Theresa B. Moser
Nancy Rosenbloom
The Legal Aid Society
199 Water Street, 3rd Floor
New York, NY 10038
212-577-3300
TBMoser@legal-aid.org
NRosenbloom@legal-aid.org

Sarah L. Cave
Reuben L. Borman
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, NY 10004
212-837-6000
cave@hugheshubbard.com
borman@hugheshubbard.com

Attorneys for Infant Plaintiff J.C.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MABLE RIVERA and ANTHONY RIVERA, individually and as next friends of E.S. and B.C., infants; and J.C., an infant, by her next friend ANDREA ZELLAN,

Plaintiffs,

-against-

JOHN MATTINGLY, individually and as Commissioner, MINA SHAH, individually and as review officer, MICHAEL WARREN, individually and as caseworker, CAROLYN WILLIAMS, individually and as supervisor; DIANA CORTEZ, individually and as manager; CITY OF NEW YORK, ANNY GARCIA, individually and as caseworker, FABIAN NJOKU, individually and as caseworker; ANDREA CUMMINGS, individually and as supervisor; REHEMA BUKENYA, individually and as associate vice president; FAMILY SUPPORT SYSTEMS UNLIMITED, INC., and JOHN JOHNSON, individually and as Commissioner,

Defendants.

06 Civ. 7077 (TPG)

PLAINTIFF J.C.'S MEMORANDUM OF LAW IN OPPOSITION TO THE FSSU DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF J.C.'S CROSS MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

REGULATIONS

Plaintiff J.C., by her next friend Andrea Zellan, submits this memorandum of law in opposition to the motion for summary judgment submitted by defendants Andrea Cummings, Rehema Bukenya and Family Support Systems Unlimited, Inc. (hereinafter collectively, "FSSU"), and in support of Plaintiff J.C.'s cross-motion for summary judgment against FSSU. J.C., a child who had lived in foster care with the Riveras, her relatives, for nearly her whole life and has since been adopted by them, was removed from their care by FSSU for almost nine months during 2006, in violation of her constitutional Fourth and Fourteenth Amendment rights not to be deprived of her family without due process of law and not to be seized illegally.

STATUTORY AND REGULATORY FRAMEWORK

Family Court Act Article 10

In New York State, responsibility for the protection of children rests with the State and the local child protective agencies. The State Office of Children and Family Services ("OCFS") oversees the local child protective agencies, including the New York City Administration for Children's Services ("ACS"). ACS and other local agencies may assign case management functions to private social services agencies. N.Y. Soc. Serv. Law § 371. ACS assigned J.C.'s case management functions to Family Support Systems Unlimited, Inc., an authorized agency.

The New York State Family Court Act (the "Act") establishes procedures for protecting children from injury or mistreatment and "safeguard[ing] their physical, mental, and emotional well-being." Fam. Ct. Act § 1011. If it appears that "immediate removal is necessary to avoid imminent danger to the child's life or health," a child protective agency may seek a court order directing temporary removal of the child. Id. § 1022(a). If there is not enough time to obtain a court order, and there is "reasonable cause" to believe that the child is in imminent danger, the agency may directly take or keep the child in protective custody. Id. § 1024(a).

The law prefers children to be placed with relatives. When a local child protective

agency removes a child from her home, the Family Court shall direct the agency to conduct an investigation to locate suitable relatives of the child with whom she might stay. Fam. Ct. Act §§ 1017(1), 1027(b)(i). Once a suitable relative is located, the Family Court: (1) places the child in the custody of the relative pursuant to Article 6 of the Act; (2) places the child directly with the relative pursuant to Article 10; or (3) remands the child to the commissioner of the child protective agency for placement with that relative. Id. §§ 1017(2)(a)(i-iii), 1027(b)(i)(A), (C). If the child is remanded to the commissioner, the court also orders the commissioner to conduct a twenty-four hour home study of the relative, and then approve the relative as a foster parent or, if not appropriate to do so, report that fact to the court "forthwith." Id. §§ 1017(2)(a)(iii), 1027(b)(i)(A). A relative within the third degree of consanguinity to the parent of a child in foster care is entitled, under certain circumstances, to a hearing to determine whether placement with that relative would be in the child's best interest. Id. § 1028-a.[1]

Department of Social Services Regulations Concerning Removal From Foster Homes

New York State Department of Social Services regulations are promulgated pursuant to New York State Social Services Law §§ 20(3)(d), 34(3)(f), and 378. They govern the removal of children from foster parents and provide for notice and an opportunity for the foster parent to be heard. 18 N.Y.C.R.R. §§ 443.3, 443.5. Except in circumstances where immediate removal is necessary in order to protect the health and safety of the child, the local social services official or private agency must provide the foster parent with written notice at least ten days prior to the planned removal of the child. Id. § 443.5(a)(1). The notice must advise the foster parent that she can request a "conference," with the child protective agency, may challenge the proposed

[1] The duty to investigate and locate relatives of children in foster care continues beyond the preliminary proceedings in a neglect or abuse (Article 10) case, through the dispositional phase. Id. §§ 1052(b)(i)(C), 1052-c, 1055(a).

removal at the conference, and may bring a representative with her. Id. § 443.5(a)(2). Once requested, the conference must take place within ten days. Id. § 443.5(b). A statement of a foster parent's rights to notice and to contest a removal of a child must also be contained in a foster care contract between an authorized agency and a foster parent. Id. § 443.5(e).

The Independent Review Protocol

Removing Children from the Foster Home

Pursuant to 18 N.Y.C.R.R. § 443.5(a)(3), ACS promulgated the Independent Review Protocol (Exh. 9 to the Declaration of Carolyn A. Kubitschek, dated November 5, 2010 ("Kubitschek Dec.")). In the case of a planned removal from foster parents, the Independent Review Protocol ("I.R. Protocol") requires that foster parents must receive notice of the proposed removal at least ten days in advance of the action. The protocol further provides for an "independent review" at which a foster parent may meet with the agency and challenge the proposed removal.

