanisms being challenged by the lawsuit. Although in the past a few relatives were on occasion formally certified as foster parents for their kin, they typically received certification to care for children who were already living with them due to parental death or disappearance or the wishes of the parent. Matter of Gravina, 89 A.D.2d 534, 452 N.Y.S.2d 612 (1st Dept. 1982). Until the creation by state regulations of special "approved relative" placement procedures in the post-settlement period, N.Y. Comp. Codes R. & Regs., tit. 18, §§ 443.1, 443.3, 444.1, 444.2, 444.6 and 444.8 (effective December 11, 1985), the vast majority of children in the custody of the Commissioner of Social Services who resided with relatives were not considered to be in foster care at all. See N.Y. Soc. Serv. L. § 375; New York City Human Resources Administration Memorandum (A. 5514-19).

Moreover, kinship homes, by definition, did not fit the placement selection model prescribed by the stipulation. They did

not belong to a network of pre-certified foster boarding homes appearing on the vacancy rosters of child care agencies. They were not available to care for non-related children. Indeed, individual kinship homes were altogether unknown to the system until a related child was identified as needing placement. The utterly unique circumstances surrounding kinship placement were so at odds with the entire formulation of the stipulation that it cannot conceivably be interpreted to include them.

The stipulation's provisions are only meaningful in the context of ending discrimination in the stranger foster care placement system. The parties stated the purposes of their agreement in the clearest terms:

PURPOSES

> 4. The purposes of this Stipulation are: to ensure that all New York City children whose placement in foster care* is the responsibility of the New York City Commissioner of Social Services receive services without discrimination on the basis of race or religion and have equal access to quality services and to ensure that appropriate recognition be given to a statutorily permissible wish for in-religion placement in a manner consistent with principles ensuring equal protection and non-discrimination as defined in applicable New York State and federal laws, regulations and the Constitution.
>
> 5. Application of a wish for in-religion placement shall not operate to deny equal access to available quality services based upon a child's race or religion. A wish for in-religion placement shall not be deemed to deny or have denied equal access to the best available program to any child based on race or religion as specified in paragraphs ... (numbers omitted)

* The term "foster care" as used in this agreement means out-of-home placement in a foster boarding home, agency operated boarding home, group home, group residence or child care institution.

Stipulation of Settlement, 4/16/84 (A. 1254) and 12/28/84 (A. 4173). The remainder of the agreement was designed to effectuate these purposes and did not pertain to placing children with their relatives.

The central premise of the stipulation's remedial plan for ensuring equal access was that "all children shall be placed on a first come, first served basis" in "the best available ... program appropriate for the child's needs." ¶¶ 19, 23, 24, 37 (A. 4183-93). This principle would be nonsensical if employed in the context of relative placements. The home of an individual relative was not a "program" (a technical term used to describe a class of homes or congregate care facilities operated by a child care agency offering a particular type of care). Further, as kinship foster homes did not accept non-related children, there was no competition for these placements that would suggest a first come, first served approach. Any notion that related children should vie with one another for in-family placements would stretch the concept to the point of absurdity and cannot possibly be what the parties intended.

Two additional closely interrelated requirements -- the very foundation for the implementation of the first come, first served principle -- formed the backbone of the remedial plan: program classification and child evaluations. These crucial aspects of the stipulation were also inconsistent with the circumstances of kinship placements.

To facilitate determinations as to which programs would be the

"best available", paragraphs 6-17 of the stipulation (A. 4173-82) established procedures for differentiating programs by the type and level of care they provided and ranking them by quality. Foster boarding homes were treated as one broad category rather than individually. There was no provision for assessing kinship homes, which would have been necessary if these homes were to be included because they were not certified in advance as foster homes.

Paragraphs 48-52 (A. 4198-99) outlined procedures for evaluating the service needs of each child prior to or during the first 30 days of placement in order to permit matching of the child with the most appropriate available program identified through the classification system. Although assessing children's needs is beneficial and in keeping with good social work practice, the evaluations mandated by the stipulation did not guarantee provision of the services found to be necessary, but served the sole purpose of making possible the selection of programs on a non-discriminatory basis. Hence, they had no intrinsic significance for kinship care children.

