To be argued by:
ROBERT B. CALIHAN

(New York County Index No. 2307/85)

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division--First Department

WILLIAM PALMER, REGINALD BROWN, HAROLD FREDERICKS, JOSEPH A. MORGAN, GERVANE A. NEGRON (also known as GIOVANNI A. NEGRON), MIGUEL ACOSTA, VERNON RICKS, HUGH LESLIE, MICHAEL CONTARDI and BRISCO DAWKINS, on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

-against-

MARIO M. CUOMO, as Governor of the State of New York, CESAR A. PERALES, as Commissioner of New York State Department of Social Services, EDWARD I. KOCH, as Mayor of the City of New York and GEORGE GROSS, as Administrator/Commissioner of the City of New York Human Resources Administration,

Defendants-Appellants.

BRIEF OF PLAINTIFFS-RESPONDENTS

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BRIEF OF PLAINTIFFS-RESPONDENTS

PRELIMINARY STATEMENT

The Municipal Appellants' Brief rests upon the proposition that Special Term usurped the powers of the executive branch, and trampled on the City's prerogatives by instructing it how to run the foster care system during the pendency of this litigation, with grave consequences for the

separation of powers in this State. The proposition is nonsense.

Special Term found, on a motion for a preliminary injunction, that there was substantial merit to the claim made by six discharged and three soon-to-be-discharged foster children that the State and City appellants had breached their statutory duties (i) to prepare the respondents for independent living outside of the foster care system and (ii) to "supervise" those respondents who had already been discharged to independent living.*

Appellants' breach of their statutory duties to the discharged respondents was particularly blatant: the respondents proved that following their discharge from foster care, they had never been contacted by or on behalf of the appellants. Far from supervising these former foster care children as required by statute, the appellants did not even know if they were dead or alive, housed or wandering the streets, and with or without some means of lawful

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* The City appellants repeatedly and erroneously assert that Special Term specifically ordered that the appellants provide the discharged respondents with food, housing and clothing and continued foster care. See, e.g., Municipal Appellants' Brief ("City Brief"), at 34, 37, 44, 51. The City appellants err. Special Term did not specify any basic services that the appellants were to provide the discharged respondents. See infra, p. 13. Nor did it order continued foster care for them. Id.

support. Indeed, left to their own devices -- and woefully unprepared by the appellants for "independent living" -- the discharged respondents were living and sleeping in the streets and in the parks, abandoned buildings, and subway stations of New York City.

Special Term also found, in a reasoned and well-founded exercise of its discretion, that respondents risked irreparable harm if interim relief designed to ensure the survival of the respondents pendente lite were not granted, and that the balance of equities tipped sharply in favor of respondents. The motion for preliminary injunction was therefore granted.

When it came to settlement of the Order, the appellants urged the court to enter an order that did no more than recite the statutory duty to "supervise." Special Term, having just found that appellants had ignored their statutory mandate, declined to issue an order that merely repeated the terms of the statute. It instead defined with some greater specificity what it was that appellants were to do to ensure that the respondents survived without suffering additional irreparable harm pendente lite, directing the appellants, inter alia, to ensure "at a minimum, that respondents' basic needs are met." Notwithstanding the City appellants' repeated assertions to the contrary, Special Term did not specify what those needs were, leaving that

determination -- at least in the first instance -- to appellants.

Appellants' contention that a court of equity should be unable to award such interim relief would be a remarkable thing. By appellants' logic, courts would be held to issue decrees in nothing other than the statutory language, even after finding that the parties bound by that language had not understood it.

None of these limitations exists. Special Term did no more than exercise its equitable powers to prevent irreparable harm to a group of children who showed a virtually unchallenged right to relief. Its order granting preliminary injunctive relief should be affirmed.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did Special Term abuse its discretion in directing appellants, on an interim basis, to ensure that those respondents who have been discharged from foster care survive at least until such time as the courts determine the appellants' statutory obligations to the respondents?

2. Did Special Term abuse its discretion in enjoining appellants from involuntarily discharging those respondents still in foster care without first (i) providing them with the reasonable preparation for life as independent adults that was denied those respondents already discharged from the foster care system and (ii) ensuring that there is

a mechanism in place for supervising those respondents following their discharge?

3. In view of State appellants' conceded responsibility for the policy, practices, and administration of the foster care system, did Special Term abuse its discretion in extending the preliminary injunction to the State appellants?

COUNTERSTATEMENT OF FACTS

A. The Appellants' Abandonment of the Respondents to the City Streets.

There is no dispute in the record about any of the following facts. Respondents are present and former foster care children under the age of twenty-one* who have been or will be discharged from foster care to "independent living". They first entered foster care at a variety of ages, ranging from three weeks to seventeen years old, and for a variety of reasons, including abandonment by their own parents and child abuse. Seven of the respondents have already been discharged to "independent living" ("discharged respondents"). The remaining three respondents are still in

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* At the time this action was commenced, respondent Negron was under the age of twenty-one; however, his twenty-first birthday has now passed.

care, but expect to be discharged in the near future ("respondents in care"). (Respondents' Affidavits 16-33.)*

The discharged respondents were all discharged from foster care when they were seventeen or eighteen years old. They were discharged by the appellants -- most against their will -- even though they had nowhere else to go:

> "The day I left Pyramid House, I was told to go to a men's shelter, because I had nowhere else to go. When I arrived at the men's shelter that evening, I was not permitted to stay, because I was too young. . . ." (Affidavit of Reginald Brown, sworn to January 2, 1985 ("Brown Aff.") ¶ 2, R. 26.)