Removals of children in foster care must be done on notice to the foster parent, "except where the health or safety of the child[ren] requires that the child[ren] be removed immediately from the foster family home." I.R. Protocol § II.A. Foster parents, when faced with the planned removal of a foster child, may request one or more of the following, in sequence or simultaneously: (1) a Foster Care Agency Conference, (2) an independent review, and (3) a New York State fair hearing. Id. §§ II.B, III.A, V.C.

In the case of an emergency removal of foster children, a form CS-701D must be provided to the foster parent at the time of the removal or as soon as is practicable thereafter. I.R. Protocol § II.A.2. A foster parent whose foster child was removed on an emergency basis may challenge the action after the removal at an independent review, a fair hearing, or both. Id. §§ II.A.2, V.C. There is no requirement that a child or his or her representative receive timely or

adequate prior notice of an independent review requested by a foster parent. Id. § IV.C.

The Independent Review, ACS Investigation, and State Administrative Hearing

The I.R. Protocol provides that the independent review must be held within ten days of being requested. Id. § IV.A. ACS's Office of Confidential Investigations (OCI) has 60 days to complete an investigation into suspected child abuse or maltreatment, including within a foster home. Id. If OCI is conducting an investigation of a foster parent who requests an independent review of a removal, the Review will go forward within ten days even if the OCI report is not completed. Id. The Review Officer must issue a decision within five days of the review. Id. at § IV.D.

The child does not have a right to a lawyer or other representative at the independent review. The decision whether to permit a child to attend the independent review at all, and to present evidence, is left to the discretion of the Review Officer. A foster parent also has the right to contest the planned, non-emergency removal of a child from the foster home by requesting a New York State Fair Hearing, governed by New York State Social Services Law §§ 400 and 22, and implementing State regulations. There is no requirement that a child or his or her representative receive timely or adequate prior notice of a fair hearing requested by a foster parent, a child who has been removed does not have a right to request or participate in a Fair Hearing, and there is no provision for the child to remain in the foster home pending a Decision After Fair Hearing. See Form CS-701D, attached to I.R. Protocol.

ARGUMENT: PLAINTIFF J.C. IS ENTITLED TO SUMMARY JUDGMENT AGAINST FSSU AND THE FSSU CASEWORKERS, AND THE FSSU DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED

As demonstrated by Plaintiff J.C.'s Rule 56.1 statement and the supporting evidence, there is no issue of material fact in dispute preventing the entry of judgment on the law in favor of J.C. and against FSSU. See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 250-255 (1986).

For nearly three decades, the law of this Circuit has been that "children of custodial relatives possess a liberty interest in preserving the stability of their family and, accordingly, that they are entitled to due process protections when the government decides to remove them from the family environment." Johnson v. City of New York, No. 99 Civ. 0048, 2003 WL 1826122, at *6 (S.D.N.Y. Apr. 8, 2003) (citing Rivera v. Marcus, 696 F2d. 1016, 1024-25 (2d Cir. 1982)). These decisions echo the United States Supreme Court's holding in Moore v. City of East Cleveland that "the Constitution protects the sanctity of the [extended] family." 431 U.S. 494, 503 (1997). For reasons set forth in Points I and II below, the undisputed facts in this case establish that FSSU unlawfully deprived plaintiff J.C. of a liberty interest by interfering in her relationship with her great aunt and great uncle.

For reasons set forth in Point III below, the undisputed facts of this case also establish that, when FSSU unnecessarily and improperly took plaintiff J.C. from her home, it "seized" her in violation of the Fourth Amendment. See Kia P. v. McIntyre, 235 F.3d 749, 762-63 (2d Cir. 2000). Accordingly, FSSU's motion should be denied, and this court should award summary judgment to Plaintiff J.C..

POINT I: J.C. WAS DENIED DUE PROCESS OF LAW BY FSSU'S IMPROPER EMERGENCY REMOVAL AND FAILURE TO RETURN HER TO HER FAMILY

OCFS, through its administrative hearing body, the Bureau of Special Hearings, has already determined that FSSU's removal of J.C. from her home was "improper as it was arbitrary and capricious" and that it was "not a reasonable exercise of the [a]gency's discretion." Decision After Fair Hearing dated Dec. 13, 2006, at 12 (Exh. 13 to Kubitschek Dec.)

A. J.C. Had a Constitutionally Protected Liberty Interest in Maintaining a Family Relationship with her Great Aunt and Great Uncle, Who Were Also her Kinship Foster Parents and Who Have Since Adopted J.C.

The question whether plaintiff J.C. can possess a liberty interest in living with her extended family has been answered by the United States Supreme Court in the affirmative. Moore, 431 U.S. at 494 (finding a liberty interest in a grandmother's right to live with grandson). In Moore, the Court wrote: "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." Id. at 504; see also Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (discussing aunt's right to freedom from State interference in rearing her niece, noting that there is a "private realm of family life which the State cannot enter"); Rivera, 696 F.2d at 1016 (custodial half-sister and her siblings have liberty interests in maintaining bonds with one another).

