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SUPREME COURT, U. S.  
WASHINGTON, D. C. 20543

In the

Supreme Court of the United States

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HENRY SMITH, et al.,	)	No. 76-180
BERNARD SHAPIRO, et al.,	)	No. 76-185
NAOMI RODRIGUEZ, et al.,	)	No. 76-5193
and DANIELLE and ERIC GANDY, et al.,	)	No. 76-5200
Appellants,	)	
vs.	)	
ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al.,	)	
Appellees.	)	

Washington, D.C.  
March 21, 1977

Pages 1 thru 80

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546-6666

IN THE SUPREME COURT OF THE UNITED STATES

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HENRY SMITH, individually and as :  
 Administrator of the New York Human :  
 Resources Administration, et al., :  
 :  
 Appellants, :  
 :  
 v. : No. 76-180

ORGANIZATION OF FOSTER FAMILIES FOR :  
 EQUALITY AND REFORM, et al., :  
 :  
 Appellees. :

----- :

BERNARD SHAPIRO, individually and as :  
 Executive Director of the New York :  
 State Board of Social Welfare, et al., :  
 :  
 Appellants, :  
 :  
 v. : No. 76-183

ORGANIZATION OF FOSTER FAMILIES FOR :  
 EQUALITY AND REFORM, et al., :  
 :  
 Appellees. :

----- :

NAOMI RODRIGUEZ, et al., :  
 :  
 Appellants, :  
 :  
 v. : No. 76-5193

ORGANIZATION OF FOSTER FAMILIES FOR :  
 EQUALITY AND REFORM, et al., :  
 :  
 Appellees. :

----- and ----- :

DANIELLE and ERIC GANDY, et al.,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR  
EQUALITY AND REFORM, et al.,

Appellees.

No. 76-5200

Washington, D. C.,

Monday, March 21, 1977.

The above-entitled matters came on for consolidated  
argument at 10:04 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice  
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

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Services, Inc., 335 Broadway, New York, New York  
10013; on behalf of Appellants Rodriguez, et al.

MRS. HELEN L. BUTTENWIESER, 575 Madison Avenue, New  
York, New York 10022; on behalf of Infant  
Appellants Gandy, et al.

[APPEARANCES [Cont'd]:

MRS. MARIA L. MARCUS, Assistant Attorney General of New York, Two World Trade Center, New York, New York 10047; on behalf of State Appellants Smith, et al., and Shapiro, et al.

MRS. MARCIA ROBINSON LOWRY, Children's Rights Project, New York Civil Liberties Union, 84 Fifth Avenue, New York, New York; on behalf of the Appellees.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 76-180, Henry Smith against the Organization of Foster Families, and the related cases.

Mrs. Gans, you may proceed whenever you're ready.

ORAL ARGUMENT OF MRS. LOUISE GRUNER GANS,

ON BEHALF OF APPELLANTS RODRIGUEZ, ET AL.

MRS. GANS: Mr. Chief Justice, and may it please the Court:

I represent Appellants' natural parents, who entrusted their children to New York Social Service officials for interim foster care and not for adoption.

The over-all question raised by the order of the three-judge court below is whether the Federal Constitution requires New York State to provide automatic hearings before a child in a foster home may return to its own home, or be transferred to another foster home or adoptive home.

QUESTION: Due process to whom, Mrs. Gans?

MRS. GANS: Due process to the child.

The specific question raised with respect to natural parents is whether the Federal Constitution permits such hearings to be held when children are returning home to them.

QUESTION: Your clients voluntarily turned over their children for temporary foster care?

MRS. GANS: That is correct.

QUESTION: It was not the result of a court order or --

MRS. GANS: No, it was not the result of a court order.

QUESTION: -- because the children were delinquent or neglected or --

MRS. GANS: No, there was no adjudication of neglect.

On the contrary, New York has neglect proceedings. The purpose of this kind of placement, which follows a separate legal track, is to enable parents who, through no fault of their own, are unable to care for their children, because of poverty and some other crisis.

QUESTION: Or illness or something?

MRS. GANS: That is correct.

QUESTION: So this is voluntary on their part. And when they did so, what was the understanding as to their conditions under which the children would return to them?

MRS. GANS: The essential understanding, as far as they were concerned, were two: they were willing to entrust their children to the State, they needed help; they were assured that they had a right to have the children returned.

QUESTION: Assured by statutory law?

MRS. GANS: By statutory law. And by actual representations of Social Service officials.

Now, the form they signed don't always say that. And since this action has commenced, there have been about

four different forms the parents have signed. The first one, which says nothing; the last one, which is in Special Procedure No. 29 of the New York City Department of Social Services, says you have a right to have your child returned.

QUESTION: When you are fit. Is that it?

MRS. GANS: That is right.

QUESTION: Excuse me, I don't want to get ahead of you.

MRS. GANS: Not when you are fit. We consider you legally fit. It's not unfitness to be ill, in the same way as the neglect of a child.

QUESTION: Well, when you are ready and prepared.

MRS. GANS: When you are ready. You are entitled to the return of your child, and we can unilaterally return the child, subject to our power, as the State of New York, always to take you to court if we think you would be abusive or neglectful. So that that is the basic understanding.

There are additional understandings. The parent is expected to visit the child. Again, if the parent is temporarily hospitalized, she can't. But when she is able to, she is expected to visit the child and she is expected to make efforts to deal with whatever the condition that required the placement, so that the child can come home.

But --

QUESTION: The foster parent relationship, then, is

not an insipient adoption at all, where the natural parent has signed off?

MRS. GANS: That is correct, it is not an adoption. It is only if the parent's rights can subsequently be terminated in a proceeding which New York provides for termination of parental rights. For example, a parent places a child, and she recovers, but never comes to see the child, New York, after a certain point, can bring a proceeding to terminate that parent's parental rights, and then the child is available for adoption.

But it is not anticipated that any voluntary foster care placement with the foster parent is an adoptive placement; not at all.

QUESTION: Who or what triggers the hearing in New York State under the conditions that you just described to terminate the parent's -- permanent terminate the parent's parental right?

MRS. GANS: The way the present New York scheme works, until the first eight -- basically during the first eighteen months of placement, the way the scheme is drawn, the relationship of parent and agency involving the child is insulated from competing claims of foster parents.

During this period -- for example, if the parent places the child and is never heard from again, then, unless the parent is hospitalized and unable to come, then sometime



around the one-year point, the State could file this proceeding and it's up to the State.

QUESTION: Well, who would draw the State's attention to the situation?

MRS. GANS: Well, the State monitors all placements. The State, at all times -- the Department of Social Services has extensive bureaucracy of social workers, whose responsibility it is to keep in touch with the parent, to have a special social worker for the child and to have someone who supervises the foster home.

QUESTION: Basically to monitor the situation.

MRS. GANS: To monitor the situation, correct. And they keep agency case records, both as a matter of social work practice and as a matter of requirement of State regulations. So they must document at all times what they are doing in the case.

But during the first eighteen months, the agency can see, well, is this mother dealing with her situation? And by the eighteen-month point or sooner -- the earliest point is six months, if the parent disappears, has never been heard from again, they can bring the proceeding.

QUESTION: Well, let me ask: In this case, haven't some of them been there four years and more?

MRS. GANS: That is correct.

QUESTION: Well, how did that happen?

MRS. GANS: Well, I'm tempted to say "that is a good question". It requires this explanation:

Until the New York -- until about six years ago, this whole system was an administrative system without any kind of legal checks for the parent, for the child, for the foster parent. Okay.

So, for example, if a parent who wanted a child returned, there was no mechanism which would insure that the child was returned.

QUESTION: No habeas corpus?

MRS. GANS: Well, if the parent knew about it. One of my clients, Mrs. Rodriguez, was a person who placed her child, wanted her child three months later, although the law does provide habeas corpus, no one advised her that it exists.

So she just kept going to the agency and saying, "I want my child", and I tried to document in the record as much as I could and in my brief how that could cause time to pass, even though the mother wanted the child and even though the mother was not unfit.

So that was one problem.

The other problem is the agency had no accountability independently, aside from the parent.

Now, the purpose of the foster care review, which was enacted in, well, roughly, 1972 and has gone through serious

transformations, was to provide an accountability mechanism so that this does not happen. And in 1975 New York passed a Social Services Law, Section 384(a), which provides: when a parent asks for a child, the State must return the child or go to court. And there has to be an immediate hearing showing why the child should not be returned.

Now, what we have in the foster care system now are children who are still, you might say, the residue of the old system.

In Mrs. Wallace's case, those children who were in placement for four years, she had six children, after two years the agency returned two children to her, with the idea that if she managed with the two, in a while the others would come home.

Now, this is not an unusual approach where there are many children and there is a mother who has gone through a depression. So that's the explanation.

QUESTION: I hear what you said.

MRS. GANS: The effect of the decision of the district court for a parent who wants her children and asks for them, under present law, is that, although the State finds nothing wrong with the parent, if the child has been in foster care for one year, not four years, the four-year case will now be taken care of in the foster care review proceeding, the agency cannot return the child, and the parent's right is conditioned on

prevailing in an enforced custody contest with the foster parent.

QUESTION: What was the standard? Was the standard imposed by the district court?

MRS. GANS: No, there was no standard imposed by the district court.

QUESTION: Then why do you say he must prevail in a custody proceeding -- the parent.

MRS. GANS: Well, if it is a contest, whatever the standard, that the parent has to prevail.

QUESTION: Well, if it's a contest, it may not be.

MRS. GANS: Well, the district court ordered hearings to be held in every case.