> "Shortly after my eighteenth birthday, I was discharged and sent to Covenant House." (Affidavit of Hugh Leslie, sworn to January 16, 1985 ("Leslie Aff.")** ¶ 2, R. 32.)

> "I was forced to leave Holland House against my will . . . when I was eighteen years old. . . . The day I left Holland House I had no other place to stay, no home to go to,

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* References to the Record on Appeal are denoted herein as "R. ____."

** Hugh Leslie later returned to foster care, where he remains today. (Leslie Aff. ¶ 2, R. 32.) Covenant House is a crisis shelter for homeless and runaway youths found in the Times Square area. (Affidavit of Douglas H. Lasdon, sworn to March 13, 1985 ("Lasdon Aff.") ¶ 2, R. 303.)

> and no job or other source of income." (Affidavit of William Palmer, sworn to December 19, 1984 ("Palmer Aff.") ¶¶ 2, 3, R. 24-25.)
>
> "I did not want to leave [my foster home] because I had no other place to go." (Affidavit of Joseph A. Morgan, sworn to December 19, 1984 ("Morgan Aff.") ¶ 2, R. 22.)

It is undisputed that the appellants never contacted four of the discharged respondents following their discharge. (The City appellants have attempted to show that the appellants may have contacted two others shortly after their discharge from foster care.) It is similarly undisputed that, notwithstanding the mandate in section 398(6)(h) of the Social Services Law that appellants "supervise" all foster care youths discharged to independent living until their twenty-first birthdays, the appellants -- pursuant to official practice -- do not attempt to contact foster care youths discharged to independent living, including the discharged respondents, following an initial trial discharge period, which is at most six months long, irrespective of the discharged youth's age.* (See Affidavit of John

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* The City appellants' sole attempt to controvert the affidavit testimony of the discharged respondents concerning their abandonment by the appellants consisted of several affidavits by individuals who claimed to have reviewed the foster care files of the

(Footnote Continued)

Courtney, sworn to February 14, 1985 ("Courtney Aff.") ¶ 23, R. 91-92.)

Nor is it disputed that for the discharged respondents "independent living" has resulted in total destitution on the streets of New York. (Affidavits of discharged respondents, R. 16-27; see generally Affidavit of Barbara L. Emmerth, sworn to January 18, 1985 ("Emmerth Aff."), R. 34-39.) These respondents have slept on subway trains and in public transportation terminals, in the hallways and on the rooftops of tenement buildings and in the parks of New York City. Id. They have often gone without food. Id. Since this action was brought, three of the six discharged respondents have been arrested and imprisoned on

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(Footnote Continued)

respondents. R. 233-47. The affidavits purported to set forth the manner in which City appellants had complied with their responsibilities to respondents. In fact, the City's affidavits established only that the City has a lot of paper that shows what its programs are for foster children, but no system for even keeping track of children discharged to independent living at any time after the sixth month following their discharge. The City and State offered no evidence that any of the discharged respondents had received any supervision at all. Appellants' submissions, far from indicating that appellants had complied with their statutory duties, confirmed respondents' assertions that appellants had failed to fulfill their statutory obligations.

Rikers Island. (See, e.g., Letter of D. Stuart Meiklejohn to Justice Wilk, dated July 16, 1985, SR. 1-2.)*

The respondents who are still in foster care have not yet received training in the skills they will need to function as adult members of the community, but have been told that they too are soon to be discharged to "independent living." (Affidavits of respondents in care, R. 28-33; see generally Emmerth Aff. ¶¶ 5-12, R. 36-39.) They have nothing better to look forward to than the homelessness, hunger and fear their discharged co-respondents have experienced.

B. Respondents' Motion for a Preliminary Injunction.

Respondents brought this action because the appellants had violated the statutory duties they owe the respondents by pushing them out the doors of the foster care agencies, without preparing them for independent living and without ever again trying to assist -- or even locate -- them. (Complaint ¶¶ 4-6, 42-111, R. 41-44, 53-70.) As a result of appellants' breach of their duties to the respondents, the respondents have suffered, and absent the relief sought will continue to suffer, homelessness and destitution.

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* References to the Supplemental Record on Appeal are denoted herein as "SR.___."

Contemporaneously with the filing of this action, respondents moved for a preliminary injunction enjoining appellants, during the pendency of this action, from continuing to fail to undertake a minimum level of supervision of the discharged respondents, and directing appellants to ensure that basic survival resources are accessible to these respondents on an interim basis, and further enjoining appellants from discharging respondents in care from the foster care system until an appropriate discharge plan had been adopted. (Order to Show Cause, R. 11-13.)

C. Special Term's Decision.

Special Term, by decision dated July 17, 1985, granted respondents' motion for preliminary relief, holding that they had "demonstrated a likelihood of success on the merits by dramatizing appellants' failure to comply with applicable provisions of the [Social Services Law] and the regulations, [and] they have ably documented the consequences of appellants' actions on their lives." (Memorandum Decision of Wilk, J., at 7, R. 329.) With respect to respondents in care, Special Term found that the City appellants had not followed the detailed discharge planning process set forth in regulations, including proper training for independent living as well as notice of discharge. (Id. at 5-6, R. 327-28.) With respect to the discharged

respondents, Special Term found that City appellants' own papers demonstrated their failure to carry out their statutory obligations.

