

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELISA W., by her next friend, Elizabeth
Barricelli, *et al.*,

Plaintiffs,

15 Civ. 5273 (LTS) (HBP)

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants.

**NAMED PLAINTIFF CHILDREN'S MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION TO SUBSTITUTE YUSUF EL ASHMAWY AS A NEXT
FRIEND**

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PRELIMINARY STATEMENT

Pursuant to Federal Rule of Civil Procedure 17, Named Plaintiff Children seek an order of this Court substituting Yusuf El Ashmawy in place of Liza Camellerie as the next friend of Brittney W., a minor child who is a named plaintiff in this litigation. Brittney is an eight-year-old girl who has been in foster care for nearly six years and who lacks normal, permanent relationships with adults who are able to represent her interests in a systemic litigation of this sort. Mr. El Ashmawy is a former attorney with the New York City Administration for Children's Services' ("ACS") Family Court Legal Services ("FCLS") unit who currently serves in private practice in New York. Mr. El Ashmawy is familiar with the facts of Brittney's case, he understands the systemic deficiencies in New York's foster care system that are the focus of this litigation and he is well positioned to advocate for Brittney's best interests in this foster care system. Mr. El Ashmawy is well suited to serve as Brittney's next friend.

To date, the Public Advocate has consented to Mr. El Ashmawy's substitution; the State Defendant has taken no position on this matter; and the City Defendant has refused its consent to the substitution of Mr. El Ashmawy for Ms. Camellerie. Named Plaintiff Children respectfully request that the Court grant this motion.

STATEMENT OF FACTS

Brittney W. is an eight-year-old girl who has been in the custody of ACS for over five and a half years. (Compl. ¶ 122.) Shortly after Brittney was born, ACS filed a neglect petition "as a result of the failure of her mother . . . and father . . . , persons legally responsible for her care, to exercise a minimum degree of care in providing her with proper supervision or guardianship". (NYC_00050584 at '607, '611-12.) According to ACS's petition, Brittney's mother is "bipolar and schizophrenic", and she "has never been compliant with her treatment [for] her mental health issues [, which] render her incapable of providing care to the

subject child”. (*Id.* at ‘611.) The petition alleges that Brittney W.’s father suffers from “mental problems” and that he “is unable to plan for the care of the subject child”. (*Id.* at ‘612.) Brittney was thereafter permitted to live in her mother’s house under the care of her mother’s niece for a period of roughly two years before ACS developed concerns about Brittney’s well-being in that arrangement. (NYC_00051005 at ‘038, ‘092.) Brittney was subsequently placed with her grandfather, but, after roughly a month of that placement, he called ACS to inform them that he was unable to provide for her care. (NYC_00012710.) ACS thereafter took custody of Brittney and placed her in a foster home, where she continues to live. (*Id.*)

Brittney is currently represented in this litigation by her next friend, Liza Camellerie. (Compl. ¶ 123.) Ms. Camellerie is an attorney in private practice in New York City who serves on the assigned panel for Family Court in Manhattan and represents children and parents in Article 10 cases. (*Id.*) She previously spent six years as an FCLS attorney for ACS. (*Id.*) Due to changing employment circumstances, Ms. Camellerie is unable to continue to serve as Brittney’s next friend, and Yusuf El Ashmawy has agreed to act as next friend in Ms. Camellerie’s place. (*See* Declaration of Liza Camellerie at ¶ 4.)

Mr. El Ashmawy is an attorney in private practice in New York City. (*See* Declaration of Yusuf El Ashmawy (“El Ashmawy Decl.”) at ¶ 1.) Like Ms. Camellerie, he currently serves on the assigned panel in Manhattan Family Court (*id.* at ¶ 2); and like Ms. Camellerie, he has also worked at FCLS, serving two years there as a Staff Attorney. (*Id.* at ¶ 3.) Mr. El Ashmawy is certified to represent parents in child abuse and neglect cases, child support “willfulness” proceedings, child custody and visitation cases and family offense proceedings in New York County. (*Id.* at ¶ 2.) He has served on the Manhattan Family Court panel since 2011 and is currently the vice-president of the Manhattan Family Court Panel

Association. (*Id.*) Mr. El Ashmawy is familiar with Brittney’s case file and the facts of her case, and he is truly dedicated to her best interests. (*Id.* at ¶ 7-8.)

