99-7218

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOEL A., MICHAEL D., ERIC R., DAVID S., MAXX R. and RAY D.,

Intervenor-Plaintiffs-Appellants,

MARISOL A., by her next friends, Rev. Dr. James Alexander Forbes, Jr., and Raymonda Cruz; LAWRENCE B., by his next friend, Dr. Vincent Bonagura; THOMAS C., by his next friend, Dr. Margaret T. McHugh; SHAUNA D., by her next friend, Nedda de Castro; OZZIE E., by his next friends, Jill Chaifetz and Kim Hawkins; DARREN F., DAVID F., by their next friends, Juan A. Figueroa and Rev. Marvin J. Owens; BILL G., VICTORIA G., by their next friend, Sister Dolores Gartanutti; BRANDON H., by his next friend, Thomas J. Moloney; STEVEN I., by his next friend, Kevin Ryan, on their own behalf and on behalf of all others similarly situated, WALTER S., by his next friends, W.N. and N.N., grandparents; RICHARD S., by their next friends, W.N. and N.N., grandparents; DANIELLE J., by her next friend, Angela Lloyd,

Plaintiffs-Appellees,

-against-

RUDOLPH W. GIULIANI, Mayor of the City of New York; JASON TURNER, Administrator of the Human Resources Administration and Commissioner of the Dept. of Social Services of the City of New York; GEORGE E. PATAKI, Governor of the State of New York, JOHN JOHNSON, Commissioner of the New York Office of Children and Family Services of the State of New York; and NICHOLAS SCOPPETTA, in his official capacity as Commissioner of the New York City Administration for Children's Services,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE
THE LEGAL AID SOCIETY

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May 18, 1999

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PRELIMINARY STATEMENT

This brief is submitted pursuant to Fed. R. App. P. 29, on behalf of amicus curiae, The Legal Aid Society. As we did in the District Court when it evaluated the fairness and adequacy of the settlement agreements in Marisol v. Giuliani, amicus seeks to explain the effect of the settlements and the dismissal of this litigation on our clients, who comprise the vast majority of the Marisol plaintiff class members. The Legal Aid Society has a role as amicus in the District Court, and asks this Court as well to consider the serious concerns of our clients.

THE AMICUS CURIAE

The Legal Aid Society ("Society"), founded in 1876, is the oldest and largest law firm in the country providing legal representation to individuals and families who cannot afford to pay a private attorney. The Society's reputation has reached the highest level of the judicial system. The United States Supreme Court, in Blum v. Stenson, 465 U.S. 886, 890 n. 3 (1984), commented, "[The Society] enjoys a wide reputation for the devotion of its staff and the quality of its service." Since 1962, the Society's Juvenile Rights Division ("JRD") has represented children in the Family Courts of New York City. The Juvenile Rights Division represents the overwhelming majority of children in cases before the Family Courts involving child abuse and neglect, termination of parental rights, status offenses, delinquency, and other proceedings affecting children's rights and welfare. JRD attorneys and social workers handle the cases of some 45,000 children in these categories annually, including approximately 90 percent of the City's 40,000 children in foster care.

The work of JRD professionals brings them into constant contact with the agencies and individuals responsible for the care and protection of our clients. It puts them in a unique

position to observe and assess the operations of the child welfare system on a wide scale and to identify specific problems. Although we address our clients' individual concerns about the system, case-by-case, at the Family Court level, we are also frequently obliged to seek remedies for systemic deficiencies impacting larger numbers of children through more broadly based litigation[1]. As it happens, our clients make up a large majority of the class member children affected by the Marisol litigation and its dismissal.

On January 22, 1999, the District Court in Marisol held a hearing pursuant to Rule 23(e) of the Federal Rules of Civil Procedure to consider the parties' application for approval of settlement agreements reached between the plaintiffs and the New York City and New York State defendants, respectively. In conjunction with that hearing, The Society submitted written comments to the court which, while affirming the creative aspects of the settlements, expressed our deep concern that certain terms of the Marisol agreements will inhibit the ability of thousands of children in our caseload to obtain timely, effective relief from child welfare policies and practices that irreparably harm them. We reiterate before this Court our grave concern about the fairness, reasonableness and adequacy of the settlement with respect to the plaintiff class in light of two aspects of the agreements: (1) the releases and covenants not to sue that preclude existing claims as well as the claims of as-yet-unknown class members arising in the future; and (2) the District Court's dismissal of all claims *with prejudice* as of the date of its order, while at

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[1]Over the years Legal Aid has successfully secured class-wide equitable relief in discrete areas of the child welfare system in the federal courts and in state courts of general jurisdiction. One such case, Jesse E. v. New York City Department of Social Services, a challenge to the City's practice of separating siblings in foster care, was the subject of a settlement approved by this Court and is currently in an active post-adjudication monitoring phase.

the same time retaining only severely limited jurisdiction to enforce the terms of the agreements or reinstate the original claims.