The correlation of other specific provisions of the final stipulation (12/28/84) with abating discrimination in non-relative foster care is equally obvious:

> ¶ 19 priority for placement on a first come, first served basis shall be established on the date the child is first reported to the Applications Unit (fn. *) (A. 4183)
>
> ¶ 20 The expression of a religious preference shall not give a child greater access to the best available program over other children for whom such programs are also appropriate. (A. 4183)
>
> ¶ 21 It is recognized that in interpreting compliance with the

principle of placement of children on a first come, first served basis, there may be occasional exceptions for compelling therapeutic reasons.... (A. 4183)

¶ 22 Agency programs shall accept all children sent to them for placement.... (A. 4184)

¶ 23 If a parent has expressed a wish for an in-religion placement, and it is practicable to do so, the placement worker shall place the child in the best in-religion program....(other in-religion placement provisions, ¶¶ 24, 25, 28, 29-31, 56-61, 70) (A. 4184-87, 4188-91, 4201-04, 4207-09)

¶ 25 An agency may take a child's race and religion into account in matching a child with an individual foster family.... (A. 4187)

¶ 26 An agency may refuse placement only on the ground that it does not have a suitable family for the particular child or that it believes that foster boarding home care is not appropriate for the particular child.... (A. 4187)

¶ 32 Children [the City] deems appropriate for placement in an agency's congregate care program shall not be identified by race or religion prior to placement....(also ¶ 33) (A. 4191)

¶ 34 An agency may object in writing to such placements solely on stated therapeutic grounds within 10 days.... (also ¶ 35) (A. 4191-92)

¶ 36 If an agency displays a pattern of therapeutic objections by race or religion...[the City] shall investigate the matter.... (A. 4192-93)

¶ 37 Pre-evaluation placements shall be made in the best available agency program that takes such placements.... (also ¶¶ 38-40) (A. 4193-95)

¶ 41 If a child and/or parent physically appears at an agency and apparently is in need of placement, the agency shall refer that child and/or parent to the appropriate [City] office....(also ¶¶ 42, 43) (A. 4195-96)

¶ 44 Waiting lists for placement will be established....(also ¶¶ 45-47) (4196-98)

¶ 53 All agency programs shall report their vacancies for New York City children to [the City].... [The City]...shall make placement decisions based on these vacancy lists. (A. 4200)

¶ 54 No agency shall be permitted to reject or accept a child based on the presence or lack of a vacancy...unless...reflected on a master list.... A. 4200-01)

¶ 55 Nothing contained in this Stipulation of Settlement is intended to create an obligation upon City defendants to guarantee the placement of any child in a particular agency or agency program or in a program with a particular rating....[11] (A. 4201)

The clear import of these collective provisions is to limit the scope of the agreement to the fulfillment of the stipulation's unambiguously articulated purposes with respect to children placed in foster care with strangers. These children constituted nearly the entire foster care population from the inception of the lawsuit through the period of the settlement and were the only ones suffering from the evils of bias addressed by the stipulation.

Nevertheless, the district court ruled that the stipulation is all-encompassing and "covers everything", including kinship care. Opinion and Order, dated February 23, 1994 (A. 6069). While it is well recognized that consent decrees may contain broader relief than was originally sought or might have been awarded after trial, Kozlowski v. Coughlin, 871 F.2d 241, 244 (2d Cir. 1989), a party's consent to more extensive relief cannot be presumed, even where one term of the agreement may tend to support that conclusion. See New York Telephone Co. v. Communications Workers of America, 445 F. 2d 39 (2d Cir. 1971); Alliance to End Repression v. City of Chicago, 742 F.2d 1007 (7th Cir. 1984). In this case, the overall language

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[11] Paragraphs 62-68 (A. 4204-07) and 71-84 (A. 4209-17) address data collection and record-keeping, confidentiality of information, monitoring, enforcement and other housekeeping matters.

of the stipulation, which not only fails to make any reference to the placement of children with relatives but is also facially inconsistent with such placements, precludes any reading of the agreement that would embrace them.

B. Circumstances Surrounding the Formation of the Consent Decree Do Not Support the Inclusion of Kinship Foster Care Children

In interpreting the language of a consent decree, a court may examine "circumstances surrounding the formation of the consent order" and the context in which the parties were operating, United States v. ITT Continental Baking Co., 420 U.S. at 238; Canterbury Belts Ltd. v. Lane Walker Rudkin Ltd., 869 F.2d 35, 38 (2d Cir. 1989). This includes consideration of the background and primary focus of the litigation and the settlement negotiations. United States v. O'Rourke, 943 F.2d 180 (2d Cir. 1991) (primary focus of lawsuit supported restricted interpretation of waste disposal agreement). Huertas v. East River Housing Corp., 992 F.2d 1263 (2d Cir. 1993) (purpose of litigation to eliminate discrimination in rental housing was chief factor in interpreting meaning of consent decree).

