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,

– against –

MARISOL. A, by her next friend, Rev. Dr. James Alexander Forbes, Jr., by her next friend Raymunda Cruz, LAWRENCE. B, by his next friend, Dr. Vincent Bonagura, THOMAS C., by his next friend, Dr. Margaret T. McHugh,

(For Continuation of Caption See Next Page)

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

BRIEF FOR THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, THE NATIONAL CENTER FOR YOUTH LAW, SUPPORT CENTER FOR CHILD ADVOCATES, YOUTH LAW CENTER, DEAN BOGART R. LEASHORE, DEAN THOMAS M. MEENAGHAN, DEAN RONALD FELDMAN, DEAN MARY ANN QUARANTA, DEAN SHELDON R. GELMAN, DEAN ROGER A. LEVIN, and DEAN FRANCES L. BRISBANE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES' OPPOSITION TO INTERVENOR'S APPEAL

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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 H. Moloney, STEVEN I., by his next friend, Kevin Ryan, on their own behalf and behalf of and 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,

RUDOLPH W. GIULIANI, Mayor of the City of New York, MARVA LIVINGSTON HAMMONS, 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 fka Commissioner of the Dept. Social Services of the State of New York, NICHOLAS SCOPPETTA, in his official capacity as Commissioner of the New York City Administration for Children's Services,

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici make the following disclosure:

The Judge David L. Bazelon Center For Mental Health Law is a private, non-profit corporation incorporated under the laws of the District of Columbia. It has no parent corporation and no publicly held company owns ten percent or more of the Judge David L. Bazelon Center For Mental Health Law's stock.

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INTERESTS OF AMICI CURIAE

Amici curiae include (i) several of the nation's leading organizations that conduct class action litigation and other forms of advocacy on behalf of children; and (ii) the deans of seven schools of social work at major universities in New York State, all of whom are leading social work educators familiar with the child welfare system in New York City.[1]

Amici curiae bring to this case a wealth of experience and information pertinent to the issues raised by this appeal. Amici are fully familiar with the difficulty of reforming complex social service systems, including child welfare systems, and the important role that class action litigation has played in many institutional reform efforts. Each amicus organization has participated in class action litigation to reform child welfare systems, and to address the diverse needs and interests of children monitored by social services or in its custody. The amici deans, from seven prominent Schools of Social Work in the New York metropolitan area, have researched, taught, chaired committees and served as consultants concerning a wide range of social welfare issues, including child

[1] Amici curiae include the Judge David L. Bazelon Center For Mental Health Law, the National Center for Youth Law, the Support Center for Child Advocates, the Youth Law Center, as well as the Deans of the Schools of Social Work or Social Welfare of Hunter College of the City University of New York, New York University, Columbia University, Fordham University, Yeshiva University, Adelphi University, and the State University of New York at Stony Brook. Set forth in the Addendum, hereto, is a complete description of each amicus curiae.

[redacted] and the foster care system. As children's advocates and social work [redacted], and as leaders in the field of social welfare, their interest is in [redacted] the development of a child welfare system in New York City that [redacted] protects all of the children under its auspices, and in encouraging the [redacted] use of the law to reform public systems.

SUMMARY OF ARGUMENT

As organizations and professionals committed to the improvement of [redacted] social service systems that serve children and other vulnerable populations [redacted], the amici curiae urge the Court to affirm the District Court's approval [redacted] an innovative class action settlement that will contribute substantially to the [redacted] and reform of the agency designed to serve New York City's abused [redacted] children. The amici support the Marisol settlement as one likely to [redacted] because of the parties' willingness to cooperate and their commitment to [redacted] the functioning of a long-troubled agency.

Amici's collective experience, in a variety of social service fields, has [redacted] them that the type of broad-based class action litigation at issue here is a [redacted] vehicle for achieving comprehensive institutional reform. Although more [redacted]-targeted litigation can be useful at times to remedy limited or contained [redacted] violations, complex social service systems that serve extremely troubled [redacted] -- such as child welfare systems serving abused and neglected children

-- face unusually difficult challenges which necessitate wholesale reform of the system or agency involved.

The abused and neglected children for whom New York City's Administration for Children's Services (ACS) is responsible do not fit into a single classifiable mold. They are of different genders, races, ethnicities, religions, ages, sexual orientation, and income levels. Some have physical, emotional, and learning disabilities, and some were physically, sexually, or emotionally abused. There are children with drug and alcohol problems, and some who are, or will soon become, parents. Some would like to return to their families and some are runaways. Furthermore, not only is there a plethora of possible "categories" by which to classify foster children, but it is also highly likely that most children will fall into several of these categories at the same time.

Lasting reform of social service systems and of public agencies generally, is best accomplished with a comprehensive understanding of the system's problems based upon complete information, the cooperation and participation of the agency's leaders, and sufficient flexibility to permit the reform process to adapt to the difficult, and often changing environment, in which the agency functions. All of those critical elements are exhibited in the Marisol settlement agreement. (Point I, infra).

Moreover, the Marisol settlement is a particularly constructive solution because it provides ACS management and staff with a stake and voice in the reform effort and requires the state to fulfill its appropriate oversight responsibilities. The participation of ACS leadership fosters the cooperation and commitment on the part of the agency that is necessary to continue changing ACS' institutional culture and to develop and implement lasting reforms. (Point II, infra).

Finally, the Marisol settlement is commendable for its exceptional and unusually flexible approach that allows plaintiffs, defendants, and the court to play appropriate and constructive roles in the reform process, while involving the state and providing the flexibility necessary to accommodate the changing needs of ACS and the children and families it serves. The settlement devised by the parties in this action has a great likelihood of creating a reformed agency that is able to accommodate not only the needs of different groups of children, but also to accommodate the diverse needs particular to each individual child. (Point III, infra).

ARGUMENT

I. BROAD CLASS ACTIONS ARE IMPORTANT TO ATTAINING COMPREHENSIVE INSTITUTIONAL AND STRUCTURAL REFORM.

A. Comprehensive Reform Of A Child Welfare System Requires Broad Changes Affecting All Aspects Of The Organization.

Reforming New York City's child welfare system requires the sort of expansive structural changes to ACS contemplated by the Marisol settlement. Legal scholars, judges, and experts in management and public administration strongly advocate the sort of broad-based, comprehensive reform effort provided by the Marisol settlement agreement, as opposed to piecemeal changes to an organization that address only limited issues.[2] A narrower focus is less likely to achieve enduring improvements in overall agency performance.[3]

The different units or divisions of an organization like ACS are highly interdependent, each one relying on the proper functioning of the others in order to work successfully. As a result, a reform effort must include and involve all of

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[2] Such a broad-based comprehensive reform effort, while appropriate in the Marisol case as well as several other cases mentioned hereafter, may not be necessary or appropriate in every situation, as certain situations may justifiably require focusing upon a narrow problem or group.

[3] See Elaine Romanelli and Michael L. Tushman, Organizational Transformation as Punctuated Equilibrium: An Empirical Test, in 37(5) Academy of Management Journal 1141 (1994). Extensive studies by experts on management and organizational change indicate fundamental organizational change is more likely to occur in relatively short, revolutionary bursts of activity that affect all aspects of the organization than through longer-term, piecemeal efforts.

those subunits and account for their interactions. It is widely accepted that subunits within an organization are resistant to change.[4] This resistance "prevents small changes in organizational subunits from taking hold or substantially influencing activities in related subunits."[5] Because piecemeal changes to separate divisions of an agency are usually ineffective, a revolutionary transformation of the entire organization is necessary to ensure that the reform has a lasting effect on all aspects of the organization.[6]

Notably, the Marisol Advisory Panel's [See Plaintiffs-Appellees Brief, pp. 11-13 for a complete description of the Panel's functions and responsibilities] most recent report on matters concerning the placement of foster children identifies as problematic and makes recommendations about, among other things, precisely this kind of structural problem. The overlapping responsibilities among subunits in ACS slows the process of making appropriate, informed decisions about where to place children who enter foster care, and is one of the

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[4] Id. at 1144.

[5] Id.

[6] Id. at 1162. See also David Nadler, Concepts for the Management of Organization Change, in The Management of Organizations 490, 495 (Tushman, Reilly, Nadler, eds., 1989).

many areas that ACS needs to address to provide better protection and appropriate services for children.[7]

B. Structural Reform Requires A Plaintiff Class That Can Establish The Need For Broad Relief.

To accomplish the type of structural reform necessary to address the situations of children denied legally-mandated government benefits and protection requires proving a "broad pattern and practice of legal violations," and will, by definition, encompass children in a range of circumstances and with various needs and interests.[8] Correspondingly, proof of a "broad pattern and practice of legal violations" by definition mandates the implementation of broad relief proposals to solve the structural problems contributing to the violations.[9]

When, in a case such as this, it is necessary and appropriate for a class to include plaintiffs with related but varying needs and interests, the Court should not permit separate counsel to impose itself in the litigation at the last minute, as

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[7] See Advisory Report on Placement Issues in the New York City Child Welfare System, 14 (May 21, 1999).

[8] Christopher Dunn, Response to the Conference, The Ethical Legitimacy of Class-Action, Institutional-Reform Litigation on Behalf of Children: A Response To Martha Matthews, 64 Fordham L. Rev. 1991, 1995 (March 1996) (children's needs may range from the type of home setting in which they should be placed to appropriate medical care). See also Baby Neal v. Casey, 43 F.3d 48 (3rd Cir. 1994); Eric L. v. Bird, No. 91-376-D slip op. (D.N.H. Dec. 16, 1993); David C. v. Leavitt, No. 93-C-206W slip op. (D.Utah May 5, 1993) (class actions involving children in foster care that also certified broad classes of plaintiffs).

[9] Dunn, supra note 8, at 1995.

such intervention may preclude effective decision-making or attempt to relitigate issues that already have been resolved.[10] Permitting the disruption of a settlement by new counsel representing a portion of the certified class, or permitting such counsel to interpose its own terms into the settlement, would upset the delicate balance that has been reached by all of the well-represented parties in this case.

In this situation, such intervention would have the unfortunate consequence of preventing the mutually-chosen expert advisory panel from completing a comprehensive investigation and analysis of New York City's child welfare system, and from making recommendations that will address and balance the diverse, but also similar and overlapping needs, of all of the children in the plaintiff class. Implementation of these recommendations will form the basis for the Panel's reports on the agency's progress toward reform and for its determination of whether ACS is making good faith efforts to take appropriate steps to achieve that reform.

Refusing to permit the Joel A. objectors to thwart the settlement agreement is not a declaration that the interests of lesbian, gay, bisexual, and transgendered youth are not important. Rather, it is an acknowledgment that ACS is responsible for these children, as well as many other categories of children, each

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[10] Deborah L. Rhode, Class Conflicts In Class Actions, 34 Stan. L. Rev. 1183, 1253 (July 1982).

of whom may be defined in numerous ways and may be considered a part of numerous different groups within the three sub-classes certified by the district court. For example, a child may be male, gay, a member of an ethnic minority group, have a physical disability, be at risk of abuse or neglect at home, and then be placed in ACS custody. That child would share the interests not only of the children in the proposed class in Joel A., but also of many different potential sub-groups of children currently included in all of the sub-classes in Marisol. It would be impractical and counter-productive to have a separate class action law suit on behalf of each child plaintiff when plaintiff children will fall into several classifications.

Regardless of the multiple potential sub-classifications of each of the plaintiff children, the terms of the Marisol settlement agreement require that ACS continue to accept responsibility for the diverse needs of all of the children it serves, regardless of the number of categories into which they may fall. Indeed, the most recent report of the Marisol Advisory Panel, whose creation was mandated by the settlement agreement at issue, specifically recommends that ACS address the needs of children who are hard to place, including gay and lesbian youth, young mothers with children, teenagers, large sibling groups, and children with serious mental health needs or developmental delays, and that ACS develop a resource development plan with specific objectives and time frames to ensure that

new placements are created for all such children.[11] Development of such a plan requires assessment of the particular and overlapping needs of each of these groups of children, and an analysis of how ACS can best meet those needs.

Planning for each group of children in isolation from the others, and from the child welfare system in which each is situated, would virtually guarantee the ineffective use of scarce resources. Developing resources for only those children who bring a narrowly-targeted lawsuit would clearly be unfair to equally needy children, and would inhibit the kind of agency-wide resource planning critical to a well-functioning, responsive agency.

In sum, neither ACS nor the Marisol settlement agreement views in isolation the needs of each of the possible sub-groups that comprise the larger class of abused and neglected children who are plaintiffs in this action. The needs of all of the children, including those represented in Joel A., are various and overlapping. The child welfare system must be structured and reformed in a way that will accommodate and provide for all of those intersecting needs. Permitting the objectors to dismantle the settlement agreement that attempts to address all of these

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[11] Advisory Report on Placement Issues in the New York City Child Welfare System, supra note 7, at 11-13. "The Panel recommends that, in identifying priorities, ACS include groups of children for whom the greatest difficulty is likely to come after their entry into foster care rather than at the time of initial placement. Gay and lesbian children are an excellent example." Id. at 13.

needs would thwart the parties' important effort to achieve broad-based, comprehensive reform that will benefit all of the plaintiff children.

