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.

15 Civ. 5273 (LTS) (HBP)

NAMED PLAINTIFF CHILDREN'S SUR-REPLY IN OPPOSITION TO CITY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

CRAVATH, SWAINE & MOORE LLP
Julie A. North
J. Wesley Earnhardt

825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
Email: jnorth@cravath.com
Email: wearnhardt@cravath.com

A BETTER CHILDHOOD INC.
Marcia Robinson Lowry
1095 Hardscrabble Road
Chappaqua, NY 10514
(844) 422-2425
Email: mlowry@abetterchildhood.org

Attorneys for Plaintiffs Elisa W., by her next friend, Elizabeth Barricelli; Alexandria R., by her next friend, Alison Max Rothschild; Thierry E., by his next friend, Amy Mulzer; Lucas T., Ximena T., Jose T. C. and Valentina T. C., by their next friend, Rachel Friedman; Ayanna J., by her next friend, Meyghan McCrea; Olivia and Ana-Maria R., by their next friend, Dawn Cardi; Xavion M., by his next friend, Michael B. Mushlin; Dameon C., by his next friend, Reverend Doctor Gwendolyn Hadley-Hall; Tyrone M., by his next friend, Bishop Lillian Robinson-Wiltshire; Brittney W., by her next friend, Liza Camellerie; Mikayla G., by her next friend, Amy Mulzer; Myls J. and Malik M., by their next friend, Elizabeth Hendrix; and Emmanuel S. and Matthew V., by their next friend, Samuel D. Perry, individually and on behalf of a class of all others similarly situated

INTRODUCTION

Named Plaintiff Children submit this Sur-Reply to address the additional facts and arguments City Defendant improperly includes in its Reply Memorandum of Law in Support of Defendant's Motion for Partial Summary Judgment ("Def. Reply").

ARGUMENT

Named Plaintiff Children set forth at pages 2 through 15 of their opposition brief ("Plf. Opp.") facts taken from the children's case files that document their experiences in and out of foster care. City Defendant has consistently—and erroneously—asserted that the allegations in the Amended Complaint concerning Named Plaintiff Children are inconsistent with Named Plaintiff Children's case files. (*See* Defs.' Mem. Opp'n to Pls.' Mot. Class Certification, ECF No. 205; Hr'g Tr., 29:18-20; 30:19-21, Aug. 5, 2016, ECF No. 267.) Now that City Defendant has produced the case files and is confronted with the facts contained therein, City Defendant alternately asks the Court to disregard the facts on procedural grounds or disputes facts evidenced by its own case files. City Defendant (1) argues that Named Plaintiff Children's "proposed facts should be disregarded by the Court"; (2) relies on misleading 2015 adoption reentry data; (3) introduces additional documentation from Xavion M.'s case file in an attempt to support an ACS attorney's version of the facts; and (4) misrepresents the nature of a letter sent by Elisa W. notifying the foster care agency of her decision to leave care. City Defendant is incorrect that the Court is required to disregard the facts cited in Named Plaintiff Children's opposition brief, and the new facts City Defendant raises to counter the facts are entirely misleading. At best, City Defendant's attempt to counter the facts Named Plaintiff Children cite in their opposition brief demonstrates that there are

disputed issues of material fact and City Defendant's motion for summary judgment must therefore be denied.

First, City Defendant claims that the "proposed facts should be disregarded by the Court [for failure] to submit a 56.1 Statement of additional material facts". (Def. Reply at 2 n.1.) Local Civil Rule 56.1(b) requires that the party opposing the motion respond to each of the paragraphs included in the moving party's Rule 56.1 statement and include any additional paragraphs containing "additional material facts as to which it is contended that *there exists a genuine issue to be tried*". (*See* Local Civil Rule 56.1(b) (emphasis added).) Given that the information contained in the case files, which City Defendant itself produced, is not in dispute, Named Plaintiff Children were not required to include them in their Rule 56.1(b) submission.

Moreover, even if the case file facts should have been set forth in a separate Rule 56.1(b) submission, it is well within the Court's discretion to consider the facts nonetheless. *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 73 (2d Cir. 2001) (noting that "[a] district court has broad discretion to determine whether to overlook a party's failure to comply with local court rules"). Here, Named Plaintiff Children clearly set forth their statement of facts on pages 2 to 15 of their opposition brief. City Defendant's footnote calling attention to these facts makes clear that they realized these facts' importance. There is therefore no basis to disregard these plainly relevant facts.[1]

[1] City Defendant violated the Local Rules of Civil Practice by filing a Supplementary Rule 56.1 Statement, which improperly introduced new facts with its reply. *See* Local Rule 56.1 (requiring a Statement of Material Facts "[u]pon any motion", not upon reply). City Defendant is not permitted to bolster its motion by citing to facts that were available to City Defendant at the time of the filing of its initial motion. *See Bravia Capital Partners, Inc. v. Fike*, 296 F.R.D. 136, 144 (S.D.N.Y. 2013) (finding plaintiff "was obligated, in her initial moving papers, not in her reply, to provide evidence" supporting plaintiff's argument).

