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INTERVENOR

94-7322, 7324

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To Be Argued By
Michael D. Scherz

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APR 11 1994
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 MILDRED 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,

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page prob
reply

BRIEF FOR PLAINTIFF-INTERVENORS-APPELLANTS

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settlement is contrary to reason. Appellees completely misapprehend the gist of plaintiff-intervenors argument as to why the parties did not contemplate including children placed with relatives in the settlement agreement. It was not because "kinship care, in its present form, did not exist when the Stipulation was negotiated and approved" (Intervenors' Brief at 22; similarly, Plaintiffs' Brief at 15), although this is certainly true. It was because, in contrast to stranger foster care, the placement of children with relatives was never achieved through the discriminatory placement mechanisms being challenged by the lawsuit, and kinship care was therefore irrelevant to the object of the settlement. Plaintiff-intervenors' Brief at 15-16, 29-30.

Appellees nevertheless go to great lengths to demonstrate that kinship placements were a high profile component of the child care system at the time of settlement, so as to place the City on constructive notice, even in the absence of any reference to them, that they would be covered by the stipulation. Plaintiffs' Brief at 34-39; Intervenors' Brief at 24-25. Not only have these circumstances been inflated out of all proportion; they are also beside the point.

In reality, only an infinitesimal percentage of the children placed with relatives were living in homes that had been formally certified for foster care. Affidavits of B.-Paoli, ¶ 4; Stupp, ¶ 6. The overwhelming majority -- several hundred at most -- were living in non-foster care arrangements with relatives and receiving welfare or no public support. Stupp, ¶ 10. New York Social Services Law § 375 ostensibly permitted the circumvention of federal reimbursement statutes in authorizing the care of children

by relatives whose homes were never evaluated for foster care. For the most part, City policy was defined by this informal approach. B.-Paoli, ¶ 2.

Even after the formalization of kinship foster care through the promulgation of state regulations in late 1985, N.Y. Comp. Codes R. & Regs., tit. 18 §§ 443.1, 443.3, 444.1, 444.2, 444.6 and 444.8, the City largely continued to treat related caretakers as non-foster care providers. The City's foot-dragging in reforming these ingrained practices prompted The Legal Aid Society to sue on a class-wide basis to gain foster care status for children placed with kin. Eugene F. v. Gross, 1125/86 (Sup. Ct. N.Y. Co.)

It is true that in the early 1980's the City sought, often unsuccessfully, to obtain federal and state foster care reimbursement for some children placed with relatives. Letter of Perales to Commissioners, 7/26/84. It is also true that the City sought official foster care status for a handful of kinship children through Family Court orders. Matter of Gravina, 89 A.D.2d 534, 452 N.Y.S.2d 612 (1st Dept. 1982). However, the existence of these efforts as well as a few children in certified relative homes is by no means inconsistent with the City's position that it never considered children placed with relatives to be within the scope of the settlement agreement. Whether there were tens or hundreds of these cases, the crucial fact is that kinship placements were not part of the placement process being restructured through the settlement agreement. Even assuming arguendo that the City anticipated the regulatory changes that would later affect kinship care, it had to know that the new rules would formally establish a different process for placing children with relatives than with

strangers. N.Y. Comp. Codes R. & Regs., tit. 18, § 443.7. Thus, the thrust of appellees' argument is altogether misdirected.

On the other hand, the complete absence of discussion or mention of kinship care children during the two years of settlement talks, let alone any express reference to them in the agreement, is highly significant in determining whether the parties intended to include these children. Intervenors contend that in light of the broad language of the stipulation it never occurred to them that kinship care should be expressly included, just as it never occurred to them specifically to include non-members of the certified plaintiff class, such as black Catholics, whites, Hispanics and Asians, who have nevertheless been treated as subject to the decree. Intervenors' Brief at 9-10. If it did not occur to intervenors, it certainly did occur to the other parties and the district court to reach an understanding about the scope of the decree with respect to these racial and religious groups. A colloquy took place on the record as follows:

Court: I am responsible for making certain that the rights of all who are affected by this settlement are properly protected. ...I recognized the plaintiffs represent the interests of essentially the black Protestant children. My question at this point is who do I look to with respect to the rights of Catholic and Jewish children and parents? Because as I view this structure that is being created we will be concerned with the clients represented by Ms. Lowry, but it is also essential that I consider the rights of the Catholic and Jewish children and their parents.