QUESTION: To find out what?

MRS. GANS: To provide a forum. What the district court said --

QUESTION: Well, I know; to provide a forum to find out what?

MRS. GANS: That is exactly our question: to find out what?

We submit that if there is information which a foster parent has which would suggest that a child that is about to be returned home might in some way be neglected or harmed by the parent, that there are existing procedures available that the foster parent can resort to, or, of course, that the Social Services Agency can resort to.



QUESTION: Well, it may be the only thing the district court might want the hearing to provide is, as you say, a forum where the agency can come in and say "yes, we" -- I mean formally say, "Yes, we don't think there's anything wrong with the children going back to the parents".

MRS. GANS: That hardly seems to be a reason for a hearing in which the foster parent, who has --

QUESTION: I take it, then, you think the standard really would be, at the hearing, what are the best --

MRS. GANS: If you mean --

QUESTION: -- what are the best -- you just ask one question: What are the best interests of the child?

MRS. GANS: No.

QUESTION: No? Why?

MRS. GANS: If the case is of a child in a foster home for one year, then the standard is, Is the parent unfit?

QUESTION: Did the district court say that?

MRS. GANS: The district court said that it was leaving the New York standards in place. And that is the standard in one-year cases.

As interpreted by the New York Court of Appeals.

QUESTION: Well, I thought you said a minute ago that it didn't provide a standard at all.

MRS. GANS: Well, the district court said it wasn't creating a new standard. What happened is that when the foster

parents brought the action, they challenged the removal hearings, and they also challenged the standards.

QUESTION: You think the foster parent has the burden, then, of proving unfitness on the part of the parent?

MRS. GANS: The foster parent and the State, yes. The foster parent and the State.

QUESTION: The parent hasn't got any burden, I don't --

MRS. GANS: No. Well, the parent has to defend a right which he has.

QUESTION: Yes?

MRS. GANS: Because, under State law, she's legally fit. And she has to defend her right without there being an accusation. Because the foster parent comes --

QUESTION: Well, if the foster parent has the burden, why, the foster parent is going to have to put on some evidence, I suppose.

MRS. GANS: Well, but shouldn't -- our point is this: if the foster parent has evidence, then Article 10 of the Family Court Act provides a proceeding which is instantly available to the foster parent, and anyone else, to protect the child from being returned to a neglectful parent.

Section 1031 of the New York Family Court Act specifically provides that neglect proceedings are applicable with respect to children in foster care, who may be returned to a home where they may be neglected.

So there is that forum.

In addition, if the foster parent has information about possible neglect and tells it to the social worker, New York child protective laws mandate an immediate 24-hour investigation. And a social worker who doesn't follow up on the information is subject to civil and criminal liability.

QUESTION: What the district court holding, then, says is, even though the foster parent has presented that evidence to the social worker and the social worker has gone through the investigation and found nothing to it, nonetheless there must still be a due process hearing.

MRS. GANS: That is correct. We say that that is a hearing without a purpose; a fishing expedition against the parent, to find out about parent's failings. And we believe that, to require every parent with a child in foster care, though they are legally fit, if they have had their child in foster care for one year, to submit to that kind of hearing is an impermissible burden on the parent.

MR. CHIEF JUSTICE BURGER: Your time has expired now, Mrs. Gans.

QUESTION: Let me ask just one question: What is the requirement of notice to the foster parent before the child is returned to the natural parent?

What does the State require?

Is there any requirement on that?

MRS. GANS: There is a requirement of a ten-day notice before any child is moved out of the foster home.

We have raised in our brief a question -- well, I think the notice requirement applies in all cases. We have raised in our brief a question as to whether any of the subsequent hearing procedures were intended to apply to the case of children going home, as opposed to situations where children were going to other foster placements.

Thank you.

MR. CHIEF JUSTICE BURGER: Mrs. Bittenwieser.

ORAL ARGUMENT OF MRS. HELEN L. BUTTENWIESER,

ON BEHALF OF INFANT APPELLANTS GANDY, ET AL.

MRS. BUTTENWIESER: Mr. Chief Justice, may it please the Court:

I am the attorney appointed by the court to represent the children, and I want to discuss this case from the point of view of the rights of the children. In fact, my principal objection on behalf of the children is that I am reluctant to see any more adults being given any more rights from which they have to be disentangled before one can consider the best interests of the child.

This case was, to start --

QUESTION: Well, your position doesn't require you to disparage the rights of the natural parents or attack those rights.



MRS. BUTTENWIESER: We don't attack anybody's rights. We don't attack the rights of the foster parents, the natural parents, or anybody.

QUESTION: Do you concede that the foster parents have some constitutional rights?

MRS. BUTTENWIESER: No, sir, we do not concede that.

QUESTION: I didn't think so.

MRS. BUTTENWIESER: But I didn't assume that we had to attack it, because the court below found that they didn't -- or didn't reach that question, and did not grant them constitutional rights.

And when I'm talking about the children, I am not talking about delinquent children, I am talking about all of the children who come into care of the State because the parents are not able to take care of them.

Once I got into the case, I examined the complaint and decided that, on behalf of the children, the relief that was being requested was really benefitting the foster parents and not the children. And I have submitted an answer, in which I have stated that none of the relief requested will be of benefit to the children. And I have asked that it be dismissed.

However, the issue as to whether or not there is, as a result, a case or controversy has already been briefed, and I -- unless the Court wishes an answer -- I do not propose to answer that question.

We are opposed to the mandated hearings, in the first place, because we do not see the advantage to anyone; as it is, a foster parent has a right to ask for at least to be heard, not a hearing, but to be heard, if it wishes to. And the number of foster parents that have requested to be heard in New York City, since this statute went in, since a change went in in the regulations permitting an actual hearing, has been, I think, six or seven cases, or, at most, ten cases in one year.

Whereas, if we have a hearing here, we will have upwards of thousands of cases, two or three thousand cases, because that is the number of children who either return home or go to another facility, or are placed for adoption out of the foster home. Of course, a number of foster families adopt the children, if they become free for adoption, and that is desirable; but where it is not desirable, and the children have to be moved into an adoptive home.

You take the little boy who is involved as a plaintiff in this proceeding, Rafael Serrano, the parents claimed that they had a right to consider that this child would stay with them, but when they separated they left the child. The child is now back in an institution, because they did not keep the child. There was no counter-obligation on the part of the foster family to keep the child.

The issue as to whether or not these proceedings, which have been provided by the State of New York, for

determining whether or not the child should be returned, have, up until now, not only adequately, as far as anybody can see, determined when a child should go back, but there is actually no evidence in the record that they are unsatisfactory, and there is no evidence in the record that a hearing would add to anything that would be helpful.

As a matter of fact, in the opinion, the majority of the court writes: A hearing perform the salutary function of providing the agency with an organized forum in which to gather information.

I'm afraid one doesn't "gather information" in a forum. And that information is already available to the agency.

QUESTION: Do you think the State has adequate facilities to do this without the assistance of the federal courts?

MRS. BUTTENWIESER: Yes, very definitely.

These children are all under the care of authorized agencies, either the City Commissioner, State County Commissioner or private agencies. In New York City they are private agencies. They are, by statute, visited regularly. They are required by the laws of the State of New York to encourage parental visiting, so that the children can be returned home; and they are required, at very short intervals, to report to the City or State as to what they have.

All of the material which the opinion refers to as

the function of gathering information has already been gathered, is already before the decision maker on behalf of the child. And the only time that hearings have been required in the past is where the foster parent has decided that the foster parent wants to keep the children.

I feel, in making the children who were under the care of these foster parents plaintiffs in this proceeding was an unreasonable usurpation of the rights of the children. The children were under the care of public departments by contract with the parents. They had guardians. They were not -- did not require next friends. And they certainly did not require next friends who were looking to the joining of the children with them, to obtain a right that foster parents not only don't have now, but, by contract, don't have now.

The contract with the foster parents requires them to return the children at any time that the agency decides that it is in the best interest of the child to be returned.

QUESTION: Well, do you think it -- excuse me; go ahead.

QUESTION: That is upon ten days' notice, isn't it?

MRS. BUTTENWIESER: The ten days' notice is the official notice. They can have no less than ten days.

QUESTION: That's a statutory notice.

MRS. BUTTENWIESER: That's a statutory notice.

However, when children ought to be returned to their



natural parents or to go to another facility, it is customary -- I cannot say that it occurs in every case, because I haven't examined every case. But I represent a number of social agencies, and I know that those social agencies at least, and many, many others, work with the children and with the foster family to enable the child to move from that foster facility. And, as a matter of fact, the only evidence on the procedures for removing children is in the record, it's the evidence testified by Mrs. Creech and Mrs. Edwards, both of them executive directors of agencies with children, and they describe a procedure whereby the child is facilitated in making the change.

If you have a hearing, what you have is litigation, you have the child the subject of warring parties, and then, at the time of the decision, when it has already been made, you then have a far more precipitous move of the children.

QUESTION: But the statute itself, the New York law, does provide, as I understood it from reading these briefs, that if the child has been in a foster home for eighteen months or longer, the foster parents are given an opportunity to try to explain why the child should not leave the foster home; is that correct?

MRS. BUTTENWIESER: It's not exactly that. This is called a foster care review, and the objective of that review is the child's welfare, not the right of the foster parent to

say why the child should remain.

And, actually, the emphasis --

QUESTION: Well, why, in the interest of the child's welfare, the child should not be in the foster home; that's the --

MRS. BUTTENWIESER: No. Why, in the interest of the child's welfare, it should stay in the foster home. Because it is presumed that the welfare of the child will require its return home, if there is a home to return to; or be placed in an adoptive home.