Special Term rejected the argument of State appellants that, because they did not bear primary responsibility for providing the services at issue, they should be excluded from the scope of any preliminary relief awarded. As State appellants have conceded, they have the ultimate responsibility to oversee the foster care system. Accordingly, as Special Term found, they must be held accountable for the system's failure to comply with statutory requirements. (Id. at 9, R. 331.)

On the issue of irreparable harm, Special Term found that respondents' homelessness in itself constituted irreparable injury. (Id. at 7, R. 329.) Noting the apparent inability of the discharged respondents -- without assistance from appellants -- to deal with the various programs for providing social services to the needy, and the City appellants' own recognition of the inappropriateness of placing youths in dangerous and overcrowded municipal shelters, Special Term rejected City appellants' argument that their special obligations to the discharged respondents were adequately met by the theoretical availability of public assistance programs and municipal shelters. (Id. at 5, R. 327.)

In balancing the equities, Special Term held that "[c]onsidering the current circumstances of the respondents, their lack of resources and alternatives, it is clear that the balance of equities lies with them as well." (Id. at 8, R. 330.)

Special Term concluded its decision by directing appellants not to discharge respondents in care "until a discharge plan has been adopted and until they are given reasonable notice of their impending discharge" and to undertake "supervision of respondents until they reach 21 years of age." (Id. at 9-10, R. 331-32.)

D. Special Term's Order.

Plaintiffs submitted a proposed form of order on July 26, 1985. The City appellants filed a counter-proposed Order under cover of letter dated July 25, 1985, arguing that the order should simply repeat the statutory language which they had ignored in the past. (See Letter of David Drueding to Justice Wilk, dated July 25, 1985, SR. 10-11.)

Shortly thereafter, the City appellants demonstrated the necessity for Special Term to go beyond the statutory language in explaining the remedial relief the appellants were to provide. On August 7, 1985, counsel for respondents informed the City appellants' counsel that respondent Acosta, who had been discharged from foster care, had been told to leave the place where he had been staying and had nowhere else to go. The City appellants advised

respondents' counsel to send Acosta to a municipal shelter, in direct contravention of Special Term's decision finding such placements inappropriate. (See Letter of Robert B. Calihan to Justice Wilk, dated August 13, 1983, SR. 18-19.)

On August 17, Special Term entered the Order. (Order of Wilk, J. at 3-4, R. 9-10.) This appeal followed.

In their brief on appeal, the City appellants obfuscate the interim relief Special Term provided. They do not quote from the decretal paragraphs of the Order, though they quote from other parts of the August 17 Order and from the January 30, 1985 Order to Show Cause. In the August 17 Order, Special Term granted the preliminary injunction (first decretal paragraph) and then

> "ORDERED that, pending a final determination in this matter, [appellants] are (1) enjoined from effecting the involuntary discharge of [respondents in care] from foster care until a discharge plan has been adopted for them in accordance with the Social Services Law and related regulations and they are given reasonable preparation for their discharge, including career counselling and training in a marketable skill or trade and in skills for independent living, as well as reasonable notice of their impending discharge; and (2) directed to offer supervision to each of the respondents until they reach 21 years of age, ensuring, at a minimum, that respondents' basic needs are met, including appropriate housing outside the New York City

municipal shelter system."

(Id. at 3-4, R. 9-10.)

THE STATUTE

Social Services Law § 398(6)(h) provides in pertinent part that

> "Commissioners of public welfare . . . shall have powers and perform duties as follows:
>
> * * * *
>
> 6. As to all foregoing classes of children [i.e., destitute, neglected, abused, abandoned, delinquent, defective, physically handicapped or born out of wedlock]:
>
> * * * *
>
> (h) Supervise children who have been cared for away from their families until such children become twenty-one years of age or until they are discharged to their own parents, relatives within the third degree or guardians, or adopted."

ARGUMENT

I. SPECIAL TERM DID NOT ABUSE ITS DISCRETION IN GRANTING RESPONDENTS' MOTION FOR PRELIMINARY RELIEF.

A. The Standard of Review on this Appeal.

The standard of review on appeal of an order granting a preliminary injunction is whether the lower court abused its discretion. As this Court has noted in the past:

> "[I]t is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits. Further, on an appeal from the granting of a preliminary injunction, we should not interfere with the exercise of discretion by Special Term and will review only to determine whether that discretion has been abused."

Gambar Enterprises v. Kelly Serv., Inc., 69 A.D.2d 297, 306, 419 N.Y.S.2d 818, 824 (4th Dept. 1979) (citations omitted), quoting Hoppman v. Riverview Equities Corp., 16 A.D.2d 631, 226 N.Y.S.2d 805 (1st Dept. 1962). Accord, Town of Pound Ridge v. Introne, 81 A.D.2d 885, 439 N.Y.S.2d 53 (2d Dept. 1981).

