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The Riddle of State Actor Status for Private Foster Care Agencies

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By **Sofya Uvaydov, Timothy Capowski and Jennifer Graw** | March 05, 2021

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For the last 15 years, the courts in this Circuit have consistently split on a focused question: Are private foster care agencies state actors for purpose of 42 U.S.C. §1983 liability? The district courts have the unenviable task of reconciling two Second Circuit decisions from the 1970s, finding state actor status, with 40 years of subsequent Supreme Court precedent establishing a framework of analysis that dictates the opposite answer.

One camp of district judges believes that until the Second Circuit explicitly holds otherwise, they must adhere to the rulings of the Second Circuit from the 1970s. The other camp believes that the Second Circuit's decisions have been overruled and applies the Supreme Court's tests. This results in opposite and conflicting conclusions. Strikingly, however, the overwhelming majority of district courts in both camps share the same reservations that these Second Circuit decisions on the matter are no longer good law.

Given this near-unanimous questioning of Second Circuit precedent, it is baffling that the issue has escaped appellate review and resolution. The answer appears to lie in the unwillingness of the defendants to bring this to light. Defendants focus on individual cases and strategically calculate that the easier argument would be to challenge the underlying merits or assert qualified immunity instead of focusing on the threshold issue of whether they are subject to suit under the statute. An ideal example of such approach is the recent decision of *Smith v. Tkach*,[1] where a private foster care management agency, after unsuccessfully raising state actor status at the district court level, abandoned the argument on appeal in favor of seeking affirmance on the merits (failure to state a claim). In other situations, the cases settle in light of the costly discovery and trial process that is required before appellate finality is achieved.

That myopic litigation view, however, fails to appreciate that over the last fifteen years, many of these private foster care agencies have dedicated more funds and time litigating Section 1983 claims than they would if they were to pursue the state actor issue once and for all.

Second Circuit Precedent

By way of background, currently, a private entity can only be sued under Section 1983[2] if they qualify as a state actor in the limited circumstances, (i) when the private entity performs a traditional, exclusive public function (the "public function test"), (ii) when the government compels the private entity to take a particular action (the "compulsion test"), or (iii) when the government acts jointly with the private entity (the "joint action test").[3]

The key decision from the Second Circuit on application of state actor tests for private foster agencies was *Perez v. Sugarman*.[4] The appeals court in this 1972 decision found that the private foster care agencies in the case, St. Joseph's and NY Foundling Hospital, were performing a "function public or governmental in nature and which would have been performed by the Government but for the activities of the private parties."[5] The court relied on N.Y. Social Welfare Law, that existed as of 1972, providing that the government shall be responsible for the welfare of the children that need assistance. As a secondary basis, *Perez* found that the "comprehensive statutory regulatory scheme" of supervision and control over the private agencies also warranted a finding of state action.[6]

In a subsequent appeal from the same case three years later, now titled *Duchesne v. Sugarman*,[7] the agencies once more raised the state action defense in light of the Supreme Court decision, *Jackson v. Metropolitan Edison Company*.[8] The Second Circuit declined to reconsider the holding in *Perez*, noting that after considering the implications of *Jackson*, it nevertheless "reaffirm[s] our earlier finding of state action."[9] Notably, less than a year later, the Supreme Court reversed the Second Circuit's interpretation of *Jackson*'s public function test in a different case.[10]

The Changed State Actor Tests

Shortly after the Second Circuit decided *Perez*, the Supreme Court drastically changed the framework for state actor analysis in a trio of decisions: *Jackson, Blum v. Yaretsky*[11] and *Rendell-Baker v. Kohn*.[12]

In *Jackson*, the Supreme Court first addressed the comprehensive statutory scheme analysis finding that the mere fact that a business is subject to extensive and detailed state regulation does not render it a state actor, instead finding that there must be close nexus.[13] In addressing the public function test, the Supreme

Court considered and rejected that providing utilities was "traditionally the exclusive prerogative of the State."[14]

