15-CV-5273 (LTS) (HBP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

-against-

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

Defendants.

DEFENDANT CITY OF NEW YORK'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS CROSS-MOTION TO DISMISS CERTAIN NEXT FRIENDS OF PLAINTIFF CHILDREN

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PRELIMINARY STATEMENT

By Notice of Motion dated March 23, 2017, Plaintiffs moved to substitute Yusuf El Ashmawy for Liza Camellerie as a next friend for Plaintiff Brittney W., even though neither Mr. El Ashmawy nor Ms. Camellerie has ever spoken to Brittney W. or to her Family Court attorney. *See* Pls.' Notice of Motion, Docket No. 357.

City Defendant opposed the motion, and further cross-moved[1] to dismiss Eight Next Friends who purported to represent certain Plaintiff Children in this litigation.[2] *See* City Def.'s Notice of Cross-Motion, Docket No. 363; City Def.'s Mem., Docket No. 365. City Defendant argued that Mr. El Ashmawy and the Eight Next Friends were not suitable next friends for their assigned Plaintiff Children because they had never communicated with the children or their Family Court attorneys to ascertain the children's interests in the litigation, and accordingly could not in good faith represent to the Court that they were advancing the children's best interests. City Def.'s Mem., Docket No. 365 at 7-13. City Defendant further argued that Mr. El Ashmawy and the Eight Next Friends appeared to have offered their services not to Plaintiff Children, but to Plaintiffs' counsel in order to advance a shared generalized interest in reforming the City's foster care system. In support of these arguments, City Defendant cited case law for the principle that persons having only an ideological stake in a child's case, or who seek only to advance their own political agenda, can never be deemed eligible to serve as next friends. *Id.* at 5-7.

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1 Under the Individual Practices of Magistrate Judge Henry Pitman, to whom the case has been referred for general pre-trial management, City Defendant was not required to confer with Plaintiffs' counsel prior to bringing the cross-motion.

2 City Defendant also argued that one next friend, Elizabeth Barricelli, should be dismissed because Elisa W., the child she claimed to represent, had turned eighteen years old in 2016 and no longer need an adult to litigate on her behalf. *See* City Def.'s Mem., Docket No. 365 at 14. Plaintiffs acknowledged that Elisa W. could appear on her own behalf and accordingly withdrew Ms. Barricelli as her next friend. *See* Pls.' Opp., Docket No. 369 at 22.

In their opposition to City Defendant's cross-motion, Plaintiffs left these arguments substantially unrebutted. *See* Pls.' Opp., Docket No. 369. Instead, Plaintiffs expended considerable effort erecting and attacking a straw man argument that next friends must demonstrate a "significant relationship" with plaintiff children—an argument Plaintiffs erroneously attribute to City Defendant, tellingly without accurate citations to City Defendant's memorandum. *Id.* at 9-13. In this reply, City Defendant corrects Plaintiffs' mischaracterization of its arguments and addresses additional arguments Plaintiffs asserted in their opposition.

ARGUMENT

POINT I

MR. EL ASHMAWY AND THE EIGHT NEXT FRIENDS ARE NOT SUITABLE NEXT FRIENDS FOR THEIR ASSIGNED PLAINTIFF CHILDREN BECAUSE THEY HAVE NOT DEMONSTRATED THAT THEY ARE TRULY DEDICATED TO THE CHILDREN'S BEST INTERESTS

In City Defendant's memorandum in support of its opposition to Plaintiffs' motion to substitute and cross-motion to dismiss the Eight Next Friends, City Defendant argued that neither Mr. El Ashmawy nor the Eight Next Friends (collectively, "Next Friends") should be permitted to serve as next friends because all nine individuals have failed to show that they are truly dedicated to the best interests of the sixteen children they purport to represent. *See* City Def.'s Mem. at 7-13. Nothing in Plaintiffs' consolidated reply and opposition papers refutes this argument. This Court should accordingly deny Plaintiff's motion to substitute Mr. El Ashmawy as Brittney W.'s next friend and dismiss the Eight Next Friends.

Plaintiffs open their argument by vigorously asserting that next friends are not required to have a "significant relationship" with the foster children they represent. *See* Pls.' Opp. at 8-9. They then dedicate nine pages to distinguishing various cases in City Defendant's

memorandum, including several parenthetical cites, in furtherance of this argument. *Id.* at 9-17. This is a curious stratagem considering City Defendant never argued that a significant relationship is required. Rather, City Defendant argued that the analytical touchstone of every case discussing the suitability of a next friend—whether cited by Plaintiffs or City Defendant—is whether the next friend is motivated by a sincere desire to advance the best interests of the child he or she seeks to represent, as opposed to the next friend's own ideological or political preferences. *See* City Def.'s Mem. at 6-13. None of the cases Plaintiffs cite stray from this principle. *See, e.g.*, *Sam M. v. Carcieri*, 608 F.3d 77, 91 (1st Cir. 2010) (next friend must demonstrate "a good faith interest in pursuing a federal claim on the minor's behalf").

