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 MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO SUBSTITUTE YUSUF EL ASHMAWY AS A NEXT FRIEND AND IN SUPPORT OF ITS CROSS-MOTION TO DISMISS NEXT FRIENDS OF ADDITIONAL PLAINTIFF CHILDREN

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PRELIMINARY STATEMENT

Pursuant to Federal Rule of Civil Procedure 17(c), Plaintiffs seek, by Motion dated March 23, 2017, to "substitute" Yusuf El Ashmawy as the "next friend" for Brittany W., a minor named as a plaintiff in this action.[1] In order to litigate this lawsuit on behalf of Brittney W. as her next friend, Mr. El Ashmawy is required to prove that he is "truly dedicated" to her best interests. Mr. El Ashmawy has failed to do so. While he professes an abstract interest in reforming New York City's foster care system as a whole, he fails to allege any contact whatsoever with Brittney W. or any first-hand knowledge of Brittney W.'s circumstances or needs. This Court should accordingly not authorize Mr. El Ashmawy's substitution as Brittney W.'s next friend.

Defendant City of New York ("City Defendant") additionally cross-moves this Court for an order (i) dismissing the eight next friends put forward by Plaintiffs' counsel to represent the interests of Plaintiffs Thierry E., Mikayla G., Lucas T., Ximena T., Jose T.C., Valentina T.C., Olivia R., Ana-Maria R., Xavion M., Dameon C., Tyrone M., Myls J., Malik M., Emmanuel S., and Matthew V. because they, like Mr. El Ashmawy, do not know the children they claim to represent; and (ii) dismissing Elizabeth Barricelli as the next friend of Elisa W. because Elisa W. is now an adult who does not need another adult to litigate on her behalf.

[1] While Plaintiffs' counsel style this motion as one for substitution of Mr. Ashmawy as Brittney W.'s next friend, "substitution" presupposes a prior judicial appointment of a next friend. No such appointment has been made for either Brittney W. or any of the other Plaintiff children, nor has there been any judicial review of any next friend's qualification to act in that capacity.

STATEMENT OF FACTS

City Defendant assumes the Court's familiarity with the nature and procedural history of this litigation. For the purposes of this cross-motion, the following facts are relevant.

This action was brought, purportedly on behalf of nineteen children in the New York City foster care system and in the custody of the New York City Administration for Children's Services ("ACS"), through twelve next friends. *See* Am. Compl. ¶¶ 9-171. This action is not a class action. *See* Docket No. 282 (denying Plaintiffs' request to certify a class consisting of "children who are now or will be in the foster care custody of the Commissioner of [ACS].") Plaintiffs' next friends are accordingly not tasked with representing the interests of any class; rather, they are tasked with representing the individual interests of their assigned children.

Nine of those next friends, however, do not allege any personal knowledge of or familiarity with the personal circumstances and best interests of the sixteen children they purport to represent. *See* Am. Compl. ¶¶ 35, 131, 50, 78, 91, 105, 113, 123, 144, 159. Plaintiffs now seek, by Notice of Motion dated March 23, 2017, to substitute Mr. Ashmawy for one of those next friends, Liza Camellerie, as the next friend of Brittney W. *See* Docket Nos. 357-60. Ms. Camellerie is allegedly "no longer able to act" as Brittney W.'s next friend because she wants to seek employment opportunities that may conflict with her participation in the present litigation. *See* Declaration of Liza Camellerie in Support of Plaintiffs' Motion to Substitute Yusuf El Ashmawy as a Next Friend ("Camellerie Decl.") at ¶ 4. Like Ms. Camellerie, Mr. Ashmawy does not allege any personal knowledge of or familiarity with Brittney W.'s personal circumstances and best interests. *See* Declaration of Yusuf El Ashmawy in Support of Plaintiffs' Motion to Substitute Yusuf El Ashmawy as a Next Friend ("El Ashmawy Decl.") at ¶¶ 6-8. He only states

that he has read the Amended Complaint and spent "approximately ten hours" reviewing "Brittney W.'s case." *Id.* at ¶ 7.