II. INSTITUTIONAL REFORMS ARE MORE LIKELY TO BE SUCCESSFUL IF THEY RESULT FROM VOLUNTARY AGREEMENTS.

A. Voluntary Settlements Reached With The Cooperation And Input Of All Parties Are More Likely Than Rigid, Externally-Imposed Mandates To Result In Long-Term System Reform.

Legal scholars have often acknowledged that a significant advantage of a settlement agreement over a court order is that it is reached with the participation and consent of the defendants. Such an arrangement, unlike a court order following a trial, allows the parties to formulate, through their own creative efforts, a more feasible and finely-tuned decree than can a judge. Defendants are also more likely to comply with a decree they have helped to formulate than with a decree imposed upon them by a federal judge. "In various ways, then, consent decrees offer genuine promise for a higher quality of justice at less cost than the parties could achieve through traditional adjudication."[12] To accomplish lasting institutional reform, it is essential that those involved and those affected have a

[12] Lloyd C. Anderson, Implementation of Consent Decrees in Structural Reform Litigation, 1986 U. Ill. L. Rev. 725, 726-27 (1986).

commitment to, and a stake in, the reform efforts.[13] Several child welfare reform lawsuits over the last decade aptly illustrate this point.

One example is the attempt to reform the Kansas City child welfare agency. After sixteen years of hostile class action litigation, the agency finally acknowledged its deficiencies and commenced a good faith effort at long-term reform by working in conjunction with the plaintiffs' attorneys, employees, administrators, foster parents, child welfare advocates, and community leaders to structure an "integrated strategic planning process."[14] The Kansas City experience prompted the Center for the Study of Social Policy to conclude that "there had to be a better way of fixing dysfunctional child welfare agencies than litigating them

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[13] Edward E. Lawler, Increasing Worker Involvement To Enhance Organizational Effectiveness, in Change In Organizations 280, 300 (Paul S. Goodman and Associates, ed., 1984). ("[T]he data show that when individuals feel responsibility for a task, they are particularly motivated to improve the quality because they feel personally identified with the product and do not wish to be associated with a low quality product.").

[14] Ellen Borgensen and Stephen Shapiro, G.L. v. Stangler: A Case Study In Court-Ordered Child Welfare Reform, 1997 J. Disp. Resol. 189, 189-190 and 198. See G.L. v. Stangler, 873 F. Supp. 252 (W.D. Missouri 1994) (approving a comprehensive modified consent decree, an Operational Guide, and a Framework for Monitoring Methodology in a class action that applied to all (emphasis added) children in the legal custody of the Missouri Division of Family Services, Jackson County, Missouri Office).

into a state of Bosnian exhaustion and forcing technical assistance down their throats at gunpoint."[15]

Unlike the initial climate in Kansas City, Alabama's 1991 child welfare class action settlement in R.C. v. Hornsby[16] created an environment of mutual cooperation between plaintiffs, defendants, and the numerous individuals involved in child welfare, including employees and families.[17] In that case, plaintiffs' attorneys and the state worked together to implement a county-by-county strategy of long-term reform that resulted in a complete modification of institutional practices and culture.[18]

The change in the institutional culture was so dramatic and extensive that it withstood subsequent attempts to roll back the reforms when a new governor was elected in 1995.[19] Everyone, including the attorneys representing the class

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[15] Borgenson and Shapiro, supra note 14, at 190.

[16] Docket No. 88-1170-N (M.D. Alabama 1988).

[17] Bazelon Center For Mental Health Law, Making Child Welfare Work, 5 (1998). As in the Marisol A. settlement, the class in R.C. v. Hornsby was extremely broad. Although not as expansive at first, the plaintiff class was eventually enlarged to include all children at risk of placement, as plaintiffs and the Department of Human Resources both agreed that "*all* children at imminent risk of foster care placement were at high risk of developing emotional or behavioral disorders." Id. at 16-17.

[18] Id. at 6-7.

[19] Id. at 7-8.

members, the employees of the Department of Human Resources ("DHR"), state politicians and the media, expressed support for the changes that had been implemented as a result of the settlement agreement. Furthermore, both the judge monitoring the consent decree and the county directors of DHR refused to curtail the reforms when the political climate became hostile.[20] In short, "[t]he reform has survived, with the support of a fair-minded judge and stakeholders at every stripe."[21]

As the experience with the Alabama child welfare reform illustrates, long-term institutional improvement is more successful when all interested parties work together to develop and implement a reform effort in an atmosphere of cooperation and mutual commitment to improving the functioning of the agency. The Marisol settlement at issue here has a strong likelihood of success because it demonstrates this sort of mutual resolve, and provides an appropriate recourse to the judicial process if the non-coercive aspects of the settlement are unsuccessful. The agreement capitalizes on the combined experience, expertise and commitment

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[20] Id. See R.C. by his next friend, the Alabama Disabilities Advocacy Program v. Nachman, 969 F. Supp. 682 (M.D. Alabama 1997), aff'd, 145 F.3d 363 (11th Cir. 1998) (denying state defendants' motion to modify or vacate the consent decree at issue in R.C. v. Hornsby).

[21] Bazelon Center for Mental Health Law, supra note 17, at 83 (noting that the reforms will not occur according to the original time-table because of Nachman's attempt to quash the reform efforts).

of the parties, their counsel and neutral experts in child welfare administration to develop a comprehensive reform program.

By settling this case rather than taking it to what would likely have been a long and bitter trial, the parties have committed to working together for the benefit of the entire class of plaintiff children, while providing appropriate safeguards for the plaintiffs should the cooperative attempts prove unsuccessful, building in that instance as well on the knowledge and involvement of this expert panel. The support of ACS in this endeavor, including its willingness to open the agency to the scrutiny of the expert panel for two years, is critical to the continued development and implementation of a successful, comprehensive and lasting reform.[22]

B. Commitment By The Organization's Leaders To Institutional Change Is Imperative For An Effective Institutional Reform Effort And Is More Likely When the Effort Is Voluntary.

Without the active support and participation of an organization's leadership, an institution is unlikely to have the impetus to affect significant changes.[23] Because the Marisol settlement allows ACS leaders to continue to develop, influence, and implement the reform process, it offers an exceptional

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[22] Significantly, a former defendant in R.C. v. Hornsby, Paul Vincent, is a member of the Advisory Panel for Marisol.

[23] See Lawler, supra note 13.

opportunity to accomplish the significant task of overhauling New York City's child welfare system.

One characteristic of most successful reform efforts is that its key players share a vision of the desired outcome.[24] Effective leaders generate energy and momentum in support of change, and this energy affects the formal institutional environment as well as the informal institutional culture.[25] Agency leaders and staff are more likely to support reforms which they have helped to develop and in which they have a stake.[26] Gaining the support of those in charge also helps combat other problems associated with structural reform efforts. For example, support by the directors of individual departments may prevent resistance by lower-level staff from infecting the entire reform effort.

Nowhere were the benefits of supportive and committed leadership more apparent than in the settlement in R.C. v. Hornsby in Alabama. The plaintiffs' attorney, from the Bazelon Center for Mental Health Law, and the director of the Alabama child welfare system were not hostile adversaries, but

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[24] Id. at 310-311.

[25] Nadler, supra note 6.

[26] Lawler, supra note 13, at 300.

"shared the goal of system reform at the outset."[27] In fact, the Bazelon Center's account of the reform effort specifically declared that "[o]ne of the reasons the reform effort succeeded is because DHR's leadership was strongly committed to the guiding principles laid out in the consent decree."[28]

Reforming ACS requires the type of committed leadership exhibited in the Alabama settlement. ACS is a large organization that must serve and protect a diverse group of children with pressing needs. In addition to the highly experienced, independent experts who will be scrutinizing the system as part of the Marisol agreement, the input, cooperation and commitment of all of those involved with its mission -- from the agency's top administrators to its caseworkers -- is critical. Only a supportive and committed leadership will be able to foster the necessary cooperation and participation at all levels of the agency.

By agreeing to a resolution, opening the agency to scrutiny, and committing to heed, in good faith, the recommendations of the neutral expert panel, ACS has demonstrated in this settlement agreement that its leaders are committed and serious about its reform effort. That effort should be commended, encouraged and facilitated, rather than obstructed. Finally, if ACS fails to act in

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[27] Bazelon Center For Mental Health Law, supra note 17, at 26. "Although technically adversaries, they began a collaboration aimed at refocusing the system to emphasize family preservation and permanency for children in care." Id. at 11.

[28] Id. at 6-7.

good faith to take steps necessary for reform and the Panel makes such findings, the matter returns to the District Court with the testimony of experts chosen by ACS itself to point out to the Court what more should have been done.

C. In This Situation It Is Reasonable To Forsake The Threat Of Additional Class Action Litigation During The Reform Process.

Rather than providing mere "illusory" relief and benefits to the plaintiff class as asserted by the Joel A. objectors, providing the neutral experts with unfettered access to ACS and the foster care system is essential to the development of an effective change effort. Plaintiffs' promise not to bring additional class action litigation during the duration of the agreement, unless the expert panel determines that necessary reforms are not being accomplished, is a reasonable concession in exchange. Of course, if the Advisory Panel finds that ACS is not making necessary changes during this period, plaintiffs can return to court, supported by this uniquely well-informed Panel.

If additional systemic litigation were to occur during this initial time period, implementation of the settlement agreement's reforms would be seriously compromised. Any court orders issued in related litigation would potentially conflict with the advice of the expert Marisol Advisory Panel, based on its comprehensive investigation of ACS. Conflicting orders would, of course, obstruct the City's ability to comply with the Panel's recommendations, or to accomplish the Panel's recommended actions in the sequence that is best for

overall organizational planning, undermining the goal of a coherent, well-planned reform process.

Moreover, court orders stemming from other class actions would focus on only the specific legal violations that are the subject of that lawsuit, to the exclusion of the other, related problems that exist in the child welfare system. ACS would thus be forced to view the particular violation in isolation, and have to respond in the priority set by whichever class got to judgment first. This would thwart the substantial system-wide reform effort that the City has agreed to undertake and the State has agreed to supervise.

In addition, a court order imposed in a different case, without the agreement of defendants, could threaten to pit the parties against each other in a situation in which they would otherwise be working together more constructively. For effective reform to take place, the caseworkers and administrators who work within the system on a daily basis must provide the Panel and the City with information, and must suggest and assist in implementing changes. Systemic litigation would also deter ACS employees and administrators from providing critical evaluations of the agency, as such information could be seen as an admission of wrongdoing by ACS and used against it in Court. This situation would diminish the value of the settlement agreement by eliminating the ability of ACS to be an active, candid partner in the evaluation and reform process.

For these reasons, plaintiffs' covenant not to bring additional class action litigation or litigation seeking systemic relief during the two-year period of this agreement, unless ACS is not fulfilling its obligations under the agreement, is eminently reasonable. We note and support the fact that the settlement agreement permits plaintiffs to pursue any individual legal claims they may have.

III. INSTITUTIONAL REFORM EFFORTS REQUIRE FLEXIBILITY TO ACCOMMODATE AN AGENCY'S CHANGING NEEDS, CLIENTS, AND ENVIRONMENT.

Institutional reform efforts, and public agencies generally, require flexibility to accommodate rapidly changing environments. Child welfare agencies in particular, need the flexibility to respond to changes in funding, political and social support, negative media publicity, and programmatic shifts, as well as to changes in the society such as increased drug abuse and family violence.[29] Moreover, as some critics of litigation have noted, reforming government institutions requires enough flexibility to permit experimentation and innovation.[30] This may be impeded by successive, piecemeal litigation.

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[29] Barbara A. Pine, Robin Warsh and Anthony N. Maluccio, Participatory Management in a Public Child Welfare Agency: A Key To Effective Change, in 22(1) Administration in Social Work, 19, 22 (1998).

[30] Susan V. Demers, Essay, The Failures of Litigation As A Tool For The Development of Social Welfare Policy, 22 Fordham Urb. L.J. 1009, 1011 (Summer 1995).

The Marisol settlement provides the flexibility necessary to accommodate an agency that must function in a rapidly changing, and at times, unpredictable environment. Rather than imposing rigid requirements developed in isolation from the agency, the settlement agreement reached between plaintiffs and New York City provides for a two-year process of intense reform that will include top management and child welfare experts in developing a flexible approach that responds to the varying needs of the agency and the children and families it must serve. The agreement between plaintiffs and the State further provides for dramatically improved oversight that will ensure the effectiveness of the City agency's reforms. In contrast, a court-imposed order or rigid, prescriptive consent decree, although sometimes necessary, in this case would be less effective except as a matter of last resort, as it would be less able to account for the changing needs of the organization and its clients, and might not receive the same degree of support from the agency's management and staff.