Indeed, Plaintiffs themselves advance a similar test. Specifically, they claim a next friend meets the requirements of Federal Rule of Civil Procedure 17(c) so long as (i) he or she is "motivated by a sincere desire to seek justice on the infant's behalf" and (ii) there is "nothing to suggest that the [next friend] is not acting in good faith or [is] not ready, willing and able to prosecute this action." *See* Pls.' Opp. at 8 (quoting *Ad Hoc Comm. of Concerned Teachers ex rel Minor & Under-Age Students etc. v. Greenburgh #11 Union Free Sch. Dist.*, 873 F.2d 25, 30-31 (2d Cir. 1989)). The Next Friends, however, cannot clear Plaintiffs' own hurdle.

Plaintiffs attempt to rely on two cases—*Sam M.* and *Marisol A. v. Giuliani*, 95-CV-10533, 1998 U.S. Dist. LEXIS 7726 (S.D.N.Y. May 22, 1998)—in which courts approved next friends who had little or limited contact with the infant plaintiffs they sought to represent. [3] *See* Pls.' Opp. at 9-13. These cases are inapposite, however, because in both cases, the reviewing

[3] In *Sam M.*, only one next friend had no contact with the children he sought to represent. 608 F.3d at 92-93. Two other next friends were deemed suitable because, in addition to the reasons stated in Plaintiffs' opposition, one next friend had served as her assigned plaintiff-child's foster parent for two years and the other had bonded with her plaintiff-child while serving as the child's school psychologist. *Id.*

court found no basis to question either the next friends' "good faith […] desire to pursue the children's best interests," *Sam M.*, 608 F.3d at 92-93; or their "sincere desire to seek justice for the named plaintiffs," *Marisol A.*, 1998 U.S. Dist. LEXIS 7726 at *29-30.[4] Here, on the other hand, the Court has ample bases, three of which are set forth below, to question the Next Friends' good faith desire to pursue and advance the Plaintiff Children's best interests.

First, this lawsuit has been variously described by local advocacy organizations, including the Legal Aid Society, Lawyers For Children, Inc., and the Children's Law Center of New York (collectively, "Children's Advocate Groups") who represent a substantial majority of the City's foster children in Family Court proceedings, as "myopic," "misguided," "wrongheaded," and based on "data that does not reflect the realities of child welfare practice in New York." *See* Legal Aid Society's Press Release dated October 21, 2015, Docket No. 108-2 at 1; Politico article dated October 29, 2015, Docket No. 108-1 at 4. In light of this collective denunciation of the goals and premises underlying this lawsuit—by groups that actually work with and represent the City's foster children in Family Court proceedings—the Next Friends should not be accorded any judicial presumption of good faith, particularly when they offer the Court no evidence that they could even identify their assigned Plaintiff Children if they encountered them, let alone know what the children's actual best interests are.

Second, Plaintiffs' counsel's early efforts to settle this case raise doubts about the Eight Next Friends' desire to protect the Plaintiff Children's actual interests and pursue justice

[4] In its prior submission and therefore not repeated here, City Defendant distinguished the other cases Plaintiffs purport to rely on—*Ad Hoc Comm.*, 873 F.2d 25 (2d Cir. 1989) and *Child v. Beame*, 412 F. Supp. 593 (S.D.N.Y. 1976)—and preemptively addressed Plaintiffs' attempt to limit the habeas cases discussing next friend standing to their facts. *See* City Def.'s Mem., Docket No. 365 at 11-13 (discussing *Ad Hoc Comm.* and *Beame*); and *id*. at 6, n.4 (identifying cases applying the next friend test set forth in *Whitmore v. Arkansas*, 495 U.S. 149 (1990) outside the habeas context).

on their behalf. In October 2015, Plaintiffs sought to settle this case through a consent decree with the State Defendant. *See* Proposed Consent Decree, Docket No. 50. What involvement, if any, the Eight Next Friends had in negotiating the proposed settlement is not clear. What is clear, however, is that the settlement they either knowingly approved or otherwise acquiesced to on behalf of the Plaintiff Children, was vehemently opposed by the Children's Advocate Groups, who went so far as to intervene in this action solely to object to the settlement. *See* Children's Advocate Groups' Motion to Intervene, Docket No. 180. The Children's Advocate Groups pointed out that the settlement proposed by Plaintiffs' counsel did not provide *any* benefit to children in foster care, yet included an unprecedented seven-year waiver of the children's due process right to sue New York State to reform the foster care system. *See* Children's Advocate Groups' Objections to Settlement, Docket No. 187 at 9-21. Perhaps most significantly, the settlement that the Eight Next Friends either approved or acquiesced to was ultimately flatly rejected by this Court as "unreasonable" and "patently unfair" to the City's foster children. *See* Order dated August 12, 2016, Docket No. 259 at 20-21. This Court also chastised Plaintiffs' counsel (and, by extension, the next friends purporting to represent Plaintiff Children) for seeking to settle the case without undertaking any investigation into the "particular circumstances of the Named Plaintiff Children." *Id.* at 13-14, 20-21.