The Court decided *Blum* and *Rendell-Baker* simultaneously eight years later applying a similar analysis to both. *Blum* involved a private nursing home providing care to Medicaid-funded patients while *Rendell-Baker* involved a heavily-regulated private school which derived over 90-99% of its income from public funds by taking in state-referred special needs students. The Supreme Court held that dependence on public funds, even if it is virtually all of the private actor's income, does not render the private actor a state actor for purposes of Section 1983.[15] Second, the Court held that extensive regulation by the state of the entity also does not confer state actor status.[16] Finally, as to the public function test, the Supreme Court clarified that to determine if the "function performed has been traditionally the *exclusive* prerogative of the State," the Court should consider if this function has been historically performed by the state.[17]

Courts Continuing To Follow 'Perez' Despite Misgivings of Its Validity

In 2011, Judge Edward Korman in *Phelan v. Torres*[18] brought the discrepancy of *Perez* with the current standards to the forefront, outlining how both the state actor analysis has changed and how *Perez* was factually inaccurate at the time decided. *Blum* and *Rendell-Baker* changed the public function test by instructing that the critical consideration is whether the function has historically been the exclusive prerogative of the state. The *Phelan* court, citing to extensive historical literature, noted that care and fostering of abandoned children has traditionally been performed by *private parties*, and not the government. The state began to regulate these private agencies in the 1880s but it was not until the end of the 19th century, that the state would take responsibility for abandoned children. Indeed, the Social Services statute that *Perez* relied upon was not passed until 1929. The court also drew analogy to a more recent Second Circuit holding that a private group home where the state would place mentally disabled adults was not a state actor even though the statutory scheme and delegation of responsibility paralleled that of the foster care system.[19]

Despite a lengthy discussion of the various reasons that *Perez* was no longer good law, the *Phelan* court still assumed that it was bound by *Perez* and granted summary judgment on the alternative ground that that plaintiff did not state an underlying constitutional violation. When appealed to the Second Circuit, the appeals court affirmed, finding no underlying constitutional violation by "[a]ssuming without deciding that SVS qualifies as a state actor subject to suit under §1983."[20]

A few years later, Judge Colleen McMahon echoed Judge Korman's reservations in her ruling of *P.P. v. City of New York*[21] that:

> Although I agree with Judge Korman that subsequent doctrinal developments have significantly undermined *Perez*, I also concur with his conclusion that a district judge does not have the ability to ignore it. Until the Second Circuit says otherwise, the [private foster care] Defendants acted under color of state law. It is hoped that the Court of Appeals, mindful of Judge Korman's thoughtful analysis, will find an occasion to revisit the issue.

At least eight different courts have similarly followed suit.[22] Indeed, district courts have continued to follow *Perez* as recently as August 2020 in *Yi Sun v. Saslovsky*[23] where Judge Laura Taylor Swain once more held that Forestdale, a private foster care agency, was a state actor.

The Dissent

However, the first inkling of dissent emerged as early as 2006 in a Northern District of New York case *Lynn v. St. Anne Institute*[24] Relying on the same trio of *Rendell-Baker, Blum* and *Jackson*, Judge McAvoy found that "the Supreme Court has markedly changed the legal landscape of this area of law such that these cases *[Perez* and *Duchesne*] are no longer controlling."[25] Unlike the subsequent opinion of *Phelan, Lynn* held that the changed public function test necessitates a finding of no state actor and a departure from *Perez*.

In March of 2018, Judge Berman also issued two decisions holding that *Perez* was no longer valid based on the superseding Supreme Court and Second Circuit precedent and holding that the private foster care agency defendants were not state actors.[26] Notably, in *CB v. St. Vincent's Services*, the court bucked the concept that it was required to follow Second Circuit precedent when it has been explicitly or implicitly overturned by intervening Supreme Court decisions finding that the "view enunciated by the Supreme Court has substantially replaced the approach relied upon in *Perez* and *Duchesne*" and thus, defendants were not state actors under "current Supreme Court precedent."[27]