It is also settled that a child can have a liberty interest in living with her foster parent who happens also to be a blood relation. Rivera, 696 F.2d at 1026 (children residing with their half-sister have a liberty interest in preserving the integrity of their extended family); A.C. and H.C. v. Mattingly, No. 05 CV 2986, 2007 WL 894268, at *5 (S.D.N.Y. Mar. 20, 2007) (children residing with their aunt possess a constitutionally protected liberty interest in the integrity of their kinship foster family); Johnson, 2003 WL 1826122, at *6 (custodial grandmother who is also a foster parent has liberty interest in caring for her foster grandchildren); Harley ex rel. Johnson v. City of New York, 36 F. Supp. 2d 136, 140 (E.D.N.Y. 1999), aff'd 208 F. 3d 203 (2d

Cir. 2000).[2]

1. A Liberty Interest Arises from a Combination of Biological Ties and Close Family Relationship.

The central inquiry in Rivera was whether the children's kinship foster parent "should be treated for purposes of procedural due process as a natural parent or a foster parent." Rivera, 696 F.2d at 1017. The Rivera court looked *first* to the foster parent's biological ties to her siblings and then to other factors, including to the foster parent's role as a "surrogate mother" to the children. Id. at 1018. After considering that the foster parent was the children's half-sister, that the children had lived with their half-sister since before she became their foster parent, and that there was no tension between the rights of the children's parents and their foster parent, the Second Circuit concluded "[i]f the liberty interest of children is to be firmly recognized in the law, *we must ensure that due process is afforded in situations. . . where the state seeks to terminate a child's long-standing familial relationship.*" Id. at 1026 (emphasis added).

Pursuant to Rivera, plaintiff J.C. clearly has a constitutionally protected liberty interest in maintaining the integrity of her relationship with her great aunt and great uncle. First, the Riveras are blood relatives. R 56.1 ¶¶ 158, 160. Second, it is indisputable that her great aunt and great uncle were asked to become J.C.'s foster parents *because* of their blood relationship. FSSU nevertheless makes the novel but unsubstantiated argument that J.C. lacks a liberty interest in her kinship foster family because she was not living with the Riveras prior to a foster care agreement. (FSSU Mem. at 7.) This argument ignores the biological relationship between J.C. and her great aunt and great uncle. FSSU seems to erroneously believe that it is not the biological relationship between the child and her relative caretakers that gives rise to a liberty

[2] Unlike foster parents with biological relationships to their foster children, the courts have not found a liberty interest for non-relative foster parents. See Rodriguez v. McLoughlin, 214 F.3d 328, 337 (2d Cir. 2000), cert. denied 532 U.S. 1051 (2001).

interest, but only the duration of their residence together before the foster care contract.

ACS is *required*, pursuant to Family Court Act § 1017, to locate "suitable relatives" with whom children might be placed. As the Supreme Court stated in Smith v. OFFER, the intent of New York State's foster care program is to "provide[] substitute *family care* . . . for a child when his own family cannot care for him . . . ." 431 U.S. 816, 823 (1977) (quotation marks omitted) (emphasis added). To thereafter discount the biological relationship *because the foster care contract has been signed* is to turn the tables on the kinship resource and subjugate her biological ties to the foster care contract. Nothing could be further from the purpose behind Family Court Act § 1017's mandate to seek out relatives, or from the holding of Rivera.

J.C.'s relationship with the Riveras was not created by the state. They enjoyed a close relationship even before J.C. came to live with the Riveras. R 56.1 ¶¶ 146, 153. When the State determined that her mother could no longer care for her, the Riveras welcomed J.C. as one of their own children. R 56.1 ¶¶ 162, 163, 165. J.C. was a member of the Riveras' household – a family that included several cousins – from the age of one until she was removed from their home at the age of 8 ½. (Fact 9, 163, 165.) Theirs was virtually the only home J.C. had ever known. It would arbitrarily narrow the constitutional protections upheld in Rivera to afford them only to children who lived with their relatives before the relatives became foster parents. Indeed, that suggestion has already been rejected.[3] See Finch v. City of New York, 591 F. Supp. 2d 349, 362-63 (S.D.N.Y. 2008) (denying summary judgment because a jury could find a liberty interest where grandmother had offered herself as foster parent and visited regularly, but never actually lived with child); A.C. and H.C. v. Mattingly, 2007 WL 894268, at *5 (finding liberty interest

[3] To the extent that the FSSU defendants argue that the District Court in Finch interpreted Rivera to apply only to families who live together before the foster care contract is signed (FSSU Mem. at 6) they ignore the fact that that court refused to find, as a matter of law, that the family in that case, which had never lived together, did not have a protected liberty interest under Rivera.

where children were placed with kinship foster parents from birth).

Finally, there was no tension between J.C.'s biological mother's interests and those of the Riveras. In 2005, J.C.'s mother executed, and the New York Family Court approved, a surrender of her parental rights to J.C. *on the condition* that the Riveras adopt J.C.. R 56.1 ¶ 180. Like the mother in Rivera v. Marcus, J.C.'s mother wanted her to be with her family. Accordingly, at the time of the events at issue here, the permanency plan for J.C. was for her to be adopted by the Riveras. R 56.1 ¶ 181.[4]

FSSU's argument that the Riveras' plan to adopt J.C. is irrelevant to this court's analysis is absurd. (FSSU Mem. at 8.) Aside from demonstrating the closeness of their family relationship, the adoption plan, supported by J.C.'s mother, demonstrates the unity of interests between J.C.'s mother and the Riveras. FSSU's reliance on the Second Circuit's holding in Rodriguez v. McLoughlin, 214 F.3d 328 (2d Cir. 2000), cert. denied 532 U.S. 1501 (2001), is thus inapposite; there, the Second Circuit found no liberty interest in a foster parent's relationship with a biologically *unrelated* foster child.

2. This Court Has Recognized J.C.'s Liberty Interest in the Integrity of Her Family Unit and Found J.C. was Denied Due Process.

FSSU should be barred from arguing that J.C. does not have a liberty interest in her family relationship with the Riveras because this court has already found that a liberty interest exists:

> At the time in question, the following principles were clearly established in the law, principally by the Second Circuit's decision in Rivera v. Marcus, 696 F.2d 1016 (1982). Under Rivera, kinship foster parents "have a liberty interest in preserving the integrity and stability of [their] family." 696 F.2d at 1024-25. Thus, when the state decides to remove a child from a foster home and the foster

[4] Once this court ordered J.C.'s return home, the adoption process was resumed. Mable and Anthony Rivera adopted J.C. in June 2007. R 56.1 ¶ 181.