Another next friend, Elizabeth Barricelli, represents Elisa W., who since the filing of the Amended Complaint, has turned 18 years old and therefore no longer requires an adult to litigate on her behalf. *See* Am. Compl. ¶ 10; City Defendant's Local Civil Rule 56.1 Statement of Material Facts, dated November 16, 2016 (Docket No. 298), ¶ 5.

Simultaneously pending before this Court is City Defendant's motion to dismiss the claims of six of the Plaintiff Children (Elisa W., Alexandria R., Olivia R., Ana-Maria R., Xavion M., and Dameon C.) as moot because the children are no longer in the foster care system or in ACS's custody. *See* Docket Nos. 297-300.

Set forth on the next page is a table listing each Plaintiff child, his or her next friend, and the current motions pending regarding each child.

<table>
<tr><th>PLAINTIFF[2]</th><th>NEXT FRIEND[3]</th><th>PLAINTIFF SUBJECT OF MOTION TO DISQUALIFY NEXT FRIEND</th><th>PLAINTIFF SUBJECT OF MOTION TO DISMISS FOR MOOTNESS</th></tr>
<tr><td>Thierry E.</td><td rowspan="2">Amy Mulzer (¶¶ 35, 131)</td><td>Yes</td><td>No</td></tr>
<tr><td>Mikayla G</td><td>Yes</td><td>No</td></tr>
<tr><td rowspan="4">Lucas T.
Ximena T.
Jose T.C.
Valentina T.C.</td><td rowspan="4">Rachel Friedman (¶ 50)</td><td>Yes</td><td>No</td></tr>
<tr><td>Yes</td><td>No</td></tr>
<tr><td>Yes</td><td>No</td></tr>
<tr><td>Yes</td><td>No</td></tr>
<tr><td rowspan="2">Olivia R
Ana-Maria R.</td><td rowspan="2">Dawn Cardi (¶ 78)</td><td>Yes</td><td>Yes</td></tr>
<tr><td>Yes</td><td>Yes</td></tr>
<tr><td>Xavion M.</td><td>Michael B. Mushlin (¶ 91)</td><td>Yes</td><td>Yes</td></tr>
<tr><td>Dameon C.</td><td>Rev. Dr. Gwendolyn Hadley-Hall (¶ 105)</td><td>Yes</td><td>Yes</td></tr>
<tr><td>Tyrone M.</td><td>Bishop Lillian Robinson-Wiltshire (¶ 113)</td><td>Yes</td><td>No</td></tr>
<tr><td>Brittney W.</td><td>Yusuf El Ashmawy (¶¶ 7-8)</td><td>Yes</td><td>No</td></tr>
<tr><td rowspan="2">Myls J.
Malik M.</td><td rowspan="2">Elizabeth Hendrix (¶ 144)</td><td>Yes</td><td>No</td></tr>
<tr><td>Yes</td><td>No</td></tr>
<tr><td rowspan="2">Emanuel S.
Matthew V.</td><td rowspan="2">Samuel D. Perry (¶ 159)</td><td>Yes</td><td>No</td></tr>
<tr><td>Yes</td><td>No</td></tr>
<tr><td>Elisa W.</td><td>Elizabeth Barricelli (¶ 10)</td><td>Yes</td><td>Yes</td></tr>
<tr><td>Alexandria R.</td><td>Alison Max Rothschild (¶ 21)</td><td>No</td><td>Yes</td></tr>
<tr><td>Ayanna J.</td><td>Meyghan McCrea (¶ 64)</td><td>No</td><td>No</td></tr>
</table>

[2] Plaintiffs who are siblings are grouped together in a single cell.

[3] The paragraph number(s) after each next friend refers to the paragraph(s) in the Amended Complaint, or in the case of Mr. El Ashmawy, the El Ashmawy Declaration, that describes the next friend's connection, if any, to his or her assigned Plaintiff child or children.