The Split Continues To Escape Second Circuit Review

At least two of these decisions eventually reached the Second Circuit. In the original matter of *Phelan*, the Second Circuit affirmed dismissal of the private foster care agency on other grounds without reaching the state actor issue.[28] Just recently, the Second Circuit heard another case from the Northern District, *Smith v. Tkach*,[29] involving the Department of Social Services and a private agency, Berkshire Farm Center. Although Berkshire raised—and lost—the state actor defense at the district court level based once more on adherence to the binding precedent of Perez, Berkshire decided to forego the issue entirely on appeal (as an alternate ground for affirmance). Thus, instead of being able to opine on this decade and half court split, the Second Circuit once more affirmed the dismissal on other grounds.[30]

The other dozen cases listed throughout this article were resolved without ever reaching the Second Circuit. Both *C.B.* and *E.L.A.,* where the district court dismissed the Section 1983 claims, lacked finality as the court exercised its supplemental jurisdiction to retain the state law claims. In cases where the district courts adhered to *Perez,* approximately half dismissed the private agencies on other grounds (*Phelan, Mortimor, Castro* and *Smith*) while the remainder of cases settled during the continued proceedings and before a final judgment (*P.P., Jewels, Panzardi* and *S.W.*). Of all the cases that ruled on this issue, leave for interlocutory appeal was only sought in *S.W.* back in 2014,[31] which the district court denied. Thus, almost fifteen years after the split emerged, there is still no clear ruling on this purely legal issue.

Private Agencies Need To Proactively Seek Interlocutory Appeal To End the Stalemate

Instead of skirting the issue, litigants would be best advised to proactively seek interlocutory appeal based on the historic district court split and whether *Perez* remains good law or has been overturned or even so undermined by the Supreme Court precedent that will almost inevitably be overruled.[32] Motion practice and discovery in the 21st century is not cheap and a strategic resolution of whether a private agency is even a state actor will permit dismissal at an earlier stage of the many cases in the decades to come. Indeed, in certain *pro se* cases, this might avoid litigation entirely, as the court may perform an initial *sua sponte* review after the complaint is filed but before it is served on defendants, and dismiss frivolous claims without any action by a defendant.

Endnotes:

[1] No. 19-3240, 2021 U.S. App. LEXIS 3669, at *1 (2d Cir. Feb. 10, 2021) (summary order).

[2] 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

[3] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (internal citations and quotations omitted); Sybalski v. Indep. Grp. Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008).

[4] 499 F.2d 761 (2d Cir. 1974).

[5] Id. at 765, citing *Evans v. Newton*, 382 U.S. 296 (1966).

[6] *Perez*, 499 F.2d at 765.

[7] 566 F.2d 817, 822 at fn. 4 (2d Cir. 1977).

[8] 419 U.S. 345 (1974).

[9] Id.

[10] *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978) (reversing finding of state action since the standard is not whether it has been "traditionally performed by governments" but "exclusively reserved to the State.").

[11] 457 U.S. 991 (1982).

[12] 457 U.S. 830 (1982).

[13] 419 U.S. at 350-51.

[14] Id. at 353. In comparison, *Perez* applied a test of where "private parties are performing a function public or governmental in nature and which would have to be performed by the Government but for the activities of the private parties." *Perez*, 499 F.2d at 765.

[15] *Rendell-Baker*, 457 U.S at 840-41.

[16] Id. at 841-42; Blum, 457 U.S. at 1007-08; 1011-12.

[17] *Rendell Baker*, 457 U.S. at 842.

[18] 843 F. Supp. 2d 259, 268 (E.D.N.Y. 2011).

[19] *Sybalski v. Independent Group Home Living Program, Inc.,* 546 F.3d 255 (2d Cir. 2008).

[20] *Phelan v. Mullane*, 512 F. App'x 88, 90 (2d Cir. 2013).

[21] 13 Civ. 5049 (CM) (FM), 2014 U.S. Dist. LEXIS 139070, at *36-37, 2014 WL 4704800 (S.D.N.Y. Sept. 19, 2014).