B. Special Term's Order Was Well Within Its Discretion.

Respondents' entitlement to injunctive relief depended upon a showing that: (1) they were likely to succeed on the merits of their claims; (2) they would suffer irreparable injury in the absence of interim injunctive relief; and (3) a balancing of the equities weighed in favor of granting the relief sought. See, e.g., W.T. Grant Co. v. Srogi, 52 N.Y.2d 496, 517, 438 N.Y.S.2d 761, 771 (1981).

Accord, Decision of Wilk, J. at 2, R. 324; City Brief at 33; State Brief at 10.

1. Success on the Merits.

Section 398(6)(h) mandates that designated public officials shall "supervise" foster care children, including the discharged respondents, discharged to independent living "until such children become twenty-one years of age."

Like the vast majority of youths discharged from foster care to independent living, the discharged respondents were discharged shortly before or after their eighteenth birthdays. (R. 16-27.) Although there was some dispute below as to whether the discharged respondents had ever been contacted by or on behalf of the appellants following their discharge from foster care, it is beyond dispute that appellants ended all contacts with the discharged respondents either upon or shortly following their discharges -- and it is uncontested that supervision, by any imaginable standard, ended long before their twenty-first birthdays.

The record demonstrates that appellants' failure to supervise was not unusual or inadvertent. As appellants concede, the absence of contact is intentional, and is part of the program that the City appellants maintain: as a matter of official practice they do not contact foster care children discharged to independent living after the first three to six months following their discharge -- irrespec-

tive of their age. See City Brief at 46; Courtney Aff. ¶¶ 21, 23(4), R. 91-92.

The City appellants contend -- contrary to the statute's plain meaning -- that their program meets their supervisory obligations under section 398(6)(h). The City appellants urge the Court to accept their construction of section 398(6)(h) solely on the ground that, being charged with administering the Social Service laws, they know best what the statute means.* See City Mem. at 46. The City appellants do not explain, however, why their construction of section 398(6)(h) is entitled to any deference when the State appellants, who are responsible for ensuring compliance with that section, see generally Point II, infra, have carefully refrained from endorsing the City appellants' construction.

Whatever the precise obligation imposed by section 398(6)(h) may be, the City appellants' construction of the statute is neither rational nor consistent with the section's requirement that supervision continue until a youth's twenty-first birthday. Although an agency's

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* Whatever the merits of the City appellants' pilot program described in their brief, see City Brief at 47, it is irrelevant here: the program apparently consists of nothing more than a proposal; it was not in effect for the discharged respondents, and was not presented to Special Term.

construction of a statute it administers is entitled to deference when the construction is rational, where, as here, the construction is clearly irrational and inconsistent with the terms of the statute, that construction must be rejected by the courts. See, e.g., Bernstein v. Toia, 43 N.Y.2d 437, 448, 402 N.Y.S.2d 342, 348 (1977).

2. Irreparable Harm.

Special Term properly found -- and the appellants have conceded by not denying on appeal -- that the discharged respondents have already suffered irreparable harm by virtue of their abandonment by the appellants to the streets of New York and would likely continue to suffer such harm absent preliminary relief. As Special Term noted, "[h]omelessness itself constitutes irreparable injury" (Decision of Wilk, J. at 7, R. 7 citing Williams v. Barry, 490 F. Supp. 941 (D.D.C. 1980), mod. on other grds., 708 F.2d 789 (D.C. Cir. 1983)). Accord New York State Department of Social Services, Administrative Directive, 82-ADM-71, November 16, 1982 ("[In] the absence of transitional programs for adolescents for whom 'discharge to own responsibility' was the appropriate objective, children were often overwhelmed by the adult responsibilities which living alone involves").

3. Balance of Equities.

As Special Term found, the balance of equities tips sharply in favor of the respondents. Absent some form of relief, respondents face destitution because of their

abandonment by the appellants. As a result of appellants' failure to abide by the statute, respondents are unlikely ever to become self-sufficient members of our society, although that is one of the principal objectives of foster care. See Affidavit of Eric Brettschneider, sworn to February, 1985, ¶ 25, R. 255. Moreover, the City appellants' duties under section 398(6)(h) -- save for whatever remedial relief may be granted the respondents -- terminate with the respondents' twenty-first birthdays. The passage of each day thus threatens to diminish whatever assistance the discharged respondents may obtain from the appellants in order to become productive members of society.

Even apart from the mandate of section 398(6)(h), the interim relief granted by lower court does not appreciably add to the appellants' duties under the state constitution and statutes. Article XVII, section 2 of the New York State Constitution imposes upon the State an affirmative duty to aid the needy. Tucker v. Toia, 43 N.Y.2d 1, 400 N.Y.S.2d 728 (1977); Matter of Lee v. Smith, 43 N.Y.2d 453, 402 N.Y.S.2d 351 (1977). Appellants are already responsible for providing programs designed to meet various basic needs of the poor, including home relief grants, food stamps, and medicaid. See Affidavit of Robert White, sworn to February 25, 1985, ¶ 4, R. 283. Moreover, the appellants are already obligated to assist foster children destined for discharge to independent living to contact and obtain the

services and resources provided through such programs. 18 N.Y.C.R.R. § 430.12(3)(i); Affidavit of Joseph Semidei, sworn to February 13, 1985 ¶¶ 16, 17, R. 79-80.

Given the availability of existing resources and the appellants' duty to make those recources available to respondents as they are made available to all State residents, Special Term's directive to "ensure" that the discharged respondents' basic needs are being met -- based on a recognition that an eighteen-year old who has no family and who has spent his life in foster care may need some extra help -- does not substantially add to the appellants' obligations.