CONCLUSION

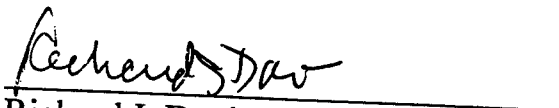
The child welfare system in New York City requires, and has undertaken, institutional reform and a complete transformation so that it can adequately address the needs of all of the children in its care or under its auspices. As the organization must be considered as a whole and re-structured accordingly, the plaintiff class of children must likewise be viewed as a group with both common and diverse interests which overlap and intersect.

The amici curiae support the Marisol settlement because it has the potential to incorporate the cooperation, commitment, and flexibility necessary for effective institutional reform. It is therefore likely to accomplish its goals of reforming ACS and of providing the children under ACS' auspices with improved services and protection. Furthermore, if the Advisory Panel finds that the voluntary aspects of the settlement have failed, the plaintiffs will be able to seek more coercive remedies from the court, informed by the knowledge these experts have gained.

For the foregoing reasons, and those stated in Appellees' brief to the Court, the amici curiae urge this Court to affirm the decision of the district court and to permit this settlement to proceed, so that the children of New York City may finally begin to receive the protection and services to which the law entitles them.

Dated: New York, New York
May 24, 1999

Respectfully submitted,



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ADDENDUM

Judge David L. Bazelon Center For Mental Health Law

The Judge David L. Bazelon Center For Mental Health Law ("Bazelon Center") is a national non-profit advocacy organization, formed in 1972 (called the Mental Health Law Project until 1993), and based in Washington, D.C. As the pre-eminent national legal advocate for children and adults with mental disabilities, it has opened up public schools, employment, housing, and other opportunities for those with mental illness or developmental disabilities. A Bazelon Center attorney was also one of the leading attorneys in a class action settlement that restructured the Alabama child welfare system.

National Center for Youth Law

The National Center for Youth Law ("NYCL"), headquartered in San Francisco, California, is a private, non-profit law office whose advocacy focuses upon the lives of children living in poverty. From its inception more than twenty-five years ago, NYCL has worked to reform child welfare systems throughout the country. NYCL is counsel for the plaintiff class in statewide federal civil rights class actions brought on behalf of abused children and youth and foster children in Arkansas and Utah. NYCL also has litigated similar cases in several municipalities around the country. In each of these cases, the plaintiff class definition was similar to that adopted in Marisol, The majority of cases in which

NYCL has represented Marisol-type plaintiff classes have been resolved through comprehensive consent decrees which address all aspects of the child welfare system, from protective services to foster care to adoption and reunification.

Support Center for Child Advocates

The Support Center for Child Advocates ("Support Center") provides legal assistance and social service advocacy to abused and neglected children in Philadelphia. For all the children committed to the Support Center's care, lawyers and social workers advocate to ensure safety, health, education, permanency and access to justice. In its advocacy, the Support Center witnesses a range of systemic problems affecting children served by public agencies. Systemically, the Support Center promotes collaborative, multi-disciplinary case work and solutions to recurrent problems. Respected for diligent and effective advocacy, the Support Center moves both public systems to deliver entitled services and private systems to open their doors to needy children and their families.

Youth Law Center

The Youth Law Center, headquartered in San Francisco California, is a nationally-known, non-profit child advocacy group that works on behalf of children who have been removed from their parents and are in state custody. It has considerable experience with the use of class action litigation to implement child welfare reform. The Youth Law Center is currently involved in a federal class-

action suit against the Florida Department of Children and Family Services ("DCF"), alleging that the Broward County foster care system was unconstitutionally dangerous. The Youth Law Center initially attempted to address the DCF situation without judicial involvement, and had worked with the state for over a year to attempt to improve the foster care system.

Dean Bogart Leashore

Bogart R. Leashore, Ph.D. in Social Work and Sociology, has been the Dean and Professor of the School of Social Work at Hunter College of the City University of New York since 1991. His areas of research and/or teaching include clinical social work, family and child welfare, mental health, African American families/males, urban service systems, community development, and organizational development. He is a member of several professional organizations, President of the New York State Association of Deans of Schools of Social Work, Co-Chair of the Commission on Accreditation, Council of Social Work Education, and serves on the Board of Directors of the National Association of Deans and Directors of Schools of Social Work and the Board of Trustees of the Children's Aid Society in New York City. One of the several honors and awards that Dean Leashore has garnered is the Service Award from the Foster Parents Association of Washington. D.C. in 1971 and 1986. In addition to the numerous grants that he has received in the past, Dean Leashore is presently responsible for writing grants

involving the Child Welfare Training Program of the New York State Department of Social Services and the National Resource Center on Permanency Planning of the U.S. Department of Health and Human Services. Furthermore, Dean Leashore's scores of scholarly publications and presentations concerning child welfare issues have recently focused on permanency planning in a multicultural society and other issues related to foster care.

Dean Thomas M. Meenaghan

Thomas M. Meenaghan, Ph.D. in Sociology, has been the Dean and Professor of the School of Social Work at the New York University Ehrenkranz School of Social Work since January of 1996. He has taught social policy, planning, community studies, organizational behavior, and social aspects of behavior. Dean Meenaghan has served as a Current Council on Social Work Education Site Visitor (Former CSWE Commissioner) and as a member of the Association for Retarded Children. He has been the Director of Social Services and Planning, administering and supervising a large multi-disciplined department, and a Research Associate and Planning Consultant, assisting various urban agencies on how to introduce social services into neighborhood settings, as well as how to evaluate their current structure of services. In addition, Dean Meenaghan has been the author or co-author of five books, twenty-two articles, and at least forty papers.

Dean Ronald Feldman

Ronald Feldman, Ph.D. has been a Professor and Dean of the Columbia University School of Social Work since 1986. In 1992, he was also a resident Fellow at the Rockefeller Foundation Study and Conference Center in Bellagio, Italy. He has headed and been a member of several committees and commissions concerning social work, education, and behavioral and mental disorders. Dean Feldman is the co-editor of six books of original articles, the author or co-author of more than eighty publications in professional journals and texts, and the senior author of three original scholarly studies. In addition, Dean Feldman has served as Founding Director of the Center for the Study of Youth Development at Boys Town, Nebraska (1974-1978) and as Founding Director of the Center for Adolescent Mental Health at Washington University, St. Louis and at Columbia University (1983-1990).

Dean Mary Ann Quaranta

Mary Ann Quaranta, D.S.W., has been the dean of the Fordham University Graduate School of Social Service since 1975. For several years, she has also maintained a private practice in which she treats emotionally disturbed children and adolescents and their families. Dr. Quaranta is currently on the Boards of Directors of the United Way of New York City (as well as being Co-

Chair of its Advisory Board), the West-End Intergenerational Residence, Catholic Charities, and of Welfare Research, Incorporated. She serves on the Board of Trustees of the Catholic Health Care Network, on the Board of Governors of the Pius XII Foundation, and is a member of the Administration for Children's Services Advisory Committee on Research. In the past, Dr. Quaranta has been president of the 150,000 member National Association of Social Workers and of Catholic Charities, USA, and has served as vice president to North America of the International Federation of Social Workers. Dr. Quaranta's scholarly contributions include thirty-eight papers or presentations on social work issues.

Dean Sheldon R. Gelman

Sheldon R. Gelman, Ph.D., ACSW, MSL, has been the Dorothy and David Schachne Dean of the Wurzweiler School of Social Work at Yeshiva University since July of 1990. He has also been the Interim Vice President for Academic Affairs of Yeshiva University since July of 1998. From July of 1978 until June of 1990, Dean Gelman was Director, Social Work Major, at Pennsylvania State University. He has conducted numerous research projects, served as a consultant for thirty years, been an expert witness in several cases involving social services, and served on nine commissions or committees involving social work. Dean Gelman has authored or co-authored twenty-nine articles in refereed journals, sixteen articles in books, two monographs, one book, ten

research reports, four book reviews, and eight miscellaneous publications. He has also served as an editorial reviewer for over twenty publishers, has presented almost one hundred papers at technical and professional meetings, testified before several state legislative bodies, and presented and participated in numerous seminars, workshops, and institutes. In addition, he has won several awards, and participated on the Council on Social Work Education, the Academy on Mental Retardation, the American Association on Mental Retardation, the National Association of Social Workers, and the New York State Association of Social Work Schools.

Dean Roger Levin

Roger A. Levin, Ph.D., has been the Acting Dean and Associate Professor of the Adelphi University School of Social Work since April of 1997 and was Associate Dean from 1993 to 1997. He has taught classes in public administration and conflict management, as well as in social program development. Dean Levin was a consultant to the Manhasset School District's New York State funded "Youth at Risk" Program between 1988 and 1993, and was employed by the New York City Department of Social Services, as a caseworker, and then as a supervisor, between 1964 and 1970.

Dean Frances L. Brisbane

Frances L. Brisbane, Ph.D., is Professor and Dean of the School of Social Welfare at the State University of New York at Stony Brook. She is also the Dean of the Black Alcoholism and Addictions Institute, co-sponsored by the Morehouse School of Medicine in Atlanta, and the National Black Alcoholism and Addictions Council in Washington, D.C. Dean Brisbane is the co-founder of an international conference, "Counseling and Treating People of Colour: An International Perspective", in which health, mental health, substance abuse, AIDS, violence, and education across cultural lines is discussed. She has created model primary drug prevention programs used in the United States, Africa, and the Caribbean, and has developed "Overcoming Compassion Fatigue", designed for human service professionals who deal with abandoned and neglected children, the terminally ill, and others in similar situations. Dean Brisbane has won numerous honors and awards, and has written several books.

CERTIFICATE OF COMPLIANCE

Richard J. Davis, one of the attorneys for the amici curiae, hereby certifies, based upon the word count of the word processing system utilized to prepare this brief, that this brief complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure Rule 29(d) and Rule 32(a)(7)(B) in that the brief contains 6,603 words.

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May 26, 1999

BY MAIL

Ira Burnim
Judge David L. Bazelon Center For Mental Health Law
1101 Fifteenth Street, N.W., Suite 1212
Washington, D.C. 20005

Re: Marisol A. Amicus Brief

Dear Mr. Burnim:

Thank you so much for agreeing to permit Bazelon Center to be one of the *amici* on this brief and for sending me the book concerning the child welfare reform in Alabama and the Bazelon Center's role in it. As you can see, I found the book extremely useful in writing the brief. I have enclosed a copy of the brief that was submitted to the Court.

Thank you again. I'll let you know whether the settlement is upheld.

Sincerely,

Janet Goldberg

Janet Goldberg

99-7218

To be argued by:
MARC FALCONE

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 friend, Rev. Dr. James Alexander Forbes, Jr., by her next friend Raymond 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 H. Moloney, STEVEN I., by his next friend, Kevin Ryan, on their own behalf and behalf of and 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,

v.

RUDOLPH W. GIULIANI, Mayor of the City of New York, MARVA LIVINGSTON HAMMONS, 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 fka Commissioner of the Dept. Social Services of the State of New York, 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 INTERVENOR-PLAINTIFFS-APPELLANTS JOEL A., MICHAEL D., ERIC R., DAVID S., MAXX R. AND RAY D.

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PRELIMINARY STATEMENT

Intervenor-Plaintiffs-Appellants Joel A., by his next friend Jonathan Cole, Michael D., by his next friend Elise Harris, Eric R., by his next friend Jewelnel Davis, David S., by his next friend Michael Williams, Maxx R., and Ray D. (the "*Joel A.* Objectors") appeal from an order and judgment approving a class action settlement in the Southern District of New York (Ward, J.).[1/]

Lesbian, gay, bisexual, and transgendered youth in the New York City foster care system are targeted for relentless violence, harassment, discrimination, and abuse due to their sexual orientation and gender atypicality. [JA 801][2/] This victimization is perpetrated largely by their straight peers within the class certified in this action (the "*Marisol* Class"), but also by social workers, child care workers, and New York City and State officials charged with the care of these young people. [JA 801-06] Moreover, because this victimization is a direct response to the victims' sexual orientation and identity, it has a profound impact not only on the victims' physical well-being, but also on the victims' mental health and personal development and on the physical, mental, and developmental well-being of indirect victims, *i.e.*, those young people in the foster care

---

1/ The *Joel A.* Objectors appear under pseudonyms to protect their privacy.

2/ "JA" designates the Joint Appendix, filed April 15, 1999.

system who live in fear, hiding feelings of same-sex attraction. [JA 813-19]

The *Joel A.* Objectors have filed a putative class action lawsuit on behalf of these severely victimized youth, seeking relief tailored to the cause of their injuries, systemic bias and ignorance concerning adolescent homosexuality. [JA 800 *et seq.*] That lawsuit is now pending before the Honorable Robert J. Ward in the Southern District of New York, who entered the order and judgment in this case from which the *Joel A.* Objectors now appeal.