[22] *See Smith v. Tkach*, 3:17-CV-0286 (GTS/ML), 2019 U.S. Dist. LEXIS 142456, at *30 fn. 16 (N.D.N.Y. August 22, 2019) (Suddaby, J.) (holding that court is constrained to follow *Perez*); *Mortimer v. City of New York*, 15 Civ. 7186 (KPF), 2018 U.S. Dist. LEXIS 53492, at *38 (S.D.N.Y. March 29, 2018) (Failla, J.) (same); *Jewels v. Lewis*, 15-CV-5760 (KAM)(ST), 2019 U.S. Dist. LEXIS 196250, at *34 (E.D.N.Y. Nov. 12, 2019) (Matsumoto, J.)(same); *Castro v. Windham,* No. 16-CV-8148-LTS-KHP, 2017 U.S. Dist. LEXIS 153376, at *11 (S.D.N.Y. Sep. 19, 2017) (Parker, J.) *R&R adopted* 2017 U.S. Dist. LEXIS 171030 (S.D.N.Y. Oct. 16, 2017) (Swain, J.) (despite reservations,

holding that private agency was a state actor but dismissing the complaint for failure to state a claim); *J.A. v. SCO Family of Servs.*, 2017 U.S. Dist. LEXIS 123595, *9 (E.D.N.Y. Aug. 3, 2017) (Shield, J.) *R&R adopted* 2017 U.S. Dist. LEXIS 144178 (E.D.N.Y. Sep. 6, 2017) (Feuerstein, J.) (while noting the subsequent contrary Supreme Court and Second Circuit precedent, accepting that private foster care agency SCO Family of Services was a state actor); *see also Panzardi v. Jensen*, No. 13-CV-4441 (MKB), 2015 U.S. Dist. LEXIS 20609, at *4 (E.D.N.Y. Feb. 18, 2015) (Brodie, J.) (finding that Graham Windham Services to Families and Children were state actors under *Perez*); *S.W. v. City of N.Y.,* 46 F. Supp. 3d 176, 196 (E.D.N.Y. 2014) (Vitaliano, J.) (holding that private care agencies were state actors pursuant to *Perez*).

[23] No. 1:19-CV-10858 (LTS), 2020 U.S. Dist. LEXIS 140881, at *20 (S.D.N.Y. Aug. 6, 2020). Of course, *Yi Sun* involved a different procedural posture with the district court dismissing claims against the private foster care *sua sponte* at the pleading stage on other grounds.

[24] 2006 U.S. Dist. LEXIS 18786, at *42, 2006 WL 516796 (N.D.N.Y. March 2, 2006)

[25] *Id.* at 42.

[26] *CB v. St. Vincent's Servs.,* 16 Civ. 2282 (RMB), 2018 U.S. Dist. LEXIS 45847, at *13 (S.D.N.Y. March 19, 2018) *E.L.A. v. Abbott House*, 16 Civ. 1688 (RMB) 2018 U.S. Dist. LEXIS 52313, at *12 (S.D.N.Y. March 27, 2018).

[27] 2018 U.S. Dist. LEXIS 45847, at *13-14.

[28] *Phelan*, 512 F. App'x at 90.

[29] 3:17-CV-0286 (GTS/ML), 2019 U.S. Dist. LEXIS 142456, at *30 fn. 16 (N.D.N.Y. Aug. 22, 2019) (Suddaby, J.).

[30] 2021 U.S. App. LEXIS 3669, at *1.

[31] The private foster care defendants were represented by the author's firm.

[32] *See also Austin v. United States*, 280 F. Supp. 3d 567, 572 (S.D.N.Y. 2017) (Rakoff, J.)("When 'a subsequent decision of the Supreme Court so undermines Second Circuit precedent that it will almost inevitably be overruled' the District Court is bound by the Supreme Court's ruling and not by the Second Circuit's prior decisions." (quoting *United States v. Emmenegger*, 329 F. Supp. 2d 416, 429 (S.D.N.Y. 2004)); *FDIC v. No. Bear Stearns Asset Backed Sec. I LLC,* 92 F. Supp. 3d 206, 214 (S.D.N.Y. 2015) (Swain, J.); *Kazazian v. Bartlett & Bartlett LLP*, 2007 U.S. Dist. LEXIS 94243, at *6 (S.D.N.Y. Dec. 17, 2007).

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