A Community Case Study on the Crisis in Jewish Child Care*

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The Wilder vs. Sugarman legal challenge to government-subsidized child care under voluntary sectarian auspices is supported by civil libertarians and many social workers but poses a serious threat to the quality of child-care and treatment, and parental rights to safeguard the Jewish identity of their children.

Wilder vs. Sugarman

In June, 1973, the New York Chapter of the American Civil Liberties Union, with the aid of the Legal Aid Society in New York, initiated a lawsuit in the federal District Court, charging that New York State's child-care statutes were unconstitutional. This lawsuit is known as Wilder vs. Sugarman. The plaintiffs alleged that Shirley Wilder, then aged 13, and others in her class, suffered damage and were deprived of constitutional rights because of the way the child-care system in New York City operated. Jules Sugarman, at the time New York City Commissioner of Human Resources, was using public funds to purchase services from voluntary agencies. Aside from Mr. Sugarman, all state and city public officials involved in the child welfare system, as well as the administrators of all 77 voluntary child care agencies, were named as defendants.

The plaintiffs pointed out that many of the voluntary agencies were under sectarian control and were using public monies for the religious training of children. It was alleged that this violated the First Amendment relative to separation of church and state. It was further alleged that Shirley Wilder, a Black child, was deprived of equal treatment because of her race, which is a violation of the Fourteenth Amendment. Another allegation was that the system constituted cruel and unusual punishment, which is a violation of the Eighth Amendment.

* Presented at the Annual Meeting of the National Conference of Jewish Communal Service, Washington, D.C., June 6, 1977.

These charges received support in New York social work community. This included the Citizens' Committee for Children, the Federation of Protestant Welfare Agencies, the Metropolitan Applied Research Center, and the New York City Chapter of NASW. The Jewish Child Care Association of New York, one of the defendants, has been very active in resisting the plaintiffs' action. So have the Jewish Board of Guardians, Catholic Charities of New York, and Greer Children's Services. Other voluntary agencies, including Louise Wise Services, have signed "stipulations" by which they agreed to accept the final decision without participating in the lawsuit.

Decision of U.S. District Court

On November 19, 1974, Judges Mansfield, Tyler, and Duffy of the U.S. District Court in New York ruled on only one of the constitutional issues, the allegation of violation of the Establishment Clause of the First Amendment. This ruling, favorable to the defendants, fully upholds the right of voluntary agencies under the sectarian auspices to use public monies to meet both the temporal and religious needs of children. Details of this unanimous decision are worth examining for its vindication of voluntarism under sectarian auspices. The plaintiffs had challenged Article VI, #32 of the New York State Constitution which provides that a child "shall be committed or remanded or placed, when practicable, in an institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child." This constitutional provision is implemented in New York social services law.

Recent amendments to the law supplement the religious matching provision by specifying: "so far as consistent with the best interests of the child, and where practicable . . . so as to give effect to the religious wishes of the parents." Parents may request a placement in their own religion, in a different religion, with indifference to religion, or with religion a subordinate consideration.

In upholding the constitutionality of these provisions, the Court was guided by previous legal decision, especially that of the U.S. Supreme Court in the matter of Walz vs. Tax Commission. Here the Supreme Court held: "we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts, there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Elaborating on this concept the District Court stated: "the state must wear two hats, one as a surrogate parent obligated to enforce the biological parent's individual rights to provide religious direction, and the other as a government obligated to refrain from use of its powers to further or inhibit religion." The decision further states: "a literal reading of the absolute and sweeping language of the Establishment Clause would bar the state from carrying out these essential duties as a substitute parent . . . our duty is to interpret the two clauses in a sensible and realistic fashion with a view to achieving whatever reconciliation is reasonably consistent with the purpose and intention of the Founding Fathers. Repeatedly the Supreme Court has recognized that the sweeping unqualified language of the Establishment Clause cannot be literally enforced but must be construed to accommodate other fundamental rights."

The District Court further points out that the plaintiffs offered no suitable or constructive alternative to the existing system. Assuming the plaintiffs' argument that foster children should be placed in non-sectarian homes, serious problems would arise. The Court recognized the "radically differing needs of the thousands of foster children who are the beneficiaries of state aid . . . a child raised as a Hassidic Jew would demand . . . observance of dietary rules, the Sabbath, attendance at temple, and continued close affiliation with others of his same religious persuasion . . . the state, if it were required in each case to be responsible for such "custom tailoring" of each child's religious training . . . would be hopelessly entangled in religion, far beyond its existing simple relationship with foster parents and religious institutions under which the latter assume all of these responsibilities for the child's religious education."

The District Court was "satisfied that the challenged New York laws represent on their face a fair and reasonable accommodation between the Establishment and Free Exercise Clauses of the Constitution."

Why Jewish Auspices?

Developments subsequent to this 1974 decision indicate that the plaintiffs do not accept it. Far from any concern about adult responsibility for religious training of children, they rather emphasize the right of children to reject any religious identity or training. This is clear because repeated efforts have been made since 1974 to reach an out-of-court settlement and to avoid further litigation in the District Court on another aspect of Wilder vs. Sugarman which I will discuss later. In the plaintiffs' attempts (including a very recent one) to draft an acceptable compromise settlement, one curious point appears. That is the right of children entering placement to determine for themselves whether they wish any religious designation, or whether they wish a designation different from their parents. At one point reference is made to children over 14; at another point no age is specified.