The *Joel A.* Objectors oppose the *Marisol* Settlement because it imposes oppressively overbroad restrictions on the Class members' rights of access to the courts, in violation of public policy, the Due Process Clause of the United States Constitution, and Federal Rules of Civil Procedures 23(e). In addition, these extraordinary concessions to the *Marisol* defendants were given in exchange for illusory relief. Finally, the record of the fairness hearing and the papers submitted in support of the settlement contain no evidence that the subclass of which the *Joel A.* Objectors are members was adequately represented *vis à vis* the other *Marisol* subclasses during settlement negotiations.

STATEMENT OF JURISDICTION

This is an appeal from a final order approving the complete settlement of a class action lawsuit. The district court exercised jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1367(a). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

The district court announced its final decision on the record in open court on January 22, 1999. The *Joel A.* Objectors filed their notice of appeal on February 17, 1999, making this appeal timely pursuant to Fed. R. App. P. 4(a)(2). The district court issued an opinion and entered a written order and final judgment on March 31, 1999.

ISSUES PRESENTED

(1) Did the district court abuse its discretion by approving class action settlement agreements that contain a release and covenants-not-to-sue that are oppressively and impermissibly overbroad in that they severely restrict class members' access to the courts for the purpose of asserting claims that the class representatives did not have standing to litigate and in which the class representatives had no personal stake?

(2) Did the district court abuse its discretion by approving class action settlement agreements that contain a release and covenants-not-to-sue that are oppressively and

impermissibly overbroad in that they severely restrict class members' access to the courts for the purpose of seeking systemic relief from injuries inflicted after the date of the settlement?

(3) Did the district court abuse its discretion by approving a class action settlement pursuant to which an oppressively broad release and covenants-not-to-sue were given in exchange for relief with a practical value so speculative that there is a strong danger that the settlement will have absolutely no value to the class?

(4) Did the district court abuse its discretion by approving an omnibus settlement of claims asserted by three subclasses, certified for the purpose of assuring adequate representation of divergent interests within the class, despite the absence of any indication that, in fact, the subclasses were adequately represented *vis à vis* each other during settlement negotiations?

STATEMENT OF THE CASE

A.
The *Marisol* Litigation and Settlement

On December 13, 1995, eleven named plaintiffs (the "*Marisol* Named Plaintiffs") filed a complaint in the United States District Court for the Southern District of New York against various officials of the City of New York (the "City Defendants") and against various officials of the State of New York (the "State Defendants") who were alleged to be responsible

for the operation or oversight of the New York City child welfare system. [JA 77 *et seq.*] Each defendant, including the Mayor of the City of New York and the Governor of the State of New York, was sued in his or her official capacity. [JA 92-94]

1. *The* Marisol *Complaint*

The complaint contained extensive factual allegations concerning the Named Plaintiffs. [JA 106-41] They purported to represent an omnibus class (the "*Marisol* Class") consisting of

> [a]ll children who are or will be in the custody of the New York City Child Welfare Administration ("CWA"), and those children who, while not in the custody of CWA, are or will be at risk of neglect or abuse and whose status is known or should be known to CWA.

[JA 86]

On behalf of this expansive class, the Named Plaintiffs asserted claims for violations of a sweeping array of legal rights, defined at the highest level of generality. For example, in their First Cause of Action, the Named Plaintiffs alleged:

> As a result of the foregoing actions and inactions of the defendants, plaintiff children are being deprived of the rights conferred upon them by the First, Ninth and Fourteenth Amendments to the United States Constitution. These rights include but are not limited to their right to protection from harm; their right not to be deprived of a family relationship absent compelling reasons; their right not to be harmed–physically, emotionally, developmentally or otherwise–while in state custody; their right not to remain in state custody unnecessarily; their right to be housed in the least restrictive, most appropriate and family-like placement; their right to treatment; their right to equal

> protection of the law and not to be discriminated against by virtue of their handicap or disability; their right to receive care, treatment and services consistent with competent professional judgment; and their right not to be deprived of state or federally created liberty or property rights without due process of law.

[JA 181]

The Named Plaintiffs' Prayer for Relief, like their causes of action, was stated in the broadest terms possible. They asked the district court to

> [e]nter declaratory and injunctive relief necessary and appropriate to remedy the defendants' violations of the plaintiffs' rights under the First, Ninth and Fourteenth Amendments to the United States Constitution; the Adoption Assistance and Child Welfare Act of 1980, 42 United States Code §§ 620-27, 670-79a; the Child Abuse Prevention and Treatment Act, 42 United States Code §§ 5101-06a; the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program of the Medicaid Act, 42 United States Code §§ 1396a, 1396(a) and (r); the Multiethnic Placement Act of 1994, 42 United States Code § 622(b)(9); the Americans with Disabilities Act, 42 United States Code §§ 12101 et seq.; the Rehabilitation Act of 1973, 29 United States Code § 794, 794a; Article XVII of the New York State Constitution; the New York State Social Services Law, Articles 2, 3, 6 & 7; the New York State Family Court Act, Articles 6 & 10; and applicable state regulations, 18 N.Y.C.R.R. §§ 400-484.

[JA 107]

None of the Named Plaintiffs was alleged to be lesbian, gay, bisexual, or transgendered. None alleged injury resulting from bias-related violence, abuse, or harassment or

discrimination based on sexual orientation. None sought relief from discrimination on the basis of sexual orientation or gender atypicality under the Equal Protection Clause of the United States Constitution, nor on any basis under the equal protection and anti-discrimination provisions of the New York State Constitution, N.Y. CONST. art. I §§ 6, 11, or the New York City Human Rights Law, N.Y. COMP. CODES R. & REGS. tit. 8 chs. 1, 6 (1998).

2. Marisol *Class Certification*

On June 18, 1996, the district court certified the *Marisol* Class, as defined in the *Marisol* complaint, pursuant to Fed. R. Civ. P. 23(b)(2). [JA 190 *et seq.*] The court subsequently granted the City and State Defendants' applications for interlocutory appeal from the class certification. [JA 1398-99]

This Court affirmed the *Marisol* Class certification, but with reservations. *See Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997). The Court noted that the district court found certain legal and factual issues common to all members of the *Marisol* Class by conceptualizing those issues at a "high level of abstraction," and that the district court's generalized characterization of the claims raised by the Named Plaintiffs "stretches the notions of commonality and typicality." *Id.* at 377. Although the Court concluded that it had no basis, "at [that] stage of the litigation," to find that the district court

had abused its discretion by certifying the Class, *id.*, this Court instructed the district court to certify subclasses "well in advance of trial":

> the district court must engage in a rigorous analysis of the plaintiffs' legal claims and factual circumstances in order to ensure that appropriate subclasses are identified, that each subclass is tied to one or more suitable representatives, and that each subclass satisfies Rule 23(b)(2).

Id. at 378-79. This Court directed the district court to undertake such a rigorous analysis so that the district court could "weed out, and, if necessary, dismiss those claims for which no named plaintiff is an adequate representative." *Id.* at 379. Moreover, the Court provided guidance to assist the district court in this task:

> One possible method of developing proper subclasses would divide the present class based on the commonality of the children's particular circumstances, the type of harm the children allegedly have suffered, and the particular systemic failures which the plaintiffs assert have occurred.

Id.

On April 23, 1998, the district court certified three subclasses proposed by the Named Plaintiffs:

Subclass I:	Children whom the defendants know or should know have been abused or neglected/maltreated by virtue of a report of abuse or neglect/maltreatment.
Subclass II:	Children in families in which there is an open indicated report of abuse or neglect.

Subclass III: Children in the custody of the Administration for Children's Services.

[JA 424-26]

According to the *Marisol* complaint, Subclass Three consisted of approximately 43,000 children as of late 1995. [JA 80]

3. *The* Marisol *Settlement*

In July 1998, "[a]fter more than two years of intensive discovery and on the eve of the July 27, 1998 trial date" set by the district court in its Fourth Amended Scheduling Order, Class counsel and the City and State Defendants informed the court that they were engaged in settlement negotiations. [JA 1401] By that time, the City and State Defendants had produced over 100,000 pages of documents to Class counsel and the parties had exchanged extensive expert reports. [JA 1420-21][3/] Over thirty depositions had been taken. [JA 1357] All parties had submitted proposed findings of fact to the district court. [JA 1421] Class counsel believed that they were ready for trial and they were "confident" that they would prevail. [JA 1156] On December 2, 1998, the parties presented two settlement agreements for district court approval pursuant to Fed. R. Civ. P. 23(e): an agreement between the *Marisol* Class and the City Defendants (the "City Settlement Agreement"), and a separate agreement between the *Marisol* Class

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[3/] See also [JA 1357] (Class counsel stating that plaintiffs reviewed "hundreds of thousands of pages of documents").

and the State Defendants (the "State Settlement Agreement"). [JA 728, 755]

The Settlement Agreements provide no direct, concrete, effective or reasonably certain relief for the *Marisol* Class members, yet the Agreements bind Class members to a sweeping release and covenants-not-to-sue. [JA 745-47, 750-51, 775-76] These non-suit provisions extend to claims for relief from future injuries, inflicted after the date of the settlement, as well as to claims for which the Named Plaintiffs lack standing to litigate and in which they have no stake.

Moreover, the terms of the Settlement Agreements indicate that the three *Marisol* Subclasses were treated as a monolith during settlement negotiations, even though the Subclasses had been separately certified to assure adequate representation of their diverse interests *vis à vis* each other. Neither Settlement Agreement even mentions the Subclasses, and the City Settlement Agreement expressly defines "Plaintiffs" with reference to the omnibus class initially certified by the district court in 1996. [JA 730]; *see also* [JA 757] (omission in State Agreement of this Court's order concerning subclasses).

(a) ***The City Settlement Agreement***

The City Settlement Agreement provides for the establishment of an independent, privately-funded, Advisory Panel authorized to study five defined areas of the operations of the New York City Administration for Children's Services ("ACS") and

to produce a written Initial Report on each area.[4/] [JA 734-35] In each Initial Report, the Panel may recommend steps for ACS to take as part of the agency's reform effort. [JA 734] These recommendations are not binding; they are "purely advisory." [JA 734] Moreover, the Panel's discretion to make even these non-binding suggestions is restricted. The Panel may not even "*attempt* to suggest approaches" that would differ from the "overall goals and principles" of a reform plan issued by ACS approximately two years before the date of the Settlement. [JA 734] (emphasis added)

The Panel may, "at its sole discretion," extend its review and the subject matter of each Initial Report to ACS activities and programs that, although outside the five defined subject matter areas, nevertheless "directly affect" the subject matter of that Initial Report. [JA 735]

The Panel may provide "informal" written or oral advice to ACS concerning activities and programs that do not "directly affect" one of the five defined subject matter areas, but the

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[4/] Neither the members of the Advisory Panel—four experts in the child welfare field [JA 733]—nor the foundation which funds the Advisory Panel [JA 745] appears to be a party to the Settlement Agreement or to the *Marisol* litigation. They therefore appear not to be bound by the Agreement and to be beyond the jurisdiction of the court for purposes of enforcement. The City Settlement Agreement contains no provision fixing the parties rights *vis à vis* each other if the Advisory Panel cannot or does not perform its role as specified in the Agreement.

Panel may not include such advice "in any Advisory Panel review or report." [JA 736]

The Settlement Agreement establishes no schedule for the issuance of the Advisory Panel's Initial Reports, nor does it establish any fact-finding or other procedures for the Panel to follow.