QUESTION: Yes. Sometimes it's returned to the natural parents, sometimes it is a transfer to either another foster family or to an institution, and sometimes it's a transfer for purposes of adoption; isn't that it?

MRS. BUTTENWIESER: Yes. But the actual statute is called foster care review, and it is to review why the child should not be in a permanent setting, whether it's his own home or an adoptive home, or the foster family adopt; whichever it is.

QUESTION: And that New York law does, after a child has been eighteen months or more in a foster family, --

MRS. BUTTENWIESER: That is correct.

QUESTION: -- gives some rights, at least to be heard or be heard from, to the foster parents; is that correct?

MRS. BUTTENWIESER: It does. It does.

QUESTION: Is it clear in New York as to whether the foster parent -- or who has loco parentis over the child?

MRS. BUTTENWIESER: The Commissioner of Social Services. The parent signs a document, giving the Commissioner of Social Services, either the County or the City Commissioner, the custody of the child, a temporary custody, to be returned the child on the happening of an event or within -- or on demand.

QUESTION: That I understand. But who determines what the child shall do? Like, who does what a parent would do?

MRS. BUTTENWIESER: The authorized agency that is in care of the child -- sometimes it is the --

QUESTION: Well, how can an authorized agency take care of the day-by-day care of the child?

MRS. BUTTENWIESER: The authorized agency -- authorized agencies all have staffs of trained social workers, who visit regularly in the home, in the school, the home of the natural parent --

QUESTION: Once again, who is in the parental position day-by-day -- and since you push me -- and hour-by-hour? It's the foster parent, isn't it?

MRS. BUTTENWIESER: Yes. The foster parent --

QUESTION: Now, is that delegated from --

MRS. BUTTENWIESER: It's by contract. It's not delegated. The foster parent enters into a contract with the

Commissioner, or the authorized agency.

QUESTION: Is it fundamentally different from the arrangement made when they put people -- people take their children and put them in a summer camp for three months, except that it's a longer arrangement?

MRS. BUTTENWIESER: In all fairness to the foster family arrangement, I think it's a closer arrangement than that. But it's very much like that. It's like a boarding school, with all the attributes of home. It's a contract with them.

Now, a contract which neither binds them nor binds the Commissioner. The element which is binding is the best interest of the child.

Now, sometimes people do make mistakes, as to the best interest of the child, but then so do the courts. Sort of adversary proceedings. Otherwise we wouldn't have any appellate procedures, if courts never made a mistake.

But -- and there are procedures whereby, if it is in the child's best interest to remain in the foster home, the foster home has access to the courts, family courts, the Supreme Court under a writ of habeas corpus; and they are not without recourse, as far as the child is concerned.

QUESTION: Let me ask, on page 20 of the brief of the New York City Appellants, it says that SSC Procedure No. 5, which is described --

MRS. BUTTENWIESER: Social Services law, I don't know what No. 5 is.

QUESTION: It says that under this procedure, instituted in 1974, a foster parent may request a full trial type hearing before removal.

MRS. BUTTENWIESER: That's right.

QUESTION: Now, I thought that was what this case was all about.

MRS. BUTTENWIESER: They may request --

QUESTION: Then it goes on to say: between August '74 and June '76, only 26 foster parents requested hearings.

MRS. BUTTENWIESER: That's right.

QUESTION: Now, could these -- were these foster parents in New York City or not?

MRS. BUTTENWIESER: These foster parents were in New York City. New York --

QUESTION: Well, did they have the right or didn't they to request this full trial type hearing?

MRS. BUTTENWIESER: They requested a full trial type hearing.

QUESTION: Well, were they granted it?

MRS. BUTTENWIESER: Yes. They were granted it.

QUESTION: Well, what did the district court order?

MRS. BUTTENWIESER: The district court ordered that in every case of every child that is to be returned to their



natural parent or to another facility, there must be a hearing. And that would be children in the thousands, where there is no -- sometimes where there is no dispute.

QUESTION: In the State of New York?

MRS. BUTTENWIESER: With or without a request.

QUESTION: Yes, but any foster parent who has this kind of a right hasn't too much to complain about it, I take it.

MRS. BUTTENWIESER: Not in New York City. This is not true in the rest of New York State.

QUESTION: I understand, but --

MRS. BUTTENWIESER: No. And I represent three child -- sizable child care agencies, and I have had one such hearing since the law went into effect.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mrs. Marcus.

ORAL ARGUMENT OF MRS. MARIA L. MARCUS,

ON BEHALF OF THE STATE APPELLANTS, SMITH, ET AL.,

AND SHAPIRO, ET AL.

MRS. MARCUS: Mr. Chief Justice, and may it please the Court:

I am an Assistant Attorney General of New York State, but I am representing today the State of New York and the City of New York. And, if the Court please, I would like to reserve

five minutes for rebuttal.

I think Mr. Justice White's questions illustrate the drastic overkill in the decision below, in which we have, in the year 1975, 16 requests for hearings, 26 in the entire period that this hearing procedure of New York City has been in operation. And just to summarize what that procedure would offer to anybody who wants it, counsel, cross-examination, it's a full-dress adversary hearing.

QUESTION: That's in New York City.

MRS. MARCUS: That is correct. And, of course, the vast majority of foster children are in the New York City population.

QUESTION: Outside of New York City, it's a ten-day notice, but then the sit-down sort of discussion if the foster parent wants to talk about it.

MRS. MARCUS: Yes. And of course the removal is not done. The ten-day notice simply is to set the date of the removal, it is not, by any means, the parameters of the process. The process goes on over a period of months.

QUESTION: But if the foster parent wants to come in and talk about it, they will listen?

MRS. MARCUS: That is correct.

And also, of course, at the eighteen-month point, New York State has a statute in which a full judicial hearing is available to a foster parent, who can come in and present

whatever reasons they would present to the hearing officers that are now been asked for by the district court, to the Family Court. And --

QUESTION: In a sense, sort of a neglect -- sort of a neglect proceeding, --

MRS. MARCUS: Well, then it --

QUESTION: -- they would be talking about the neglect of the parent.

MRS. MARCUS: In the 392, they can present a variety of information if they have information of neglect or abuse, that can of course be brought forward. They can also bring forward any other reason that they feel that the child should remain in their home.

QUESTION: I see.

QUESTION: And in New York City, this right to a hearing, at the initiative of foster parents, is applicable no matter how long the child has been in the foster home? Or does that have to have been eighteen months?

MRS. MARCUS: It is triggered by the removal, it has nothing to do with eighteen months. But --

QUESTION: That was my question.

MRS. MARCUS: -- when there's been a removal, --

QUESTION: Any time there's a proposed removal.

MRS. MARCUS: -- there will be a removal to a foster family placement, as opposed to the natural parent.

QUESTION: As opposed to returning to the natural parent.

MRS. MARCUS: Right. If there is a removal contemplated to another foster placement, that foster parent can request the full-dress adversary hearing that New York City offers.

QUESTION: However short or long a time the child has been in a foster home.

MRS. MARCUS: That is correct.

QUESTION: Is that just from the one foster parent to another foster parent, or is it also from a foster parent back to the natural parent?

MRS. MARCUS: No, it does not include the return to the natural parent, it includes any other foster placement which would be to a foster parent or to an institution, to something other than the natural parent.

QUESTION: How about or for adoption?

MRS. MARCUS: The adoption, I think, would be inappropriate in a case where the child would be adopted.

QUESTION: Well, whatever you think, I think I am asking if the law provides.

MRS. MARCUS: It is not available in the case the child is being moved for adoption.

It is for another foster placement.

QUESTION: Right.

MRS. MARCUS: Now, the district court ordered these automatic hearings because children cannot speak for themselves, and because the court assumed that the foster parent would not speak for them for a continuation of the foster care relationship in asking for this hearing.

This assumption, it seems to me, is totally inconsistent with the argument of appellees that after a year the foster care relationship is the equivalent of the biological relationship, because it's inconceivable to assume that a biological parent is going to allow their child to be taken away and not bother to ask for a hearing.

Now, if the foster parents have the feeling of natural parents for the child, and they feel he should remain in the home, they will request a hearing, and since only 26 foster parents have done so in New York City in the past two and a half years, this means that the transfers that have been involved have not involved any dispute between the parties, and as this Court held last month, in Codd vs. Velger, due process doesn't require a hearing where there are no factual disputes to be resolved.

Now, what is another result of the decision below, in addition to the costly hearings and the hearings which nobody really wants --

QUESTION: Well, you're saying no one wants them.

MRS. MARCUS: Nobody except those few that have



requested them.

QUESTION: Yes.

MRS. MARCUS: One of the things also -- by the way, I'm advised here that the hearings are available if the move is to an adoptive home. So I stand corrected on the point. The city hearings.

QUESTION: Now, tell us that again.

MRS. MARCUS: Pardon?

QUESTION: Tell us that again, will you, please?

MRS. MARCUS: I am advised that the hearing process available under the city procedure is available if a child is being moved to an adoptive home. The only exception is if it's being moved to its natural parent.

QUESTION: Right.

MRS. MARCUS: Now, another --

QUESTION: But the ten-day notice and the sitdown discussion is available?

MRS. MARCUS: That's required regardless of what the child is being --

QUESTION: That's the statute now.

MRS. MARCUS: Yes.

Now, Mr. Justice White asked the question earlier of what is the standard going to be in these hearings which are going to come up, what is the standard now, what is going to happen under the district court's mandate.