C. The Interim Relief Fashioned by Special Term Was Well Within the Bounds of Its Discretionary Equitable Powers.

1. Special Term properly ordered limited equitable interim relief necessary to protect its jurisdiction by maintaining the status quo and avoiding future irreparable harm to respondents.

Special Term did not, as appellants claim, direct that those respondents still in care be provided an "appropriate discharge setting" prior to their discharge. Special Term did direct that the respondents still in care not be involuntarily discharged until the appellants had complied with the provisions of the law and related regulations that require adequate preparation of foster care children for discharge to independent living. Compare Order

of Wilk, J., R. 7-10, with 18 N.Y.C.R.R. 430.12(f)(2) and (3) (foster care child destined for discharge to independent living shall be provided, inter alia, training in independent living skills, training "directed toward career objectives, such as training in a marketable skill or trade," and pre-discharge referrals to "any persons, services, or agencies which would help the child maintain and support himself") and 18 N.Y.C.R.R. 430.12(c)(2) (providing for service plan reviews with child, including review of discharge plans).

This limited relief consisted of no more than a direction that the appellants comply with the applicable Social Service Law and regulations. Even the appellants, who contend that Special Term was empowered to do no more than direct the appellants to comply with applicable statutes and regulations, must admit that this is precisely the sort of relief that is appropriate.*

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* Ignoring the inherent discretion of a court of equity to fashion appropriate interim relief, the City appellants try to make much of their erroneous claim that Special Term exceeded its discretion by mandating the provision of training in a marketable skill. City Brief 54-58. Section 398(6)(h) provides for vocational training to suitable foster case children. Pursuant to 18 N.Y.C.R.R. § 430.12(f)(2) appellants have guaranteed the in-care respondents training "directed toward career objectives." Accordingly, Special Term's requirement for training in a marketable skill was well within the statutory and regulatory scheme applicable

(Footnote Continued)

With respect to the discharged respondents, Special Term directed appellants "to offer supervision to each of the respondents until they reach 21 years of age, ensuring, at a minimum, that respondents' basic needs are met, including appropriate housing outside the New York City municipal shelter system." (Order of Wilk, J. at 4, R. 10.)

Beyond question interim equitable relief was necessary. The dangers the respondents face by virtue of their abandonment by appellants to the streets of New York -- exposure, malnutrition, disease, and crime -- threaten respondents' well-being, and, indeed, their very survival. If the respondents are dead, seriously ill, psychologically damaged, or in prison at the conclusion of this litigation, whatever final relief is awarded them would be meaningless -- or, at best, of substantially limited value to them.

No court of equity is compelled to stand aside as plaintiffs with claims that are likely to succeed on the merits suffer, pendente lite, the very irreparable harm that their claims seek to remedy. Nor is any court of equity compelled to stand aside while the passage of time during

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(Footnote Continued)

to in-care respondents and well within the court's discretion. Special Term did not specifically order appellants to provide "an appropriate discharge setting". Cf. City Brief 54-58.

which relief is not awarded substantially diminishes the value of any relief awarded at the end of the lawsuit:

> "Equitable remedies are distinguished by 'their flexibility, their unlimited variety' and 'their adaptability to circumstances'. A court of equity has 'the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties', and that power is not limited by the fact that no precedent on the precise question is discoverable; when grounds exist calling for the exercise of equitable power to furnish a remedy the courts will not hesitate to act."

Martin Delicatessen, Inc. v. Schumacher, 70 A.D.2d 1, 9-10 419 N.Y.S.2d 558, 563 (1st Dept. 1979) (citations omitted). Accord, Walker v. Walker, 82 N.Y. 260, 262 (1880); Schwartz v. Lubin, 6 A.D.2d 108, 109-11, 175 N.Y.S.2d 652, 654-55 (1st Dept. 1958); Welton v. City of Lockport, 177 N.Y.S.2d 438, 440 (Sup. Ct. 1958).

2. Special Term's order did not require -- and does not embody -- a final determination of the proper scope of the supervisory obligation imposed by section 398(6)(h).

The final determination of the meaning of section 398(6)(h) was not before Special Term, nor is it now before this Court. All that Special Term found with respect to section 398(6)(h) was the likelihood that the respondents

would prevail on the merits of their claim that the appellants had not supervised them. Precise determination of the requirements of section 398(6)(h) and the appropriate terms of a final judgment present complex questions that are properly deferred to the development of a complete factual record and in-depth consideration of the merits of respondents' claims that is neither possible nor required on a motion for a preliminary injunction. As this Court has noted in affirming a preliminary injunction barring implementation of an allegedly unconstitutional section of the Social Services Law providing for the discontinuance of home relief to certain persons:

> "Plaintiffs' argument and the State's counter-arguments in favor of upholding the statute's validity involve aspects of constitutional law too weighty to have been briefed adequately in the short time available to the parties before this motion was heard at Special Term and too complex for Special Term to resolve in the even shorter time available to it before its decision was required. This is precisely the situation in which a preliminary injunction should be granted to hold the parties in status quo while the legal issues are determined in a deliberate and judicious manner."

Tucker v. Toia, 54 A.D.2d 322, 326, 388 N.Y.S.2d 475, 478 (4th Dept. 1976) (citations omitted). Accord, McNulty v.