Lowry: I think the City, which has the responsibility for all of the children in its custody, has the responsibility for pressing their interests, and certainly in the course of this settlement discussion we never suggested to the City that they adopt any measures that would have been to the disadvantage of Catholic or Jewish children....

Schwarz: I regarded myself as counsel for the City as

carrying forward the City's statutory and constitutional obligation with respect to all children, be they black or white, be they Catholic or Jewish, be they Protestant or agnostic.

Tr. 8/9/84, pp. 255-60.

The inescapable conclusion to be drawn from this exchange is that racial and religious discrimination was the primary focus of the agreement and that the intent to extend its scope beyond the certified plaintiff class of black Protestant children was limited to those of other races and religions who would be affected by the remedial placement structure. That these additional groups were openly acknowledged as being covered while children placed with relatives were never discussed is telling. It strongly suggests that if the parties had intended to include kinship care, they would have said so.

2. The Parties Post-Settlement Conduct Demonstrates That the Stipulation Was Never Intended to Apply to Kinship Foster Care.

In their brief, plaintiff-intervenors demonstrate at length that the parties' conduct for a considerable period of time in the post-settlement era before kinship foster care became the subject of controversy evinced the parties' intent that the stipulation did not apply to kinship foster care. Plaintiff-Intervenors' Brief at 43-48. Utilizing the time-honored doctrine of practical construction, plaintiff-intervenors showed that for approximately four years, from the time the district court entered the stipulation in 1987 until late May 1991, none of the parties' post-settlement conduct in any way indicated that the stipulation covered children placed in kinship foster care.

Without disputing any of plaintiff-intervenors' factual assertions, plaintiffs attempt, in a footnote, to dismiss the

doctrine of practical construction argument. Plaintiffs' Brief at 28-29. Incredibly, plaintiffs plead ignorance and argue that "for years after the Decree was entered, Plaintiffs were completely unaware that city Defendants were not protecting kinship foster children under Wilder because Defendants were not providing Plaintiffs with any monitoring data." Plaintiffs' Brief at 28-29. At best, this argument is specious. For 20 years, plaintiffs' counsel have with the greatest aggressiveness and tenacity represented their clients in this action. It defies credulity that plaintiffs' counsel did not even suspect, for years no less, that the City was not applying the terms of the stipulation to children in kinship foster care.

This argument is particularly difficult to fathom because during this time governmental officials, the child welfare community and the media were all regularly monitoring and reporting the explosive increase in the number of children placed with relatives and the growing pains associated with the City's kinship foster care program. The events described in plaintiff-intervenors' brief that transpired from the mid 1980's to the early 1990's -- including the promulgation of state regulations establishing separate procedures for kinship placements, the enactment of a state statutory preference for kinship foster care and the commencement of a state court lawsuit alleging serious deficiencies in the kinship foster care system -- would have placed any reasonably prescient attorney on notice that the City was not applying the stipulation to kinship foster care. Plaintiff-Intervenors' Brief at 45-48. Furthermore, none of plaintiffs' correspondence from 1987 through 1990 seeking information from the

City (JA) ever sought information relating to kinship foster care. Finally, plaintiffs' argument flies in the face of the district court's finding in granting plaintiff-intervenors' motion to intervene that "applicants ... had, for seven years [1986-1993], 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." Memorandum Decision, January 28, 1994, at 8.

In addition, plaintiffs mischaracterize plaintiff-intervenors' argument. Plaintiff-intervenors do not claim that "[p]laintiffs implicitly excluded kinship foster care from the decree." Plaintiffs' Brief at 28. This is not an example of "implicit exclusion" or "implied consent to exclude kinship foster children." Rather, plaintiff-intervenors maintain that it was never the parties' intent, as revealed by their post-settlement behavior, to include kinship foster care within the scope of the stipulation.

3. The Stipulation Was Not a Mandate for System-wide Improvement in Child Care Services, and the Inclusion of Kinship Foster Care Cannot Be Justified on That Basis.