THE SETTLEMENT AGREEMENTS

The Marisol v. Giuliani lawsuit is global in nature, an attempt to achieve judicial child welfare reform of a scope and magnitude unprecedented in the history of New York City. The *suit attacks on constitutional and statutory grounds virtually every area of the City's $1.2 billion* child welfare operations, including abuse and neglect prevention, child protection, case assessment and planning, services provision, foster care and efforts to achieve permanency for children. See Complaint ¶¶187-324. It encompasses more than 100,000 children, including thousands who are not in contact with the system but may possibly be at risk of abuse or maltreatment. See Complaint ¶¶13-21. The essence of its request for relief is a judicial takeover of the system through the creation of a receivership. See Complaint ¶354.

In the settlement agreements reached with the New York City defendants ("City Agreement") and the New York State defendants ("State Agreement") plaintiffs have chosen to forego a judicial resolution of the controversy. The settlements, which are essentially private contracts among the parties and not "so ordered" decrees, required dismissal of the lawsuit with prejudice against the respective defendants upon the court's approval of the agreements pursuant to Fed. R. Civ. P. 23(e). The City Agreement, most notably, contains no injunctive or other enforceable relief, no specific tasks that the defendant government agency must perform, and no time deadlines. The centerpiece of the City Agreement is the parties' acceptance of the voluntary assistance for approximately two years of an independent Advisory Panel of four experts in child welfare, funded by a private foundation. See City Agr. ¶¶4-6. The goal of the settlement is

simply for the City's Administration for Children's Services ("ACS") to go forward with implementation of its own preexisting Reform Plan, rather than a plan negotiated by the parties or developed with the help of the expert panel. City Agr. ¶10. Using the ACS plan as a guide, the Advisory Panel is to study broadly defined areas of ACS' operations and issue reports and recommendations. City Agr. ¶¶7-25. The City's obligation under the agreement is limited to "cooperat[ing] fully with the Advisory Panel's review processes . . . consider[ing] fully each recommendation made by the Advisory Panel and to provid[ing] the Advisory Panel full access to information, documents and personnel as it may request." City Agr. ¶9. The panel's "recommendations are not binding on ACS or the City but are purely advisory . . . ." City Agr. ¶10.

In exchange for the City defendant's cooperation with the purely advisory expert panel, plaintiffs' counsel has agreed that the plaintiff class members shall have no rights to pursue their existing claims during the next two years. They have also agreed to preclude both current and as-yet-unknown class member children's rights to seek judicial redress on even a limited systemic basis for claims that arise during the two years following the date of the settlement. Although equitable relief and damages may still be sought on behalf of individual children, the settlement prevents even individual class members from seeking any relief that has an impact on any class members other than themselves. See City Agr. ¶¶41-42, 47-48; State Agr. ¶¶40-41.

The Marisol litigation was dismissed with prejudice upon the court's approval of the settlements, but the parties have provided in the City agreement that the district court will retain jurisdiction for very limited purposes: for "enforcing the terms of this Agreement during its term," and for reinstating a claim or claims in the event the Advisory Panel makes a finding that

the City has not acted in good faith. City Agr. ¶2. However, because there are no substantive terms of the agreement to enforce, practically speaking, the court's jurisdiction is in effect restricted to allowing the plaintiffs to move for reinstatement, subject to the panel's determination. See City Agr. ¶26. ACS (but not the plaintiffs) will have an opportunity to discuss with the panel any preliminary "not in good faith" finding, ostensibly for purposes of convincing the panel not to "retain[] that conclusion" in a final report. City Agr. ¶24. It is only upon a final "not in good faith" finding that the plaintiffs will be allowed to make a motion before the court. Additionally, the plaintiffs are barred from using the panel "as, in effect, arbitrators or administrative law judges with respect to any disputes Plaintiffs may have with ACS." City Agr. ¶25.