> parent is a relative of the child, the foster parent is entitled to due process protections. Id.

(Op. and Order Denying Def. Johnson's Mot. for J. on the Pleadings, ECF No. 86, March 24, 2009) ("March 24, 2009 Order"). As early as the initial hearing in this case, this Court, after eliciting some of the facts, recognized that this family is entitled to constitutional protection:

> If an aunt or a grandmother or great-aunt or some family member has really furnished the home for children, certainly if that had been done from infancy…for a period of years, then there is a constitutional right, I believe . . . There is a constitutional right to be protected against arbitrary removal of those children, and that [sic] there is some due process right, not the same as a mother or father, but there is some due process right….I haven't heard all the facts, but it's totally useless to say there is no constitutional right because the cases say there is.

Kubitschek Dec. Exh. 1, Tr. of Proceedings, Sep. 14, 2006, at 24-25.; see also Kubitschek Dec. Exh. 3, Tr. of Proceedings, Dec. 11, 2006, at 38 ("what I have concluded is that due process required resolution much earlier than now, and surely much early than 60 days from now as to whether the removal was proper . . . . it is my conclusion that there has been a violation of due process rights . . . .").

B. FSSU's Improper "Emergency" Removal of J.C. from Her Home and Failure to Return Her for Almost Nine Months Violated J.C.'s Right to Be with Her Family Without Due Process of Law

After a liberty interest has been established, the question turns to what level of process is due. Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976); Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970); Rivera v. Marcus, 696 F.2d at 1026-27. Certain basic requirements are beyond dispute: "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews, 424 U.S. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); Rivera, 696 F.2d at 1026-27.

1. The Circumstances at the Time of the Decision to Remove Did Not Warrant an Emergency Removal

As discussed above, pursuant to 18 N.Y.C.R.R. § 443.5(a)(1), a social services official or

authorized agency acting must provide ten days written notice of the intention to remove a child from a foster home "except where the health or safety of the child requires that the child be removed immediately." ACS instructs its contract agencies that in the case of an immediate or emergency removal, written notice "should be given at the time of the removal or as soon as is practicable thereafter." I.R. Protocol § II.A.2. Consistent with 18 N.Y.C.R.R. § 443.5(d), ACS also directs foster care contract agencies that if an Independent Review is requested, the child may not be removed until three days after the Independent Review decision is sent. I.R. Protocol § II.A.1.

By conducting an immediate removal where J.C.'s health and safety did not require it, FSSU deprived J.C. of the only available pre-deprivation process. When FSSU received a report that Leandro Johnson was having sex with one of the older children in the Rivera home, FSSU had known the Rivera family for many years. Although there had been several reports of maltreatment against the Riveras in the past, all but one of the reports was unfounded -- meaning that they were not supported by "some credible evidence," N.Y. Soc. Serv. Law §§ 424-d, 412(6) & (7) -- and FSSU never removed the children from the Riveras' care. R 56.1 ¶¶ 188-191. The one report that was ever substantiated was later expunged on appeal. R 56.1 ¶¶ 192-193. Perhaps the most compelling evidence that FSSU was untroubled by the past unfounded reports against the Riveras is the fact that the agency was planning for the Riveras to adopt J.C. when she was removed, and continued with that plan until the Riveras adopted J.C..

FSSU's decision to remove J.C. was unreasonable in several ways. First, the allegations had nothing to do with J.C., and J.C. stated the allegations were not true. R 56.1 ¶¶ 235, 236. In addition, the other children in the Rivera home gave conflicting account of the events, diminishing the credibility of the allegations. R 56.1 ¶¶ 213, 230. Further, after the children

were examined at the hospital, FSSU was told by hospital personnel that there was no evidence of sexual abuse. R 56.1 ¶ 229. Laporsha, the alleged victim of sexual abuse, also denied the allegations. R 56.1 ¶ 213. And perhaps most important, the alleged perpetrator of the assault, Leandro Johnson, did not reside in the Riveras' home. R 56.1 ¶ 200. Assuming they had genuine concerns, FSSU could easily have taken measures short of removal to ensure that Mr. Johnson would not be a threat to J.C.. They could have secured the Riveras' commitment – which they later did (R 56.1 ¶ 251) – not to permit Mr. Johnson in the home. They could have asked the Riveras to seek an order of protection against Mr. Johnson in Family Court. If they had any concerns that the Riveras would not bar Mr. Johnson from their home, the agency could have made periodic unannounced visits to their home. Each of these measures would have been consistent with ACS policy to avoid disrupting a foster care placement and to remove only if no available measures would preserve the placement. R 56.1 ¶ 276. Given all of the circumstances, J.C.'s health and safety clearly did not require an immediate removal.[5] FSSU's failure to take any steps to avoid an immediate removal interfered with J.C.'s liberty interest in remaining with her family and deprived J.C. of any possibility of having a meaningful pre-deprivation hearing.[6]

This interference with J.C.'s liberty interest is critical not only because it set in motion the chain of events that deprived J.C. of her family for almost nine months, but because the opportunity to be heard before being torn from her family is substantially more meaningful for a young child. See Rivera v. Marcus, 696 F.2d at 1026-27. Moreover, the improper emergency

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[5] The State Administrative Law Judge agreed. See Exh. 14 to Kubitschek Dec., Decision after Hearing, at 8.

[6] Although the Independent Review itself is constitutionally inadequate, among other reasons, because it does not afford the child a right to request a review or to participate in it, J.C.'s concerns might have been raised in a pre-removal Independent Review. By removing J.C. without prior notice, the FSSU defendants deprived her of that possibility.

removal precluded any mitigation of harm that could have been done by preparing J.C. for a planned removal.