Appellees maintain that the stipulation applies to children in kinship foster care because the stipulation mandates universal improvement in the quality of care for all children, rather than just the elimination of racial and religious discrimination. As demonstrated below, this argument is untenable.

Consent decrees must be interpreted with the meaning intended by the parties at the time of the settlement, not subsequent purposes favored by one or more parties to the decree. United States v. ITT Continental Baking Co., 420 U.S. 223 (1975), United States v. O'Rourke, 943 F.2d 180 (2d Cir. 1991). Wilder was at the

time of settlement and always has been a case about racial and religious discrimination in New York City's non-relative foster care system and not about the general quality of care. Quality of care may have been an issue from the beginning, as plaintiffs assert, but only insofar as it related to discrimination. Black Protestant children were allegedly denied access to the best quality care because of discriminatory placement practices. Plaintiffs certainly could have raised claims on state law grounds alleging the general lack of quality of care. They never did so, however, and the parties did not settle the case on that basis.

Plaintiffs also now claim that the discrimination issue "had faded" and the issue of higher quality was "moving to the fore" when the stipulation was signed. Plaintiffs' Brief at 10. This is flatly contradicted by plaintiffs' own submissions in support of the stipulation which decried the continued existence of racial and religious discrimination in New York City's foster care system:

Plaintiffs have contended that the child welfare system operates in such a way as to favor Catholic and Jewish children and disfavor black and Protestant children, in violation of the establishment and free exercise clauses of the First Amendment and the equal protection clause of the Fourteenth Amendment. The settlement arrived at between plaintiffs and the city, which is legally responsible for providing services to all New York City children, attempts to put into place a system that will permit sectarian child care agencies to continue to operate but which is designed to end the inequities and the constitutional violations in the existing system.

Plaintiffs' Memorandum in Support of the Proposed Settlement at 3 (emphasis added).

Shortly before settlement discussions began in 1983, plaintiffs commissioned a study to document the continuing racial and religious discrimination in the foster care placement process and used it in their arguments for approval of the stipulation.

See "Children Receiving Out-of-Home Services in New York City: Allocation by Race and Religion" (7/26/83). In 1984 plaintiffs pointed to statistics that "describe a child welfare system in which race and religion are significantly associated with the placement of children, to the detriment of black Protestant children." Plaintiffs' Reply Brief in Support of the Proposed Stipulation at 14. Equal access to quality care on a racially and religiously non-discriminatory basis was plaintiffs' goal. Plaintiffs' contemporaneous statements in support of the settlement belie their current claims about the stipulation's reorientation.

City defendants' stated reason for settling the lawsuit, rather than continuing with litigation, was their concern that the City was vulnerable on the plaintiffs' discrimination claims. In a section of its memorandum in support of the settlement labelled "Reasons for Settlement," the City admitted that:

Upon review, the system as it now exists was legally vulnerable. The statistics, the analysis of which would have been have been a central issue at trial, could be interpreted as demonstrating that plaintiff class children [black Protestants] are disproportionately concentrated in (i) agencies other than defendant agencies, and (ii) in agencies that are arguably of lower quality. It is also claimed that such children are disproportionately rejected by certain agencies as compared to out-of-religion white children.

City Defendants' Memorandum of Law in Support of the Proposed Stipulation of Settlement at 13 (citation omitted). See also Plaintiff-Intervenors' Brief at 37-8. Defendants repeatedly emphasized the limited scope and purpose of the stipulation.

Plaintiffs' efforts to show that the stipulation is "replete with mandates to improve the overall quality of foster care," Plaintiffs' Brief at 32, are unavailing. To the contrary, the stipulation contains nothing whatsoever that can be construed as a

binding obligation to improve foster care. Although plaintiffs specifically point to the classification system consultants, the review of paperwork, and the settlement panel as "but a few examples of the broad scope of the consent decree," Plaintiffs' Brief at 32-3, plaintiffs' misquote or mischaracterize each of these provisions.