After the Panel has completed all five of its Initial Reports, it will continue to review the five defined areas of ACS operations, and it will issue Periodic Reports on these areas. [JA 737-39] "The focus of the Periodic Reports will be to determine whether or not, in the Advisory Panel's opinion . . . , ACS is acting in good faith in making efforts toward reform in the operational areas being reviewed." [JA 737] The Panel may not determine whether ACS is acting in good faith based solely on whether ACS is implementing the Panel's recommendations, or adhering to schedules proposed by the Panel, or even "whether any reform efforts are actually effective in bringing about reform." [JA 737]

In addition, the Panel may not determine whether ACS is acting in good faith based solely on whether the City has complied with its only obligation under the entire Settlement Agreement, to provide the Panel with such information as the Panel may request. [JA 737-38] The City Settlement Agreement imposes no obligation whatsoever on at least one of the City Defendants, the Mayor of New York, who, according to the *Marisol*

complaint, "is responsible for ensuring that all New York City agencies comply with all applicable federal and state law." [JA 92-93]

Moreover, a "not in good faith" finding by the Panel is not an arbitral determination. It does not compel ACS or any of the City Defendants to alter their conduct and it does not establish legal liability to the Class. The only consequence of a "not in good faith" finding is that it entitles Class counsel to re-instate a portion of the *Marisol* class action lawsuit, subject to the City Defendants' right to rebut the Panel's bad faith finding in the district court. [JA 739-40]

In sum, *after* the Panel has issued all five of its Initial Reports (whenever that may be), and *if* the Panel subsequently finds that ACS is not pursuing its own reform agenda in good faith (a finding neither compelled nor even permitted based solely on the City Defendants' failure to achieved any degree of actual reform or remedy any violation of the Class members' legal rights), and *if* the City Defendants fail to rebut that finding in the district court, *then* the Class may re-instate those claims—and *only* those claims—already asserted in *Marisol* that are related to the subject matter areas in which the Panel has determined that ACS is not acting in good faith. Having re-instated that portion of the *Marisol* action, the Class will then bear the same legal burden they bore prior to Settlement: the Class must prove liability under the applicable laws already

identified in the *Marisol* pleadings (no new legal theories may be added) subject to all of the City Defendants' applicable defenses to liability and relief. [JA 739-40]

Lest there be any mistake about the very narrow and novel role that the Advisory Panel is to play under the City Settlement Agreement, the parties have expressly disclaimed "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." [JA 739] The Panel is not a forum for resolving disputes between the Class, or individual Class members, and the City Defendants.[5/]

Nevertheless, the City Settlement Agreement binds Class members to a covenant not to sue and a release that place unprecedented restrictions on the Class members' access to the courts. First, the Agreement, which, by its own express terms, is not a consent decree [JA 733], bars the Class from bringing any action in court to enforce the Agreement itself, at least until and unless the Panel issues a Periodic Report that contains a finding of bad faith.[6/] [JA 739-40, 745-47] In other words, the Class will not have access to judicial enforcement of the

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[5/] In the very next sentence, though, the Agreement does guarantee "rights" to the *City* -- including the right to meet with the Panel before a finding of bad faith is issued -- that "shall [not be] limit[ed]." [JA 739-40]

[6/] It is not clear whether, even then, the Class could bring such an action, or would be limited to pursuing its legal claims stated in the *Marisol* pleadings. [JA 739-40]

Agreement until after the Panel has issued all five Initial Reports. *Supra* at 12-13.

Second, the City Settlement Agreement bars Class members from initiating any action for "systemic declaratory, injunctive, or other form of equitable relief" based on events occurring prior to the Settlement and "based on, arising out of, or *relating to* any claims that were *or could have been* asserted" in the *Marisol* pleadings. [JA 746] (emphasis added)

Third, the Agreement bars Class members from initiating any action, ever, for "systemic declaratory, injunctive, or other form of equitable relief" based on "facts, events, actions or omissions . . . which *relate in any way* to any claim raised in the *Marisol* litigation, as described in Plaintiffs' Statement of Claims to be Tried[7/] . . . and which occur *after* the signing of this Agreement and prior to December 15, 2000," the date on which the City Settlement Agreement expires. [JA 746] (emphasis added)

Fourth, the Agreement bars Class members from initiating, prior to December 16, 2000, "any *new* action for systemic declaratory, injunctive or other form of equitable relief based on facts, events, actions or omissions . . . which relate to claims raised [in the *Marisol* pleadings] which were not contained or described in Plaintiffs' Statement of Claims to be

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7/ These are set forth in the Pre-trial Order dated July 16, 1998. [JA 629-68]

Tried[8/] . . . and which occur *after* the signing of this Agreement and prior to December 15, 2000." [JA 746-47]

The agreement permits individual Class members to bring actions for damages and equitable relief, but such actions may seek only relief "tailored solely to the specific circumstances of that individual plaintiff." [JA 747]

(b) *The State Defendants' Settlement Agreement*

The State Settlement Agreement calls for the State Defendants to do several things: to oversee, monitor, supervise, review, evaluate, discuss, recommend, report, provide information, and advertise. [JA 755 *et seq.*] The Agreement also requires the State Defendants to implement a statewide computer system and to decrease the time it takes to answer calls at the State Central Register, which accepts reports concerning domestic violence. [JA 763-65] The Agreement does not, however, provide any direct, concrete, or reasonably certain relief to any members of *Marisol* Subclass Three, even though the State Defendants have oversight authority over ACS. This authority is acknowledged in the State Settlement Agreement provisions calling for the State's Office of Children and Family Services ("OCFS") to undertake case record reviews to determine whether ACS is in "substantial non-compliance with applicable laws, regulations and/or reasonable case work practice" and then to "direct ACS to take Corrective

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[8/] See note 4.

Action designed to improve ACS's performance in the specific areas of non-compliance." [JA 767] OCFS need not exercise this oversight authority prior to completing the case record reviews, and it need not complete these reviews until twenty-one months after entry of the order dismissing the claims against the State Defendants in this case. [JA 766-67] Given the City and State Defendants' record of failing to address obvious atrocities within New York City's child welfare system—as set forth in both the *Marisol* and *Joel A.* complaints [JA 106-80, 801-67]—it is highly likely that any exercise of authority by OCFS is at least two years off.

During those two years of continuing devastation, the *Marisol* Class members will be barred from pursuing relief against the State Defendants through class action claims, and even through individual lawsuits alleging system-wide violations arising out of such claims, even if based on facts or circumstances that occur after execution of the Settlement Agreement. [JA 745-46] Moreover, class-wide or systemic claims arising from new facts and/or circumstances that occur" after execution of the proposed Settlement Agreement would be barred forever if those claims "relate in any way to any claim raised in . . . the Pre-Trial Order" in *Marisol.* [JA 746]

B.

The *Joel A.* Objectors

On January 15, 1999, the *Joel A.* Objectors filed a putative class action lawsuit against certain New York City and State officials who are also defendants in *Marisol*. [JA 800 *et seq.*] Each of the *Joel A.* Objectors is a gay youth in the care and custody of the New York City Administration for Children's Services. [JA 806-09] They are all victims of intense bias-related violence, harassment, abuse, and discrimination based on sexual orientation perpetrated by their straight peers in the foster care system and by the City and State Defendants and the public and private entities for the actions of which the defendants are responsible. [JA 827-52]

The *Joel A.* Objectors seek to represent a class of young people that finds itself in unique and dire circumstances within the foster care system —a class including young people in the New York City foster care system who are lesbian, gay, bisexual, transgendered, or gender atypical (the "*Joel A.* Class"). [JA 809-10] They seek, on behalf of this class, specific and concrete relief from bias-related victimization at the hands of their peers, and systemic discrimination based on sexual orientation, both of which result in physical, emotional, psychological, and developmental injuries. [JA 874-76] Moreover, the chief perpetrators of such victimization are members of *Marisol* Subclass Three; they are the heterosexual

peers of the *Joel A.* Class members against whom the *Joel A.* objectors seek protection, including adequate disciplinary responses to violence, harassment, and abuse perpetrated on the basis of sexual orientation and gender atypicality. [JA 819-52]

The *Joel A.* Objectors allege, in general, that

> 36. By failing to protect Class members from bias-related violence, harassment, and abuse, and by placing Class members in hostile environments that disrupt critical developmental processes and thus cause grave emotional, psychological and developmental injury, the defendants manifest their indifference to the physical and mental health of the Class members and fail to provide Class members with care that meets minimum professional standards. Although researchers have documented the need for a professional response to the dire circumstances in which the Class members find themselves, and although the City defendants have admitted the need for and their failure to provide such a professional response, no defendant has implemented any concrete remedy.
>
> 37. Indeed, the defendants routinely discriminate against Class members in the provision of existing services offered to children in the defendants' care and custody. Class members are frequently excluded from group homes because of their actual or perceived sexual orientation; some group homes even maintain an official policy of excluding lesbian, bisexual, gay, and transgendered youth. When they are admitted to group homes, Class members are frequently denied even basic protection or services. Defendants' staff frequently manifest and adopt a position of deliberate indifference to the bias-related violence, harassment, and abuse to which Class members are subjected by other group home residents, and fail to act in situations where they would intercede on behalf of children whom they did not believe to be gay, lesbian or bisexual.

[JA 812]

In support of these general allegations, the *Joel A.* Plaintiffs allege that members of the class they seek to

represent encounter a common set of challenges to their physical and mental health and their personal development due in large part to the intersection of the critical developmental tasks of personal and social identity development that they must confront, their awakening sense of same-sex attraction or gender atypicality, and the intense heterosexist bias of both their peers, with whom they must live in close contact, and those charged with their care and protection. [JA 813-52] They further allege intense bias-related victimization based on their sexual orientation or gender atypicality. For example:

- Because he is gay, Joel A. has been punched and thrown down a flight of stairs. He has had his shoulder blade and finger broken, and he has had his nose broken twice, once from being hit in the face with a broom. Because of Joel's sexual orientation, one facility where he resided for three years assigned him four times to a special group for residents exhibiting "problematic sexualized behavior."

- Michael D., has had rocks and a textbook thrown at his face, and he has been repeatedly slapped and punched by other kids because he is gay and transgendered. Although he is constantly called "faggot," "'ho," "slug," and "batiman" by his peers, and feels completely isolated and alone, staff at his residence tell him that they won't be able to help him unless he stops acting "so gay."

- Shortly after being warned by a social worker that he would be "torn apart" by the other residents at the group home where Maxx R. was first placed in the foster care system, Maxx was attacked by eight boys who burst into his room at night. After the attack, at about 3:00 A.M., Maxx told the residential staff that he was leaving because the group home was not safe for him. The staff responded by handing Maxx two dollars and showing him the door. Maxx spent the rest of that night at a squatters' house. A case worker subsequently told Maxx that she had intentionally

> denied him a safe placement because she thought he needed to experience and learn to deal with hostility toward gay people.

[JA 802] *See also* [JA 819-52] Finally, the *Joel A.* Plaintiffs allege that the City and State Defendants named in their complaint have manifested deliberate indifference for their failure to provide members of the *Joel A.* Class with care and protection that meets professional standards. [JA 852-67]

The *Joel A.* Plaintiffs state claims for relief from their bias-related injuries under certain constitutional provisions, statutes, and regulations, including the Equal Protection Clauses of the United States and New York State Constitutions and the New York City Human Rights Law. [JA 868-73] They seek, on behalf of the putative class, specific, concrete relief tailored to the class members' unique and dire circumstances, including, for example, the immediate establishment of safe houses in which these youth can safely develop healthy sexual identities by disclosing and expressing their feelings, and by discussing issues related to sexual identity without fear. [JA 874]

C.
Settlement Approval Proceedings

Class counsel and the City and State Defendants presented the Settlement Agreements to the district court at a hearing on December 2, 1999. [JA 1401] The district court preliminarily approved the City and State Settlement Agreements,

and subsequently ordered the distribution of notice to the Class and scheduled dates for submission of objections and a fairness hearing. [JA 1411-13]

In their papers submitted in support of the Settlement Agreements, Class counsel asserted that they were "confident" that the *Marisol* Class would have prevailed on liability had the Class gone to trial instead of settling. [JA 1156] Class counsel asserted that this judgment was based on extensive discovery and trial preparation. Supra at 9. [JA 1155-56]

Moreover, the settling parties conceded that it was their intent to bar claims for systemic relief such as those asserted in the *Joel A.* class action, and that it is the parties' understanding that such claims are barred by the release and covenants not to sue in the City and State Settlement Agreements. [JA 1166, 1380]

THE DECISION BELOW

After giving an account of the history of the proceedings in *Marisol* and a related case, *Wilder v. Bernstein*, 78 Civ. 957 (RJW) (S.D.N.Y.) [JA 1394-1400], the district court summarized the terms of the City and State Settlement Agreements [JA 1401-11], and summarized the settlement approval process [JA 1411-15]. The court then proceeded to analyze the sufficiency of the settlement consideration under the "*Grinnell* factors" identified by this Court in *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323-24 (2d Cir. 1990). The district court found that the *Marisol* litigation was highly complex, that few of the indigent children in the *Marisol* Class had filed objections to the Settlement, that extensive discovery had been completed prior to settlement, and that it was unlikely that the *Marisol* Class would have been decertified after trial. [JA 1411-15]

The linchpin of the court's analysis, however, was its finding that the terms of the Settlement Agreements provided the *Marisol* Class with as much relief as the Class could have obtained even if it had prevailed on trial, and that the Settlement terms provided such relief in a more timely manner. [JA 1422-25]

The Court also found that the Settlement Agreements were negotiated at arms length by experienced and competent Class counsel. [JA 1426-32]

After discussing the dismissal of the *Wilder* action, *supra*, pursuant to the terms of the *Marisol* Settlement [JA 740-44], the district court turned to its discussion of the claims raised by the *Joel A.* Objectors [JA 1433-42]. The court rejected the *Joel A.* Objectors claim that the City Settlement Agreement was vague because a key term in the Agreement ("permanency") was defined by reference to a draft document that had been withheld from Class members. The court rejected this claim because (1) the settling parties had access to the document during settlement negotiations, (2) the court found the term defined with reference to the confidential document to be sufficiently clear on its face, and (3) the court found that any ambiguity in the term would beneficially increase the discretion of the Advisory Panel to determine the scope of its review of ACS operations. [JA 1434-36]