In this case, racial and religious discrimination is what the plaintiffs sought to address when they filed this lawsuit and what the parties intended to remedy when they executed the settlement agreement. From the outset plaintiffs attacked in a series of complaints the prevailing practices of religious matching that preferred white Catholic and Jewish children over black Protestant children in what could only be understood as stranger foster care.

This focus never changed. The parties' proposed pretrial order made clear that all efforts at trial would be centered on proving or disproving the existence of discrimination. Nowhere in the hundreds of pages of documents constituting the pre-settlement record in this case was there any mention of, reference to or even the description of any procedure, process or circumstance that pertained to placing children with relatives. Cf. New York Telephone Co. v. Communications Workers of America, 445 F.2d 39 (complaint and supporting documents defined limited scope of relief awarded and extended by parties' agreement, despite all-encompassing language of court order).

Nor was kinship care, either by name or in concept, at any time the subject of bargaining among the parties. Although hundreds of children in the custody of the Commissioner of Social Services were living with relatives, albeit primarily in arrangements that were not foster care in the legal sense, kinship care was never mentioned or discussed during settlement talks. This is one point on which the various participants, including representatives of the parties and the district court, appear to be in agreement. Morgenroth Affidavit (A. 5167-68); Stupp Affidavit (A. 6030); Tr. 11/5/92 (A. 4913), 10/15/93 (A. 5782, 5816); Opinion and Order, dated February 23, 1994 (A. 6069). However, the reason for this conspicuous omission is obvious: given the unique manner in which children came to be placed with relatives and the absence of any race or religion issues, kinship care was simply irrelevant to the object of the settlement.

There is no mistaking that the parties intended to restrict their agreement to remedying racial and religious discrimination, because they said so. The record abounds with contemporaneous representations of the parties confirming their understanding of the stipulation's primary focus. Arguing in support of the first version of the stipulation, City defendants' counsel summed it up: "Every single section of the stipulation has as its objective the implementation of our dual purpose: protection of the right to equal access to quality care and protection of religious freedom." Schwarz Affidavit (A. 1360). "Nothing in this stipulation goes beyond remedying discrimination." Tr. 8/6/84 (A. 3074). Plaintiffs' counsel echoed this view: "All of the provisions in this proposed settlement are provisions related to ... how the discrimination operates in the system." Tr. 10/9/84 (A. 3528).

Even after the second round of settlement negotiations, which produced numerous amendments to procedural detail, the core premises of the stipulation did not change: "Although the settlement has been modified as the result of objections raised by the intervenor and state defendants, its thrust remains the same...." Plaintiffs' Second Memorandum in Support (A. 3853). Not a single alteration or addition to the statement of purposes contained in paragraphs 4 and 5 was made between the first and second versions. (A. 1245, 4173). Both the plaintiffs and City defendants reaffirmed their previous assertions that the stipulation was limited to fulfilling the two constitutional principles on which it was based. Defendants' Second Brief in

Support (A. 3748, 3750, 3753-54, 3760-61, 3763); Plaintiffs' Second Memorandum in Support (A. 3856, 3870, 3881, 3914).[12]

The district court suggests that its expanded interpretation of the stipulation to include kinship care children is justified because the stipulation actually had an additional purpose -- to improve the quality of foster care services for all children. This is not the case. While the record certainly contains frequent expressions of concern from every quarter that the general quality of foster care services should be upgraded, there is no indication that this was per se a purpose of the parties or that the City consented to assume this obligation.[13] To the contrary, the City firmly refused to commit resources or to accept plaintiffs' specific proposals during settlement for achieving this admittedly "desirable goal." (A. 2558, 2564, 2937). According to the City's

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[12] Further support for the interpretation that the stipulation does not include kinship foster care derives from the notice to the class describing the proposed settlement. This notice was provided only to black, non-Catholic, non-Jewish children and stated the purpose of the agreement as expressed in ¶ 4 of the stipulation. (A. 3242).