ARGUMENT

I.

Amicus Urges This Court to Examine Carefully the Way in Which the Overly Broad Covenants Not to Sue and Releases Bar Claims That Have Not Yet Arisen and Unfairly Affect Present and Future Members of the Plaintiff Class

The general standard for judicial approval of a settlement in a class action is whether the settlement is fair, reasonable and adequate. Fed. R. Civ .P. 23(e); Malchman v. Davis, 706 F.2d 426, 433 (2d Cir. 1983). Despite the fact that Marisol was dismissed with prejudice upon approval of the settlement, the agreement nevertheless "reaches into the future and has continuing effect," so that "its terms require more careful scrutiny." Wilder v. Bernstein, 645 F. Supp. 1292, 1308 (S.D.N.Y. 1986). We urge this reviewing Court to consider carefully the

reality of the circumstances in which the agreement will operate. In this regard, the "reaction of the class to the settlement" is perhaps the most crucial of the factors the Court is bound to consider. Robertson v. National Basketball Association, 556 F.2d 682, 684 n. 1 (2d Cir. 1977) (citing City of Detroit v. Grinnell Corp., 495 F.2d 448, 463) (2d Cir. 1974).

As representatives of tens of thousands of class members, amicus urges this Court, as we urged the district court, to give "more careful scrutiny" to the potentially prejudicial effects of the non-litigation covenants and release provisions of the agreements. While we support the goals of this innovative agreement, we nonetheless have grave reservations about provisions of the settlements that will completely deprive our clients of the right to seek certain legal and equitable remedies for at least two years, without more than the mere hope that meaningful changes may someday occur.

In paragraph 41 of the City Agreement, plaintiff class members promise not to "sue, or bring or assign any cause of action, for systemic declaratory, injunctive, or other form of equitable relief against the City . . . in this or any other Court, based on events occurring prior to the signing of this Agreement and based on, arising out of, or relating to any claims that were or could have been asserted in the Complaint . . . ." Paragraph 42 similarly provides that plaintiffs will not commence any new action for such relief based on claims "which occur after the signing of this Agreement and prior to December 15, 2000," including claims which were not set forth in the Pretrial Order.[2] Plaintiffs further release the City from all claims "known or unknown, foreseen or unforeseen, matured or unmatured, accrued or not accrued, direct or indirect . . . that

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[2]The State settlement agreement contains similar non-litigation covenants. State Agr. ¶¶40-41.

[the plaintiff class] ever had, now has or have, or can, shall or may hereafter have . . . from the beginning of time" through December 15, 2000. City Agr. ¶¶47-48. The settlement agreement expressly leaves room only for the assertion of legal and equitable claims "by an individual . . . tailored solely to the specific circumstances of that individual plaintiff." City Agr. ¶41(c). See also State Agr. ¶41.

In other words, the Marisol settlement agreement between the plaintiffs and the City defendants not only bars the plaintiff children from pursuing the claims raised in this litigation, but contains covenants not to sue and release clauses that reach out to bar future claims. These provisions preclude claims, perhaps by as-yet-unknown class members and regarding currently unforeseen events, that may arise in the roughly two years after the agreements were signed. While individual equitable relief and damages claims may still be pursued, the agreement precludes even individual children from seeking injunctive, declaratory or other equitable relief that has impact beyond themselves, both for existing claims and for many claims that have not yet arisen. It is written to encompass all claims that are or could have been stated in the Marisol Complaint or Intervening Complaint, as described in the plaintiffs' July 1998 Statement of Claims to be Tried. See City Agr. ¶¶41-42, 47-48.

Although the doctrine of *res judicata*, even *absent* the non-litigation covenants, would prevent the plaintiffs from raising again the same claims accruing prior to the 1995 Complaint or the 1998 Statement of Claims and dismissed with prejudice, *res judicata* alone does not bar new claims arising after the date of the agreement. See 9 Wright, Miller and Kane, Federal Practice and Procedure: Civil 2d §2367. Indeed, the District Court recognized as much in its March 31, 1999 Marisol Decision at 19 (dismissal does not forever bar future claims: "after December 15,

2000, plaintiffs can bring an action seeking systemic declaratory, injunctive, or other forms of equitable relief based on claims arising after December 15, 2000 . . . ."). It is only the addition of the covenants not to sue and the releases in this private agreement that extend the claim preclusion into the future.