Plaintiffs misrepresent the consultants authority to "make recommendations for improving any and all aspects of the foster care scheme that arise out of their review of the existing system (consent decree, ¶ 9(e), JA ___)" as a mandate. Plaintiffs' Brief at 32. Plaintiffs fail to quote accurately the language of the subparagraph which reads: "The parties welcome and are prepared to consider on a non-binding basis any other recommendations the consultant(s) deems appropriate for improvement in any and all aspects of the foster care system arising out of its review of the foster care system described in paragraph 9." (Emphasis added.) The consultant's power is obviously only advisory. The purpose of paragraph 9 was not to improve the quality of care, as plaintiffs seek to portray it, but instead to develop a method of classifying all congregate care programs in order to permit the placement of children in the best available program without regard to race or religion. See also Stipulation ¶ 13(b).

Plaintiffs claim that "the commitment of the state and city to reduce the paperwork burden plaguing participants in the child care system" in paragraph 62 is a further example of the mandate to improve the quality of care. Plaintiffs' Brief at 32. Again, plaintiffs fail to quote the stipulation's actual language. Paragraph 62, in its entirety, merely provides that:

In order to reduce the paperwork burden upon all participants in the New York City child care system, the State and City have agreed to jointly review existing paperwork requirements. Within ninety days after entry of this Stipulation, the City shall retain an advisor to recommend, within six months of his or her selection, appropriate measures to be taken by both the State and City to achieve these goals.

(Emphasis added.) The hortatory language of paragraph 62 is eviscerated in any event by the additional information gathering and recordkeeping requirements imposed by stipulation paragraphs 63(a) and 64. Paperwork reduction may be a laudable goal, but the stipulation neither mandated nor achieved it.¹

Plaintiffs misstate altogether "the settlement panel's opportunity to 'make recommendations for improvements in the delivery of foster care to New York City children' (id. [citing to the stipulation], ¶ 73, JA __)". Nowhere in the eight subsections of paragraph 73, which describes the duties of the settlement panel's members, is this language to be found. Rather, the

¹ Intervenors also seek to portray the inclusion of paragraph 62's agreement to review paperwork as both a substantive requirement and a major victory extracted from recalcitrant parties that "has absolutely nothing to do with discrimination." Intervenors' Brief at 13. Intervenors are wrong on both counts: Paragraph 62 is part of a stipulation section that generates additional paperwork, requiring agencies to report on the race and religion of all children in nonrelative foster care. Stipulation ¶¶ 63-67. This provision is directly tied to elimination of racial and religious discrimination, the stipulation's stated goal. Intervenors now claim that they "would not have signed any stipulation that did not require steps to be taken to reduce paperwork." Intervenors' Brief at 13. Intervenors objected to the proposed paperwork provisions for fear that the State might not sign the stipulation, thereby depriving the court of jurisdiction to enforce ¶ 62's amorphous provisions regarding paperwork and stripping it of all meaning. Tr. 9/19/84 at 366-7. Intervenors' fears were realized. The State did not sign the stipulation and flatly refused to change any of its forms: "what we have agreed to do is sit with the city and see if the city can eliminate its forms, because the state's forms are required by state law." Tr. 9/19/84 at 368. The City echoed this view, characterizing the paperwork review as a mere "agreement to analyze the problem." Tr. 9/19/84 at 370.

settlement panel's authority to make recommendations is limited to "the implementation of the purposes and terms of this Stipulation." Stipulation, ¶ 73(7). Plaintiffs then go on to quote the district court's misreading of this section as the "availability of the settlement Panel to monitor placements and assess their effect on the quality of child care provided ..." Plaintiffs' Brief at 32. Even in its mistaken reading of the actual provision, the district court nonetheless conservatively characterized the settlement panel's authority, as well as other provisions, as an opportunity and not a mandate for improvement in the foster care system. Wilder v. Bernstein, 645 F. Supp. 1292, 1351 (S.D.N.Y. 1986).

Nor did the involvement of the intervenor agencies in this case transform the settlement agreement from a remedy for racial and religious discrimination into a blueprint for improving the overall quality of child care. This in no way minimizes intervenors' substantial contribution to the stipulation, as they were undeniably instrumental in bringing about many beneficial revisions. However, a careful examination of their objections to the original agreement and the actual changes that resulted shows that their aim and ultimate achievement were to prevent harm to the system from the implementation of the agreement.