[13] The district court notes that what amounts to three lines in the 46-page stipulation referring to improving the lives of children and families, ¶ 2 (A. 4172), and to the City's continuing its efforts to improve the quality of foster care services, ¶ 69 (A. 4207), "tend to support" plaintiffs' argument that improving substantive quality was a "dual" purpose of the agreement. Opinion and Order, dated February 23, 1994 (A. 6065-66). Not only are these exceedingly brief references so vague as to be unenforceable, but had the parties actually intended these to be concrete purposes of the agreement, it is reasonable to expect they would have included them in their carefully worded statement of purposes. Moreover, the contents of the record refute the court's conclusion. The only specific reference to ¶ 69 (¶ 62 in the original version) by any of the participants characterized the provision as "an empty promise." Tr. 8/6/84 (A. 2887).

Corporation Counsel, the stipulation guaranteed "equal opportunity...not results." (A. 4075). At most, the stipulation was viewed at the time as affording a possibility, a hope or an opportunity for improvements in child care.[14]

Although the rhetoric in recent years has increasingly asserted expansive purposes for the stipulation with respect to child welfare services, the fact that the parties could have consented to a settlement which went beyond the original claims of discrimination in the lawsuit does not mean that they did so. To the contrary, the contemporaneous statements and observations of the participants in the settlement process dictate otherwise. The primary focus of the agreement cannot now be redefined to justify extension of the stipulation to unintended territory. New York Telephone Co. v. Communications Workers of America, 445 F.2d at 47-8.

C. The Term "All" as Used in the Stipulation Does Not Include Children in Kinship Foster Care

In adopting the plaintiffs' expansive interpretation of the stipulation, the district court placed much emphasis on the use of the word "all" in ¶ 4. (A. 1254). When viewed in the context of the entire stipulation and the foster care system as it then existed, it is clear that "all" did not include kinship foster care. In interpreting a consent decree, a court must look at all

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[14] The City's Corporation Counsel referred to improvements in the quality of services as a possible "side benefit" to eliminating discrimination. Tr. 8/6/84 (A. 3047); 10/9/84 (A. 3527). The district court itself characterized the stipulation only as offering "several opportunities" for quality improvements. Wilder v. Bernstein, 645 F. Supp. 1292, 1351.

four corners of the document, examine all of its terms, and may not simply rely on selective excerpts. Taitt v. Chemical Bank, 810 F.2d 29, 32 (2d Cir. 1987). In interpreting the stipulation to apply to kinship foster care, the district court heavily relied on "one corner" of the stipulation.

When read in the context of the whole stipulation, the word "all," in ¶ 4, could only logically and practically refer to "all" children who were then subject to the allegedly discriminatory foster care placement process, i.e. children not in care with relatives. In the first place, racial and religious bias has never played any role in placing children with family members. Moreover, kinship homes did not fit the placement model set forth in the stipulation. The stipulation's placement procedures, which include placement of all children on a first come, first served basis in the best available program for the child's needs as chosen from a list of vacancies regularly reported to the City by child care agencies, are flatly inconsistent with the placement of children with relatives. ¶¶ 16, 19, 23, 46-7 (A. 4182-98). Kinship homes, available only to specific, related children, have never been part of the pool of pre-certified foster boarding homes or on any list of vacancies. When applied to kinship care, the provisions of the stipulation make no sense.

The language of a consent decree must not be construed so as to render another portion of the consent decree meaningless, Suarez v. Ward, 896 F.2d 28 (2d Cir. 1990), and an interpretation that renders "at least one clause superfluous or meaningless ... is

not preferred and will be avoided if possible." Garza v. Marine Transport Lines, 861 F.2d 23 (2d Cir. 1988). The district court's application of the stipulation to kinship foster care renders portions of the stipulation governing the placement process, ¶¶ 16, 19, 20, 23, 24, 37, 44-7, 53-54 (A. 4182-4201), "superfluous or meaningless." Interpreting the stipulation not to apply to kinship foster care is the only interpretation that gives "reasonable or effective meaning to all terms of the [stipulation]." Rothenberg v. Lincoln Farm Camp, 755 F.2d 1017, 1019 (2d Cir. 1985).

Relying on a standard dictionary definition of the word "all", the district court concluded that the stipulation covered the entire universe of foster care children. That the word "all" is not nearly as all-inconclusive and unambiguous as the district court suggests is reflected throughout the stipulation. For example, the key reference in ¶ 4 to "all New York City children whose placement in foster care is the responsibility of the New York City Commissioner of Social Services" was left undefined and did not have an expressly accepted meaning. Given the period of time and the context in which the stipulation was drafted, it is hardly free from ambiguity that "all" in ¶ 4 covered kinship foster care. If foster care with relatives was intended to come within the scope of the stipulation, it was incumbent upon the plaintiffs to make that explicit.