ARGUMENT

POINT I

THIS COURT SHOULD DENY PLAINTIFFS' MOTION TO SUBSTITUTE MR. EL ASHMAWY AS A NEXT FRIEND AND DISMISS NINE OTHER NEXT FRIENDS FOR LACK OF STANDING

Under Federal Rule of Civil Procedure 17(c)(2), a minor who does not have a duly appointed representative may sue by a "next friend." A next friend is simply an individual who, without being appointed the child's guardian ad litem, initiates an action in federal court on behalf of the child. 4-17 Moore's Federal Practice - Civil § 17.25 (2016). *See also Caban v. 600 E. 21st St. Co.*, 200 F.R.D. 176, 179 n.12 (E.D.N.Y. 2001). Obtaining next-friend status, however, is not automatic. *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990).

In *Whitmore v. Arkansas,* the Supreme Court denied next-friend standing to a prisoner who sought to petition a state court to conduct appellate review of another prisoner's death sentence, even though that inmate had already waived his right to appellate review. 495 U.S. at 152-55. In determining whether the plaintiff had standing, the Supreme Court considered various decisions regarding next friends who had sought to file writs of habeas corpus on behalf of inmates, and identified "at least two firmly rooted prerequisites for 'next friend' standing":

> First, a "next friend" must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action. […] Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, […] and it has been further suggested that a "next friend" must have some significant relationship with the real party in interest.

Id. at 163-164 (internal citations omitted).

The Supreme Court noted that these limitations on the next friend doctrine are "driven by the recognition" that federal relief—even habeas relief to spare a convicted criminal defendant's life—should not be made available to "intruders or uninvited meddlers, styling themselves as next friends." *Id*. at 164. The Court further added that, "if there were no restriction on 'next friend' standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of [standing] simply by assuming the mantle of 'next friend.'" *Id.*[4]

Anticipating the reasoning of *Whitmore*, the Second Circuit held that when an adult makes an application to a court to serve as an infant's next friend, the district court "should conduct an inquiry" into the adult's suitability to represent the child's interests. *Ad Hoc Comm. of Concerned Teachers ex rel Minor & Under-Age Students etc. v. Greenburgh #11 Union Free Sch. Dist.*, 873 F.2d 25, 31 (2d Cir. 1989). When a child's rights are being adjudicated in a court, the child becomes a "ward" of the court and the court is obligated to ensure that the child's interests are protected. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 201 (2d Cir. 2002). Accordingly, when deciding an individual's application to serve as a child's next friend, the reviewing court should consider the facts and circumstances of the case and the "good faith" of the applicant and approve the application only if the court has "satisf[ied] itself that the 'next friend' is motivated by a sincere desire to seek justice on the infant's behalf." *Ad Hoc Comm.,* 873 F.2d at 30-31.

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[4] Although the Supreme Court articulated these prerequisites for next-friend standing in the *habeas corpus* context, courts in the Second Circuit have since applied the *Whitmore* standard in other contexts. *See, e.g., Fenstermaker v. Obama*, 354 F. App'x 452 (2d Cir. 2009) (using *Whitmore* standard to analyze whether attorney seeking various declaratory and injunctive relief on behalf of detainees had next-friend standing); *Praseuth v. Werbe*, No. 95-CV-7449, 1995 U.S. App. LEXIS 39911, at *3-4 (2d Cir. Dec. 15, 1995) (using *Whitmore* standard to analyze next-friend standing in fraud action).

The reviewing court should not "sanction any attempt" by an adult "to assert the legitimate rights of children as a mere pretext for advancing ulterior political or economic aims." *Ad Hoc Comm.,* 873 F.2d at 31. *See also T.W. by Enk v. Brophy*, 124 F.3d 893, 897 (7th Cir. 1997) ("persons having only an ideological stake in the child's case are never eligible" to serve as next friends); *Schornhorst ex rel. Fleenor v. Anderson*, 77 F. Supp. 2d 944, 951 (S.D. Ind. 1999) (individuals seeking to merely "advance their own political agenda" are not suitable next friends).