The court turned next to the *Joel A.* Objectors' claims regarding the non-suit provisions in the City and State Settlement Agreements and the sufficiency of the settlement consideration obtained on behalf of the Class. The court found that the settlement consideration is not illusory, as the *Joel A.* Objectors argued, because "the City and State Settlement Agreements are designed to benefit these children." [JA 1437] In addition, the court stated that the *Joel A.* Objectors had not indicated how the State Settlement Agreement is illusory. [JA 1438]

The district court also rejected the *Joel A.* Objectors' claim that the release and non-suit covenants contained in the City and State Settlement Agreements were unfair and oppressive. [JA 1438-40] The court's ruling on this point rested on its conclusion that the Class members' right of access to the courts had been sufficiently preserved by the Settlement terms permitting Class members to bring actions for damages and non-systemic equitable relief. [JA 1440] Moreover, the court concluded that the City Defendants' commitment to provide information to the Advisory Panel constituted adequate consideration for the Class members' relinquishing their right to initiate lawsuits for systemic relief against the City Defendants for the next two years. [JA 1440]

The district court also rejected the *Joel A.* Objectors' claim that the *Marisol* Named Plaintiffs compromised and released claims with respect to which the Named Plaintiffs could not adequately have represented the *Joel A.* Objectors because the Named Plaintiffs lacked standing to assert and had no personal stake in pursuing those claims. [JA 1440-42] The court construed the objection as one directed at the court's earlier decision to certify Subclass Three, rather than as a challenge to the attempt of Class counsel and the Named Plaintiffs to overstep their negotiating authority during the settlement negotiations and stated that it had previously resolved the issue. [JA 1441-42]

The district court overlooked and did not address the issue whether each of the three *Marisol* Subclasses had been adequately represented *vis à vis* each other during settlement negotiations, although the *Joel A.* Objectors called this issue to the court's attention both in their papers opposing settlement approval and at the fairness hearing. *See* Amended Memorandum in Support of Motion to Intervene and Objections to Proposed Class Action Settlement by Intervenor Joel Plaintiffs, at 24-25; [JA 1369-71].

SUMMARY OF ARGUMENT

The Settlement Agreements require the members of the *Marisol* Class to relinquish vital rights of access to judicial relief in exchange for vague and highly speculative relief. The result is a profoundly unfair compromise of their rights and interests.

First, the Settlement Agreements release all existing claims that relate to ACS's provision of child welfare services to the Class. These include the claims of the *Joel A.* plaintiffs, which the class representatives in *Marisol* did not possess and had no standing to assert. The Settlement Agreements also contain non-suit provisions that amount to a two-year-long "free pass," preventing Class members from ever seeking systemic relief on the basis of any actions taken by ACS for two years following the date of the Agreements. If ACS continues its demonstrated malfeasance during these two years, the only recourse left to an abused, neglected or homeless child in the Class is to seek individual representation and bring an individual suit addressed solely to the child's individual circumstances. The desperate circumstances of the Class members render such suits unlikely to be brought, and the desperate need for system-wide improvements instead of stop-gap measures render such suits unlikely to have any lasting effect.

Second, in return for these extraordinary concessions, the Settlement Agreements give the Class members relief so

speculative that it will likely have no practical value. The totality of the relief that the City Settlement Agreement provides is the creation of an Advisory Panel without power to compel ACS to do anything. Its only function is to conduct carefully circumscribed investigations of ACS's activities, to make non-binding recommendations as to how ACS might improve its services, and, if it ultimately concludes that ACS has failed to proceed in good faith, to issue a rebuttable finding to that effect. This finding entitles the Class merely to reinstate portions of the lawsuit that was ready to go to trial in July 1998. Such "relief" would be illusory even if offered in return for only modest concessions. The relief afforded by the State Settlement Agreement is equally speculative. When measured against the sweeping releases contained in the Settlement Agreements, the relief is starkly inadequate.

Third, this profoundly unbalanced Settlement is the result of a process in which no structural precautions were implemented to ensure that the diverse interests of the certified subclasses were adequately represented. The district court made no finding concerning adequate representation of the *Marisol* subclasses *vis à vis* each other during settlement negotiations—and, indeed, had no basis on which to make such a finding due to the failure of Class counsel to address the issue.

The result of this flawed process is a profoundly unfair settlement that makes sweeping concessions in return for

no tangible benefit of any kind. This is a violation of both Rule 23 and the rights of the *Marisol* Class under the Due Process Clause, and it requires that the district court's approval of the settlement be reversed.

ARGUMENT

Writing for the United States Court of Appeals for the Third Circuit in *Georgine v. Amchem Products*, Judge Edward Becker observed that "[e]very decade presents a few great cases that force the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other." 83 F.3d 610, 617 (3rd Cir. 1996). This is such a case, and just as the Third Circuit in *Georgine* and the United States Supreme Court, on *certiorari*, in *Amchem Products v. Windsor*, 521 U.S. 591 (1997), adhered to the institutional values that protect the rights of unnamed parties in class action litigation, and rejected an improperly negotiated settlement even though it would greatly have mitigated the vexing problem of asbestos litigation, so this Court, adhering to those same values, should reverse the district court's approval of the two Settlement Agreements in this case.

The City and State Settlement Agreements, which the proponents presented to the district court as an "extremely novel" approach to the dire situation of children in New York City's foster care system [JA 1353] are indeed novel in that they bind unnamed class members, who had no opportunity to opt-out of the settlement, to singularly and oppressively broad non-suit provisions in exchange for relief with a practical value so speculative that there is a strong danger that the settlement will have absolutely no value to the class. Moreover, although

the district court complied with the letter of this Court's instruction to certify subclasses on remand from the City and State Defendants' appeal concerning class certification, the record contains no evidence indicating that the purpose of that instruction—to assure that each class member received adequate representation for each claim resolved in this action—was fulfilled during settlement negotiations.

The district court's decision to approve the City and State Settlement Agreements is subject to review for abuse of discretion, but the district court's discretion to approve a class action settlement is limited by the court's fiduciary duty to unnamed class members. The district court must ensure that the settlement terms are fair, reasonable, and adequate as to all unnamed class members and that the interests of each were adequately represented—i.e., vigorously represented by a representative with undivided loyalty—during settlement negotiations. *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982); *Papilsky v. Berndt*, 466 F.2d 251, 260 (2d Cir. 1972); *Louis M. v. Ambach*, 113 F.R.D. 133, 137 (N.D.N.Y. 1986). This requirement of vigorous representation is continuing and applies "at all times," including, of course, during settlement negotiations. *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 395 (1996) (Ginsburg, concurring in part and dissenting in part), citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

Moreover, in determining the scope of claims that may be released or compromised in a class action settlement, the district court must ensure that the named plaintiffs have purported to represent the class "only to the extent of the interests they possess in common with members of the class." *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 17 (2d Cir. 1981). Indeed, the Supreme Court has cautioned against the tendency to permit expansive class representation based on the assumption that "all will be well for surely the plaintiff will win and manna will fall on all members of the class." *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 161 (1983), quoting *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1127 (5th Cir. 1969) (Godbold, J., specially concurring). That caution against permitting expansive representation is especially appropriate in the context of a settlement such as this, where representatives purport to release a vast spectrum of claims on behalf of a highly diverse class. What may be "most significant" about expansive representation is the unfairness to Class members who find themselves bound by a judgment. *Falcon*, 457 U.S. at 161 citing *Johnson*, 417 at 1127.

In this case, Class Counsel and the Named Plaintiffs exceeded the bounds of their representation by purporting to release claims which they had no standing to assert and in which they had no personal stake. In addition, the Named Plaintiffs

bound all absent Class members to onerous non-suit provisions that extend to claims based on future injury, and did so in exchange for speculative relief that is likely to have no practical value to the Class.

Moreover, there was no evidentiary basis, either in the papers submitted in support of the Settlements or in the record of the fairness hearing, to support a finding that the Subclass to which the *Joel A.* Objectors belong was adequately represented during settlement negotiations *vis à vis* the other *Marisol* Subclasses. Indeed, the district court made no such finding. Yet in order to fulfill its fiduciary obligation to unnamed Class members, however, the district court must make findings, and those findings must be based on an explanation of the facts, rather than on the arguments and recommendations of counsel. *Plummer*, 668 F.2d at 659. "[A] court may not delegate to counsel the performance of its duty to protect the interests of absent class members." *Id.* at 659 n.4. Moreover, the record must provide an appellate court with "a basis for judging the exercise of the district court's discretion." *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983).

I.
The Record Contains No Evidence Indicating That Any Structural Precautions Were Implemented to Assure Adequate Representation of the Diverse Interests of the Three Sub-classes During Settlement Negotiations.

In its opinion affirming the district court's certification of the *Marisol* class, this Court expressly instructed the district court to certify subclasses in order to assure adequate representation of each unnamed class member with respect to the class member's "separate and discrete legal claims." *Marisol*, 126 F.3d at 378-79. This instruction was consistent with the Supreme Court's disapproval of global compromises achieved in the absence of any "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Amchem*, 117 S. Ct. at 2251.

Although the district court complied with the letter of this Court's instruction to certify proper subclasses, *supra* at 8-9, neither the papers submitted in support of the settlement nor the record of the fairness hearing contain any evidence indicating that settlement negotiations were conducted in a manner sufficient to assure that the certification of the three *Marisol* Subclasses served its purpose during those negotiations, to assure adequate representation of the class members' diverse interests *vis à vis* each other. Remarkably, neither the City nor State Settlement Agreements make any reference to the three Subclasses certified by the district court. Both Settlement Agreements treat the three Subclasses as a monolith. *Supra*

at 10. The district court did not appoint separate counsel for each Subclass [JA 422 *et seq.*], and the record contains no evidence suggesting that Class counsel undertook to allocate among themselves the representation of the three Subclasses.[9/] Moreover, neither the papers submitted in support of the Settlements nor the record of the fairness hearing contain any evidence establishing that Class counsel kept all representatives of each Subclass adequately apprised of the course of the settlement negotiations, or obtained the representatives' approval of the Settlement after adequately apprising them of the final terms.[10/] Despite the absence of any evidence indicating that each Subclass was adequately represented *vis à vis* the other Subclasses during settlement negotiations, the district court conducted no inquiry and made no findings concerning this issue.

9/ Class counsel had the resources to do so. The Class was represented by lawyers from two public interests organizations, Children's Right, Inc. and Lawyers for Children, and two prominent law firms, Schulte, Roth & Zabel and Cahill, Gorden & Reindel.

10/ The Seventh Circuit noted in the *General Motors Corporation Engine Interchange Litigation*, that when Class counsel who were not involved in settlement negotiations express support for a settlement that is presented to them as a *fait accompli*, such support does not constitute ratification of the conduct of the negotiations because Class counsel "should know the options considered and the topics discussed during the negotiations before supporting a settlement as fair." 594 F.2d at 1126 n.29. Similarly, especially where diverse subclasses have been jointly represented by Class counsel, the subclass representatives should be apprised not only of the final terms of the proposed settlement, but also of the course of the negotiations.

That omission constitutes a clear abuse of discretion. The proponents of a class action settlement must establish that all requirements for settlement approval have been met. *See Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983); *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1126 n.30 (7th Cir. 1979). The district court may not shift the burden of proof regarding the fairness of the settlement, including the adequacy of representation during settlement negotiations, from the settlement proponents to objectors. *See General Motors,* 594 F.2d at 1126 n.30.

Moreover, the district court has a "continuing duty to undertake a stringent examination of the adequacy of representation by the named class representatives and their counsel at all stages of the litigation." *Id.* at 1124. This duty arises from the requirement, in Fed. R. Civ. P. 23(a)(4), that the court determine whether "the representative parties will fairly and adequately protect the interests of the class." The duty is heightened in the settlement context by the court's responsibility, under Fed. R. Civ. P. 23(e), to review the fairness of any compromise. *See General Motors*, 594 F.2d at 1124. The court's duty stringently to examine the adequacy of representation during settlement negotiations, and the settling parties' burden of coming forward with evidence establishing that all class members were adequately represented, apply with equal force regardless whether the class was represented by private

counsel, who may be driven to settle by the prospect of earning a large fee, or public interest lawyers, who may be equally driven to settle by the prospect of reputational enhancement. *Id.* at 1125.