Elsewhere in the stipulation the meaning of "all" is less than unambiguous. In parts of the stipulation, even though the word "all" is used, the parties made explicit the scope of the coverage.

For example, in ¶ 9 of the stipulation, which provides that "[a] method of classifying all congregate care programs (including Direct Care congregate care programs)... shall be developed" (A. 4176), the parties added an explanatory parenthetical to show exactly what "all" covered. Paragraphs 10 and 53 of the stipulation (A. 4179, 4200) refer to "all agency programs" and ¶ 57(4) refers to "all agencies" without specifying whether or not this category includes programs operated directly by the City. (A. 4202). Reference to "all SSC children" in ¶ 64(B) and 64(C) (A. 4205) is equally ambiguous because it could mean either (a) all children in directly operated city programs or (b) all children in both directly operated programs and in programs operated by voluntary authorized child care agencies for which the City is ultimately responsible.

In at least one provision, "all" cannot even be construed to include all children who are in non-kinship foster care. Without explanation, ¶ 25 declares that: "Pursuant to SSC policy, all children shall be placed with foster boarding home families appropriate for their needs." (A. 4187). This clause can only be interpreted to apply to children for whom a determination has been made that a foster boarding home is the appropriate level of care; otherwise, the absurd result would be to require placement of all children in foster boarding homes, even if a child required a higher level of care.

Contrary to the district court's conclusion, the term "all" in ¶ 4 is not unambiguous. Opinion and order, dated February 23, 1994

(A. 6068). In Garza v. Marine Transport Lines, 861 F.2d 23, 27 (2d Cir. 1988) (citing Walk-in Medical Centers v. Breuer Capital Corp., 818 F.2d 260, 263 (2d Cir. 1987) as quoted in Eskimo Pie Corp v. Whitelawn Dairies, 284 F.Supp. 987, 994 (S.D.N.Y. 1968)), this court stated:

> A word or phrase is ambiguous when it is capable of more than a single meaning "'when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.'"

In light of the complete structure and text of the stipulation and the operation of the foster care system at the time the stipulation was drafted, "all" in ¶ 4 could not possibly be read to include children in relative foster care.

D. The Parties' Conduct During the Post-Settlement Period Demonstrates that the Stipulation Does Not Apply to Kinship Foster Care

Where the terms of a contract or consent decree are ambiguous, a court "may resort to a time tested method of resolving such ambiguity." IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp., 1994 WL 262009 (2d Cir. June 15, 1994). This "time tested method," which courts have utilized for more than a century as an aid in the interpretation of contracts, permits a court to examine the conduct of the parties. In Brooklyn Life Insurance Co. v. Dutcher, 95 U.S. 269, 273 (1877), the Court stated:

> The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done.

Often referred to as the doctrine of practical construction, the Court, in Old Colony Trust v. Omaha, 230 U.S. 100, 118 (1913), declared: "[g]enerally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not, controlling, influence." Ocean Transportation Line v. American Philippine Fiber Industries, Inc., 743 F.2d 85, 91 (2d Cir. 1984). This long-standing rule of contract interpretation has been used by courts to resolve ambiguities in complex civil rights consent decrees as well as in standard commercial contracts. Sanchez v. Maher, 560 F.2d 1105, 1108 (2d Cir. 1977).

In the present case, none of the provisions of the stipulation specifically address, mention or even refer to kinship foster care. This lack of specificity in the language of the stipulation and the vague meaning of the word "all" throughout the stipulation creates sufficient ambiguity to permit the court to examine the parties' post-settlement conduct to determine whether the parties intended kinship foster care to come within the scope of the stipulation. IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp.

The parties' practical construction of the stipulation, manifested by their behavior for a considerable period of time after the stipulation became effective, but before kinship foster care became a subject of controversy in this litigation, demonstrates that the parties never intended that the stipulation apply to kinship foster care. For approximately four years, from the time the district court entered the stipulation in 1987 until

late May 1991, plaintiffs' conduct in enforcing the stipulation did not in any way indicate that children placed with relatives were intended to be covered by the terms of the stipulation. Significantly, during this four year period, the parties submitted a series of post-settlement contempt motions, reports and other documents to the district court, none of which applied the stipulation to kinship foster care.