Well, we have to first emphasize that New York law seeks to effectuate the reunion of the child with the natural parent or adoption, it does not seek to maintain the child's relationship to a foster parent who is taking care of that child by virtue of a contract and providing him with temporary care rather than an adoptive home.

QUESTION: Supposing that over the span of several years there is -- it's deemed by the social service agencies neither desirable to reunite the child with the natural parent, nor to place it for its adoption, would it be normal in that situation for the child to remain with only one foster parent or might there be more than one foster parent involved?

MRS. MARCUS: Well, the 384(b), which is a new statute, what has been passed, doesn't contemplate the situation that you're asking about. It contemplates that there be no limbo of this type. That either the natural parent will be returned the child, or, if it appears that the natural parent is not going to be fit to do that, that the parent's right should be terminated and the child be freed for adoption. And the Legislature states there that it is contrary to the legislative purpose to allow this extended limbo to continue to occur.

QUESTION: But don't situations arise where there is disharmony between a particular foster child and a particular foster parent, so that there is a change in foster placement even though there is no adoption?

MRS. MARCUS: Yes. Actually, it's interesting to note that, of the foster -- the removals from foster homes, one-third are at the request of the foster parent themselves. So that, of the movements within foster care, one-third of them are attributable to the foster parent, and the foster parent's request.

Now, --

QUESTION: Well, as a practical matter, if you know, is that because the foster parents find that this child is a problem child and they are not able to cope with it; is that generally the --

MRS. MARCUS: Well, I think that is certainly a major reason. Another reason would be that I think some foster parents are suited, for example, to a younger child who is more sedentary; when the child becomes more active and more physically active and engaging in more different kinds of things, the foster parent finds it more difficult to exercise supervision.

Now, what would the effect of the district court's decisions be, that there are now going to be automatic hearings in virtually every case where a child has been in a foster home for one year or more. Obviously, that decision would require a stay of removal during the period where the hearing is scheduled, takes place, and a decision is rendered. And such stays would probably be issued during the course of appellate

reviews that are available under New York's Civil Practice Law and Rules.

And what happens with the substantive decisions that are ultimately rendered in these administrative hearings, in the review and in the judicial hearings which are presently available under New York Law.

If the district court's decision is affirmed by this Court, New York judges will read it as a mandate to put a new weight in the scale: The child's liberty interest in the foster care relationship.

And since this liberty interest would be of constitutional magnitude, judges would ultimately give the natural parent's claim less weight than it presently has, even where such parents are neither neglectful nor abusive.

MR. CHIEF JUSTICE BURGER: You are now into your rebuttal time, Mrs. Marcus.

MRS. MARCUS: Well then, I will reserve the rest of the time. Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well.

Mrs. Lowry.

ORAL ARGUMENT OF MRS. MARCIA ROBINSON LOWRY,

ON BEHALF OF THE APPELLEES

MRS. LOWRY: Mr. Chief Justice, and may it please the Court:

I represent the foster parents who were plaintiffs

below and who are appellees today. And I would like to address myself specifically to some of the statements that have been made by the appellants, and I'd like to try and give the Court some understanding of the factual context in which the district court decided this decision.

We have heard about the natural parents. Indeed, natural parent relationships have always been accorded primary protection by this Court, and we have no quarrel with that.

The record below shows that 80 percent of the children who were removed from foster homes in New York State, after living in the foster home for a year or more, were removed for placement in another foster care setting. That is, children were going to be moved either to another foster home or they were going to be moved to an institution of some sort; they were not going back to their biological families.

QUESTION: What percentage?

MRS. LOWRY: Over 80 percent.

QUESTION: Over 80, yes.

MRS. LOWRY: Yes, Your Honor; 13 percent of those children went back to biological family, 7 percent went into adoption. That's what is going on in the foster care system, and that is the system with which the New York District Court was dealing.

The length of time of children in foster care in New York State has, unfortunately, increased. At the time that



the district court reached its decision, it found that children were in care an average of four and a half years; it's now over five years.

QUESTION: But not necessarily with the same family, is it?

MRS. LOWRY: That's right, Your Honor. That's right.

The only statistics with regard to children being removed from foster homes in which they have lived for a year or more were furnished in the course of this litigation, and from the State defendants in response to interrogatories. Those are the only statistics, and it shows that most of these children, 80 percent of these children are going elsewhere in the foster care system.

QUESTION: Mrs. Lowry, does the record show why the State decided, in a typical case or in a certain percentage of cases, however it might show it, to remove a foster child from one foster care setting to another?

MRS. LOWRY: Your Honor, the record does not show that, but I would like to describe to the Court the situation of the foster family that initially brought this lawsuit. I think it's very illustrative.

Mrs. Madeline Smith is a widow who has been a foster family with a New York City agency now since 1970. The two children who were placed with her were two and four years old

when they were placed with her in 1970. They had not been placed as a result of a court adjudication against the natural parent. The natural parent had in fact left the children with a neighbor. So that was considered a voluntary placement.

Those children were with Mrs. Smith for four years, and Mrs. Smith repeatedly expressed her desire to adopt those children. She, in fact, thought they were free for adoption because the natural parent had never visited those children.

After four years, the agency workers changed, as is the case usually in New York City; typically, the record shows three or four or five workers will be involved in one foster care situation. All of the named foster parents had several workers, never the same worker.

The new worker came on the case, and the new worker decided that these two children should be removed from Mrs. Smith's home because Mrs. Smith had arthritis which interfered --

QUESTION: Does New York have a policy with respect to adoptions by unmarried people? That is, this woman is a widow, you said.

MRS. LOWRY: She is a widow, yes.

QUESTION: Does New York have a policy about allowing individuals to adopt?

MRS. LOWRY: The policy is that single parents can adopt in New York City, and single parent adoptions do take place even with unmarried people. Mrs. Smith, as you know, is

a widow.

And Mrs. Smith has been trying repeatedly to adopt these children. Mrs. Smith's is the only permanent home these children are ever going to have.

Nevertheless, an agency worker decided that the children should be removed. Mrs. Smith had no kind of right to a hearing, nor did these children. These children faced the loss of the only family they had ever known, and --

QUESTION: Mrs. Lowry, I have a problem, maybe you can help me. We have a child who is in Foster Family A, who is about to be transferred to Foster Family B; how can you represent both family A and family B?

MRS. LOWRY: Your Honor, --

QUESTION: Who are both foster parents.

MRS. LOWRY: Your Honor, what we are representing in this case is that there should be a hearing that the decision-making process should be constitutionally adequate. At the hearing itself, surely counsel for Foster Parent A could not represent Foster Family B. But what the Foster Families --

QUESTION: Well, do you represent both?

MRS. LOWRY: Your Honor, we are representing the foster families' interest in a constitutionally adequate decision-making process.

QUESTION: So you're representing A and B?

MRS. LOWRY: We are representing the principle that

there should be a decision-making process that is constitutionally adequate, and I don't believe that there is any conflict between Foster Family A and Foster Family B. Surely Foster Family B has no interest in having the child that is coming to them unnecessarily traumatized by a removal from the home that is a valuable home to that child. I don't believe that there is any conflicting interest there at all.

All this case is about and all the foster parents are interest in is that the child's interest be protected in the decision-making process by a constitutionally adequate procedure.

QUESTION: Adequate procedure, yes, but who is going to fashion the -- who is going to draw up the standards or the rules? Is that going to be a federal rule that the courts should impose?

MRS. LOWRY: No, Your Honor. The district court below specifically said that the federal court was only setting forth the need for a procedure at which State standards could be effectively applied.

QUESTION: Well, the State standard has already been enforced in these cases. The agencies have decided that the children are to be returned to the home with respect to -- under the State rules.

MRS. LOWRY: No, Your Honor. The State standard varies. When a child is going to go back to a natural family,

there is one standard, which the federal court did not deal with; and --

QUESTION: But, in any event, in any of these situations, by the time the child has -- they have decided the child is to be returned, the State standard presumably has been satisfied in the eyes of the agency.

MRS. LOWRY: Well, we're talking --

QUESTION: Is that right or not?

MRS. LOWRY: The agency thinks it has applied the State standard, presumably.

QUESTION: All right. Now, is all the federal court is going to do, or is all the trial type hearing is going to do is to make sure that that standard has been applied; is that all?

MRS. LOWRY: The federal court ordered that a decision be made with all of the information before it, and it found that the procedure that presently exists was not adequate.

QUESTION: So the hearing is going to -- the controlling standard is going to remain the State standard; is that it?

MRS. LOWRY: That's right, Your Honor. There was absolutely no tampering with the State standard.

QUESTION: So if there is a proposed transfer from Foster Home A to Foster Home B, the procedure which you contemplate means that Foster Home A would be represented by



counsel, Foster Home B would be represented by a different counsel, the children would be represented by a third counsel, and the State by a fourth counsel?

MRS. LOWRY: No, Your Honor. What the district court ordered was simply that there be some sort of a hearing held so that all information that was relevant could be presented to an administrative decision-maker.

QUESTION: Wouldn't there be lawyers at these hearings?

MRS. LOWRY: Not necessarily. The district court specifically did not deal with that and said, in fact, there is no requirement that counsel be available to represent these parties.

QUESTION: Then why is the hearing the district court ordered any different from the one that the State conducts now?

MRS. LOWRY: Your Honor, are you referring to the New York City procedure or the conference that the district court found unconstitutional?

QUESTION: Take them both.

MRS. LOWRY: All right.