Intervenors complained that "settlement of this case has become a goal in and of itself, apart from the impact it will have on the care provided to children", Memorandum of the Non-Defendant Agencies In Support of Objections at 26, and prophesied "unfortunate, if not tragic, consequences" if the stipulation were approved. Id. at 28. They strenuously denounced the stipulation's fundamental first come, first served premise as "indefensible" and

predicted that it would

ignor[e] the specific needs and urgencies of each child. By so treating individual children as fungible, the Proposed Stipulation violates every precept of clinical psychiatry; it robs the children of their individuality; it denies their humanity.

Memorandum of the Non-Defendant Agencies in Support of Objections at 32.

Intervenors' formal objections, set forth in a document containing 41 numbered paragraphs, fell into six categories: 1) serious impairment of child care agencies' ability to perform their function; 2) the undue complexity of the agreement; 3) the inappropriate use of scarce resources; 4) the lack of input from non-defendant agencies; 5) the applicability to non-defendant agencies of procedural requirements going beyond the elimination of discrimination; and 6) the unfair treatment of children whose parents express a preference for in-religion placement. See Objections of Non Defendant Agencies to Proposed Stipulation, 6/1/84. For the most part, these were administrative and "clinical" concerns that had nothing to do with discrimination per se, as intervenors point out. But they were all directed to avoiding negative impact rather than affirmatively enhancing the quality of care.

Three important features of the stipulation for which intervenors claim credit in their brief -- child evaluation, qualifications and selection of the program classification consultant and reduction of paperwork, Intervenors' Brief at 12-16 -- are all closely related to the objective of ending discrimination and do not in any way signify a broader purpose for the stipulation. See supra at 9-10, 11 n. 1; infra at 21-2.

It is particularly baffling how intervenors can now assert responsibility for the child evaluation provisions of paragraph 48. They initially railed against paragraph 48 (originally numbered 42) as "unnecessary and unwarranted evaluation procedures" that would divert scarce resources away from child care. Objections of Non-Defendant Agencies at 5. Moreover, the text of paragraph 48 was not renegotiated and remained unchanged from the first to final versions of the stipulation. It is difficult to identify any single factor or combination of factors that would have caused intervenors to reverse their position on this provision, or on the agreement as a whole, for that matter.

Intervenors trumpet again and again their role as the sole proponents of the "best interests" of the children, as though this also somehow refocused the stipulation's purposes toward improving the general quality of child care. It did not. To the extent that the best interests concept may be implied in the agreement at all (it is explicit in only four paragraphs, each pertaining to in-religion placements of children), it is not synonymous with any requirement to make available a particular quality of care. See Youngberg v. Romeo, 457 U.S. 307 (1982); Sinhogar v. Perry, 53 N.Y.2d 424 (1981); Tr. 3/4/85 at 1016-20. Protection of children's best interests in this case was one aspect of intervenors' efforts at damage control, that is, avoidance of the potentially adverse consequences of the original agreement.

Plaintiffs and intervenors engage in revisionist history in their attempt to recast the stipulation as a "mandate" to improve the general quality of foster care services. Plaintiff-intervenors are fully aware of the frequent expressions of concern in the

record about the need for overall improvement. Plaintiff-intervenors' Brief at 38-39. Nevertheless, it is a substantial leap to assert that these concerns found their way into the final agreement in the form of a mandate. As has been previously emphasized, the City consistently opposed this proposition when negotiating the stipulation, and maintained that the final product guaranteed "equal opportunity...not results." Id. At the time plaintiffs also predicted only that the stipulation "may" have the effect of improving quality. Id. at 15 n. 6. Therefore, the present argument that the stipulation is a blueprint and a mandate for improved services must be rejected.

4. Kinship Foster Children Will Be Harmed Rather Than Benefitted by Being Subjected to the Wilder Stipulation.

To buttress their argument that the district court correctly interpreted the stipulation to include kinship foster children, appellees maintain that the stipulation can be readily applied to kinship placements without harm and, moreover, that the failure to extend the benefits of the stipulation to these children would constitute unjust discrimination. Plaintiffs' Brief at 43-47; Intervenors' Brief at 28-34. If this were true, plaintiff-intervenors would not be involved in this appeal, and, indeed, the need for intervention would never have arisen.