Chinland, 62 A.D.2d 682, 688, 406 N.Y.S.2d 558, 561 (3d Dept. 1978).

3. Construing "supervise" to require that the discharged respondents' basic needs are met is consistent with the Social Services Law and within Special Term's discretion.

In any event, to the extent that Special Term may have determined, as an interim matter, that section 398(6)(h) required the appellants to ensure that the discharged respondents' basic needs are met, that determination was well within the court's discretion.

Special Term's order sought only to ensure that the discharged respondents, who, as the record demonstrates and the Social Services Law presumes, are unable to fend for themselves, were helped during their early experiences outside the foster care system in obtaining the things they need to survive. To construe the mandate of supervision as requiring anything less is contrary to logic and inconsistent with the structure of the Social Services Laws, which provide for a period of supervision, pursuant to section 398(6)(h), during which foster care youths discharged to independent living are expected to make the difficult transition from the dependence of foster care to the independence of adult life.

Foster care involves the appellants' full time custodial care and protection of foster care children away from their natural families. See Affidavit of Eric

Brettschneider, sworn to February 25, 1985, ¶ 5, R 249. Accord, 18 N.Y.C.R.R. § 427.2(a). The foster care system is designed to "promote the best interests of the child". Social Services Law § 392(5)(d) (emphasis added); 18 N.Y.C.R.R. § 428.1 (foster care includes an assessment of the child's "problems, strengths and needs" designed to assist in the protection of the child's safety and well-being).

Once a youth in foster care reaches his eighteenth birthday, the appellants may either continue to provide him with foster care's full panoply of protections and custodial care until the youth's twenty-first birthday, or, alternatively, discharge the youth to independent living. Social Services Law § 398(6)(h) and (i). If the appellants decide to discharge the youth to independent living, however, section 398(6)(h) requires them to supervise him until his twenty-first birthday.

Special Term's interim order provided former foster care children with considerably less than continued foster care, but more assistance than appellants lend independent adults in need. The relief was consistent with the transition between the complete dependence of foster care and the independence of adult life provided by section 398(6)(h).

Special Term's order also comported with generally shared notions of parental responsibility. Under the laws

of this State, the appellants stand as parents for destitute children. See Bartels v. County of Westchester, 76 A.D.2d 517, 520, 429 N.Y.S.2d 906, 908 (2d Dept. 1980). It is inconceivable that any parent who accepted the responsibility of providing ongoing supervision to his or her child as the youth approached adulthood -- the responsibility 398(6)(h) confers upon appellants -- would consider that responsibility met by standing idly by while the youth went homeless and hungry.

Ignoring both the scope of the interim relief ordered below and the extent of care provided to foster care youths, the City appellants -- again without the support of the State appellants -- contend that the interim relief ordered is equivalent to the mandatory continuation of foster care for the discharged respondents in violation of various provisions of the Social Services Laws. See City Brief at 36-41. As shown above, foster care entails substantially more than simply meeting a child's "basic needs". In directing that the appellants ensure that the discharged respondents' "basic needs" were met, Special Term stopped far short of mandating a continuation of foster care for the discharged respondents past their eighteenth birthdays -- and so left intact what ever discretion the City appellants' enjoy under section 398(6)(i). See City Brief 38-41. Similarly, the "care" various other provisions of section 398 require the appellants to provide children

under eighteen -- and which is principally provided through foster care, see generally Social Services Law § 398(6) -- involves far more than the mere satisfaction of basic needs. Accordingly, Special Term's order is consistent with the legislature's use of the terms "care" and "assistance" elsewhere in the statute, notwithstanding appellants' claims to the contrary. See City Brief 41-42.

4. Special Term's award of interim relief did not impermissibly infringe upon the City appellants' discretion in administering the foster care system.

Special Term was free to detail the terms of the interim relief it ordered on behalf of the discharged respondents -- particularly in light of the City appellants' continued assertions that their supervisory duties were fulfilled by sporadically contacting the discharged respondents during the first few months following their discharge. Nonetheless, Special Term directed only that the appellants ensure, pendente lite, that the discharged respondents' "basic needs" were met. Order of Wilk, J. at 4, R. 10. It did not identify any specific "basic needs". Instead it left -- at least in the first instance -- to appellants' own discretion the identification of those needs and the determination of how to meet them.

Special Term limited that discretion only by specifying that placement of the discharged respondents within emergency men's shelters would not adequately meet

their basic needs. Id. As set forth above, pp. 12-13, supra, this direction was necessary because, although Special Term had specifically found that placement of the discharged respondents in an emergency shelter would likely cause irreparable harm the City appellants had attempted to send one of the respondents to such a shelter shortly after the issuance of Special Term's decision.

II. SPECIAL TERM DID NOT ABUSE ITS DISCRETION IN DIRECTING THAT STATE APPELLANTS, WHO ADMIT THEIR OVERALL RESPONSIBILITY FOR THE FOSTER CARE SYSTEM AND ITS ADMINISTRATION, SHOULD BE BOUND BY THE PRELIMINARY INJUNCTION.