We are clearly dealing with people whose concept of religious training is alien to the Jewish concept, which is so linked to community or peoplehood. The plaintiffs conceive of religious training as a kind of pill

which the Rabbi dispenses at prescribed intervals. According to this concept the child could live anywhere, under the auspices of any organization, and still get his prescribed pill, if he wants it. I conceive of Jewish training as a way of relating to a child to a religious civilization. The child is exposed to various expressions of this civilization, which might include food, ceremonies in the home or with peer groups, exposure to art, literature, past and present history, etc.

In the course of these protracted procedures I had the opportunity to testify as an expert witness on the importance of placing children according to parental wishes, and the rationale for placing a Jewish child in a Jewish agency. In this process it was very clear that the plaintiffs' representative who examined me rejected the concept that Jewish parents should have a right to choose a Jewish agency for their children. She clearly showed her conviction that if individuals of other religious or racial groups did not have a choice or a desire to place their children within their own group, then Jewish individuals should not have that choice or that desire. At one point, where I indicated my knowledge that only in very rare instances did Jewish parents choose to place their children in non-Jewish facilities, the young attorney demanded to know why this should be so. I felt sad about the colossal ignorance of recent and ancient Jewish history revealed by this question and angry about its destructive and hostile implications for Jewish communal life. I could only respond: "You are asking me to account for two thousand years of Jewish history." I realize now that I made a mistake. At least four thousand years of history are behind the persistent desire of Jews to survive as a people.

Equal Protection or Proper Diagnosis?

No decision has as yet been made on ACLU's additional contentions that current child-care practice in New York City also violates the Fourteenth Amendment, relative to equal protection, and the Eighth Amendment concerning cruel and unusual punishment. It is alleged that Black children, because of their race, are deprived of equal treatment in the system, since most Jewish and Catholic agencies give preference to the needs of their co-religionists. Since over half the children in care are Black and most of these are Protestants, it is alleged that this imposes a disproportionate burden on Protestant agencies, and deprives Black children of needed services, especially residential treatment and other specialized institutional and group care. Actually the facts are that Black children requiring foster home care do have ready access to foster homes. There is a shortage of suitable treatment resources for multi-handicapped adolescents of all races and religions. In reality the ACLU, and other civil libertarians, including, unfortunately, many social workers poorly informed about the complex treatment problems of today's youth, and the special problems of Black youth, have jumped to the conclusion that Shirley Wilder and others have been deprived of fair treatment because of race.

Our experience and the experience of other clinically oriented practitioners in child welfare indicates that the small number of children who cannot be placed within existing facilities are multiply handicapped individuals, some requiring lifetime care. In fact white children in this class have no easier access to care than Black or Hispanic children. Some of these children are now or have been in state facilities for the retarded or psychotic; some with severe developmental disabilities are in municipal hospitals, and many violent and extremely impulsive individuals who cannot be controlled in existing facilities are on the streets or in and out of temporary holding facilities. Over 3 years ago The Jewish Child Care Association attempted to diagnose and treat some boys in this latter group who were known to the Family Court. Our hypothesis was that some children allegedly denied care were actually lost in the system because they and their families were not properly identified. Their needs and their strengths were not known, and they had never been prepared for

or truly offered a different life than they had been leading. Over these 3 years the Pleasantville Diagnostic Center has proved the validity of this hypothesis and has successfully placed 158 of the 193 children studied. An additional 22 were sent home by plan with community supports. Well over 90 percent of the children placed remained in placement for over a year, or returned home by plan. The great majority of this population is Black or Hispanic.

The New York City Jewish community, over a long period, and with great expenditure of private philanthropic funds, has developed a large network of specialized services to meet the specific needs of deprived, troubled, and handicapped Jewish children. Today this network is open to children of other religions, regardless of race. Of 950 children in all JCCA placement facilities, 427 or 45 percent are not Jewish. The proportions of Jewish and non-Jewish children varies considerably from one group care facility to another, ranging from 19 percent Jewish in one institution to 70 percent in the group homes. A majority of the non-Jewish population is Black or Puerto Rican. There are also 48 Jewish children who are Black or Puerto Rican. At present the Jewish Child Care Association of New York receives approximately 86 percent of its operating costs, as distinct from capital outlays, from public sources. These funds were accepted with a clear understanding and contractual agreement that they would not diminish the Agency's traditional responsibility to serve Jewish children whose parents choose care under Jewish auspices. Unfortunately, some people have assumed a change in this traditional responsibility, sanctioned by law, since the Association began to extend care in 1967 to children of other religions. In fact, the Association has steadfastly affirmed this commitment to the care of Jewish children and has continued to identify the special needs of Jewish families and children in the New York metropolitan area. It seems most unfortunate that some people, Jews and non-Jews, continue to demand that Jews abandon their religion, their peoplehood, or their communal services. At different times in history this has been required as evidence of loyalty to the state religion, or to the secular state. Now it is being demanded in relation to a mistaken concept of equal treatment under law.

The same laws which enable Jewish communal service to flourish in our country equally enable services for other religious and ethnic groups. It would benefit no one, but deprive many, if the Jewish Child Care Association of New York had to abandon its commitment to Jewish children, or its valiant efforts to serve the pressing needs of children of other faiths.