With specific regard to the banning of future legal claims raised by current or as-yet-unknown class members, federal courts of appeals outside this Circuit have found that barring future claims is bad public policy, and that such settlements may not be fair, reasonable, or in the best interests of the whole class. The courts have stressed these concerns in particular with regard to waiving prospective claims based on violations of civil rights. See, e.g., Adams v. Philip Morris, Inc., 67 F.3d 580, 584 (6th Cir. 1996) (ADEA); United States v. Allegheny-Ludlum Industries, 517 F.2d 826, 854 (5th Cir. 1975) (Title VII); cf. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (waiver of prospective rights under Title VII). See also Kalisch-Jarcho, Inc. v. City of New York, 58 N.Y.2d 377, 384-85 (1983) (public policy dictates that exculpatory contract agreements, no matter how unqualified, will not exempt "willful or grossly negligent acts").

In this case, while the expert panel is conducting its long-range review of how the City will implement its own Reform Plan, a host of urgent problems infect all areas of the child welfare system. The root of these problems is systemic in nature. On a daily basis amicus' clients encounter serious and wide-spread deficiencies in kinship foster care practices, availability of resources for siblings and children with special needs, provisions of mental health and medical services and conditions in group foster care, *to name but a few*. Nowhere is this situation more acute than in cases of special needs children -- estimated to comprise more than a

third of the total foster care population -- as well as countless other children being supervised in their homes. Relinquishing for two years the right to seek redress, where the children are especially vulnerable to harm, is contrary to the best interests of class members and contrary to public policy.

II.

Amicus Asks This Court to Consider Carefully the Harm Caused by the Absence of Enforceable Relief in the City Agreement and the Lack of Alternative Means of Redress for Children Who Are and Will Be Members of the Plaintiff Class.

In exchange for the covenants not to sue and the releases, the City Agreement affords no enforceable substantive relief to children who are currently members of the class and those who will join the class and suffer harm in the child welfare system over the coming two years.[3] Even their right to invoke the court's jurisdiction for purposes of reinstating the original claims in the case is severely curtailed under the agreement, having been placed under the control of an independent and "purely advisory" body of child welfare experts, who are operating voluntarily, without judicial standards or guidelines, and whose recommendations for long-term agency change are "not binding" on anyone. City Agr. ¶10. We urge the Court to review carefully whether this sacrifice of class members' rights to seek relief, solely in favor of potential institutional improvement in the distant future, is a fair, reasonable and adequate exchange.

A. The City Agreement Contains No Substantive Relief To Be Enforced.

The settlement with the City is structured as follows: All claims against the City are

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[3]Although plaintiffs' settlement with the State contains enforceable substantive provisions, chiefly in the nature of monitoring and reporting activities, the agreement with the City does not.

dismissed with prejudice immediately upon the court's signing of its decision approving the settlement -- not at the end of the two-year period covered by the agreement. There is no injunctive relief as part of the settlement which would normally be enforceable by a court; rather the agreement provides only for the advisory panel to make non-binding recommendations. As the agreement is not "so-ordered" by the Court, it remains essentially a private contractual arrangement between the parties. The provision authorizing the Court to "retain jurisdiction" for purposes of "enforcing the agreement" (City Agr. ¶2) is deceptive and largely meaningless, both because the agreement itself defines more narrowly the circumstances under which jurisdiction can again be invoked by the plaintiffs and because the City has not committed itself under the agreement to do anything of direct benefit to the plaintiffs.

The City's only affirmative obligation under the agreement is to "cooperate fully with the Advisory Panel's review processes, to consider fully each recommendation made by the Advisory Panel and to provide the Advisory Panel full access to information, documents and personnel as it may request." City Agr. ¶9. The City is not even required to follow any of the panel's recommendations, which are expressly "not binding . . . but purely advisory, intended to assist ACS in achieving the reform goals it has set in each area under review." City Agr. ¶10.