For example, on March 6, 1990, without any reference to kinship foster care, plaintiffs moved for contempt against the City, alleging a failure to implement the evaluation, vacancy control, first come, first served and best available program provisions of the stipulation. Notice of Motion for Contempt and Enforcement (A. 4651-55). Plaintiffs' evidence of the City's non-compliance consisted of the results of a court-authorized six-month investigation by plaintiffs' expert of the child placement process as it pertained to stranger foster care. Report of Dr. Theodore J. Stein (A. 4710-4839). Plaintiffs' motion ignored kinship care although the plaintiffs knew or should have known that the state's regulations establishing different procedures for kinship placements had already been in effect for more than four years, N.Y. Comp. Codes R. & Regs., tit. 18, §§ 444.1 (c), 8, 9 (1985), the legislative preference for kinship placements had been enacted the previous year, Fam. Ct. Act § 1017; Soc. Serv. L. § 384-a(1-a)(Chap. 744, N.Y. Laws of 1989), and serious deficiencies in the City's kinship foster care system were the subject of litigation in the state courts. Eugene F. v. Gross, Docket No. 1125/86 (Sup. Ct.

N.Y. Co.)

During the same period, the City's behavior did not suggest any indication that it interpreted the stipulation to apply to kinship foster care. In October 1989 the district court directed the City to submit a report on its specific efforts and plans to place children in the best available program on a first come, first served basis in accordance with the stipulation. Lowry Affidavit (A. 4662). The City's response addressed only stranger foster care. Verified Report on the Placement of Children (A. 4292-4352). Although plaintiffs' expert, Dr. Stein, flatly contradicted the report's factual statements, Lowry Affidavit (A. 4662-63), plaintiffs never criticized, or even noted, that kinship placements were not accounted for.

Plaintiffs first formally raised the issue of the stipulation's applicability to kinship foster care in a May 31, 1991 letter to the district court. (A. 5024). By that time the foster care population had grown dramatically, from under 17,000 in 1985 to more than 49,000 in 1991, with the number of children residing in relatives' homes rising from an estimated few hundred to over 20,000. Barrios-Paoli Affidavit (A. 5935); Task Force on Permanency Planning for Foster Children, Inc., "the Double Edged Dilemma", October 1990 (A.5387). Plaintiffs' belated interest in kinship care happened to coincide with a larger debate in the child welfare community as to kinship foster care, including whether the City might be utilizing kinship care to avoid its obligations under the stipulation. Tr. 11/5/92 (A. 4977-78). The City responded

that kinship care was not within the terms of the stipulation. Letter of Joel Berger, dated July 11, 1991 (A. 6511-17). It has never deviated from that position. See, e.g. Tr. 11/5/92 (A. 4914-15, 4919).

In July 1993, plaintiffs again moved for contempt against the City regarding the performance of child evaluations and certain other provisions of the stipulation. Notice of Motion for Contempt and Enforcement (A. 5027-31). In comparison with their 1990 contempt motion, plaintiffs now alleged that the City had failed to implement the stipulation with respect to children placed with relatives, Id., and maintained that the stipulation covered children in kinship care. The City opposed the motion. (A. 5170-94).

It was not until the post-settlement era was well under way that the plaintiffs' advanced their interpretation that the stipulation applied to kinship foster care. Cf. Croce v. Kurnit, 737 F.2d 229, 235 (2d Cir. 1984). The parties' practical interpretation of the stipulation prior to the time when kinship foster care became the subject of controversy squarely conflicts with plaintiffs' recent re-interpretation of the stipulation and provides compelling evidence that kinship care was not intended to be included within the scope of the stipulation. In light of their conduct, the parties' practical interpretation should be accorded "great, if not, controlling influence." Old Colony Trust v. Omaha, 230 U.S. at 118.

E. Summary of Point II

In sum, nothing in the amended complaints and other pre-stipulation documents, nothing in the history of the settlement negotiations or the circumstances surrounding the formation of the stipulation and nothing in the structure or language of the stipulation itself suggests that the terms of the stipulation apply to kinship foster care. Moreover, the parties' practical interpretation of the stipulation, as demonstrated by their conduct for a considerable amount of time after the stipulation became effective, confirms that they never intended the stipulation to apply to kinship foster care. By applying the stipulation to kinship foster care, the district court seriously misinterpreted the stipulation, modified its injunctive requirements and significantly enlarged the city defendants' legal obligations.

CONCLUSION

For all of the above reasons, this court should deny the motion to dismiss the appeal and reverse the district court's order applying the stipulation to kinship foster care.

Dated:
New York, New York
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Yours, etc.

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