Moreover, the issue of subclass representation, which the settlement proponents failed to address, is especially acute in this case. This Court clearly expressed its concern that the district court was "near the boundary of the class action device" when it certified the omnibus *Marisol* Class, because the district court had addressed the commonality and typicality criteria of Fed R. Civ. P. 23(a) based on a conceptualization of the common legal and factual questions in this case at a "high level of abstraction." *Marisol*, 126 F.3d at 377. Indeed, this Court explicitly recognized that "the class certified by the district court implicitly consist[ed] of two large subclasses" and that "in reality, each of these subclasses consist[ed] of smaller groups of children, each of which has separate and discrete legal claims," each of which "is based on one or more specific alleged deficiencies of the child welfare system." Based on this recognition, *id.* at 378, this Court carefully instructed the district court to "engage in a rigorous analysis of the plaintiffs' legal claims and factual circumstances in order to ensure that appropriate subclasses are identified, that each subclass is tied to one or more suitable representatives, and that each subclass satisfies Rule 23(b)(2)." *Id.* at 378-79. The

Court stated its expectation that creation of subclasses in this manner would serve the purpose of "allow[ing] the district court to weed out, and, if necessary dismiss those claims for which no named plaintiff is an adequate representative." *Id.* at 379. In light of this Court's forceful expression of concern regarding the adequacy of representation for the separate and distinct legal claims and factual circumstances peculiar to subclasses within the *Marisol* Class, and in light of the Supreme Court's requirement that there be "*structural* assurance of fair and adequate representation for . . . diverse groups and individuals affected," *Amchem*, 117 S. Ct. at 2251 (emphasis added), the district court abused its discretion by permitting the question whether each Subclass received adequate representation *vis à vis* the other Subclasses to be passed over without comment by the settlement proponents and without evidence sufficient to support an explicit finding in this regard.

II.
The Covenants-not-to-sue and the Release Contained in the Settlement Agreements Are Overbroad, Oppressive, and Violate the Due Process Rights of Absent Class Members.

The Settlement Agreements bind all *Marisol* Class members to onerous non-suit provisions that compromise, and in many cases will extinguish for two years, as a practical matter, their rights to obtain relief from violations of vital legal rights. The Agreements include covenants not to sue and a release that preclude *any* action seeking systemic declaratory,

injunctive or other forms of equitable relief for two years, whether such relief is sought through a class action on behalf of a particular group of children or whether such relief is sought on behalf of an individual child, even if the claim is based on injuries inflicted after the Settlement. *Supra 14-16, 17.* Moreover, the non-suit provisions in the City and State Settlement Agreements extend to claims which the Named Plaintiffs lacked standing to assert and in which they had no personal stake. Although the Agreements permit suits seeking damages and non-systemic relief tailored to an individual's concerns, as a practical matter, this will offer cold comfort to Class members in many important cases, as explained in sub-section C, below.

A. The covenants and the release unlawfully and unfairly restrict the rights of class members to seek judicial relief for injuries inflicted *in the future.*

The non-suit covenants and release in the City Settlement Agreement bar claims for systemic relief based on "facts, events, actions or omissions by the City . . . which occur *after the signing of this Agreement and prior to December 15, 2000.*" [JA 746] (emphasis added) The State Settlement Agreement has a similar provision, barring any claims for "system-wide violations . . . based upon *new facts or circumstances that occur during the duration of this Agreement.*" [JA 776] (emphasis added)

"No settlement that precludes future, unknown causes of action can be considered fair, reasonable, or in the best

interests of the class as a whole." *J.A. Shults v. Champion Int'l Corp.*, 821 F. Supp. 520, 524 (E.D. Tenn. 1993). Indeed, courts and legislatures agree that exculpatory releases violate public policy.[11/] As one New York court explained:

[11/] States have determined that willful or reckless acts that result in injury can never be shielded from liability by waiver or release. *See, e.g.*, CAL. CIVIL CODE § 1668 (West 1999) ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."); MONT. CODE ANN. § 28-2-702 (1997) (same); N.D. CENT. CODE § 9-08-02 (1997) (same); *see also Richards v. Richards*, 513 N.W.2d 118, 121 (Wisc. 1994) ("An exculpatory agreement will be held to contravene public policy if it is so broad 'that it would absolve [the defendant] from any injury to [the plaintiff] for any reason.'"); *Restatement (Second) of Contracts* § 195 (1979) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy."); *Wagenblast v. Odessa School District No. 105-157-166J*, 758 P.2d 968, 970 (Wash. 1988) (en banc); *Rosenthal v. Bologna*, 620 N.Y.S.2d 376, 378 (App. Div. 1995); *DeVito v. NYU College of Dentistry*, 544 N.Y.S.2d 109, 110 (Sup. Ct. 1989). Also, states have invalidated attempted waivers of civil and human rights, *see* MINN. STAT. § 363.031 (1998), and other waivers that contravene public order and morals, *see, e.g.*, GA. CODE ANN. § 1-3-7 (1998) (prohibiting waiver of laws "made for the preservation of public order or good morals"); N.D. CENT. CODE § 9-08-02 (1997) (fraud, wilful injury, or violation of law) LA. CIV. CODE ANN. art. 7 (1998) (contracts that "derogate from laws enacted for the protection of the public interest"); MONT. CODE ANN. §§ 1-3-204 (1997) (laws "established for a public reason"); OKLA. STAT. tit. 15 § 211(3) (1998) (contracts "contrary to good morals"). States have also recognized that children require special protection from harm and exploitation, invalidating attempts by employers to secure waivers of child-labor laws, or even to insure against such provisions. *See, e.g.*, FLA. STAT. ANN. § 440.54 (1998); MISS. REV. STAT. § 71-3-107 (1998); PA. STAT. ANN. tit. 77 § (continued...)

> While, concededly, exculpatory agreements or covenants not to sue are recognized by courts, under announced public policy they are ineffective to insulate the releasee from intentional, willful or grossly negligent acts. So strong is this policy that it is applicable regardless of whether exemption of such conduct was within the parties' contemplation at the time the agreement was executed.

Great Northern Associates, Inc. v. Continental Casualty Co., et al., 596 N.Y.S.2d 938, 940 (App. Div. 1993) (citations omitted).

The release and non-suit covenants in the City and State Settlement Agreements effectively license the City and State Defendants to commit systemic violations of *Marisol* Class members' legal rights over the next two years. *See Adams v.*

11/ (...continued)
672 (1998). Where the activities of private individuals serve important public functions, as in the case of railroads and other common carriers, States have not hesitated to invalidate attempts by such individuals to escape, through waiver, the consequences of their own malfeasance. *See, e.g.*, ALA. CODE § 37-2-81 (1998) (liability of railroad); ARK. CODE ANN. § 23-10-408 (1997) (railroad); COLO. REV. STAT. § 40-33-106 (1998) (liability of common carrier); GA. CODE ANN. § 34-7-44 (1998) (railroad); KAN. STAT. ANN. § 66-240 (common carrier); KY. CONST. § 196 (common carrier); MONT. CODE ANN. § 69-14-216 (1997) (railroad transporting livestock); NEV. REV. STAT. § 705.320 (railroad); N.M. CONST. art. 20 § 16 (1998) (railroad); N.D. CENT. CODE § 8-07-07 (1997) (common carrier); *id.* § 49-16-05 (railroad); OHIO REV. CODE ANN. § 4973.02 (1998) (railroad); TEX. REV. CIV. STAT. ANN. art. 6442 (1998) (railroad); VA. CODE ANN. § 8.01-60 (1998) (railroad); *id.* 56-119 (transportation companies); WASH. REV. CODE § 81.29.020 (1998) (common carrier); WYO. STAT. ANN. § 37-9-504 (Michie 1998) (railroad); *see also* 235 ILL. COMP. STAT. § 5/6-21 (1998) (servers of alcohol); KY. REV. STAT. ANN. § 189.720 (1998) (liability of parking operator); MASS. GEN. LAWS ch. 231 § 85M (1998) (garage); N.Y. GEN. OBLIG. LAW § 5-325 (1998) (garages and parking places); *id.* § 5-326 (recreational facilities).

Philip Morris, Inc., 67 F.3d 580, 585 (6th Cir. 1996) (holding that a release could not apply to future claims and stating that "[a]n employer cannot purchase a license to discriminate").

The policy against waivers of future civil rights violations is clear. In *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983), the Sixth Circuit Court of Appeals examined a consent decree in a class action that included provisions "waiv[ing] the ability of minorities to complain about discrimination which may occur in the future." *Id.* at 924. In large part because of those provisions, the court determined that the consent decree "is illegal and contrary to the public interest." *Id.* at 925. *Cf. Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) ("Clearly, it would be unlawful for an employer to condition employment on an employee's agreement to give up the right to be free from racial or gender discrimination.")

Similarly, in *United States v. Allegheny-Ludlum Industries*, 517 F.2d 826 (5th Cir. 1975), the Fifth Circuit determined that certain broadly phrased releases could not bar suits based on future acts, in part because

> the release can have no other acceptable meaning, for notwithstanding that the systemic reforms contained in the decrees have been put into operation . . . the *defendants have an ongoing statutory responsibility* independent of the decrees to see that the corrective measures and goals established thereunder are maintained and updated so that the effects of past discrimination will be wiped out as quickly as due diligence and business necessity permit.

Id. at 855 (emphasis added).

Both the *Williams* and *Allegheny-Ludlum Industries* courts relied on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which found that prospective waivers of employees' rights under Title VII in the collective bargaining context would be contrary to the very purpose of Title VII in protecting an individual's right to equal employment opportunities. *Id.* at 51-52. Here, by contrast, the proponents of the Settlement Agreement have asserted that even antidiscrimination claims—based on constitutional provisions, statutes, and regulations created in order to protect individuals from bias-related injuries such as those suffered by *Joel A.* Objectors, *see, e.g.* NYC Human Rights Law, Title 8, Chapters 1, 6—are precluded, even if those claims are based on events that have not yet occurred. The Supreme Court's reasoning in *Gardner-Denver*, however, dictates that such restrictive provisions are impermissible and directly contradict statutory protections.[12/]

The actions of the City and State Defendants in providing child welfare services implicate all of the principles that courts and legislatures have sought to protect by

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12/ Indeed, *Gardner-Denver* dictates that the Marisol Named Plaintiffs themselves cannot release prospective claims that they have brought pursuant to the Americans with Disabilities Act and the Federal Rehabilitation Act of 1973. [JA 103] *See Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1303 n.25 (D.C. Cir. 1998) (expressing "skeptic[ism]" that ADA claims can be prospectively waived following *Gardner-Denver*).

invalidating exculpatory release.[13/] The Defendants perform an essential and important public function on behalf of minor children in their custody and care; and a serious failure to perform that important public function threatens to deprive those children of their constitutionally and statutorily protected civil rights. Public policy dictates that Defendants not be permitted to obtain a license from those children that frees Defendants from liability for *any* system-wide practice or policy—whether it is reckless, intentionally discriminatory, or simply negligent—that they may choose to implement.

B. The covenants and the release in the Settlement Agreements unlawfully and unfairly restrict the rights of class members to assert legal claims that the class representatives lacked standing to litigate.

This Court has held that the authority of a class representative to represent class members extends only to claims on which there is a commonality of interest. *See National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 17 (2d Cir. 1981). "The justification for permitting the representatives to sue [or settle] on behalf of the class has no application to claims of class members in which the representatives have no interest." *Id.* Moreover, "standing to sue is an essential prerequisite to maintaining an action, whether in one's own right or as a representative of a class." *German v. Federal Home Loan Mortgage Corp.*, 885 F. Supp. 537, 548

[13/] See note 9.

(S.D.N.Y. 1995). *See also Gross v. Summa Four, Inc.*, 93 F.3d 987, 993 (1st Cir. 1996); *Denny v. Barber*, 576 F.2d 465, 468-69 (2d Cir. 1978). It is "an essential threshold which must be crossed before any determination as to class representation under Rule 23 can be made." *German*, 885 F. Supp. at 548.

In order to establish standing to assert a claim a plaintiff must establish (1) injury-in-fact, (2) causation, *i.e.*, a fairly traceable connection between that plaintiff's injury and the defendant's conduct of which the plaintiff is complaining, and (3) redressability, *i.e.*, a likelihood that the relief requested by the plaintiff will redress the plaintiff's alleged injury. *See Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1016-17 (1998); *Fund for Animals v. Babbitt*, 89 F.3d 128, 134 (2d Cir. 1996). The Named Plaintiffs appointed to represent Subclass Three might adequately have represented the *Joel A.* Objectors on a variety of claims in which all members of Subclass Three have a truly common interest. Class counsel and the Named Plaintiffs exceeded the limits of their authority as representatives, however, when they purported to bind the absent class members in a highly diverse class to non-suit provisions that extend to claims for relief in which the Named Plaintiffs had no stake and which the Named Plaintiffs lacked standing to assert.