But the reality is just the opposite: imposing the stipulation's placement standards upon children in kinship care threatens to undercut state statutory and regulatory procedures that have been carefully tailored to facilitate kinship placements and, ultimately, to impair the rights and interests of children in being able to live with their own families. In granting intervention, the district court 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. Memorandum Decision, 1/28/94, at 8.

The State of New York assigns the highest priority to placing children with qualified relatives. Under New York Family Court Act § 1017, the Family Court is required, when ordering the removal of a child from his or her home in a child protective proceeding, to direct the Commissioner of Social Services to search for a suitable relative who is willing to care for the child. If a relative is located who meets these criteria and is able to provide an appropriate home, the Court is mandated to order the child's placement with the relative. When a child is to be voluntarily placed, New York Social Services Law § 384-a(1-a) requires the Commissioner to ascertain whether a similarly qualified relative is available. In effect, placement with an appropriate relative is presumed to be the best available placement for the child.

The preference for entrusting children to the care of relatives, historically a touchstone of the state's child welfare policy, is firmly grounded in notions of the best interests of children. There is overwhelming support among professionals in the field for the concept that when children must be placed away from their homes, "the family is the first and best resource for meeting those needs that lead to the optimal development of the child." Child Welfare League of America, Kinship Care: A Natural Bridge, Washington, D.C. 1993, p. 20. See also, Family Assets: Kinship Foster Care in New York City, Report of the Mayors' Commission for the Foster Care of Children, November 1993.

For minority children, substitute care by relatives is of particular social and cultural significance. According to Dr. Megan E. McLaughlin, Executive Director of the Federation of Protestant Welfare Agencies and an eminent practitioner, author, consultant, teacher and social policy planner in the child welfare area, "the formal use of suitable kin to provide foster care carries on a critically important social and cultural tradition among Blacks and Latino children who are the overwhelming majority of children needing out-of-home placement." Affidavit of Megan McLaughlin, DSW, 11/16/93, ¶ 13. See also Affidavit of John Stupp, 2/7/94, ¶ 13, quoting sponsor's memorandum, Chap. 744, N.Y. Laws of 1989.

The unique benefits provided by loving and capable relatives - security and a sense of continuity, the sense of belonging to one's own family, the sense of identity, self-confidence and self-esteem that derives from being part of one's family history and culture -- address vital needs of children that are not measured by 30-day evaluations or fulfilled by strangers under the supervision of even the most highly-rated child care agencies.

Despite the clear preference for kinship care under New York law, placement with relatives does not head the list of priorities under the stipulation. While appellees pay lip service to the importance of kinship placements (see e.g., Plaintiffs' Brief at 40; Plaintiffs' Memorandum in Opposition to Motion to Intervene at 2, 28), the plain language of the stipulation as well as statements of the appellees themselves belie their protestations. Under the stipulation it is not the individual foster home but rather the quality of the child care agency program that takes precedence.

Stipulation, ¶¶ 23, 24; Plaintiffs' Brief at 41-43. Evaluations of children are performed for the purpose of determining their service needs and the level of care and program type required in order to place them in the best available programs on a first come, first served basis. CWA is forbidden to deviate from the prescribed placement process except in the most extraordinary circumstances. Stipulation, ¶¶ 21, 61.

Whatever significance program quality may have with respect to serving the needs of children in foster care, it is not a factor to consider under New York law in determining whether to place a child with a relative. The existence of a vacancy in a highly-rated agency program is entirely irrelevant to the judgment that a relative is "suitable" and can furnish an appropriate home for the child. When the statutory criteria are satisfied, both the Family Court and the Commissioner must place the child with the relative.

Although the standards for approving and supporting kinship foster homes may be superficially similar to those applicable to non-relative homes, as appellees hasten to point out, Plaintiffs' Brief at 38-39; Intervenors' Brief at 28-31, it is the distinctive procedures embodied in state law for placing children with kin that constitute a major source of conflict with the stipulation. In emergency placement situations (the vast majority of foster care cases) children are not placed with agencies but go directly to their relatives, whose homes are preliminarily screened for suitability and then subjected to an accelerated full home study within the next 60 days. N.Y. Comp. Codes R. & Regs., tit. 18, § 443.7. These measures are intended to mitigate for the child the trauma of family disruption by avoiding placement with strangers

during the many months normally required for the assessment of a home.

