

CONSTITUTIONAL LAW

SPRING 2000

Prof. Ariens

FINAL EXAMINATION-PART II

QUESTION I (90 minutes)

The state of Oregon's foster-home program is based on the policy of reintegrating foster children in society, with the long term hope that the foster children will be reunited with a parent or parents. The reason these children are in foster care, of course, is that at present their parents cannot properly care for them. In order to lessen the harm suffered by these children, the state has undertaken several policies designed to protect, as much as possible, these children. The state's Social Services Department tries to place foster children with their relatives, in the following order: grandparents, aunts and uncles, adult siblings (including half-siblings), and other relatives. If the state is unable to place the child or children with a relative, it offers to pay a sum of up to \$75 per day to a non-relative to care for the foster child. It does not pay any money to relatives willing to take in the foster child. In order to limit applications to the foster parent program of those interested only in the monetary rewards, the state reimbursement scheme is as follows: 1) Foster parents will be paid \$50 per day if they have no previous foster parenting experience in Oregon for the first six months of the first placement of a foster child; 2) if the foster parents have lived in another state within 12 months of the application to become foster parents, they will be paid the lesser of \$50 per day a rate or the rate at which they were paid in the state from which they came; and 3) after the first six months, the reimbursement rate is \$75 per day. If the child is not placed with a relative, the state limits the placement of foster children to foster parents of the same race or ethnicity as the child "to ensure the child will receive appropriate cultural exposure and understanding. Psychologists now believe that long-term harm may occur if the child is living in a foster home with foster parents who are of a different ethnic or racial group." Further, if the last custodial parent of the foster child was raising the child in a religious faith, the state requires the foster parents to take the child to appropriate religious services in the faith, to ensure that the child obtains the religious training initially chosen by the last custodial parent.

In 1996, seven-year-old Mark Covey was abandoned by his mother, Victoria. Mark's father left Victoria while she was pregnant with Mark. Victoria's parents were deceased, but Victoria's brother, Anthony, agreed to become Mark's foster father. After Mark lost his job, he noticed that, had he been a non-relative of Mark's, the state would have paid him \$50 per day to care for Mark for the first six months, and \$75 per day thereafter. Because he was Mark's uncle, he was paid nothing.

When Mark was abandoned by Victoria, both Victoria's sister, Teresa, and Victoria's brother, Anthony, applied to act as Mark's foster parent. Unfortunately for Mark, Teresa and Anthony do not speak to one another, and wouldn't agree to any arrangement in which they jointly would act as foster parents. The state chose Anthony as the foster parent to care for Mark on the grounds that "Mark has been denied the presence of a father figure since he was born. It is demonstrably clear from all longitudinal empirical studies that boys need father figures to make the right choices as they enter adolescence and adulthood. For this reason, Anthony makes a better option for Mark's foster care."

In 1996, David and Ana Whitfield, an Anglo married couple whose grown children were all living in their own homes and apartments, asked to be placed on a list of willing foster parents. The state placed them on a list, but did not call them. Finally, in early 2000, the Whitfields asked a foster care placement official with the state why they had never been contacted. The official told them that the number of Anglo foster children placed with non-relatives since 1996 was relatively small, and the Whitfields remained near the end of the list. When asked whether there were any non-Anglo children who had not been placed in foster homes, the official replied affirmatively. There was a particular need for Samoan and other Pacific Islander foster parents, for a number of Samoan and Pacific Islander children could not be placed due to a lack of ethnically-compatible foster parents. The Whitfields immediately offered to take in one or more of these children. The official declined the Whitfield's offer, pointing out the state's policy of limiting foster placements to non-relatives of the same ethnicity or race as the foster children.

In 1998, ten-year-old Christopher Davis was placed in the foster home of Abel and Dina Hauser. As part of the foster placement, the Hausers agreed to take Christopher to Episcopalian services every Sunday. They did so for approximately 12 months, after which they informed the Social Services Department of the state of Oregon that they no longer in good conscience take Christopher to those services. The Hausers had become members of the Worldwide Christian Church, a Christian denomination that celebrates the Sabbath from sunrise Sunday until 1:00 p.m. The Hausers indicated that Christopher wanted to attend the Worldwide Christian Church services instead of Episcopalian services, which were held Sunday mornings at 10:00 a.m. The Social Services Department did nothing for three months. Somehow Christopher's mother Betty heard about the letter written by the Hausers to the Department, and she protested that her religious beliefs were being compromised by the state's and the Hauser's actions. In response, the Social Services Department ordered the Hausers to take Christopher to Episcopalian services on Sundays, and, pursuant to administrative regulations, withheld payment of the per diem for 20 days, or \$1500 (20 days @ \$75 per day). It also sent a letter to all foster parents reminding them that their contract with the state required them to take their foster children to religious services when so indicated, even if those services did not comport with their own religious beliefs.

In early 1999, Carl and Karla Pasternak moved to Oregon from California. They had been foster parents for over fifteen years in California, and immediately applied to become foster parents in Oregon. The state took their application, and approved it. However, the Social Services Department informed them that they would be considered inexperienced foster parents because they had not previously cared for foster children in Oregon. Further, because they had moved to Oregon from California, their initial reimbursement rate would be \$35 per day, the reimbursement rate in California for foster parents. After six months, the rate would increase to \$75 per day. The Pasternaks grumbled, but agreed to take a foster child.

In early 2000, in response to a series of critical stories about Oregon's foster care system, Anthony and Teresa, the Whitfields, the Hausers and the Pasternaks all contacted lawyers about suing the state of Oregon for its unconstitutional actions in operating its foster care system. Anthony and Teresa, using separate lawyers, sued, Anthony over the state's reimbursement differential, and Teresa, over the state's decision to choose Anthony as Mark's foster parent. The Whitfields sued, alleging that the state acted unconstitutionally in refusing to

allow them to act as foster parents for the non-Anglo children who had not been placed in foster homes. The Hausers also sued the state, alleging that the contractual provision requiring them to take their foster child to religious services with which they disagreed was unconstitutional. Betty, Christopher's mother, also sued the state, alleging that the state failed to follow her instructions concerning the upbringing of Christopher, which she alleged violated both her constitutional rights and Christopher's. Finally, the Pasternaks sued, claiming that the differential reimbursement rate paid them as foster parents violated their constitutional rights. You are a law clerk to the judge who has been assigned these consolidated cases. Discuss all relevant constitutional issues applicable to each of these cases.

QUESTION II (30 minutes)

"One crucial question concerning the exercise of power is the allocation of that power: who gets to decide who gets to decide. The Supreme Court thought it answered that question in *Marbury v. Madison*, when Chief Justice Marshall wrote for a unanimous Court that it is the Court who gets to decide who has the authority to decide the disputed question. Marshall tempered that conclusion with the remark that the Court had no authority to decide political questions, but it was the Court itself that decided it had the power to determine what is a political question and what is a legal question. The awesome procedural power, deciding who has the substantive power (that is, the Court procedurally gets to decide whether it's a political question, in which case Congress and the Executive have the substantive power to decide the question, or whether it's a legal question, in which gets the Court has the substantive power to decide), is at the heart of the debate of judicial review, and no matter how hard the Court tries to convince us it's using the approved modes of interpretation and the accepted forms of legal reasoning, that suspicion of the Court will continue to exist." Discuss.

END OF EXAMINATION