With regard to the conference that the district court found unconstitutional, the problem with that conference was, No. 1, the decision maker had been involved in the decision to begin with; No. 2, the agency, as in the case of New York

City, that had made the decision need not be present; No. 3, the foster parent who was coming in to contest the decision did not necessarily know the reason for removal. The record shows that in some instances the foster parent isn't even told, because the agency may consider it wise to withhold the information; and, No. 2, it's undisputed that the notice that the foster parent receives under the statute, under the procedure declared unconstitutional, contained no information whatsoever; and, No. 3, the foster parents had no right to present any kind of witnesses, all they had was the opportunity to come in and explain to the decision maker already involved in the decision why the decision was wrong, without knowing the basis for the decision.

In addition, if the agency had based the decision on any kind of documentary information, the foster parent who came in to contest that had no right to know what that was.

QUESTION: How about the New York City one?

MRS. LOWRY: All right. The New York City procedure is a substantial improvement over that. It applies only to New York City, as the Court is aware, and it does not apply to the return-home situation.

The court below found that the New York City procedure was inadequate because it was dependent upon the foster parent triggering the hearing, when it was the child's interest that the court was concerned with protecting.

QUESTION: And the court below, as I understand it, held that the foster parents, themselves, whom you represent, did not have a constitutionally protected interest.

MRS. LOWRY: They found that -- they reached only one of the foster parents' claims. They found that the foster parents had no constitutionally protected property interest in the foster parent relationship. They did not reach the foster parent's liberty interest or equal protection claim. They found it unnecessary because they gave the hearing that the foster parents were concerned with; and, in fact, the foster parents got the relief they asked for.

QUESTION: But they gave it, purportedly, at the behest of the children.

MRS. LOWRY: That's correct. It was based solely on the children's constitutional right, and the foster --

QUESTION: Yes, but based upon an identification of a deprivation of the children's liberty, because, as we all know, the Fourteenth Amendment isn't even invoked until or unless a State deprives somebody of life, liberty or property.

MRS. LOWRY: That's correct, Your Honor.

QUESTION: And the primary inquiry, therefore, is: Has somebody been deprived by the State of life, liberty or property?

And that primary inquiry was answered here by the three-judge district court: Yes, the children have been

deprived of liberty by the State, isn't that correct?

MRS. LOWRY: That's correct, Your Honor. That was indeed their answer.

QUESTION: And then, and only then, do we look to see what procedural -- the guarantee of the Fourteenth Amendment, the due process clause, of procedural protection, what does it require in this case. And that's the question that the district court answered.

MRS. LOWRY: That's correct, Your Honor. That was what it was limited to.

QUESTION: And there is, arguably, a property interest that's been deprived of the foster parents here, since they do get paid, don't they? They have a statutory entitlement to pay so long as -- to be paid by the State, so long as the child is in their home; isn't that correct?

MRS. LOWRY: That is correct. The district court rejected that.

QUESTION: But that was defeasible as a matter of contract, is that what the --

MRS. LOWRY: Well, the district court rejected that and found that there was no expectation of the continuation of the relationship.

QUESTION: Because there was no -- it was contractually defeasible, that's the will of the State; is that it?

MRS. LOWRY: That's right. That's right, Your Honor.

QUESTION: Mrs. Lowry, when these children were put into foster homes, there was no hearing, was there?

MRS. LOWRY: The foster -- the natural parent had a right to a hearing. The natural parent either consented to the child coming into the foster home or could object, and there was a full hearing available in the Family Court. That's right, there was no --

QUESTION: But they didn't automatically get a hearing, did they?

MRS. LOWRY: They did if they didn't consent. They either had a hearing --

QUESTION: Well, automatically, I mean without consent or anything.

MRS. LOWRY: That's right.

QUESTION: Well, let me put it another way: They didn't force a hearing on them, did they?

MRS. LOWRY: No, they did not. They consented. They, unlike the children, --

QUESTION: So the children lost that liberty then, didn't they? Without a hearing.

MRS. LOWRY: They certainly did.

QUESTION: And then when they get under a foster parent, they get more rights than they had when they were with



their biological parents.

MRS. LOWRY: Well, either --

QUESTION: Is that right?

MRS. LOWRY: Not exactly. Not exactly.

QUESTION: It sounds the same to me.

MRS. LOWRY: Well, I'll explain to you why it's not.

QUESTION: First, they took them away from their own parents, without a hearing for the children. The children didn't get any hearing, did they?

MRS. LOWRY: Your Honor, they did not take them away from their own parents. Their parents either gave them up or, if there was a hearing, the children were represented at the hearing by counsel.

QUESTION: Well, so far as the children were concerned, nobody paid anything about that at all, so far as a full-blown hearing was concerned.

Now you're going to give the foster parents more rights than the biological parents had.

MRS. LOWRY: Your Honor, we are only concerned --

QUESTION: Where am I wrong on that?

MRS. LOWRY: Where you are wrong is that if the State -- the State has an obligation not to agree to have the parents give up the children unless the parent has a reason for doing that. If a parent comes in to the State and says, "I don't like my child today, please take my child," the State will not

take that child. If the parent wants to put the child in, and there is no reason for it, then the child cannot be put in.

On the other hand -- so the parent has to affirmatively say, "I can't deal with my child", and the State has to look and see that the parent in fact cannot. And if the parent then agrees to put the child in, then there is no hearing.

However, if the State comes to the parent and says, "I want to take your child" and the parent says "I'd rather you didn't", then there is a full-blown hearing at which the child is separately represented in New York by a law guardian, who may say --

QUESTION: Am I correct, or do I read the opinion wrong? Under this opinion, I think if the foster parent says, "I think the child ought to be transferred", you still have to have a hearing.

MRS. LOWRY: No, Your Honor. The order specifically exempts that situation. The order --

QUESTION: That's the way I read it.

MRS. LOWRY: I beg your pardon?

QUESTION: Well, you read it differently.

MRS. LOWRY: Well, Your Honor, I believe that the --

QUESTION: Well, we'll read it again.

QUESTION: Are you speaking of the order or the opinion?

MRS. LOWRY: I'm speaking of the order. In the order --

QUESTION: Is the opinion all that clear, in your view?

MRS. LOWRY: No, Your Honor. It is not.

But the order specifically exempts that, and of course exempts the situation in which some court has ruled.

I wanted to --

QUESTION: Do the children ever get in on these hearings? Are they personally present?

MRS. LOWRY: In which hearings? The ones that --

QUESTION: Any hearings. Any of these hearings.

MRS. LOWRY: The children are generally not personally present. If there is a court hearing of some sort, the judge may often question the child in chambers; but the child does not usually actually participate at the --

QUESTION: Mrs. Lowry, what about the hearings ordered by the district court? Is the interest of the child to be represented at that hearing, and, if so, by whom?

MRS. LOWRY: The child -- the district court contemplated that the child's interest would be represented and that the child --

QUESTION: By whom?

MRS. LOWRY: I must say, it's not exactly clear from the order.

QUESTION: Well, isn't that critical?

MRS. LOWRY: I believe that --

QUESTION: Isn't it the child's liberty interest that triggers the whole process?

MRS. LOWRY: I believe that it is, and, as I read the opinion, the court contemplated that either the child would participate in the hearing if the child were old enough, or that an adult representative would be appointed to represent the child's interest at the hearing.

QUESTION: So if you have a child three or four years old, as some, at least, when these started, you'd have to appoint an adult representative in every case.

MRS. LOWRY: Yes, sir.

QUESTION: I take it, it could also mean that no one could waive the right to a hearing, so that we would have to have a hearing before every transfer?

MRS. LOWRY: That's right.

QUESTION: Do you think that's the correct decision that we should reach?

MRS. LOWRY: I think that it's the correct decision under the circumstances that the district court limited in its order. That is, I think that there should be a hearing when the child has been in for a year or more and is going any place. I think that some -- and the foster parent has not requested the removal. I think that some hearings can be --

QUESTION: Why should it matter if the foster parent requested the removal?

MRS. LOWRY: Well, I think that that was simply a practical consideration. I don't think that -- I think that if a foster parent feels that the child cannot stay with the foster parent any longer, it doesn't make sense to try and impose that.

On the other hand, for --

QUESTION: Well, what if it's in the best interest of the child, though?

MRS. LOWRY: Well, it's hard to contemplate a situation in which it would be in the best interest of a child to stay with people that had asked that the child be taken. But I believe that's why -- your concern is why the court required a hearing in all other situations. That is, the foster parent may be silent, and it may be in the best interest of the child to stay there. And so the district court in those situations directed that a hearing be held.

It's quite obvious that at some of these hearings, the hearing may be very, very brief and fairly pro forma if there's a very good reason for the hearing and for --

QUESTION: But if you must locate an adult to represent the interest of the child, what kind of delay do you think will always be involved?

MRS. LOWRY: I think that the district court directed



that procedures be formulated, and I think the procedures can easily be formulated which will allow this to go forward within a ten-day time period. I think that there is no problem with that, and I think also the Court should be aware of the fact that, despite the fact we've heard about thousands and thousands of hearings, in fact that is not the case. The record shows that the number of transfers is not as great -- at which the hearing would apply, is not as great and we --

QUESTION: How great is it?

MRS. LOWRY: Well, there were 1500 transfers from 1973 to 1974 of those children who had been in a foster home for a year or more. The city estimates that approximately one-third of those transfers are at the foster parent's request; therefore, they would be exempted.

So what we're talking about, at best, is a thousand hearings a year. And I think, in addition to --

QUESTION: A thousand transfers?

MRS. LOWRY: We're talking about a thousand transfers that have not been at the foster parent's request. This is --

QUESTION: Under the district court's judgment, a thousand hearings.