A child cannot be placed simultaneously with a relative and in the "best available foster boarding home program" as defined by the stipulation because in most cases the relative is unknown to the system and unaffiliated with any program for at least the first 60 days or, if already approved to care for other related children, may be supervised by an inappropriate agency or one of inferior quality. Thus, by the terms of the stipulation, the existence of a known non-relative vacancy would determine the "best available foster boarding home program" and, consequently, dictate the child's initial placement.

Plaintiffs make very clear that under the stipulation "[t]he existence of an appropriate kinship home does not by itself satisfy a child's entitlement to the best available placement." Plaintiffs' Brief at 41, emphasis supplied. A simple hypothetical will illustrate how this concept runs afoul of the objectives of state law and the statutory rights of children to be placed with relatives. Let us assume that an HIV-positive child with some symptoms of AIDS is determined to be able to live in a foster boarding home, and a particular relative is found to be appropriate and capable of meeting the child's medical needs. Let us assume further that an agency operating an HIV/AIDS program has a vacancy in one of its foster boarding homes which has prior experience caring for AIDS afflicted children. Under the stipulation the HIV/AIDS program would have to be selected, even though the relative met the statutory criteria for appropriateness and could also afford the child all of those benefits uniquely associated

with care by the extended family.

Examination of another commonly encountered situation demonstrates an additional aspect of the problem: the relative of a child entering care has been previously approved as the foster caretaker of a related child, often a sibling, who is already in the foster care system. That relative's home, although deemed suitable for both children, may be supervised by an agency which is appropriate for the child in care but not the best available for the new arrival according to Wilder standards that ignore relative placements. Because foster homes are under contract to a particular agency, they cannot, contrary to appellees' simplistic assumptions, be shifted around the system with impunity or be supervised by more than one agency at a time. Pursuant to the mandates of the stipulation, the incoming child would have to forego the considerable advantages of an appropriate in-family placement in favor of a stranger placement in the other agency.

A fundamental, and most disturbing, aspect of the threat to kinship care from the application of the stipulation is the fact that appellees, notwithstanding their professions to the contrary, really do not grasp the exceptional importance of relative placements in meeting the needs of foster children. It is apparently their belief, as evidenced time and again from the beginning of their effort to have kinship children declared part of the Wilder class, that kinship care is just one variety of foster boarding home program, like a mother/infant program or an HIV program, or is just a factor to be balanced against a child's particular service needs in selecting the best available placement. See e.g. Plaintiffs' Brief at 22, 26, 41, 44; Intervenors' Brief at

9; Opinion and Order, 2/23/94, p. 15 n. 14. Plaintiffs have equated "foster boarding homes staffed by relatives" with "foster boarding homes staffed by strangers", implying that relatives open their homes to their kin merely as one kind of paid personnel. Plaintiffs' Memorandum of Law in Further Support of Motion for Contempt, 10/17/93, p. 26. Counsel for intervenors has stated:

"It never occurred to the intervenors to mention foster placement with relatives. That was the same as foster placement with anything else. Sure, there were some differences, but differences of degree, certainly not of kind."

Tr. 10/13/94, p. 38.

Kinship care is not just another type of program but a unique and preferred concept of how to meet the needs of children in out-of-home placement. "Kinship care requires different responses, both programmatically and in its placement process. The State of New York, through its statutes and administrative regulations, has acknowledged this fact. Wilder has not, because it was never intended to address this issue." Dr. McLaughlin Aff., ¶ 15.

The conflict between the stipulation's mandates and requirements for kinship placements is not easily reconciled. Should the stipulation predominate in its present form, there would be absolutely no guarantee that due preference would be given to placing children with relatives and no means of enforcing the children's right to appropriate kinship placements. Indeed, there is a substantial risk that placements with relatives could be delayed, disrupted or prevented from occurring at all.²

² The district court attempts to allay plaintiff-intervenors concerns, which it characterizes as based upon an overly simplistic view of the stipulation's mandates, by noting that the stipulation leaves room for exceptions to the first come, first served /best (continued...)