2. The Emergency Removal and Failure to Provide Notice Deprived Plaintiff J.C. of a Prompt Post-Deprivation Hearing

FSSU's failure to provide the Riveras with written notice of the reasons for removal and of their rights to contest the removal also deprived plaintiff J.C. of a prompt post-deprivation hearing. FSSU failed to follow ACS policy when they did not provide written notice at the time of removal. R 56.1 ¶¶ 248, 249.) Because the written notice conveys both the reasons for and the mechanisms for challenging a removal, FSSU's failure directly impaired the Riveras' ability to contest the removal. It was not after J.C. was removed that the Riveras learned from her Family Court attorney that they could request an Independent Review. R 56.1 ¶¶ 253, 254.) Moreover, by neglecting to detail the reasons for removal on a written notice, FSSU impaired the Riveras' and J.C.'s ability to prepare for the Independent Review.[7]

3. The FSSU's Nine-Month Removal of J.C. from Her Home Was Not "Temporary" and Deprived Her of Liberty without Due Process

FSSU argues that because the removal was only "temporary," they cannot be deemed to have interfered with J.C.'s right to family stability. FSSU Mem. at 10-11, 13-14. Even assuming against logic that the removal could be described as temporary, FSSU's assertion is incorrect. FSSU relies upon several cases that are inapposite because they deal with brief removals from parents. See Nicholson v. Scopetta, 344 F.3d 154 (2d Cir. 2003); Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999); JC v. Mark Country Day Sch., No. 03-CV-1414, 2007

[7] As noted above, J.C. did not have in independent right to request an Independent Review. To the extent that J.C.'s Family Court attorney might have been able to go to Family Court to challenge her removal based on information she received from J.C. and the Riveras, her ability to promptly prepare such a challenge was also impaired by the FSSU defendants' failure to provide written notice.

U.S. Dist. LEXIS 4716 (E.D.N.Y. Jan. 23, 2007); Sutton v. Tompkins Cty., No. 5:03-CV-0664, 2007 U.S. Dist. LEXIS 71236 (Sept. 25, 2007). When a child is removed from a parent, as the Second Circuit has "explained, the *ex parte* removal process is designed to safeguard the child until a court hearing is practicable, and judicial confirmation must be obtained 'forthwith.'" Nicholson, 344 F.3d at 172 (citing Fam. Ct. Act §§ 1022, 1026(c)). Unlike the plaintiffs in Nicholson, J.C. and Mable and Anthony Rivera, as a kinship foster family, were not afforded due process soon after the "emergency" removal by having a Family Court judge rule on the appropriateness of the removal forthwith. Under Rivera v. Marcus, because of her relationship with her great aunt and great uncle, J.C. is entitled to "substantial due process protection." 696 F.2d at 1028. But New York law does not require ACS and FSSU to seek court approval when they remove a child from a kinship foster home.

As stated earlier, New York requires that a kinship foster parent be given written notice of the reasons for a removal and how she can challenge the removal. Neither the applicable regulations nor the I.R. Protocol distinguishes between "permanent" and "temporary" removals or excuses FSSU from providing written notice to the Riveras because they removed J.C. "temporarily."

Nor is FSSU absolved from responsibility because the Independent Review upheld the original removal. Between that decision and July 14, 2006, when the OCI report was issued, FSSU did nothing to attempt to reunify J.C. with her family. After the OCI investigation report was issued, deeming the allegations against the Riveras unfounded, FSSU could and should have sought agreement from ACS to return J.C. to her home. But FSSU failed to act until late August 2006. R 56.1 ¶¶ 277, 280. Even when FSSU finally decided to return J.C. to her home and family on August 25, 2006, they failed to clear that decision with ACS with a tragic result. J.C.

was brought to the agency with her bags packed, eager to return home, only to be told that she could not be with her family because FSSU had failed to get ACS clearance. R 56.1 ¶¶ 283-286. FSSU's actions in the months after the removal exacerbated the harm that J.C. suffered from the removal. After August 25, 2006, there is no record that FSSU made any efforts to work out their difference with ACS about whether J.C. should be returned.

4. The Pendency of the ACS Investigation Did Not Absolve FSSU of Responsibility for the Continuing Violation of J.C.'s Due Process Rights

Citing Nicholson v. Scoppetta, 344 F.3d 154, FSSU incorrectly argues that once it called the State Central Register for Child Abuse and Maltreatment ("SCR"), ACS was solely responsible for investigating the allegations and making decisions about where J.C. should reside. (FSSU Mem. at 15-17.) The agency's continuing responsibility for J.C. was not suspended at that point. Once again, FSSU overlooks the critical fact that the court in Nicholson was addressing removals of children from their parents, rather than from kinship foster parents. 344 F.3d at 158. In those circumstances, there is no agency other than child protective services (in New York City, the ACS Division of Child Protection) involved in planning for the child or weighing in on where the child should reside. Soc. Serv. Law § 424(9.) By contrast, when the SCR receives a report concerning a child who is in a foster home, the investigation is governed by Social Services Law §§ 424-b, 424-c, which allow the possibility that if a placement is going to change, both the investigative worker and the foster care agency should be involved in that decision.

In J.C.'s case, FSSU acknowledges that they, and not OCI, made the decision to remove J.C. from her family. FSSU Mem. at 10, 13-14. But regardless of whether OCI or the agency made the initial decision to remove J.C., FSSU had responsibility for her care before the removal, and retained the responsibility afterward for planning for J.C.'s future. They were

required to appear in Family Court regularly to report on, among other things, J.C.'s health and well-being, the status of her placement, and progress toward her permanency goal of adoption. N.Y. Fam. Ct. Act §§ 1088, 1089. FSSU could not possibly carry out these responsibilities without ever being able to take a position on where J.C. should reside. Yet FSSU claims that "the matter was out of FSSU's hands." (FSSU Mem. at 16.) This contention ignores the fact that OCI is a part of ACS, and that FSSU is a foster care agency under contract with ACS. Just as the I.R. Protocol provides for resolving disagreements between the ACS Office of Case Management and the Independent Review officers,[8] a contract agency for ACS should be expected to communicate with other parts of ACS about appropriate placement decisions. There is nothing in the record that a contract foster care agency may not communicate with ACS to obtain agreement to return a child to her kinship foster home during an OCI investigation.