MRS. LOWRY: That's right, Your Honor. That's what we're talking about.

We don't know exactly how many of these transfers would take place if there were some sort of procedure that

required the agencies to justify the hearings.

QUESTION: Mrs. Lowry, your argument, which, I gather, was accepted by the district court, was that the foster family relationship is akin, in its protected status under the Fourteenth Amendment, to the biological family, was it not?

MRS. LOWRY: That it was akin to it. The district --

QUESTION: Not that it was identical, but that that was the basis for it.

MRS. LOWRY: Yes, Your Honor.

QUESTION: Now, if you had a biological family, where the father and mother said, "We're tired of having this natural kid around, we're going to take him over to the local institution and dump him there," would you think that the mere fact of that dumping was to occur at the initiative of the parents eliminated any requirement for a hearing?

MRS. LOWRY: No, I wouldn't necessarily think that, Your Honor.

QUESTION: Well, it's not a State action, the due process clause isn't applicable, is it?

MRS. LOWRY: Well, if the agency that's taking the child is taking the child to --

QUESTION: It's just the recipient. It's not the government that's dumping the child, it's the natural -- it's private people. The due process clause is inapplicable.

MRS. LOWRY: Well, then, that's the answer to the

question, perhaps.

[Laughter.]

QUESTION: Well, then, why is it different in the case of foster parents? Why, if they initiate the dumping -- that may be an inartful word, but I think it conveys the expression -- should there be no hearing, but if they object to it there is a hearing?

MRS. LOWRY: I think that that is simply grounded in the reality of the fact that it is very hard to -- first of all, the State is interfering here, the State is sanctioning the removal, and this child is in the custody of the State. This child remains in the custody of the State. And so the State has a continuing concern in this child's life.

However, if the facility, the home that the State has provided for the child, no longer wants to take care of the child, it is very hard to imagine that the State can require that.

Someone asked a question about whether or not this was the same as putting your child in summer camp or a boarding school. I think that it's quite clear that it is not, and I don't think that that analogy can be made.

The foster family is the best substitute that there is for a natural family home. I think everyone agrees that it's best for a child to remain in a natural family where the relationship is a viable one and the child is not being harmed.

I think there's no dispute about that.

These are children who have been out for a year or more, and the reason that the State has put the child in a foster home is because the State expects not just that the child is going to be housed and fed and not left to roam the streets at night, but because the child is going to have a family relationship. And, in fact, the foster family is the most likely family to adopt a child, if the child later is adopted.

For example, Mrs. Smith is now in the process of trying to adopt the foster children that have been with her since 1970.

Most of the adoptions in New York State are foster families -- of foster children are done by foster families. So it's not merely a custodial relationship. The State has, therefore, a very great interest, contrary to simply disrupting the relationship arbitrarily, a great interest in making sure that the decision to remove the child is made under constitutionally adequate procedures, where everyone, including the child, has an opportunity to be heard.

QUESTION: But the State isn't asserting any claim to a special hearing. It's satisfied with what it had before your lawsuit was brought, isn't it?

MRS. LOWRY: Indeed it is, Your Honor. Indeed it is. And, in fact, it raises as support for its position Meachum v.

Fano, a situation in which the right of the State to transfer a person from one prison facility to another was upheld.

And we are saying that there is a conflict here between the interest of the child and the State's assertion, because we believe that the State should be concerned about whether these decisions are being made with all of the information available.

QUESTION: Well, it may be so as a matter of policy, but getting back to the first preliminary inquiry in any procedural due process case, there must be an effort to identify whether or not there has been a deprivation of life, liberty or property.

Now, here the district -- certainly there was no deprivation of life in this case, you can set that aside. The district court found no deprivation of property. The district court did find deprivation of the child's liberty, the foster child's liberty. And how would you identify the foster child's liberty that is being deprived in this case?

MRS. LOWRY: All right. I think it stems from several sources, and I'll tell you what they are.

QUESTION: What I am interested in is a description of what it is.

MRS. LOWRY: All right. The child is being condemned to suffer grievous loss without being heard.

QUESTION: Now, let's talk about liberty. Because



-- let's talk about what the Fourteenth Amendment talks about.

MRS. LOWRY: All right.

The Fourteenth Amendment talks about certain areas in which the State may not interfere arbitrarily --

QUESTION: Life, liberty or property.

MRS. LOWRY: That's right.

QUESTION: We have eliminated two of them and we are left with liberty. Now, what liberty of the child is being taken away?

MRS. LOWRY: All right. We're talking about the liberty of the child in the foster family relationship. One of the zones of privacy that the Fourteenth Amendment has been held to protect --

QUESTION: It doesn't talk about -- try to answer my question first and then you can explain all you want.

MRS. LOWRY: It is the child's interest in the family relationship, Your Honor. That's a liberty interest.

QUESTION: Has that ever been identified as a liberty before, in any other case anywhere?

MRS. LOWRY: The family relationship has repeatedly been identified as a liberty interest.

QUESTION: The child's liberty, or has it been the parents, the natural parents?

MRS. LOWRY: There has never been a conflict between parent and child before, but in Stanley v. Illinois, the Court

spoke about the family relationship, both from the standpoint of the father and from the standpoint of the child.

QUESTION: Well, there's Armstrong v. Manzo, too. But that involves a parent's interest, the natural parent's interest. This is a foster child's liberty interest, and I am interested in how you would describe it.

MRS. LOWRY: Well, there is no -- has not been a case in which this has specifically been held. There's no question about that, and I'm not suggesting that. But the child has a liberty interest in the relationship which this Court has repeatedly found to be a protected relationship.

QUESTION: Well, where has this Court ever identified any such liberty?

MRS. LOWRY: Well, this Court has identified the liberty interest --

QUESTION: Or any court.

MRS. LOWRY: -- in family relationships, from the standpoint, as you say, of the natural family.

QUESTION: The natural parents' interest.

MRS. LOWRY: That's right.

QUESTION: That's in Stanley v. Illinois, Armstrong v. Manzo, --

MRS. LOWRY: That's right.

QUESTION: -- and, I'm sure, other cases.

MRS. LOWRY: That's right.

I find it hard to believe that the court would limit that only to the natural parent and not have the right flow two ways. Children have been held to have liberty interests in other situations. That is, --

QUESTION: Certainly. If they're put in jail, they have an interest in not being put in jail. A child can have all kinds of liberty interests.

MRS. LOWRY: They also have an interest in not being arbitrarily suspended from school.

QUESTION: Yes.

MRS. LOWRY: Both based on their property interest and their liberty interest.

And, in addition to that, Your Honor, I'd like to point out that the Fifth Circuit, just a month ago, in a decision yet unreported, found a liberty interest both in the foster family -- in the foster parent and in the foster child in an analogous situation, citing this case.

QUESTION: Well, if, as my brother Stevens suggested in a question a few moments ago, the child does, the foster child does have this liberty interest which is constitutionally protected by the procedural due process accorded by the Fourteenth Amendment, why isn't that interest protected if the foster parents don't want him in the home?

MRS. LOWRY: Well, I think that, as a reasonable matter, --

QUESTION: Well, it's still the same liberty interest, if it's the child's interest, isn't it?

MRS. LOWRY: Yes, Your Honor, and --

QUESTION: Why on earth did the district court say that no hearing is required if the foster parents don't want him in the home?

MRS. LOWRY: Well, Your Honor, this Court could of course modify the decision in that respect.

QUESTION: Well, why do you think it did? Why do you think the district court did, if the liberty interest was the kind of interest you're describing?

MRS. LOWRY: The district court did it after submission of affidavits by the city defendants, in which they made a policy argument that there was no need to have a hearing, and it would be counter-productive to have a hearing in a situation in which foster parents were requesting the removal; that, in fact, it might be destructive to a child to require the child to stay there during the hearing process when the foster family had affirmatively asked that the child leave.

That was the basis for the district court exempting that.

QUESTION: Well, then, the liberty interest, I guess our description ought to be narrowed somewhat. It's an interest in remaining in a willing foster parent's home; is that it?

MRS. LOWRY: That's right, Your Honor. In which there is a relationship that could be protected there.

And I'd like to also address myself to another question that you raised earlier, and that is whether or not the State Court review process is in effect when a child is being removed from a foster home. It is not. The State Court review process is a review of status, which takes place periodically.

Mrs. Smith had had a review of foster care status with regard to these children only two weeks before the children were to be removed from her home. And the record shows that the agencies do not require the court to order that the children be removed before the children actually are removed.

The foster care review status is a hearing in which the child is determined to remain in public care, in foster care generally, and in which the agency is free then to move the child any place, as they were preparing to do in Mrs. Smith's case.

So that there are no other other available ways in which the liberty interest could be protected.

QUESTION: Well, what need do you think is defective about the present procedure of ten days' notice and then a sitdown conference -- isn't there an opportunity for a sitdown, at least a conversation with the agency?



MRS. LOWRY: Yes, there is the --

QUESTION: And can the foster parents bring any information they have there?

MRS. LOWRY: They can bring information, but they don't know the reason that the child is going to be removed, so they are somewhat handicapped.

QUESTION: Are they ever told, at the time?

MRS. LOWRY: They may or they may not be, and it may or may not be the reason for which the child is going to be removed. The record is very clear on this. They don't know the reason for the child being removed in many cases.

If the reason for the child being removed is based on a report in the record, they do not have access for that, they have a hearing -- a person who is conducting the conference who has already presented --

QUESTION: Well, do you agree that under State law that when a parent voluntarily turns over his child to the State to place in a foster home, do you agree that the understanding is, or the State law is that the parent has the right to have the child back, upon request?