Appellees insist that kinship children will suffer unjust discrimination by being deprived of an evaluation of their needs if they remain outside the purview of the stipulation. Plaintiffs' Brief at 43-47; Intervenors' Brief at 28-34. This is not so. In the first place, the evaluation prescribed by the stipulation is a mixed blessing for children in kinship care. While it is intended to identify each child's needs for services, its limited purpose is not to ensure the appropriateness of placement in an individual relative foster home or the actual provision of necessary services, but to match the child with the best available agency program on a non-discriminatory basis. This evaluation fails to address adequately the high priority interest of kinship children.

Evaluations of children are of course essential in order to make possible the provision of appropriate individualized care. Plaintiff-intervenors have consistently stated this view, as intervenors duly note. Intervenors' Brief at 22, quoting Affidavit of K. McNally, September 29, 1993, ¶ 25. However, this does not "end the matter", as intervenors suggest. For the second time in their submissions to this Court,³ intervenors have chosen to quote the same passage out of context, each time omitting the key qualifying sentence which accurately expresses plaintiff-intervenors' position regarding Wilder evaluations for kinship

²(...continued)

available program principles. Opinion and Order, 2/23/94 at 21 n. 17. However, the exceptions were intended by the drafters to be occasional and extremely narrow. Tr. 10/1/84, pp. 562-90. Any notion that the stipulation would permit an exception for 20,000 kinship children -- in effect, swallowing the rule -- is contrary to reason.

³ See Affidavit of Donald J. Cohn, dated March 23, 1994, filed in opposition to petitions for permission to appeal, ¶ 11.

children:

"However, the laudable goals of the Stipulation's remedial plan cannot be accomplished for children in relative foster care in the context of Wilder without sacrificing other vital interests." McNally Aff., ¶ 25.

By contrast, if the district court's order is overturned on this appeal, children in relative's homes will have equivalent benefits and protections that are pertinent to their interests through an evaluation process negotiated in the state court action of Eugene F. v Gross, 1125/86 (Sup. Ct. N.Y. Co.). This process, using a timetable that is relevant to kinship placement procedures and consistent with good social work practice, addresses both the children's needs and the characteristics and capabilities of the homes while giving requisite consideration to the children's substantial interest in being placed with appropriate relatives. Affidavit of Nanette Schrandt, 11/16/93, ¶ 10.

5. The Court of Appeals Should Not Defer to the District Court's Interpretation of the Stipulation.

Throughout their brief, plaintiffs stress the district court's long-term involvement in this litigation and, on that basis, urge this court to accord great deference to the district court's interpretation of the stipulation. Plaintiffs' Brief at 3, 4, 12, 15, 48. Plaintiffs' reliance on Rufo v. Inmates of Suffolk County Jail, 502 U.S. ___, 112 S.Ct. 748, 765 (1992), a Rule 60(b) modification of judgment case, to support their position is seriously misplaced. Plaintiffs' Brief at 15, 48. The remark in Rufo quoted by plaintiffs about deference to the district court was made by Justice O'Connor in a lone concurring opinion and was effectively rejected by the majority. Id. at 765. Concluding that the district court had erred, the majority did not pay any

particular deference to the district court judge, who had actively participated in the litigation for almost 20 years, and did not suggest that any such deference was required. Indeed, at one point, the majority declared that the district court was required "to defer to local government administrators, who have the 'primary responsibility for elucidating, assessing, and solving' the problems of institutional reform, to resolve the intricacies of implementing a decree modification (citations omitted)." Id. at 764.

Furthermore, unlike a Rule 60(b) modification decision, which is subject to appellate review under an abuse of discretion standard, United States v. Bank of New York, 14 F.3d 756, 758 (2d Cir. 1994), a district court's interpretation of a consent decree is a question of law "freely reviewable" by an appellate court. Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir. 1985). Thus, this court has made clear on many occasions that a district court's interpretation of the terms of a consent decree is subject to de novo review on appeal. United States v. O'Rourke, 943 F.2d 180, 186 (2d Cir. 1991); United States v. International Brotherhood of Teamsters, 931 F.2d 177, 182 (2d Cir. 1991); Berger v. Heckler. In fact, in O'Rourke, in the course of a contempt proceeding, this court flatly rejected the district court's interpretation of the terms of a long-standing consent decree despite the district court's lengthy involvement in the litigation.

CONCLUSION

For all of the above reasons, this court should 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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