The State appellants contend that Special Term abused its discretion in extending its injunctive relief to them because the respondents had supposedly failed to show that the State appellants had caused them any harm. State Brief 14, 18. The contention is nonsense. The respondents established -- and the State appellants do not deny -- that they had not been supervised and the harm that followed. As shown below in greater detail, the Social Service Laws charge the State appellants with both concurrent primary and supervisory responsibility for the foster care system. Had the State appellants met their statutory responsibilities, respondents' abandonment could not have occurred -- as it did -- pursuant to official policy. Because respondents established that they were abandoned, Special Term acted within its discretion in finding that the respondents were

likely to succeed on the merits of their claims against the State appellants.

Under the Social Services Law, the State appellants are responsible for the enforcement of the New York Social Services Law and regulations promulgated thereunder. The law charges the State appellants with (a) the development of the policies and principles upon which public assistance, including the supervision of former foster care youths, is to be provided; (b) the supervision of all social services work undertaken by any local governmental unit, including the City of New York; (c) the disapproval of any local rules, regulations and procedures that are inconsistent with law, including section 398(6)(h); and (d) the adoption of rules, regulations and procedures to carry out the provisions of the New York Social Services Law, again including section 398(6)(h). See generally Social Services Law §§ 11, 17, 20 and 34.

By virtue of these various statutory mandates, the State appellants owed the respondents the duty of ensuring that they were provided foster care in accordance with the law. Specifically, the State appellants owed the in care respondents the duty of ensuring that they were reasonably

prepared* for independent living, and owed discharged respondents the duty of ensuring that they were not abandoned to the streets of New York City long before their twenty-first birthdays.

As the City appellants concede, they ceased all contacts with the discharged respondents shortly after their discharge pursuant to City policy. The policy provides for continued contacts with a youth discharged to "independent living" for a maximum of six months following the discharged -- irrespective of the youth's age.** The City appellants

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* The State appellants are specifically required to withhold reimbursements to the state appellants if they substantially fail to ensure the development by foster care children of "the capacity to live independently upon achieving adulthood." 18 N.Y.C.R.R. 429.4(b)(2)(i)(d) and (5)(i). As the respondents established before Special Term, they sorely lack that capacity.

** In pertinent part, PAS provides:

> "For planned discharges . . . the agency with planning responsibility shall be responsible for: . . . One face-to-face contact with the child and his/her family during the trial discharge period and each three months period thereafter, if the post-discharge period is extended to six months. IF CHILD/FAMILY IS NOT RECEIVING PREVENTIVE SERVICES, MONTHLY FACE-TO-FACE CONTACT WITH THE CHILD AND HIS/ HER FAMILY DURING THE TRIAL DISCHARGE PERIOD."

Program Assessment System - IV at 81, copy attached as Exhibit A to the Courtney Aff., R. 184. Substantially the same practice is followed following unplanned discharges. R 185.

promulgated that policy as part of their Program Assessment System ("PAS") which "incorporate[s] all applicable statutes and regulations, and additional City policies and procedures." Courtney Aff. ¶ 5. The policy violates section 398(6)(h)'s requirement that youths discharged to independent living receive supervision until their twenty-first birthdays. By allowing that policy to go unchanged the State appellants have violated their statutory duty to disapprove policies and procedures that are inconsistent with the Social Service laws. Social Services Law § 20(3)(a).

The State appellants have also failed to promulgate any regulation specifically requiring supervision in compliance with section 398(6)(h). They have thus violated their statutory duty to "establish regulations for the administration of public assistance and care within the state . . . by the local governmental units, in accordance with law." Social Services Law § 34(3)(f).

Section 20 of the Social Services Law vests State appellants with ultimate supervisory authority over the City appellants, providing that "the department shall . . . supervise all social services work, as the same may be administered by any local unit of government." Social Services Law § 20(2)(b).

In addition to dissapproving local rules, regulations and procedures promulgated by the City appellants, the State appellants enjoy the power of the purse. They are

authorized to enforce their supervisory duties by "withhold[ing] or deny[ing] state reimbursement . . . from or to any social services district [including City appellants] in the event of the failure of any such district to comply with law, rules or regulations of the department relating to public assistance and care or the administration thereof." Social Service Law § 20(3)(e).

The fact that the State appellants' regulations assign to the City appellants much responsibility for the day-to-day administration of the foster care system does not mean that the State appellants are relieved of the responsibility that the Social Services Law assigns to them.

The Court of Appeals has recognized that under the Social Services Law, the local social services districts, including the City appellants, act as the agents of the State. Beaudoin v. Toia, 45 N.Y.2d 343, 347, 408 N.Y.S.2d 417 (1978). Accord Toia v. Reagan, 387 N.Y.S.2d 309; New York v. Blum, 121 Misc. 2d 982, 470 N.Y.S.2d 982 (Sup. Ct. 1982). As the Court of Appeals explained:

> "In New York State, the social services program is a State program, administered through the fifty eight local social services districts under the general supervision of the State Department of Social Services and the State Commissioner of Social Services."

Beaudoin v. Toia, 45 N.Y.2d 343, 347, 408, N.Y.S.2d 417 (1978) (emphasis added).

Simple black letter agency law dictates that a principal can be held liable to a third person for the principal's failure adequately to supervise his agent's activity. See Restatement Second of Agency § 213. Pursuant to all accepted notions of agency theory, Special Term did not abuse its discretion in holding State appellants responsible for the actions of their agents -- the City appellants.