The present lawsuit is purportedly brought on behalf of nineteen children through twelve "next friends" of the children. However, as further discussed below, ten of these next friends should not be allowed to represent their respective Plaintiff children because they fail to meet at least one *Whitmore* prerequisite for next-friend standing.

A. Mr. El Ashmawy, Ms. Mulzer, Ms. Friedman, Ms. Cardi, Mr. Mushlin, Rev. Dr. Hadley-Hall, Bishop Robinson-Wiltshire, Ms. Hendrix, and Mr. Perry All Fail to Allege, Let Alone Satisfy, the Second Prerequisite for Next-Friend Standing

This Court should deny Plaintiffs' motion to substitute Mr. El Ashmawy as next friend of Brittney W. and grant City Defendant's cross-motion to dismiss Ms. Mulzer, Ms. Friedman, Ms. Cardi, Mr. Mushlin, Rev. Dr. Hadley-Hall, Bishop Robinson-Wiltshire, Ms. Hendrix, and Mr. Perry (the "Eight Next Friends") for lack of standing because all nine individuals have failed to satisfy the second *Whitmore* prerequisite for next-friend standing; that is, they have failed to show that they are truly dedicated to the best interests of the sixteen children they purport to represent.[5]

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[5] There is no dispute that Mr. El Ashmawy and the Eight Next Friends have satisfied the first requirement of next-friend standing: the sixteen children they seek to represent cannot appear on their own behalf because they are minors. *See* Fed. R. Civ. P. 17(b)(1); N.Y. C.P.L.R. §§ 1201, 105.

While these individuals have established their moral, academic or ideological desires to reform New York City's foster care system, they have failed to demonstrate any interest in litigating the individualized claims of their assigned plaintiff children. For example, in Mr. El Ashmawy's eight-paragraph declaration in support of his motion to serve as Brittney W.'s next friend, Mr. El Ashmawy states that he is "familiar with the systemic deficiencies of the New York City foster care system" and "how tragically the system can operate." *See* El Ashmawy Decl. ¶¶ 4-5. He does not allege any contact with Brittney W. or any understanding of her current circumstances or best interests. Instead Mr. El Ashmawy notes that he has "reviewed the complaint" and spent "approximately ten hours" reviewing "Brittney W.'s case." *Id.* at ¶ 7. He then conclusorily claims—without having any first-hand knowledge of her interests—that he is "truly dedicated" to representing Brittney W.'s "best interests in this litigation." *Id.* at ¶ 8.

The Eight Next Friends similarly fail to allege any contact with the fifteen children they seek to represent or any personal knowledge of the children's specific circumstances or desires. Instead, they all merely describe their professional backgrounds and then conclusorily state that they are "truly dedicated" to their assigned children's best interests. *See* Am. Compl. ¶¶ 35, 131, 50, 78, 91, 105, 113, 144, 159.[6]

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[6] Given these next friends' lack of any personal relationship with the children they seek to represent, there is also no guarantee that they will not follow in the footsteps of Ms. Camellerie, who abandoned her role as next friend of Brittney W. to pursue other employment opportunities. *See* Camellerie Decl. at ¶ 4. *See Ad Hoc Comm.*, 873 F.2d at 31 (cautioning against approving as next friends "persons who, despite their good intentions, find themselves unable to finish what they start").

Mr. El Ashwamy's and the Eight Next Friends' attempt to serve as next friends of children with whom they have alleged no personal interaction is similar to other attempts that have been denied by courts in this Circuit. For example, in *Bey v. N.Y.C. Dep't of Corr.*, two individuals made an application for a writ of *habeas corpus* as next friends of a detainee. No. 13-CV-2573, 2013 U.S. Dist. LEXIS 139629 (S.D.N.Y. Sep. 20, 2013) (Report and Recommendation), *adopted by* 2013 U.S. Dist. LEXIS 159529 (S.D.N.Y. Nov. 6, 2013). This Court dismissed the application because the individuals failed to establish their standing as next friends. Specifically, they did not (i) "explain why filing the application for the writ is in the best interest of [the real party]" or (ii) "provide any details of their relationship with [the real party], including whether they have ever had contact with him, how long they have known him, or otherwise explain the nature of their relationship with [the real party], if any." *Id.* at *7-8.