C. The Independent Review and Fair Hearing Did Not Provide J.C. with Due Process

The Independent Review and State Fair Hearing failed to furnish plaintiff J.C. with any of the elements of due process before depriving her of her liberty interest. As discussed above, the private interest affected by the official state action in this case – that of plaintiff J.C. in maintaining a family relationship with her great aunt and great uncle – is exceptionally substantial. See Rivera v. Marcus, 696 F.2d at 1027.

The "risk of erroneous deprivation" is also significant in the instant case. In Duchesne v. Sugarman, 566 F.2d. at 828 n26, the Second Circuit noted that "the 'fact specific' nature of the determination of the fitness of a [caretaker] presents a grave risk of erroneous deprivation when the action of the state is not promptly reviewed." Limited pre-termination procedures increase the risk of erroneous deprivation. See Rivera v. Marcus, 696 F.2d at 1027. Here, ACS's

[8] I.R. Protocol §5.A.

Independent Review is the only available pre-removal remedy when children are removed on a non-emergency basis. When ACS or its agent decides there is an emergency, there is no pre-removal review at all. ACS limits its Independent Review procedures in many of the same ways that the State of Connecticut did in Rivera: the foster parent was denied the right to counsel, to examine adverse witnesses, and to a neutral arbiter. See Rivera, 696 F.2d at 1027.

While the procedures for the foster parent are merely deficient, as to the foster child they are nonexistent. A foster child has *no* right to request or to participate in a pre or post-removal Independent Review, or to be given notice of the reasons for her removal. The child's participation is left to the discretion of the Independent Review officer. Furthermore, the child has *no* right to receive notice of the hearing. If the child (or his or her Family Court attorney) does happen to receive timely notice and is permitted to appear, as J.C.'s Family Court attorney did in this case, the child has no right to present or cross-examine witnesses and no right to subpoena witnesses or documents. Similarly, J.C. had no right to request or even participate in the State's Fair Hearing. Moreover, even though the administrative law judge concluded that J.C.'s removal was arbitrary and capricious, the State would not order J.C.'s return to her family based on FSSU's abuse of discretion, but would only direct a new 60-day investigation on J.C.'s appropriate placement. As this Court held, that determination did not provide due process. R 56.1 ¶¶ 310, 312-15.

Even if the protections afforded by the Independent Review and State Fair Hearing were Constitutionally adequate, the acts of FSSU interfered with J.C.'s and the Riveras' ability to obtain a prompt review. By failing to provide the Riveras with notice at the time of the removal

or immediately thereafter,[9] FSSU prevented a prompt Independent Review. In August 2006, by failing to appear FSSU also deprived the Riveras of a prompt Fair Hearing. It is simply unfathomable that this process could pass constitutional muster as to plaintiff J.C..

POINT II: FSSU VIOLATED THE FOURTH AMENDMENT BY UNLAWFULLY SEIZING J.C. FROM HER HOME

The Fourth Amendment applies to removals of children "by a government-agency official during a civil child-abuse or maltreatment investigation." Kia P., 235 F.3d at 762 (citing Tenenbaum, 193 F.3d at 602). In considering whether a seizure occurred, the Court must look to "all of the circumstances surrounding the incident," and examine what "a reasonable person would have believed," Kia P., 235 F.3d at 762 (quotation marks omitted), rather than looking merely to the issue of legal custody as FSSU suggests. This review should include the perspective of the child who has been removed from her caregivers, and from that perspective, the circumstances of a removal from a kinship foster home are far more like a removal from a biological parent than one from the foster home of a non-relative.

Except for the months between her improper removal and the point when she was allowed to return, Plaintiff J.C. has resided in the Riveras' home at all times since she was 14 months old. Initially, J.C. lived there along with her mother, and subsequently, as FSSU's records indicate, she was able to maintain her relationship with her mother because her great aunt and uncle ensured that J.C. was able to visit regularly with her mother in the home. When FSSU took J.C. away from the Riveras, they took her away from her family and essentially the only

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[9] The FSSU defendants call their failure to provide written notice a "minor oversight" that was "without significance" because "the foster care agreement between the Riveras and FSSU informed the Riveras of their right to an Independent Review and a Fair Hearing." FSSU Mem. at 19. The same regulation required FSSU to include the notice in the foster care contract. 18 N.Y.C.R.R. § 443.5(a), (e). The regulation in no way suggests that the general notice of rights in a contract substitutes for written notice at the time of the removal.

home she had ever known.

Defendant FSSU argues only that "because the children were in the State's legal custody, the Fourth Amendment did not apply." FSSU Mem. at 21 (citing A.C., 2007 WL 894268). In A.C. and in the cases the Court relied on in its decision (Hunt v. Green, 376 F. Supp. 2d 1043 (D.N.M. 2005); Gedrich v. Fairfax Cty. Dep't of Family Servs., 282 F. Supp. 2d 439 (E.D. Va. 2003)), the defendants argued that there may only be one seizure per foster care case, which happens at the time the child initially enters foster care. This contention was rejected by the Second Circuit in Kia P.. There, after being removed by the government from her parent at the hospital (the first seizure), the Court held that the child was seized again even though she remained physically at the same hospital, when the state kept the child in the hospital even after "the perceived danger of harm . . . from her medical condition ended." 235 F.3d at 762. At that point the private hospital became a state actor, holding the child to make a determination of "possible danger of parental abuse." Id. The Court found the very short-term seizure to be reasonable, but clearly found that it was a seizure. Id. 762-63.