Third, as Plaintiffs' counsel have conceded, the Eight Next Friends, both before this lawsuit was commenced and continuing for at least the next year, never bothered to meet with the children they purport to represent or with those children's Family Court attorneys. *See* Transcript of December 13, 2016 Proceedings before Judge Pitman, Docket No. 364-1 at 32:2-10. Having failed to familiarize themselves with the circumstances and interests of their assigned Plaintiff Children, the Eight Next Friends acquiesced to factual representations about the

children in the Amended Complaint that were not merely untrue, but provided by unidentified non-party adult stakeholders whose interests were palpably at odds with the children's best interests. Indeed, in its Order dated September 27, 2016, denying Plaintiffs' motion for class certification, this Court noted that evidence proffered by City Defendant "calls into question the veracity of some of the factual allegations in the Amended Complaint and the degree to which those allegations reflect the perspective of the named Plaintiffs and those who have represented them in foster care proceedings, as opposed to the views of other stakeholders in Plaintiffs' particular foster care cases whose interests may not be entirely consonant with those of the named Plaintiff children." *See* Docket No. 282 at 2. That is, this Court opined that the Amended Complaint, brought in the Plaintiff Children's names by, among others, the Eight Next Friends, appeared to advance not those children's interests, but the interests of "other stakeholders" whose potential conflicts, biases, and unreliability the Eight Next Friends failed to ascertain or bring to Plaintiffs' counsel's attention, or, more importantly, the Court's attention.

Despite the foregoing, Plaintiffs argue that it is somehow a foregone conclusion that the Next Friends represent the best interests of their assigned Plaintiff Children simply because the Plaintiff Children are in the City's foster care system and the Next Friends are seeking to improve that system. *See* Pls.' Opp. at 2, 19. Plaintiffs essentially argue that the Next Friends are entitled to a virtually non-rebuttable presumption that they represent the Plaintiff Children's best interests simply because their goal is reform (an assertion that the Children's Advocate Groups have, as discussed above, vociferously and successfully challenged). There is, however, no case law that suggests the goals of a lawsuit somehow absolve a next friend of his or her obligation to ascertain and advance the actual interests of the individual on whose behalf he or she appears. *See* City Def.'s Mem. at 7.

Additionally, despite this Court's denial of their motion for class certification, Plaintiffs continue to labor under the misconception that they can litigate this case on behalf all the City's foster children. Indeed, they openly state that they "do not seek in this litigation to vindicate 'particularized needs'" of the Plaintiff Children and instead seek to vindicate the rights of "*all* foster children." *See* Pls.' Opp. at 19. However salutary Plaintiffs' counsel's and the Next Friends' goals may be, it is hard to square their aspirational system reform agenda with their surprising, and continuing, failure to meet with the Plaintiff Children, who are the real parties in interest, in order to ascertain the children's actual experience and best interests in this litigation. Instead of providing this Court with evidence of such communication, the Next Friends have offered only boilerplate assertions that they are "truly dedicated" to the "best interests" of the child or children they seek to represent. *See* Declaration of Yusuf El Ashmawy, Docket No. 359 at ¶ 8; Am. Compl., Docket No. 91 at ¶¶ 35, 131, 50, 78, 91, 105, 113, 123, 144, 159.

The Next Friends have not demonstrated that they have made any effort to acquire knowledge of their assigned Plaintiff Children's best interests and cannot be presumed to be proceeding in good faith to advance the children's interests. They are not suitable next friends—under even Plaintiffs' definition of the term—and should accordingly be dismissed from this action.