Like the unsuccessful next friends in *Bey*, Mr. El Ashmawy and the Eight Next Friends have failed to (i) explain why this litigation is in the best interests of the children they seek to represent; or (ii) provide details of their relationship with their assigned children (because they have none), or describe their contacts with the children's Family Court attorneys (because, as Plaintiffs' counsel recently conceded, they never troubled to make any). They should accordingly not be authorized to serve as next friends in this action. *See also N.Y. ex rel. Fox v. Fed. Bureau of Prisons C. Lindsay*, No. 08-CV-4816, 2008 U.S. Dist. LEXIS 99245, at *8-9 (E.D.N.Y. Dec. 5, 2008) (denying attorney's application to serve as next friend where, in addition to failing to satisfy the first element, the attorney provided "no explanation of the relationship, if any" between himself and the real party and there was "nothing to suggest" that the attorney had ever "met, spoken to or corresponded with" the real party). *Cf. Bowen v. Rubin*, 213 F. Supp. 2d 220, 227 & n. 6 (E.D.N.Y. 2001) (holding that proposed next friends were

suitable because, among other things, they had "met and spoken with plaintiffs, and plaintiffs do not object to their service" and directing one next friend who had not met with her assigned plaintiff to meet with the plaintiff and supplement her declaration in support of her motion to serve as a next friend "to note [the] meeting" and "indicate whether [the plaintiff] objects to her appointment").

Mr. El Ashwamy's and the Eight Next Friends' applications are also similar to those denied by a district court in *Foreman v. Heineman*, 240 F.R.D. 456 (D. Neb. 2006) (Report and Recommendation), *adopted by* 2007 U.S. Dist. LEXIS 4172 (D. Neb., Jan. 19, 2007), a case presenting nearly identical facts. In *Foreman*, seven plaintiff foster children in the custody of Nebraska's Department of Health and Human Services ("HHS"), brought suit by their next friends against various Nebraska state officials, seeking declaratory and injunctive relief with respect to Nebraska's child welfare system. 240 F.R.D. at 464. Defendants moved to dismiss the next friends for lack of standing. *Id.* at 514. With respect to the five of the next friends, the court noted that they all "had little prior or no recent contact" with the plaintiffs, and had made "little, if any, effort to communicate with members of the community who may have relevant information concerning the named plaintiffs' well-being," such as teachers or foster parents. *Id.* at 518. The court further noted that four of the next friends had not independently investigated the adequacy of their assigned children's prior or current foster care placements or the potential risk of harm faced by their assigned plaintiffs. *Id.* at 519. The court consequently concluded that while each next friend had an "ideological stake" in changing Nebraska's child welfare system and a "sincere empathy" for the named children's plight, they did not demonstrate their dedication to the children's individual interests and had accordingly failed to establish next-friend standing. *Id.* at 519-20. Similarly, here, while Mr. El Ashmawy and the Eight Next

Friends have an avowed generalized interest in reforming the foster care system, they have all failed to prove that they are dedicated to the particularized interests of their assigned plaintiff children. They should accordingly not be authorized to serve as next friends in this litigation.

Plaintiffs purport to rely on in *Ad Hoc Comm. of Concerned Teachers* in support of their application to substitute Mr. El Ashmawy as the next friend for Brittney W., but the facts in that case are entirely inapposite. There, a committee of teachers at a school filed suit on behalf of the school's children alleging that the school's discriminatory hiring practices had deprived the students of a learning environment free of racial discrimination. 873 F.2d at 26-27. The Second Circuit held that the committee should be allowed to sue as the children's "next friend" because: (i) the committee's teachers were "intimately involved" with the children's education and "possess[ed] a first-hand knowledge" of the children's educational needs; (ii) the committee instituted the suit in good faith and "out of genuine concern" for the children's development; and (iii) the committee was the "only group of adults likely to seek vindication of the [c]hildren's constitutional rights." *Id.* at 30.