In addition to the fact that that there can be more than one "seizure" during a child's time in foster care, the Court must consider the totality of the circumstances and must view the incident from the perspective of the person being seized. "A 'seizure' occurs where, '*in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.*'" Kia P., 235 F.3d at 762 (emphasis added) (quoting United States v. Mendenhall, 446 U.S. 544 (1980) (plurality opinion of Stewart, J.)). Considering the view of the reasonable person means considering each case according to its own facts. Here, the fact that J.C. was in State custody at the time the State actors abruptly took her from her home and family members does not preclude a finding of an unlawful seizure. Instead, the facts of this case

overwhelmingly support a conclusion that the reasonable person – and certainly the reasonable eight-year-old child – would have felt she was not free to leave the defendant agencies and go back to her relatives' home once FSSU had physically taken her from her aunt and uncle's care.

The child's kinship relationship with her foster parents is a relationship with which the State may not interfere, except in a manner consistent with due process and the Fourth Amendment. Certainly if the child had already been adopted or if she were in the relative's custody under a custody order, those rights would exist. The child's connection with her family and her constitutional rights are not diminished merely because the child lived with her relatives as part of a foster care case.

J.C. was placed with her great aunt and uncle at age one. Their home is her home. Her feeling that they are her family and her permanent home could only have become stronger during the time leading up to the removal, because the record demonstrates that J.C. knew that she was going to be adopted by the Riveras, that her biological mother supported the adoption, and that all of the necessary steps and paperwork had been completed by FSSU. At the time, the family was simply waiting for the adoption to be finalized by a judge. Tellingly, at no point leading up to and even after the removal, did FSSU indicate concern or question the Riveras' adoption of J.C., which was finalized in June 2007. R 56.1 ¶ 302. Defendant FSSU supported, encouraged, and through its own efforts secured this permanent relationship.

J.C. was physically taken by government actors from her home and family, without a warrant or court order, and she was not permitted to return to live in their home until eight and one-half months later. The Supreme Court in Graham v. Connor held that a seizure that triggers Fourth Amendment protections "occurs . . . when government actors have, by means of physical force or show of authority . . . in some way restrained the liberty of a citizen." 490 U.S. 386 at

395 n.10 (1989) (quotation marks omitted). There is no doubt that this was a seizure. The critical inquiry, then, is whether this particular seizure was unreasonable, and therefore unconstitutional.

The Second Circuit has declined to endorse a specific standard for determining whether the seizure of a child during a child abuse or maltreatment investigation is reasonable. In deciding both Tenenbaum and Kia P., the court deemed it unnecessary to address "[w]hether such a seizure requires probable cause, or whether it is subject to a 'less stringent reasonableness requirement' due to the 'special needs' of child protection agencies, or whether a seizure must be justified by 'exigent circumstances.'" Kia P., 235 F.3d at 762 (citing Tenenbaum, 193 F.3d at 603-05). See also, People United for Children, Inc. v. City of New York, 108 F. Supp. 2d 275, 300 (S.D.N.Y. 2000); Van Emrik v. Chemung Cty. Dep't of Soc. Servs., 911 F.2d 863, 867 (2d Cir. 1990) (Fourth Amendment concerns implicated because no "probable cause " for an arrest and no risk that child's condition would change while court order obtained).

Regardless of which test is applied, however, the effectuation of an "emergency" removal of a kinship foster child from his or her home in the absence of a true emergency can never be considered reasonable and is thus an unconstitutional seizure. When defendants Cummings, Garcia and Bukenya made the decision to remove J.C. there was no exigent circumstance. Although unconventionally done, Ms. Rivera engaged medical personnel to determine whether any of the children showed symptoms or physical signs of sexual abuse. Medical examination revealed that they did not. R 56.1 ¶92. When asked about the alleged abuse, J.C. stated she had no knowledge of it nor had she witnessed or been the victim of any abuse by Mr. Johnson. R. 56.1 ¶99. Although Ashley made statements that rightly caused concern, at the time the case workers chose to remove the children from the home, the accusations of sex abuse had been

denied by the alleged victim, Laporsha. R. 56.1 ¶76. Given the totality of the circumstances, there was no reasonable basis to conclude that J.C. was at immediate risk of neglect or abuse. Thus, the "emergency" removal, without a warrant or court approval, violated J.C.'s rights.

FSSU essentially argues that there may never be an unconstitutional seizure of a child from a kinship foster home (because the child has already been seized once by being placed in foster care initially). The controlling case law simply does not support the argument that there can never be a Fourth Amendment violation – no matter how egregious the conduct of the government actors – when a child is summarily removed from the foster home of relatives. The reasoning of the Court of Appeals in Tenenbaum and Kia P. must prevail in a kinship foster care context; otherwise, children in foster care with relatives could be removed at moment's notice, even where no risk exists, without regard for the family relationship or their emotional well being. By removing her from her home without a warrant or court order, when there was no imminent risk, FSSU violated J.C.'s Fourth and Fourteenth Amendment rights.

POINT III: THE INDIVIDUAL FSSU DEFENDANTS ARE NOT IMMUNE FROM SUIT

The FSSU defendants Cummings, Garcia and Bukenya contend that they are immune from suit under the doctrine of qualified immunity. Because the caseworkers were aware of and violated J.C.'s clearly established constitutional rights, they should not be immune.

Plaintiff J.C. asserts that the individual workers violated her rights secured by federal law, namely her constitutional right not to be deprived without due process of law of her liberty interest in her family relationship, and her constitutional right to be free from unreasonable seizure. J.C. alleges that the caseworkers are government actors, which is undisputed by them[10], and that they are personally liable for removing her from her family in violation of her clearly

[10] FSSU Mem. at 22 n. 2.

established rights. The FSSU caseworkers' claim of qualified immunity must fail, because J.C.'s constitutional rights were clearly established at the time of the removal, and a reasonable official would have known that removing J.C. from her home, given the facts of this case, violated those rights. Pearson v. Callahan, 129 S.Ct. 808 (2009) (immunity found but standard clarified). The Supreme Court characterized qualified immunity as "balanc[ing] two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Id. at 815. Here, the FSSU caseworkers – as the State's administrative law judge confirmed – exercised their power irresponsibly.