POINT II

CITY DEFENDANT DID NOT AND CANNOT WAIVE THE COURT'S INHERENT POWER TO PROTECT PLAINTIFF CHILDREN BY CONDUCTING AN INQUIRY INTO THE SUITABILITY OF THEIR NEXT FRIENDS

Federal courts have a "mandate to protect the best interest[s] of […] infant [plaintiffs]." *Jacobs v. United States*, 08-CV-5061, 2012 U.S. Dist. LEXIS 23347, at *3 (S.D.N.Y. Feb. 22, 2012). Thus, courts may not reach the merits of a claim involving an unrepresented minor "without appointing a suitable representative." *Berrios v. N.Y. City Hous. Auth.*, 564 F.3d 130, 134 (2d Cir. 2009). Rule 17(c) states that where a minor does not have a duly appointed representative, the court "must appoint" a guardian ad litem or next friend or "issue another appropriate order—to protect [the] minor." Adults cannot automatically assume the mantle of next friend—they must be judicially appointed or approved. *See, e.g., Ad Hoc Comm.*, 873 F.2d 25, 31 (2d Cir. 1989). Additionally, even after a next friend is appointed or approved, courts have "a continuing obligation to supervise the representative's work." *Jones v. Cnty. of Westchester*, 14-CV-7635, 2017 U.S. Dist. LEXIS 64830, at *5 (S.D.N.Y. Apr. 27, 2017); *see also Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 652 (2d Cir. 1999).

As this Court has noted, Plaintiff Children are "minor children who are in the foster care system, individuals who are both uniquely vulnerable and, because of their age and dependence on others, generally ill-suited to appreciate the stakes of litigation involving their interests and to be effective advocates on their own behalf." *See* Order dated August 12, 2016, Docket No. 259 at 16. Plaintiff Children have brought this action through next friends, but apart from the pending motion to "substitute"[5] Mr. El Ashmawy as a next friend for Plaintiff Brittney

[5] As this Court never appointed or approved any next friend to appear on behalf of Brittney W., "appointment" rather than "substitution" would appear to be the more accurate term.

W., this Court has never been called upon by Plaintiffs' counsel to review the qualifications of any of the next friends. *Cf. Bowen v. Rubin*, 213 F. Supp. 2d 220 (E.D.N.Y. 2001) (deciding plaintiffs' motion to appoint next friends to represent mentally disabled plaintiffs).

Now in a desperate attempt to evade judicial inquiry into the suitability of the Eight Next Friends, Plaintiffs claim that under Federal Rule of Civil Procedure 9(a), City Defendant waived its right to challenge the Eight Next Friends' "capacity to sue" because City Defendant did not raise the issue in its Answer to the Amended Complaint.[6] *See* Pls.' Opp. at 23-25. This argument is without merit. *See, e.g., Marisol A.*, 1998 U.S. Dist. LEXIS 7726, at *15-16 (undertaking inquiry into suitability of plaintiff foster children's next friends three years into the litigation and after the class of foster children was certified).

This Court has an inherent power, and an ongoing obligation, to ensure that the interests of infant plaintiffs are being advanced by their purported representatives. This is exactly why Rule 17(c) charges the court with appointing next friends for children and issuing any other order it deems proper for their protection. The rule applies throughout the pendency of the litigation, *see Jones*, 2017 U.S. Dist. LEXIS 64830, at *5; *Neilson*, 199 F.3d at 652. The Court's power to protect an infant child cannot be waived by any party.

Gardner v. Parson, 874 F.2d 131 (3d Cir. 1989) is instructive. In that case, a grandmother brought an action against defendant social workers and school officials as the next friend of her granddaughter. During the litigation, defendants challenged the grandmother's suitability as a next friend and the district court subsequently dismissed her as next friend. On appeal, the grandmother argued, among other things, that defendants had waived their objections

[6] In its Answer, City Defendant denied knowledge or information sufficient to form a belief as to the truth of the Eight Next Friends' dedication to their assigned children's best interests. *See* Docket No. 117, at ¶¶ 35, 131, 50, 78, 91, 105, 113, 123, 144, 159.

to her capacity to sue on behalf of her granddaughter, because "they did not specifically deny, in their initial answers to the complaint, that she had capacity." *Id.* at 139 n.12. The Third Circuit declined to read Federal Rule of Civil Procedure 9(a) "so narrowly," characterized plaintiff's waiver argument as "unjust," and rejected the argument. *Id.*

Similarly here, this Court should reject Plaintiffs' attempt to thwart the Court's mandate to inquire into the suitability of the Next Friends purporting to represent the Plaintiff Children's interests. Mr. El Ashmawy and the Eight Next Friends have a duty to demonstrate to this Court that they are "motivated by a sincere desire to seek justice" on their assigned Plaintiff Children's behalf. Because they have failed to do so, they must be dismissed from this action.

CONCLUSION

For the foregoing reasons, City Defendant respectfully requests that the Court (i) deny Plaintiffs' motion to substitute Mr. El Ashmawy as the next friend of Brittney W., and (ii) grant its cross-motion to dismiss the Eight Next Friends, together with such other and further relief as the Court deems just and proper.

Dated: New York, NY
June 1, 2017

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