State appellants seek to avoid the consequences of this agency relationship by arguing that it exists only for the purpose of ensuring local compliance with the State decisions. State Brief 16. Nothing in the law or the cases setting forth this relationship supports such a limitation. Indeed, it is the essence of agency that the principal retains accountability for the conduct of its agent. State appellants' interpretation attempts to assert for the State all the benefits of their principal-agency relationship with City appellants, without accepting the concomitant responsibility.

None of the cases cited by State appellants offers any support for their novel theory of partial agency. In both Baez v. Blum, 91 A.D.2d 994, 457 N.Y.S.2d 855 (2d Dept. 1983), and Mercado v. Blum, 76 A.D.2d 907, 429 N.Y.S.2d 904 (2d Dept. 1980), the regulations of local social services officials provided certain welfare benefits, which, although not prohibited by State regulations, were not expressly per-

mitted. The Appellate Division in both cases merely held that the local officials were liable to provide such announced benefits despite the fact that the State was not required to reimburse them for those expenditures. The cases do not hold that where, as here, a statute requires that services be provided, the State agencies responsible for the administration of such services are not liable for their failure to ensure that the statute's mandate is carried out.*

Nor does Holley v. Lavine, 605 F.2d 638 (2d Cir. 1979), cited by the State appellants, State Brief 16-17, support their theory. In Holley, recognizing that a local social services district acted as an agent of the State for purposes of the Fourteenth Amendment, the court held that such an agency relationship did not arise for purposes of the Eleventh Amendment.**

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* Equally unsupportive of State appellants' contentions is Brown v. Lavine, 78 Misc. 2d 1985 (Sup. Ct. Alb. Cty. 1984). There, the court merely dismissed a proceeding brought to review a determination of the State Commissioner for failure to join the local commissioner, whose primary responsibility to provide the services at issue made him an indispensable party.

** The Holley court upheld a retroactive damages award against the municipal appellants pursuant to the well-established principle excluding such entities from the scope of the eleventh amendment immunity, even though state welfare officials could not be subjected to the same liability by virtue of their immunity.

Given the State appellants' responsibility for the failure to afford the respondents the care required by law and the State defendants' ample authority to remedy that situation, Special Term acted well within its discretion in extending its injunction to State appellants. Particularly in light of the City appellants' apparent inclination to construe their duties under statutes, regulations and judicial decisions as narrowly as they dare -- and frequently more narrowly than the law allows -- guaranteeing the respondents additional protection by enjoining the State appellants was not an abuse of discretion.

III. RESPONDENTS' CLAIMS ARE JUSTICIABLE.

The New York Court of Appeals has recently delineated the proper scope of judicial involvement in reviewing the failure of the administrative branch of government to act in accordance with legislative mandate. In Klostermann v. Cuomo, 61 N.Y.2d 525, 475 N.Y.S.2d 247 (1984), plaintiffs sought declaratory and injunctive relief with respect to the State's failure to implement a statutory program involving the residential placement, care and supervision of the mentally ill. Defendants argued that these claims were not justiciable because implementation of the programs would involve the allocation of resources and entangle the courts in the decision-making function of the executive branch. The Court of Appeals rejected this

contention, holding that although the judiciary must avoid the imposition of its own policy upon the programs of the executive and legislative branches of government, it is entirely proper for the courts to declare and enforce rights already conferred by the other branches of government:

> "The mentally ill, whether in a State institution or previously institutionalized and now homeless in New York City, are entitled to a declaration of their rights as against the State. Their claims do not present a nonjusticiable controversy merely because the activity contemplated on the State's part may be complex and rife with the exercise of discretion. Rather, the judiciary is empowered to declare the individual rights in all such cases, even if the ultimate determination is that the individual has no rights. Moreover, if a statutory directive is mandatory, not precatory, it is within the courts' competence to ascertain whether an administrative agency has satisfied the duty that has been imposed on it by the Legislature and, if it has not, to direct that the agency proceed forthwith to do so."

Klostermann v. Cuomo, 61 N.Y.2d 525, 530-31, 475 N.Y.S.2d 247, 249 (1984).

The City appellants' contention that the dispute is nonjusticiable inasmuch as it purportedly involves matters of policy and executive discretion mistakes the nature of the dispute. Respondents do not question the wisdom of

any program. See Jones v. Beame, 45 N.Y.2d 402, 408 N.Y.S.2d 449 (1978). Instead, respondents claim that section 398(6)(h) entitles them -- as a matter of right -- to substantially more than the abbreviated series of post-discharge contacts that appellants argue the section requires. Thus, as in Klostermann, the dispute requires the court's determination of what rights arise under a particular statute and what obligations the statute imposes. Once that determination is made, it is up to the appellants to decide how to perform their duties to the respondents.

Special Term did not take that decision away from the appellants. Far from impermissibly intruding into nonjusticiable areas properly reserved to the appellants' discretion, Special Term carefully fashioned its preliminary relief to preserve that discretion and avoid problems of justiciability. Having determined, at least for purposes of the respondents' application for a preliminary injunction, that section 398(6)(h) entitled respondents, pendente lite, to the satisfaction of their basic needs, it then left to the appellants' discretion the identification of these needs and the determination of how to ensure that they were met.

CONCLUSION

For the reasons set forth above, the order appealed from should be affirmed in all respects, with costs.

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Respectfully submitted,

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