Neither Mr. El Ahmawy nor the Eight Next Friends have made any showing that they meet these criteria. None of them possesses first-hand knowledge of their assigned children's particularized needs with respect to the foster care system, nor do they offer this Court any basis to conclude that they have initiated this suit out of concern for their assigned children. To the contrary, the absence of even a passing familiarity with the children on whose behalf they purport to appear suggests that these next friends have offered their services not to the Plaintiff children, but to Plaintiffs' counsel in order to advance their shared interest in institutional reform. Indeed, there are reasonable grounds to believe that the next friends have fallen far short of even protecting, let alone advancing, the Plaintiff children's interests. For example, when several next

friends, through counsel, sought to settle this action in 2015 by filing a proposed consent decree with the Court, three institutions that describe themselves as representing a substantial majority of the children in the City's foster care system in Family Court, appeals, and class action litigation for over five decades—the Legal Aid Society, Lawyers For Children Inc. and the Children's Law Center of New York—all objected to the proposed decree. *See* Docket Nos. 216, 259. Among other things, these institutions argued that the consent decree did not actually provide any concrete benefits to children who are or will be in the City's foster care system, and in fact impaired the ability of local children's legal services organizations and others to advocate on behalf of children in foster care. *See* Docket No. 259 at 16-18. Their arguments were credited by the Court, and the proposed consent decree was ultimately denied. *See* Docket No. 259 at 21. *See, e.g., Rosenberg v. United States*, 346 U.S. 273, 291-292 (1953) (Jackson, J., concurring) (criticizing practice of granting "next friend" standing to individual who sought to litigate on behalf of two prisoners, where next friend's intervention was unauthorized by the prisoners and originally opposed by the prisoners' counsel).

Plaintiffs cite *Child v. Beame,* 412 F. Supp. 593, 599 (S.D.N.Y. 1976), for the proposition 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*, however, pre-dates *Whitmore* by nearly 14 years—and the quoted language is clearly at odds with *Whitmore's* warning against permitting "intruders and uninvited meddlers" and those with a "generalized interest" in various issues to sue as next friends.[7]

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[7] Plaintiffs further rely on *Beame* to argue that there is "no requirement for next friends to have a personal relationship with the children they represent." *See* Plaintiff's Memorandum of Law in Support of Their Motion to Substitute Yusuf El Ashmawy as a Next Friend at p. 5. This characterization, however, goes too far. In *Whitmore*, the Supreme Court noted that some courts have suggested that a next friend must have "some significant relationship" with

Even if *Beame* is still good law, it stands for a principle far different from the one advanced by Plaintiffs' counsel. The next friend in that case, while recruited by counsel, alleged that he had met with the plaintiff foster children he sought to represent, learned about their personal circumstances and desires during those meetings, and received the children's authorization to serve as their next friend. 412 F. Supp. at 598-99. The facts of *Beame* make clear that a next friend cannot simply be anyone with a philosophical, moral or academic interest in children's rights—he or she must be someone with an interest in the particular welfare of the child he or she seeks to represent. Indeed, the touchstone of *Beame* and every court's inquiry into the suitability of a next friend is whether the individual is motivated by a sincere desire to seek justice on the real party's behalf. *See, e.g. Ad Hoc Comm.,* 873 F.2d at 30. *See Marisol A. v. Giuliani*, 95-CV-10533, 1998 U.S. Dist. LEXIS 7726, at *30 (S.D.N.Y. May 22, 1998) (authorizing individuals to serve as next friends, where after reviewing proposed next friends' curriculum vitae and deposition transcripts, the court satisfied itself that the next friends were "motivated only by a sincere desire to seek justice for the named plaintiffs").