ARGUMENT

I. BRITTNEY W. LACKS CAPACITY TO REPRESENT HER OWN INTERESTS.

Federal Rule of Civil Procedure 17(c)(2) provides for the representation of a minor in litigation by a next friend and establishes that “[t]he court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.” Brittney is an eight-year-old child in the custody of ACS. Under New York law, she is an infant who must be represented by a competent adult. N.Y. C.P.L.R. §§ 1201, 105; *see also* Fed. R. Civ. P. 17(b) (the question of a minor’s capacity to sue is determined under state law).

Like many children in foster care, Brittney entered the foster care system because she lacks a permanent relationship with adults who are able to represent and protect her interests. ACS has deemed her biological mother and father unable to provide for her needs and has removed her from their custody; and two other adult family members have been forced to relinquish custody of Brittney upon a determination that they were unable to care for her needs. Under the circumstances, it is “reasonable to conclude that the adults with whom [Brittney W.] ha[s] maintained some contact are not willing, able, or available to pursue [this] legal action”. *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 89 (1st Cir. 2010).

Courts have routinely appointed next friends to represent the interests of foster children like Brittney W. in systemic litigation such as this. *See Ad Hoc Comm. of Concerned Teachers on Behalf of Minor & Under-Age Students Attending Greenburgh Eleven Union Free Sch. Dist. v. Greenburgh No. 11 Union Free Sch. Dist.*, 873 F.2d 25, 29-31 (2d Cir. 1989)

(appointing non-familial next friends to act on behalf of children in foster care because “since the Children are no longer in the care and custody of their natural parents, those adults have little involvement with the daily aspects of the Children’s schooling and are not likely to prosecute this type of action”); *see also Child v. Beame*, 412 F. Supp. 593, 599 (S.D.N.Y. 1976) (holding that five children in foster care could be represented by a next friend); *Dwayne B. v. Granholm*, No. 06 Civ. 13548, 2007 WL 1140920, at *3 (E.D. Mich. Apr. 17, 2007) (finding designation of next friends for foster children appropriate where, like other children in foster care, plaintiffs went through multiple placements and had very few significant relationships). Moreover, courts in the Second Circuit “have repeatedly affirmed a court’s power to determine that the interests of a child . . . will be best represented by a ‘next friend’ . . . and not by an authorized representative such as a parent or general guardian”. *Ad Hoc Comm. of Concerned Teachers*, 873 F.2d at 30 (citing cases demonstrating the appointment of non-familial next friends).

II. THE COURT SHOULD APPOINT MR. EL ASHMAWY AS BRITTNEY’S NEXT FRIEND IN THIS SYSTEMIC LITIGATION.

Rule 17 requires that the next friend be “motivated by a sincere desire to seek justice on the infant’s behalf” and that there be “nothing to suggest that the [next friend] is not acting in good faith or [is] not ready, willing and able to prosecute this action”. *Ad Hoc Comm. of Concerned Teachers*, 873 F.2d at 30–31; *see also Marisol A. et al. v. Giuliani*, No. 95 Civ. 10533 (RJW), 1998 WL 265123, at *9 (S.D.N.Y. May 22, 1998) (stating that next friends were appropriate where “they underst[ood] their role as next friends, and . . . [were] motivated only by a sincere desire to seek justice for the named plaintiffs”). In the context of cases involving foster children, courts have found that “the term [next friend] is broad enough to include any one who has an interest in the welfare of an infant who may have a grievance or a cause of action”. *Beame*, 412 F. Supp. at 599.

Mr. El Ashmawy meets these requirements and is well positioned to represent Brittney’s interests in a systemic litigation such as this one. Mr. El Ashmawy has reviewed Brittney’s case file, is familiar with the facts of her case and is dedicated to her interests in a properly functioning foster care system. (*See* El Ashmawy Decl. at ¶¶ 7–8.) He is an attorney in private practice in New York City with experience serving foster children as a participant in the assigned panel in Manhattan Family Court. (*Id.* at ¶¶ 1–2.) He worked for two years as a Staff Attorney at FCLS in Manhattan. (*Id.* at ¶ 3.) And he has represented both children and parents “from all sides and at all stages”, allowing him to develop a deep personal familiarity with the system that is the central focus of this systemic litigation. (*Id.* at ¶¶ 4–5.) Mr. El Ashmawy understands the issues and problems faced by New York foster children such as Brittney—including the harm that is inflicted upon them by a system that does not function properly—and he is sincerely dedicated to pursuing Brittney’s best interests in this litigation.