It is law of the case that there is a "clearly established right" of due process at stake here for the purposes of evaluating qualified immunity. When this Court denied Defendant Johnson's motion for judgment on the pleadings, the Court held that then-Commissioner Johnson was "not entitled to immunity on any of the grounds asserted in his motion." (March 24, 2009 Order at 8.) In that Order, this Court, applying the Supreme Court's direction in Pearson, held that the Riveras, as plaintiff kinship foster parents, alleged facts constituting a violation of a their due process rights attaching to the liberty interest in preserving family integrity, in a situation where "the state decides to remove a child from a foster home and the foster parent is a relative of the child." Id. at 7, citing Rivera v. Marcus, 696 F.2d at 1024-25. This Court further held that this constitutional right is "clearly established" by virtue of having "been defined clearly enough for it to be 'apparent' to a reasonable official 'that what he is doing violates that right.'" Id. at 6, (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). The liberty interest in preserving family integrity belongs to children as well as adults. Johnson, 2003 WL 1826122, at *6 ("[c]hildren of custodial relatives possess a liberty interest in preserving the stability of their

family and, accordingly, that they are entitled to due process protections when the government decides to remove them from the family environment.").

Plaintiff J.C. alleges that when a child is removed from a foster parent who is a relative, due process protections attach, including the right to a hearing, notice of the removal and the reasons for it, the opportunity to contest the decision, and the right to a written decision from an impartial decision maker. "Under Rivera," this Court held in this case, "[t]his hearing should occur prior to removal, unless 'exceptional circumstances' preclude that." (March 24, 2009 Opinion at 7, quoting Rivera at 1028-29.) Plaintiff J.C., as a child, alleges due process violations that go even further than those of her foster parents, as current policy and practice of ACS and OCFS afford a child who is removed from her home no opportunity at all to request an Independent Review from ACS or an administrative "fair hearing" from OCFS. (Compl. ¶¶ 108-11.)

Ruling on the Riveras' allegations of due process violations against the State OCFS Commissioner, this Court found these rights to be established by Rivera and held: "A reasonable official would have known of these rights." (March 24, 2009 Order at 8.) The conclusion should be no different for the FSSU caseworker defendants, who are charged with knowing that children in foster care with relatives have a clearly established right in the integrity of their families, and who know that they violate that right if they remove such children from their relatives' care without any notice or an opportunity to contest, in the absence of exceptional circumstances. Certainly, a reasonable, trained caseworker "would have known of these rights."[11]

Given the violations of J.C.'s clearly established constitutional rights, the only question left to determine is whether the FSSU caseworkers should receive immunity from liability

[11] JC's right to be free from unreasonable seizure in violation of the Fourth Amendment is similarly clearly established. See Point II, supra.

because it was somehow not apparent to them that what they did violated those rights. The caseworkers' contention that the decision to remove her was a reasonable exercise of discretion should not provide them with qualified immunity, given the facts of this case. There is no doubt that caseworkers have discretion in exigent circumstances like these, and that they must make difficult decisions, but those decisions must not be arbitrary or capricious and must not run afoul of clearly established constitutional rights.

While FSSU characterizes the caseworkers' decision as choosing "to remove the children temporarily so that cooler heads might prevail," and argues that they should not have been expected to wait until they had "complete and perfect information," (FSSU Mem. at 10) the facts as alleged by J.C., and as supported by the evidence, demonstrate that this removal of J.C. was an improper exercise of discretion. When they decided to take J.C. from her family, the caseworkers knew, on the same day as the allegation of sexual abuse of a different child, that the hospital's medical examination showed no signs of sexual or other abuse of J.C.. R. 56.1 ¶92. They also knew, at the time they took J.C. from her family and placed her in the care of strangers, that the alleged perpetrator was not going to be in the home. R. 56.1 ¶113 The fact that FSSU and the caseworkers then kept J.C. in foster care with strangers for more than eight months only compounds the harm caused by their violation of her due process rights. Shockingly, the caseworkers did not return J.C. to her family even after the OCI investigation found the allegations of abuse were unfounded, and *even after the State administrative law judge found after a hearing that their initial removal had been arbitrary and capricious.* R. 56.1 ¶157. J.C. was only returned home to the Riveras after this Court directed FSSU to return her. R. 56.1 ¶161. The FSSU caseworkers should not be granted qualified immunity.

FSSU erroneously claim immunity under New York Social Service Law §419, which

protects those making good faith efforts to enforce state child abuse laws. FSSU Mem. at 23-24. As this Court recognized recently in Finch, however, "the Supreme Court has rejected state immunity defenses to section 1983 claims, holding that '[a] construction of [section 1983] which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise.'" Finch, 591 F.Supp.2d at 364 and nn. 93-94, citing Martinez v. State of Cal., 444 U.S. 277, 284 n. 8 (1980) (quotation marks and citation omitted). FSSU has no immunity from suit based on state law.

CONCLUSION

For all of the forgoing reasons, plaintiff J.C. requests that this Court (1) deny FSSU defendants' Motion for Summary Judgment, (2) grant plaintiff J.C.'s Motion for Summary Judgment on liability, and (3) order any other relief it deems appropriate.

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The Legal Aid Society
Steven Banks, Attorney-in-Chief
Theresa B. Moser, of counsel
Nancy Rosenbloom, of counsel

By: _____/s/_____
Theresa B. Moser
199 Water Street, 3rd Floor
New York, NY 10038
212-577-3300
TBMoser@legal-aid.org

Hughes Hubbard & Reed LLP
Sarah L. Cave
Reuben L. Borman
One Battery Park Plaza
New York, NY 10004
212-837-6000
cave@hugheshubbard.com
borman@hugheshubbard.com

Attorneys for Infant Plaintiff J.C.