For its part, the Advisory Panel is to examine broadly defined operational areas of the child welfare system in light of the ACS Reform Plan; it may not "suggest approaches that would differ from the Reform Plan's overall goals and principles. City Agr. ¶8. The panel's focus is limited to determining the agency's good faith in implementing the Reform Plan. However, a lack-of- good-faith determination may not be based solely on whether the panel's recommendations have been followed, whether any reform efforts have actually been successful

or whether ACS has provided access to information. City Agr. ¶¶20-21. On the other hand, the panel may excuse ACS' non-performance should it find that "significant legal and operating constraints", such as state and federal law, civil service laws or regulations, collective bargaining agreements or budget cuts, inhibit the agency in its reform efforts. City Agr. ¶22. Finally, if, and only if, the panel reports a not-in-good-faith finding in an area under review are the plaintiffs entitled to bring the matter back before the court; and the only consequence of restoring the court's jurisdiction will be the opportunity to proceed with a trial of the original claim. City Agr. ¶26. In sum, the "relief" agreed upon by the parties is insubstantial and of little or no concrete value to the plaintiff class.

B The Unique Arrangement Dismissing *Marisol* and Granting the Panel the Authority to Reinstate the Case Restricts the Federal Court's Authority to Enforce the Agreements

What is unique to this class action settlement is that the arrangement does not specifically provide for any of the traditional means of continuing jurisdiction in the district court to enforce the terms of the settlement agreements. See Kokkonen v. Guardian Life Ins. Co., 114 S.Ct. 1673 (1994); McCall-Bey v. Franzen, 777 F.2d 1178 (7th Cir. 1985). The District Court here approved a dismissal *with* prejudice that simultaneously provides for the possibility of a Rule 60(b)-type reinstatement but delegates the power to reinstate the action to an entity completely beyond the influence and control of the Court or the parties [4]. The Advisory Panel -- a group of experts operating voluntarily, at its own expense, and answerable to no one-- is the sole arbiter of when the court may again have jurisdiction over this case. It is only upon a finding by the panel that

[4]See March 31, 1999 Decision at 5-6 (approving the settlement agreements pursuant to Fed. R. Civ. P. 23(e) and dismissing the claims in Marisol). The Court does not refer specifically to Rule 41 or to Rule 60(b).

the defendants have not complied in good faith with the terms of the settlement agreement that the plaintiffs may move the federal court to consider any aspect of this litigation. City Agr. ¶¶21-26.

Amicus questions the wisdom of a scheme which limits in this manner the plaintiffs' ability to seek relief from the dismissal and the court's power to grant reinstatement. Though the City Agreement goes into great detail about when and how plaintiffs may move to reinstate this action rather than filing a new action -- in effect, defining a type of Rule 60(b) motion, the circumstances defined make it highly unlikely that such a motion could be filed. Under the City Agreement, the plaintiffs can make a motion for the litigation to be reinstated in whole or in part only if the panel deems the City not to be acting in good faith. Even if the panel should make such a finding as a preliminary matter, ACS, but not the plaintiffs, has the opportunity to discuss their behavior with the panel and attempt to dissuade the panel from stating this conclusion in one of its final reports. City Agr. ¶24. There is no provision otherwise for the court to consider a motion, as Rule 60(b) would provide in a normal situation.

Furthermore, the Advisory Panel's determination to find good faith or not, unlike the decisions of a federal magistrate judge or a court-appointed Special Master, cannot be reviewed or overturned by the court. Similarly, in contrast to a federal court order denying an actual Rule 60(b) motion, which is final and appealable, the panel's decision not to allow a motion for reinstatement of the action is not appealable. Additionally, whereas Rule 60(b) does not define the standard for vacating a judgment, the City Agreement superimposes a bad faith requirement without stipulating any judicially-approved guidelines by which the panel must evaluate good faith. Thus the independent panel becomes the exclusive, standardless and unreviewable

gatekeeper for the possible reinstatement of the action.

This unorthodox arrangement will harm plaintiff class members by unfairly restricting their access to court in the event the agreements are not complied with in part or whole. Not only will the plaintiff children be unable to enforce the substantive terms of the agreement by seeking court intervention, but they are likewise barred from asking the court to reinstate the action by the restrictive provisions that are offered as a substitute for Rule 60(b). While amicus applauds and supports on behalf of its clients the agreement of the parties to utilize the services of a distinguished panel of experts, we are nevertheless gravely concerned that children will be denied access to seek review of the private panel's determinations regarding defendants' good faith performance and, ultimately, to petition for the redress of palpable harms.