MRS. LOWRY: The State law says that, that's right. But there are certain exceptions. I think that the situations vary enormously.

The Gandy children's mother voluntarily placed these children with the State.

We are talking about situations in which at least a year has passed, often much more time has passed. I don't believe that the State law says that the natural parent has an absolute right, in fact the State law has changed since this decision and has been modified somewhat. So now a hearing that might be directed by this Court could look into a few other things, depending on the length of time the child had been there.

QUESTION: By the way, what standard do you think the agency in New York applies now when, after a year, there is a removal from a foster home proposed, and they give the foster parent notice, what standard do you think the agency is applying in deciding to remove the child, to return it to the parent?

MRS. LOWRY: I think the standard varies. I think that the standard that would be articulated --

QUESTION: Well, is it applied in -- do you find it in the statute or in a regulation, or where do you find it?

MRS. LOWRY: The statute says that an agency -- 383(2) says that an agency may remove a child from a foster home at the agency's discretion. That's the standard in the statute.

Agencies generally operate under the rubric that they are acting in the best interest of the child. But the agency's decision-making process is --

QUESTION: Well, as far as a standard is concerned, that's all right with you, I take it?

MRS. LOWRY: That certainly is. But it's obviously a sufficiently vague and subjective standard, at which a lot of subjective information is relevant --

QUESTION: Well, it may be, but you wouldn't suggest that the standard be changed?

MRS. LOWRY: No. No, Your Honor. All we're suggesting is that there has to be some sort of an adequate procedure to determine whether the standard has been correctly applied. I don't think that anyone at this point will assert that the standard was correctly applied with regard to the removal of Eric and Danielle Gandy from Mrs. Smith's home; and, in fact, the agency itself changed workers and reversed itself.

QUESTION: Is the agency decision, in New York, subject to any kind of judicial review?

MRS. LOWRY: No. The agency decision is subject to the conference that the district court declared unconstitutional, and then the child may be removed. After the child is removed, there is a full administrative fair hearing provided by Section 400 of the Social Services Law.

QUESTION: And then that is subject to judicial review?

MRS. LOWRY: And then that is subject to judicial

review, perhaps many, many months and years down the road, after the child has been subjected to an incorrect decision.

After Eric and Danielle, for example, could have been out of Mrs. Smith's home for a year and a half by the time this case could have gotten into State Court to review whether or not Mrs. Smith indeed had arthritis that made her incapable of caring for the children.

QUESTION: Do you think the district court would require that trial type hearing, the full trial type hearing prior to removal be subject to judicial review?

MRS. LOWRY: Well, I don't think that they required a full trial type hearing, but I think it was their intent and I think the opinion specifically says that they contemplate this to be a final administrative decision, so that judicial review could be obtained immediately, and if any stay was going to be granted, that of course would be up to a court. It hardly would be automatic.

But I think that they were trying to make this decision-making process as speedy as possible, rather than allowing the present procedure, which contemplates a conference first, the removal, and then full-scale review after the harm has already been done; so that, in a sense, the harm is really irrevocable, because the child has already been subjected to a removal, which may have not been necessary and which constitutional standards, we believe, could require and make

much more adequate in terms of making a decision for these children.

We're talking about children who are being separated from what may be the only home they know, talking about --

QUESTION: Mrs. Lowry, could I just put this other side of the problem to you for a moment?

Supposing the agency adopted a rule that in a single foster parent situation -- and Mrs. Smith was a 53-year-old widow -- a single parent over 52 or 53 years old, suffering from a severe illness of some kind, such as arthritis, should not, in the normal case retain custody of the child such as this; would such a rule be arbitrary?

MRS. LOWRY: I think it would not be subject to judicial -- to federal court jurisdiction.

QUESTION: Well, if that were adopted as agency policy and you imposed the hearing, then who shall decide whether or not the policy should apply in the given case? It's going to be an employee of the agency, isn't it?

MRS. LOWRY: No. The person who would decide whether the decision was arbitrary would be a public official.

QUESTION: Now, who is this independent decision maker? That's the question I was getting to.

MRS. LOWRY: All right.

QUESTION: What does the Constitution require with respect to the identity of the person who shall decide whether



or not to apply the policy?

MRS. LOWRY: I think that the only thing that the Constitution requires here is that the decision maker not be previously involved in the decision.

QUESTION: But where does the Constitution require that? Why isn't it perhaps wiser to have a person who has some background with the family and the child and all the rest making the decision?

MRS. LOWRY: Well, I think that -- first of all, there's nothing to require that this decision maker not be someone with some background in social services.

But, because --

QUESTION: No, but with knowledge of the facts of this particular case. Why does that disqualify a person, otherwise independent, having no financial interest, no interest other than the well-being of the child?

MRS. LOWRY: Because the people who then appear before the decision maker, who want to present the information to the decision maker, are burdened by the fact that the decision maker has knowledge of a great deal of information that the other people may not know of and may not have an opportunity to refute.

If the social services official has been involved in the decision, as the record shows many of them were, then they may have access to a great deal of information that in fact is

not accurate. And when the family and the child's representative or the child comes in to explain why the decision is incorrect, that the people who come in to explain that will not know about what information the decision maker has in his or her head, and they can't refute it.

That's why it is important that the decision maker make a decision based on information that's presented then, that each side can have an attempt, an opportunity to refute.

This doesn't require lawyers, it can be as informal as people sitting down and talking. But the decision cannot be made fairly unless all parties know what the other side has to say, and have an opportunity to say, "This fact is wrong, but this fact is right" or "the fact is half right and half wrong."

QUESTION: Mrs. Lowry, I'm still in trouble. Is this person a person outside of the agency?

MRS. LOWRY: The person is an employee of the Social Service District, and if the child is in care with the Social Service District, --

QUESTION: Well, I mean, I'm talking about the one you want. Will you settle for that?

MRS. LOWRY: Yes, Your Honor. I think we're talking about the same kind of a decision maker --

QUESTION: Well, the only one you want is somebody who didn't handle this particular case.

MRS. LOWRY: We want someone who is not involved in this particular case, who will make a decision based on the information presented to them at the time everybody has an opportunity to hear the information.

QUESTION: Well, is the man at the conference, the man or woman at the conference such a person?

MRS. LOWRY: I beg your pardon?

QUESTION: When the conference is held.

MRS. LOWRY: At the conference. No. The person at the conference, the record shows, usually was involved in the decision making at the initial stages.

QUESTION: But you would settle if it were another equivalent person, but just didn't -- for example, somebody who had another authorized case but didn't have this one.

MRS. LOWRY: That's right. But we would --

QUESTION: You would be satisfied.

MRS. LOWRY: Yes, but we would say that it cannot be someone from the private agency, it has to be the public official as the conference now requires.

These are private agencies that are publicly funded and are delegated with the responsibility of taking care of these children. It's a public function, and we would say that an in-agency conference would not be adequate. But a Social Service agency conference, just as was contemplated in Goldberg v. Kelly, would be adequate.

QUESTION: Well, you don't want to overhaul the whole Social Services, do you?

MRS. LOWRY: Not at all. We're asking only for the same kind of decision maker as is presently provided in the revised city procedure. We're not asking for a different kind of decision maker.

QUESTION: Well, all these arguments go to what kind of piece of legislation the State of New York ought to have dealing with this sensitive subject.

MRS. LOWRY: Well, Your Honor, I believe not. The district court said that the exact details of the procedure should be worked out by New York, but the question of whether or not there should be a procedure and whether or not it should satisfy minimal due process, with the right of everyone to be heard, I believe is a federal issue and is a constitutional issue; and I believe that these children have been condemned to suffer grievous loss, they do have a constitutionally protected interest in the relationship, in this family relationship, which may be their only family relationship and their only hope for permanence.

QUESTION: Are you here representing the interest of the children or of the foster parents?

MRS. LOWRY: I am here representing the interest of the foster family. As you know, Your Honor, I represent the foster parents. They have an interest in the foster family

relationship.

QUESTION: Well, you were just speaking about the children's rights. I thought your friend was representing their interest, and the State.

MRS. LOWRY: Well, it is our position that we represent the foster children's rights as articulated by the district court. Mrs. Battenwieser, as you know, has not requested such relief. The foster parents have requested such relief, and we believe we have standing to raise the children's interest with regard to this right.

Mr. Justice Rehnquist, I'm sorry, I didn't hear your question.

QUESTION: You have a problem common to many counsel, of being peppered by more than one Member of the Court at a time.

What is the issue that this hearing is supposed to resolve?

MRS. LOWRY: All right. With regard to the situation, the most common situation, 80 percent of the situations, in which the child is being removed from the foster home and to be transferred some place else, the hearing is to decide whether the transfer is in the child's best interest.

QUESTION: And is the reason that that is the issue is because New York says that is what the issue is?

MRS. LOWRY: New York says that the children can be



removed at the agency's discretion.

I believe that New York also takes, as a matter of legislative policy, that decisions made with regard to children should be made in their best interest.

QUESTION: But now, is this question to be answered at the hearing one that has its direct source in New York law, or is it superimposed as part of the constitutional guarantee by the district court?

MRS. LOWRY: No. The district court --

QUESTION: Which?

MRS. LOWRY: I'm sorry. The district court did not deal with standards at all. The district court was very explicit. The questions to be answered at the hearing, about what's in the best interest of the children, are matters solely of State policy. There is not federal policy that is imposed by the district court decision.