Second, in an effort to show that it is not reasonable to think the Named Plaintiff Children who have been adopted may return to foster care in the future, City Defendant relies on ACS data relating to 997 children adopted in 2015 indicating that "only nine" of those children have returned to care as of December 2016—less than 1%. (*See* Def. Supp. 56.1, Ex. A.) This statistic accounts only for children who return to care within one year of being adopted but does not reflect the more common scenario where children return to care *after* the first year that the adoption is finalized. City Defendant's presentation of this data is misleading.[2]

Third, City Defendant cites a Court Update from Named Plaintiff Child Xavion M.'s case file to demonstrate that Xavion M. has been living with his mother for over a year, suggesting that he will never return to foster care.[3] (*See* Def. Supp. 56.1, Ex. B.) Nothing in the Court Update supports City Defendant's argument that Xavion M. will never return to care. Furthermore, contrary to what City Defendant claims, Xavion M. has only been "final discharged" from foster care (meaning without agency oversight and agency support) for nine months, not a year and a half. (Def. Reply at 3.) City Defendant has not disputed any facts contained within Xavion M.'s file or offered any reason that these facts are not indicative of his time in care. The "explanation" of the facts contained in Xavion M.'s case file provided by an ACS attorney—who does not represent Xavion M.—is nothing more than that: an ACS attorney's explanation; it does not demonstrate that Xavion M. will not return to care. (*See* Def. Reply at 3.)

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[2] In addition, this data should have been produced in response to Named Plaintiff Children's discovery requests. (*See* Named Plaintiff Children's First Request for Documents, May 6, 2016 at Document Request 75; Named Plaintiff Children's First Set of Interrogatories, May 6, 2016 at Interrogatory Nos. 6, 7.)

[3] City Defendant did not produce this document to Named Plaintiff Children until December 16, 2016, after Named Plaintiff Children's opposition brief was filed.

Fourth, City Defendant relies on a letter from Elisa W. apprising the foster care agency that she intends to leave care, suggesting that this letter provides conclusive proof that Elisa W., an 18 year-old girl, will never return to foster care within the next three years. (*See* Def. Supp. 56.1, Ex. C.) This letter, however, is a standard document that the Family Court requires a child to send when she signs herself out of care. It is thus disingenuous for City Defendant to argue that this two-line letter demonstrates that Elisa W. will not likely return to care. This letter does not show that it is not reasonable to expect that Elisa W. may choose to or need to avail herself of the services she is entitled to until she turns 21. Additionally, City Defendant's assertion that Elisa W. must express an intent to return for her return to care to be probable is not supported by the case law, which generally views claims as capable of repetition whenever the party is reasonably likely to be "subject to that same action in the future". *Lerman v. Bd. of Elections in City of N.Y.*, 232 F.3d 135, 141 (2d Cir. 2000); *see also Honig v. Doe*, 484 U.S. 305, 320 (1988) (noting plaintiff's "inability to conform his conduct", not his intent to act, would cause him to be subject to same harm). Here, given the systemic failings of ACS, there can be no question that Elisa W. (like the other allegedly moot Named Plaintiff Children) is reasonably likely to be subject to the same action in the future.

In sum, none of these new facts shows that the Named Plaintiff Children fail to meet the well-established "capable of repetition yet evading review" exception to the mootness doctrine. (*See* Plf. Opp. at 16-23.) If anything, they demonstrate that there are material facts in dispute which make summary judgment inappropriate. Nor does City Defendant's reliance on *Lasky v. Quinlan*, 558 F.2d 1133 (2d Cir. 1977) support its assertion that relation back does not apply. In *Lasky*, the five plaintiffs were no longer in

custody at the time the contempt proceedings were initiated. *Id.* at 1136. Their claims, therefore, could not have related back. Here, all six of the allegedly moot Named Plaintiff Children were in ACS custody at the time the amended complaint in the action was filed. The motion for class action status was denied without prejudice, with the implicit acknowledgment that Named Plaintiff Children need more time to seek further discovery. Thus, on a renewed motion for class certification, Named Plaintiff Children's claims would relate back to a time when all Named Plaintiffs were in care.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Named Plaintiff Children's opposition brief (ECF No. 309), City Defendant's Motion for Partial Summary Judgment should be denied.

Dated: December 29, 2016

by Marcia Robinson Lowry / CB

Marcia Robinson Lowry
A Better Childhood, Inc.
1095 Hardscrabble Road
Chappaqua, NY 10514
(844) 422-2425
mlowry@abetterchildhood.org

CRAVATH, SWAINE & MOORE LLP

Julie A. North / CB

Julie A. North
J. Wesley Earnhardt
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
jnorth@cravath.com
wearnhardt@cravath.com

Attorneys for Plaintiffs Elisa W., by her next friend, Elizabeth Barricelli; Alexandria R., by her next friend, Alison Max Rothschild; Thierry E., by his next friend, Amy Mulzer; Lucas T., Ximena T., Jose T. C. and Valentina T. C., by their next friend, Rachel Friedman; Ayanna J., by her next friend, Meyghan McCrea; Olivia and Ana-Maria R., by their next friend, Dawn Cardi; Xavion M., by his next friend, Michael B. Mushlin; Dameon C., by his next friend, Reverend Doctor Gwendolyn Hadley-Hall; Tyrone M., by his next friend, Bishop Lillian Robinson-Wiltshire; Brittney W., by her next friend, Liza Camellerie; Mikayla G., by her next friend, Amy Mulzer; Myls J. and Malik M., by their next friend, Elizabeth Hendrix; and Emmanuel S. and Matthew V., by their next friend, Samuel D. Perry, individually and on behalf of a class of all others similarly situated