C. There Are No Effective Alternative Remedies.

The Marisol agreements leave class members no dependable alternative mechanisms for addressing immediate systemic grievances. Case-by-case resolution of individual complaints cannot begin to get at the underlying causes of such shortcomings. See, e.g., Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980). To the contrary, individual litigation is the most inefficient and ineffective approach to problem-solving. It requires constant revisiting of the same issues, virtually on a daily basis, in the trial courts and severely tests the limited resources and energies of the participants in those proceedings. What is worse, individual litigation of an injunctive nature invariably pits children against one another in a contest for vital but scarce services, ensuring that some class members will succeed in getting the care and treatment they need at the expense of others. Amicus is concerned that the inability of class members to address

the policies and practices responsible for their difficulties may mean, for them, no "effective redress" at all. Id. at 338.

Nor can the Marisol Advisory Panel be expected to investigate and intercede expeditiously in discrete areas of the system. Amicus has explored such a proposition with the panel members; and even with their impressive talent and commitment, their ability to act in this manner is highly doubtful. First, the panel, including its staff, is of limited size, consisting of only six people with the monumental task of examining the child welfare system in its entirety. Second, though the parameters of its investigations are only loosely delineated in the City Agreement, the panel does not envision its role as that of an ombudsman -- resolving problems that affect children on a daily basis. Rather, the panel members expect to focus on the overarching administrative and policy issues that are key to long-term institutional transformation. Thus, the likelihood of drawing the panel's interest and energies toward more mundane functions of the system appears remote. Moreover, whatever the panel's own perception of its role may be, the City Agreement precludes approaching the panel for such purposes: "Nothing in this Agreement creates any rights for Plaintiffs to utilize the Advisory Panel as, in effect, arbitrators or administrative law judges with respect to any disputes Plaintiffs may have with ACS." See City Agr. ¶25.

Informal negotiation at administrative levels is an equally unsatisfactory alternative for the children who suffer because of urgent systemic deficiencies. During the past three years amicus has made conscientious attempts to pursue negotiated solutions to pressing issues with the Administration for Children's Services, rather than resorting immediately to the courts. In general our working relationship with ACS officials has been a positive one. For the most part,

however, progress has been painfully slow. While we intend to continue working together with the City on behalf of our clients wherever possible in the future, we are distressed that our clients will be barred from taking collective legal action when it is necessary.

In summary, the all-encompassing Marisol lawsuit was filed four years ago, presumably in the conviction that attacking the immense New York City child welfare system with a single, massive blow was the only effective way in the long run to ensure meaningful systemic reform. With these settlement agreements, plaintiffs' counsel have dramatically changed course. They have stepped away from litigation, deferring to a group of child welfare professionals who will determine whether or how the system can be repaired. They have left the City free of any judicial pressure for at least two years while officials attempt to carry out their self-described reform plan, even though full realization of this "unfinished roadmap" cannot be expected under the best of circumstances for years to come. See City Agr. p.3. However, two years is comparable to a lifetime for flesh and blood children, who may wait in vain for the advantages of administrative restructuring to trickle down to them. Though plaintiffs' counsel may have defensible reasons for embracing this non-judicial approach, our concern is that in agreeing simultaneously to suspend the pursuit of all systemic judicial relief, they unfairly sacrifice the immediate interests of a great many class members for the mere potential of long-term change.

CONCLUSION

On behalf of the many children represented by The Legal Aid Society who are and will be members of the plaintiff class in this litigation, amicus urges this Court to consider carefully the concerns discussed above as the Court reviews the District Court's approval of the settlement as fair, reasonable and adequate.

Dated: New York, New York
May 18, 1999

Respectfully submitted,

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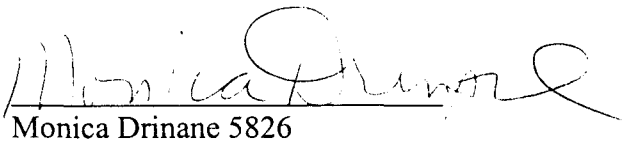

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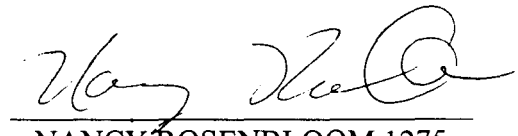
CERTIFICATE OF COMPLIANCE

Nancy Rosenbloom, one of the attorneys for the amicus curiae, The Legal Aid Society, certifies that this brief complies with the type-volume limitation in Federal Rules of Appellate Procedure Rule 29(d) in that the brief contains 4,680 words.



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