As Mr. El Ashmawy and the Eight Next Friends have failed to establish that they are truly dedicated to the best interests of the children they seek to represent, this Court should deny Plaintiffs' motion to substitute Mr. El Ashmawy as Brittney W.'s next friend, and dismiss the Eight Next Friends for lack of next-friend standing.

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the real party in interest. 495 U.S. at 164. The Second Circuit has not yet decided on whether a significant relationship is a requirement for next-friend status, but at least one court in this district has stated that "it may well (and should) be," *see Fenstermaker v. Bush*, No. 05-CV-7468, 2007 U.S. Dist. LEXIS 42644, at *20 (S.D.N.Y. June 12, 2007), and the Second Circuit has considered the presence or absence of a significant relationship with the real party a factor in determining whether a next friend meets the "truly dedicated" prerequisite, *see Obama*, 354 F. App'x at 456.

B. Ms. Barricelli Fails to Satisfy the First Prerequisite for Next-Friend Standing Because Plaintiff Elisa W., Having Passed Her Eighteenth Birthday, Should No Longer Be Represented by a Next Friend

This Court should dismiss Ms. Barricelli as next friend of Plaintiff Elisa W. for lack of standing because Ms. Barricelli has failed to satisfy the first *Whitmore* prerequisite for next-friend standing; that is, she has failed to show that Elisa W., the real party in interest, cannot appear on his own behalf. While Federal Rule of Civil Procedure 17(c)(2) permits a minor to sue by a "next friend," the determination of whether an individual is a minor and therefore incapable of suing on his or her own behalf is determined by the law of that individual's state. *See* Fed. R. Civ. P. 17(b)(1). In New York, anyone who has not attained the age of eighteen years is considered an infant, and therefore cannot bring suit on his or her own behalf. N.Y. C.P.L.R. § 105. While Elisa W. was an infant when this action was commenced, she turned eighteen years old in 2016. Ms. Barriccelli has not explained why Elisa W., as an adult with no other identified legal incapacity, cannot litigate on her own behalf. Ms. Barricelli should accordingly be dismissed from this action for lack of standing. *See, e.g., Foreman*, 240 F.R.D. at 516-17 (finding that two next friends lacked standing because the children they sought to represent had become adults).

POINT II

THIS COURT SHOULD NOT ALLOW PLAINTIFFS' COUNSEL TO CONTINUE TO LITIGATE THIS ACTION WITHOUT SECURING SUITABLE NEXT FRIENDS FOR THE NAMED PLAINTIFF CHILDREN

The absence of suitable next friends has been a significant deficiency in Plaintiffs' lawsuit since they filed their Amended Complaint. Indeed, in denying Plaintiffs' motion for class certification, this Court noted that evidence proffered by Defendants called into question "the degree to which [the allegations in the Amended Complaint] 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* Memorandum Order dated September 27, 2016 (Docket No. 282) at 2.

Plaintiffs' counsel's failure to accurately reflect the perspective of the named Plaintiff children is not surprising considering that neither counsel nor the next friends have actually spoken with any of the named Plaintiff children since initiating this lawsuit. *See* Transcript of December 13, 2016 Proceedings before Judge Pitman at 32:2-10, annexed to the accompanying Declaration of Agnetha E. Jacob, dated April 20, 2017 as Exhibit A. According to Plaintiffs' counsel, counsel is "not permitted to speak" with the named Plaintiffs because they are minors, and next friends are not "required" to speak with the "named plaintiff children at this stage of the pleading." *Id.* at 32:5-8, 13-18. In short, Plaintiffs' counsel are arguing that they can litigate this action through next friends on behalf of the named Plaintiff children, but counsel cannot speak with the children and the next friends are not required to.