Although State Defendant has taken no position on this motion, City Defendant has thus far refused to consent to Mr. El Ashmawy’s appointment as Brittney’s next friend on the ground that Mr. El Ashmawy does not have a personal relationship with Brittney and that his familiarity with Brittney’s case is therefore not based on personal knowledge or interviews. This position is meritless.

There is no requirement for next friends to have a personal relationship with the children they represent. This Court has previously recognized that because children in foster care lack the opportunity to form a significant relationship with adults in their lives, next friends should not be required to establish a prior personal relationship with the children. *See Marisol A.*, 1998 WL 265123, at *9 (“City defendants’ argument that there may be close family or friends who know the named plaintiffs and would be better suited to represent them in this

action is flawed in that it ignores the fact that ACS has taken the named plaintiffs into custody, presumably because they were not being provided for adequately by their families.”). For example, in *Child v. Beame*, the court specifically acknowledged that in cases involving foster children:

“The right of access to courts by those who feel they are aggrieved should not be curtailed; and this is particularly so in the instance of children who, rightly or wrongly, attribute such grievances to their very custodians. Those who propose to speak for the plaintiffs have manifested an interest in their welfare and should, under the circumstances here presented, be allowed to proceed.”

412 F. Supp. at 599. The *Marisol* court echoed this sentiment and specifically noted that “[t]here are no special requirements for the person suing as next friend”—the role can be served by anyone who manifests an interest in the welfare of the child. 1998 WL 265123, at *9.

The First Circuit has similarly concluded that next friends who were not known to the plaintiff foster children could nevertheless properly serve as their representatives in a similar systemic litigation. See *Sam M.*, 608 F.3d at 91-92 (“[W]e believe that because these foster care children lack significant ties with their parents and have been placed under the state’s legal custody and guardianship, a significant relationship need not be required as a prerequisite to Next Friend status. Important social interests are advanced by allowing minors access to a judicial forum to vindicate their constitutional rights through a Next Friend that . . . has a good faith interest in pursuing a federal claim on the minor’s behalf; particularly where, as here, the minors seek relief for alleged violations of the guardian’s duty to protect them.”). In *Sam M.*, the First Circuit reversed the lower court and ruled that the lower court abused its discretion by rejecting a potential next friend because he lacked a significant relationship with the named plaintiff child. The First Circuit concluded that the proposed next friend’s failure to meet the children or review the children’s family court and medical files did not preclude him from being

a next friend because he “testified he is aware of the issues and problems children face in foster care and he is familiar with the perils to which Plaintiffs have been exposed”, and because “[h]e showed that due to his expertise and research he has a good faith desire to pursue the children’s best interests in federal court”. *Id.* at 93–94.

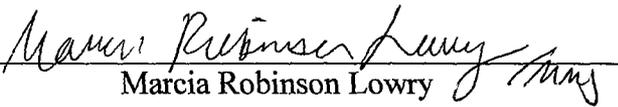
City Defendant’s position concerning Mr. El Ashmawy’s lack of significant personal relationship with Brittney is meritless. This litigation is concerned with systemic deficiencies within the child welfare system as a whole; Plaintiffs do not take any position on individual outcomes or custodial decisions made with respect to any Named Plaintiff Child, including Brittney. Mr. El Ashmawy’s role in this litigation is *not* to advocate for a particular foster placement or permanency goal on behalf of Brittney. Such a position would be inappropriate and inconsistent with the systemic focus of this case. Rather, this case seeks to remedy systemic failures—for example, ACS’s failure to adequately supervise the voluntary agencies who run the foster care system and the increased risk of maltreatment, inadequate services and delayed permanency that directly results from that failure of supervision. To be an appropriate next friend for the purposes of this litigation, Mr. El Ashmawy must be able to understand and articulate how Brittney’s best interests will be served through remedying such systemic deficiencies—a task for which he is well suited. Mr. El Ashmawy is qualified, informed and dedicated to furthering Brittney’s best interests in this litigation.

CONCLUSION

For the foregoing reasons, Named Plaintiff Children respectfully request that pursuant to Federal Rule of Civil Procedure 17, the Court remove Liza Camellerie as a next friend for Named Plaintiff Brittney W. and substitute Yusuf El Ashmawy in her place.

March 23, 2017

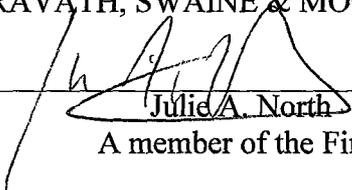
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