The district court says that the hearing is only to adequately effectuate State policy, and that it's constitutionally required but to effectuate State policy and not to impose any kinds of federal policy.

The question to be answered when the child is going to be returned to a natural parent is a question that is detailed by State law, it's a State law standard that has to be applied then, and it's a different standard than when the child is going to go to another foster family, but it is determined

by State law.

QUESTION: Each of these standards are now applied by various New York public agencies, but just not in the same manner as the district court thinks they ought to be applied?

MRS. LOWRY: They are not applied in a constitutionally adequate manner, and the decision is not reviewed in any kind of a constitutionally required manner until after the child is out of the home. It is reviewed after the child is out of the home, and not before.

QUESTION: Mrs. Lowry, could I ask you another question?

The foster parent status, as having authority to receive foster children, is something that is renewed periodically, is it?

MRS. LOWRY: Yes, it is.

QUESTION: Does the child have any right to protest the withdrawal of a license of a foster home?

MRS. LOWRY: The child does not under New York law, but that would be -- that would likely --

QUESTION: It could happen, could it not? For example, that they might adopt a rule that no one over 50 years of age, with arthritis, can be a foster parent.

MRS. LOWRY: The State could do that, that's right.

QUESTION: And without any notice or hearing to a child who might be affected by such a decision?

MRS. LOWRY: Well, I think that if a child were in a foster home and there was such a relationship, then the fact that the license was going to be withdrawn would be an issue at the hearing. And I believe under the district court decision that would require a hearing, and I believe even under the existing procedures. There is presently a procedure where that foster parent could challenge the determination of withdrawal of the license.

QUESTION: I see.

MRS. LOWRY: But that would be, again, after the child is removed. Section 400, I believe, contemplates that.

That again is after the harm has been done, the unnecessary harm.

QUESTION: The logic of the district court's opinion would seem to require that the child, whose liberty was going to be deprived by the loss of license by the foster family, would be the party at interest in such a hearing.

MRS. LOWRY: Yes.

QUESTION: Constitutionally.

MRS. LOWRY: Yes, and --

QUESTION: So that he or she would have a right to procedural due process accorded by the Fourteenth Amendment before New York could cancel the license of a foster parent, of his or her foster parent.

MRS. LOWRY: That's right. And I believe that's a

situation covered by the district court's order, because, in that case, the reason for removal would be the cancellation of the license, and then there would be a hearing at which it could be determined whether it was in the best interest of the child, then, to be removed from that foster home.

QUESTION: Mrs. Lowry, suppose the district court, in another case, says that before the child, surrendered by its own parents, can be accepted by the State there must be a hearing? Would you complain about that?

MRS. LOWRY: Not at all, Your Honor. In fact, --

QUESTION: You would want that?

MRS. LOWRY: We would want that. We would want that.

QUESTION: Well, I mean -- in other words, you say that nothing can be done concerning the child without a hearing?

MRS. LOWRY: No, we're not saying nothing can be done without a hearing.

QUESTION: Well, can the foster parent paddle the child without a hearing?

MRS. LOWRY: Yes, as long as it's not excessive.

QUESTION: That doesn't have anything to do with liberty at all, does it?

MRS. LOWRY: No, Your Honor, I don't think it does. I think that that becomes a State law issue, as to whether --

QUESTION: I know. Because you weren't paddled, I was.

QUESTION: Did you get a hearing?

QUESTION: I didn't get a hearing, no.

MRS. LOWRY: No, Your Honor, I think that the only time a hearing is required is when there is going to be a substantial deprivation to the children. And we think the children should not come into foster care unnecessarily. We think that the best thing for a child is to stay with the natural family under most circumstances. We have no quarrel with that.

All we're saying is that after time has passed, and after a child has been in a relationship for a year or more, the child then has an interest in the relationship and has an interest in not being subjected to arbitrary deprivation of that relationship. We're not talking at all about substantive standards when we're talking about the natural family.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well.

Mrs. Marcus.

REBUTTAL ARGUMENT OF MRS. MARIA L. MARCUS,

ON BEHALF OF STATE APPELLANTS SMITH, SHAPIRO, ET AL.

MRS. MARCUS: Your Honor, let me just point to the record and correct a few errors that were made in appellees' argument.

So far as the statistics are concerned, page 90a of the Appendix contains a projection based on '75 and early '76



figures, which state that as to New York City there would be 4,200 removals or changes of status; half of those would be children discharged from foster care. So that we've got half being transferred within, half being discharged out.

Now, in figures by the Child Welfare Information Service, which is a computerized service that keeps records on this for the agencies and for the city, 1975 figures were attached to Intervenor's Reply Brief, and that showed that of the discharges -- and now we're talking about half of the transfers, half are within the system and half out -- of the half that goes out, in the year 1975: of the group of children in foster care for more than a year, 48.1 percent returned to the natural parents.

So those are the statistical facts as shown by the record.

QUESTION: Is the State's argument that there is no liberty interest, or that if there is one, all the process that's due is being afforded?

MRS. MARCUS: Both, Your Honor. There can't be a liberty interest because if there were one it would collide head-on with the one already declared by this Court to the natural family. First, for the reason that I stated before, that the standard has got to change, if we're going to have --

QUESTION: Well, what about -- does this case only involve cases where the natural parent wants the children back?

MRS. MARCUS: No. But the point is that once you declare liberty interest in the foster care relationship, it's going to change the --

QUESTION: That may be. What if the natural parent isn't involved?

MRS. MARCUS: Well, --

QUESTION: And it's just that the State has decided to change the custody?

MRS. MARCUS: The State cannot guarantee a liberty interest in a relationship out of which one party can walk at any time. The natural parent --

QUESTION: Well, would you say anybody could complain -- anybody could complain at all if New York decided, Well, we've been giving too much due process here, we're going to transfer, we're going to discontinue foster care at the discretion of agencies, without any hearing, without any notice, without any sitdown discussion, without any trial type hearing at all, and not subject to any judicial review whatsoever, we're just going to transfer the children.

MRS. MARCUS: Well, that would abrogate 392, of course, which is an existing statute.

QUESTION: I just said let's assume New York decides to do it.

MRS. MARCUS: That it decides to abrogate its existing statutes. I think New York is not under any

constitutional obligation to provide any foster care services. This is --

QUESTION: That isn't what I asked you. They are providing it, and they are going to transfer -- make, say, 2,000 transfers a year in New York City, from one foster family to another, and without any hearing, without any notice, without explaining anything at all, and without any judicial review. Now, you would say they could do that because there is no liberty interest whatsoever.

MRS. MARCUS: Yes, I would say that, although, as a matter of policy that would be obviously undesirable and would not be done under New York law. You cannot have a liberty interest in a relationship in which one party has no obligation whatever to remain with it. Imagine what would happen if a natural parent or an adoptive parent decided to walk out of a relationship? They would be jailed, and they would be publicly stigmatized. There is a great difference between an adoptive and natural parent, and the foster parent here. There is no obligation. Mrs. Goldberg was obligated only so long as she took the State's money.

QUESTION: Would you think the State could, without any notice whatsoever and without any hearing, terminate the parents' rights once --

MRS. MARCUS: The natural parents' rights?

QUESTION: Yes.

MRS. MARCUS: No.

QUESTION: And that is because why?

MRS. MARCUS: Because this Court has declared that there is a constitutional right for a natural family to be together. And under this Court's decision, it would not be possible to abrogate the rights of the natural parents.

QUESTION: Do you think the child himself would have an interest in that interest? That the child would have standing --

MRS. MARCUS: As a member of the natural family, he would partake of that interest. But that does not occur here.

And I might add, as to the second part of your question, --

QUESTION: So you agree that the child certainly has a liberty interest in remaining with his natural family?

MRS. MARCUS: Yes. This Court has so declared, and we are under this Court's mandate.

Now, in so far as --

QUESTION: but not with respect to remaining with any foster family?

MRS. MARCUS: The foster family, because of the complete difference in that kind of relationship.

QUESTION: Suppose the parents are dead and the State has custody of the child, and --

MRS. MARCUS: The State always has custody in the case where the child is in foster care. And then, of course, the foster parents, by statute, have a mandatory statutory preference to become the adoptive parents in New York State.

QUESTION: Well, does anyone have standing --- would anybody have any kind of standing whatsoever to -- or any interest that you would recognize -- to question the State's decision in terminating a particular foster parent?

MRS. MARCUS: Well, under the -- I want to correct also a misconception about 392, which came up in appellees' argument, 392 of the Social Services Law. The foster parent can ask the court to maintain that child in his home. It does operate as a possible pre-removal judicial hearing, and there are a number of cases cited in our brief where that was done. It does not have to wait until years and years later. This is a pre-removal judicial hearing which is available.

QUESTION: And in what court?

MRS. MARCUS: And that is in the Family Court of the State of New York.

QUESTION: Well, it's not the United States District Court?

MRS. MARCUS: No. This is in the Family Court of the State of New York, and of course with the usual appeals and eventually to this Court if there's something amiss.



Now, Justice Stevens brought up the question of whether the decision below contemplated the child having some role. The decision below didn't say so, but under 392, this judicial proceeding that we have under the Family Court Act, the child is there and it's presumed that he will be, because there's a statutory section in that, 392(6), which says that the court may dispense with the presence of the child. So that, obviously, it's contemplated that the child will be there and will be heard unless the court feels that it's not necessary.

MR. CHIEF JUSTICE BURGER: Your time has expired now, Mrs. Marcus.

Thank you, ladies. The case is submitted.

[Whereupon, at 11:36 o'clock, a.m., the case in the above-entitled matters was submitted.]

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