Plaintiffs' counsel have articulated no authority for this position, nor could they. In fact, in a similar litigation involving plaintiff foster children, *Danny B. v. Raimondo*, 784 F.3d 825, 834 (1st Cir. 2015), the First Circuit addressed this very issue by vacating a district court order that "effectively preclude[d]" communication between plaintiff foster children and their counsel and next friends. In so holding, the Court noted that "[c]ivil litigants have a constitutional right, rooted in the Due Process Clause, to retain the services of counsel," which "right safeguards a litigant's interest in communicating freely with counsel." *Id.* at 831. While limits may be placed on "communications between foster children and their lawyers," a total absence of communication "cannot withstand [constitutional] scrutiny." *Id.* at 833. Where infant litigants are represented by next friends, the Court acknowledged that those "next friends' access to counsel" could maybe serve as a "sufficient substitute for the plaintiffs' access" to counsel, but such access certainly would not satisfy due process concerns if the next friend was also unable to communicate with the child. *Id.* at 832. Thus, Plaintiffs' counsel here cannot erect a wall barring them and any next friends from contact with their putative clients, and then rely upon that wall to justify their proceeding in ignorance of their clients' best interests. As the Supreme Court observed in *Whitmore*, next friend standing demands more of Plaintiffs' counsel and the next friends they offer to stand in for their infant clients.

As state courts have jurisdiction over matters relating to domestic relations, including litigation relating to child custody, New York state law is helpful on his point. Under the New York State Family Court Act ("FCA"), children who are the subject of family court proceedings are entitled to counsel to "help them express their wishes to the court." FCA §§ 241, 249. Pursuant to 22 N.Y.C.R.R. § 7.2(d), these attorneys must "must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough

knowledge of the child's circumstances." They must "zealously advocate the child's position" in family court proceedings and if the child is "capable of knowing, voluntary and considered judgment," the advocacy must be "directed by the wishes of the child." *See* 22 N.Y.C.R.R. § 7.2(d).[8] Similarly here, those who seek to represent the named Plaintiff children's interests, either as counsel or as next friends, should be required to consult with the children in order to ascertain, at the very least, the children's circumstances and interests.

Plaintiffs' counsel have severely undermined this Court's ability to protect the interests of sixteen of the nineteen named Plaintiff children, who are this Court's wards, by failing to present any evidence remotely supporting the putative next friends' claim to be aware of, and acting in furtherance of, the children's particularized interests in this litigation. "Absent any evidence showing [the real party's] intentions or his wish to [litigate the action initiated by his or her next friend], or any reasons why it would be in his [or her] best interest to do so, the Court may not speculate about [the real party's] intentions, wishes or what may be in his [or her] best interest." *Bey,* 2013 U.S. Dist. LEXIS 139629 at *8. Plaintiffs' counsel should not be allowed to subject these children to the continuing burden of litigation (including the possibility of depositions and trial testimony) without securing next friends who are truly knowledgeable of and dedicated to the children's best interests, and who can provide a proper corrective, as needed, to counsel's and stakeholders' potentially divergent interests in institutional reform

[8] The New York State Bar Association standards for representing children similarly underscore attorneys' ethical responsibility to consult with the children they represent in order to provide client-directed representation. *See, e.g.,* Committee on Children and the Law, New York State Bar Association, *Standards for Attorneys Representing Children in Child Protective, Foster Care, Destitute Child and Termination of Parental Rights Proceeding* (January 2015) at §§ A-1, A-3 *available at* http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=55894 (except in specific enumerated circumstances not applicable here, the attorney for the child must not substitute his or her judgment for the child's in "determining and advocating the child's position").

efforts—goals in which the children may be uninterested or, as in the case of Plaintiffs' counsel's settlement efforts, which they actually vigorously oppose.

CONCLUSION

For the foregoing reasons, Defendant City of New York 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 Ms. Mulzer, Ms. Friedman, Ms. Cardi, Mr. Mushlin, Rev. Dr. Hadley-Hall, Bishop Robinson-Wiltshire, Ms. Hendrix, Mr. Perry, and Ms. Barricelli for lack of standing as next friends, together with such other and further relief as the Court deems just and proper.

Dated: New York, NY
April 20, 2017

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