The terms of the release and non-suit covenants contained in the City and State Settlement Agreements restrict

the class members' ability to pursue claims that the class representatives do not have standing to litigate. This is due, in part, to the broad terms of the release and non-suit covenants and, in part, to the high level of generality at which Class counsel stated the claims of the *Marisol* Class. *Supra* at 5-6. The Settlement Agreements bar claims that are merely "related to" or even "which relate in any way" to claims asserted in the *Marisol* Complaint or the *Marisol* Plaintiffs' Statement of Claims to be Tried. [JA 746, 776] The use of such vague, broad terms in a class action release may be suited to actions arising out of discrete past events, such as mass torts, but these terms are not appropriate in a lawsuit such as this one, "concerning continuing conduct that might well vary in its intensity or degree." *J.A. Shults,* 821 F. Supp. at 523.

Moreover, the allegations and claims in the *Marisol* Complaint and Plaintiffs' Statement of Claims to be Tried are set forth at such a high level of abstraction that the covenants and release appear "related" and therefore applicable to every conceivable issue that could ever arise in the child welfare context. For example, one claim to be tried is described in part as defendants' "failure otherwise to treat [custodial plaintiffs] in accordance with reasonable professional standards." [JA 630] Accordingly, the covenants not to sue contained in both the City and State Settlement Agreements purport to bar *any* system-wide claim that can be considered related to the unprofessional

treatment of children in the custody of ACS—even if such unprofessional treatment is based on intentionally discriminatory or grossly negligent system-wide policies or practices. For example, although none of the *Marisol* Class Representatives alleged that he or she is gay, lesbian, bisexual, or transgendered, and although none claimed to be a victim of either bias-related violence, abuse, and harassment or systemic discrimination based on sexual orientation, the Settlement proponents clearly expressed to the district court their intent and understanding that the release and covenants in the Settlement Agreements extend to all the claims raised in the *Joel A.* litigation. [JA 1166, 1380]

The breadth of the release and covenants thus violates the due process rights of the *Joel A.* plaintiffs and others similarly situated, and also violates their right to adequate representation during settlement negotiations under Fed. R. Civ. P. 23. Even if, at some extreme level of generality, the *Marisol* Class Representatives could be thought to have suffered all the same injuries as the *Joel A.* objectors, none of the injuries alleged by the *Marisol* Class Representatives was caused by bias-related violence, abuse, or harassment or by discrimination based on sexual orientation. Indeed, the interests of the *Joel A.* Objectors and their peers in *Marisol* Subclass Three are *antagonistic* because much of the harm from which the *Joel A.* Objectors seek relief is perpetrated by their

straight peers in Subclass Three. *Supra* at 18-21. Named plaintiffs cannot represent class members on claims regarding which their respective interests are antagonistic. *See Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982).

Moreover, none of the injuries alleged by the *Marisol* Class Representatives could be redressed by the relief requested in the *Joel A.* Complaint, *e.g.*, the creation of placements designed to meet the special needs of gay, lesbian, bisexual, and transgendered youth; training of ACS and contracting agency personnel in issues related to adolescent homosexuality; issuance of policy statements designed to deter discrimination based on sexual orientation; and the establishment of privately funded independent technical assistance centers to counsel child care workers regarding the needs of gay, lesbian, bisexual, and transgendered youth.

Because the *Marisol* Named Plaintiffs lack standing to bring any of the claims asserted in the *Joel A.* complaint, they do not even cross the "threshold" necessary to reach the issue whether they were adequate class representatives on those claims under Rule 23. *German*, 885 F. Supp. at 538. Moreover, because the *Marisol* Class Representatives have no stake in obtaining the relief that the *Joel A.* Objectors desperately need, the *Marisol* Class Representatives could not have adequately represented the *Joel A.* Objectors for the purpose of compromising those claims in any way. *National Super Spuds*, 660 F.3d at 17 n.6. Named

plaintiffs in a class action "can represent a class of whom they are a part only to the extent of the interests they possess in common with members of the class." *Id.* at 17.

In addition, the *Marisol* Named Plaintiffs are not adequate representatives with respect to claims that they could not have asserted against the City and State Defendants because neither the Named Plaintiffs nor Class counsel could have used those claims as leverage during settlement negotiations. The Supreme Court has recognized that permitting class representation for claims that the class representative cannot litigate "disarm[s]" Class counsel because she cannot use the threat of litigation on those claims to press for a better offer. *Amchem*, 117 S. Ct. at 2248. *See also Epstein v. MCA, Inc.*, 126 F.3d 1235, 1248 (9th Cir. 1997) ("a plaintiff's power to negotiate a reasonable settlement derives from the threat of going to trial with a credible chance of winning"), *reh'g granted by* Order, June 15, 1998, Dkt. No. 92-55675 (9th Cir.).

Indeed, allowing class representatives to settle claims that they lacked standing to litigate, and in which they had no stake, is especially oppressive where, as here, no relief has been obtained in exchange for those claims. *Infra* at 53-60. The Class as a whole cannot obtain an advantage for the class "by the uncompensated sacrifice of claims of members, whether few or many, which were not within the description of claims assertable by the class." *National Super Spuds*, 660 F.2d at 19.

Moreover, even if the Settlements appeared substantively fair, reasonable, and adequate with respect to all *Marisol* Class members, including the *Joel A.* Objectors (in fact, the Settlements do not satisfy these criteria with respect to any Class member, *infra* at 53-60), the improper representation of the *Joel A.* Objectors during settlement negotiations with respect to claims on which the class representatives lacked standing, and in which the class representatives had no stake, would still doom the Settlements. Due process and Rule 23 require procedural integrity in addition to substantive fairness. The Supreme Court engraved this principle into federal law in *Amchem,* holding that a district court's finding that the substantive terms of a settlement proposal are fair does not constitute and cannot be substituted for a determination that each class member's interests were adequately represented during settlement negotiations. *Amchem,* 117 S. Ct. at 2248-51. The Seventh Circuit explained the point well in the *General Motors Corporation Engine Interchange Litigation*:

> "fairness" may be found anywhere within a broad range of lower and upper limits. No one can tell whether a compromise found to be "fair" might have been "fairer" had the negotiating (attorney) . . . been animated by undivided loyalty . . . . The court can reject a settlement that is inadequate; it cannot undertake the partisan task of bargaining for better terms. The integrity of the negotiating process is, therefore, important.

In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1125 n.24 (7th Cir. 1979).

C. The provisions permitting actions by individuals seeking limited relief are inadequate

The district court rejected the argument that the non-suit covenants and release are unfair or oppressive because "[a]ll class members can bring individual suits at any time based on any claim seeking damages or injunctive relief, *as long as the injunctive relief sought is not system-wide and is tailored to the individual's concerns.*" [JA 1439] (emphasis added) Yet the 100,000 indigent children who comprise the *Marisol* class obviously will not be able to engage counsel with the resources to prosecute any matter requiring, for example, extensive discovery or expert analysis and opinion. *See Jackson v. Foley*, 156 F.R.D. 538, 542 (E.D.N.Y. 1994) ("the majority of the class members are from extremely low income households, thereby greatly decreasing their ability to bring individual suits"); *Ray M. v. Board of Educ. of the City Sch. Dist. of the City of New York*, 884 F. Supp. 696, 705 (E.D.N.Y. 1995) (same); *McDonald v. Heckler*, 612 F. Supp. 293, 300 (D. Mass. 1985) ("These individuals claim to be disabled and of low income. It is therefore impracticable for these persons to bring individual lawsuits challenging the Secretary [of Health and Human Services'] policies.").

The prosecution of many lawsuits is economically feasible only when problems can be addressed systemically. As the Supreme Court has observed, "[w]hen it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons *may be without any effective redress* unless they may employ the class-action device." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980) (emphasis added). Moreover, certain rights, such as the right to be free from invidious discrimination, cannot be vindicated on any basis less than systemic. Claims seeking to end discriminatory treatment, even when raised by an individual child, cannot be litigated and effectively remedied without discovery of and reference to the practices and policies that defendants implement with respect to similarly situated children. *See Afro American Patrolmens League v. Duck*, 503 F.2d 294, 298 (6th Cir. 1974) ("[A] suit by a single employee which is not brought as a class action 'is perforce a sort of class action for a fellow employee similarly situated' when it attacks the employment practices of the employer on grounds of discrimination.")

The City and State Defendants know all of this well. Indeed, the City and State Defendants appear to be talking out of both sides of their mouths when they say, on the one hand, that they are entitled under the Settlement Agreements to be free from burdensome litigation and, on the other hand, that the limitation

of actions by Class members to individual suits for non-systemic relief will not significantly impinge the Class members' access to court. The City Defendants stressed that "Defendants have no interest in beginning discovery again, conducting motion practice and preparing for trial in a new suit;" [JA 956], while State Defendants asserted that staff, money and resources were necessary to "defend wide-ranging, time consuming, and overly burdensome class action law suits." [JA 921-22] In short, even the settlement proponents recognize the impracticability of individual suits by indigent children against the City and State of New York.

III.
The Extraordinary Covenants-not-to-sue and Release Were Given in Exchange for Illusory Consideration.

In presenting the Settlement Agreements to the district court, Class counsel and the City and State Defendants stressed repeatedly that the terms of the settlements are "novel." Indeed, they are. In exchange for the singularly expansive release and non-suit covenants that bind Class Members under the City and State Settlement Agreements, *supra* at 38-53, the City and State Defendants are providing relief with a practical value so speculative that "there is a strong danger that the settlement will have absolutely no value to the class." *Clement v. American Honda Fin. Corp.*, 176 F.R.D. 15, 28 (D. Conn. 1997). This is especially bizarre in light of the expansive non-suit provisions in the City and State Settlement Agreement. "[A] defendant would

normally be expected to pay a premium for this type of global peace." *Clement v. American Honda Finance Corp.*, 176 F.R.D. 15, 29 (D. Conn. 1997) (citation omitted).

A. The City Agreement

In exchange for the sweeping restrictions on Class members' rights to seek judicial relief from present and future injury, the City Settlement Agreement imposes a single obligation on the City Defendants: to provide information to a privately-funded Advisory Panel that is not a party to either the lawsuit or the Settlement Agreement, is not required, in any enforceable sense, to do anything with the information it receives or to disclose it to anyone, and has absolutely no authority to compel the City or State Defendants to do anything. *Supra* at 13-14. The Advisory Panel cannot even compel the City Defendants to comply with their commitment to produce information that the Panel requests. *Supra* at 12-13. Moreover, the City Agreement does not impose any obligation on defendant Mayor Rudolph Giuliani, and thus does not obligate the Mayor or his successors in office to ensure that ACS personnel accomplish the agency's reform agenda.

The parties' expectation that the work of the Advisory Panel will result in some actual benefit to the *Marisol* Class is based entirely on hope: hope that the relationship between the City Defendants and the Advisory Panel will be cooperative rather than adversarial; hope that the Mayor will require ACS personnel

to implement the agency's reform objectives; and hope that the Advisory Panel will issue its Initial and Periodic Reports in a timely manner and that the Panel's mission will not be disrupted or frustrated by irreconcilable differences among the four Panel members regarding the areas of ACS operation that they are to review.

Relief based on hope is not fair, reasonable, or adequate consideration for the substantial restrictions imposed on the class members' rights to seek redress from future injury. Indeed, such restrictions are justifiable in a class action, if at all, only if the defendant agrees to a complementary injunction prohibiting the defendant from inflicting upon the class members those injuries within the scope of any restriction on the class members' rights to seek redress.

It was on this basis that the United States District Court for the Northern District of Illinois rejected proposed settlement agreements in the *Brand Name Prescription Drugs Antitrust Litigation*, 1996 WL 167347 (N.D. Ill. April 4, 1996). In that case, a class consisting of tens of thousands of retail pharmacies charged leading manufacturers and wholesalers of brand name prescription drugs with conspiring to fix prices in violation of the Sherman Act. Plaintiffs claimed that these prescription drug manufacturers and wholesalers violated the Act by maintaining a two-tiered pricing system in which defendants offered greater discounts to managed-care entities than to retail

pharmacies based solely on status. *See id.* at *6. The court recognized that the "ultimate purpose" of the lawsuit was to eliminate this two-tiered pricing system to the extent that it was not based on each plaintiff's ability to affect market share, *id.* at *7, and, on that basis, rejected proposed settlement agreements that provided for a general release of the class members' claims, but not for an injunction compelling defendants to change their pricing practices. *See id.* at *2, *6-7. The court held that the failure to provide for such an injunction "doom[ed]" the proposed settlements as "less than fair, reasonable, and adequate" even though defendants had agreed to pay a cash settlement of $408 million, "five times the largest settlement in any [other] antitrust class action not preceded by a prior governmental investigation." *Id.* at *4, *7.

By rejecting the proposed settlement for failing to provide injunctive relief, even while recognizing that the "settlement amount committed to by the defendants [would] surely counsel deterrence," *id.* at *7, the court implicitly held that class members' claims for relief from future injuries cannot be extinguished through a settlement release in the absence of a complementary injunction prohibiting the defendants from inflicting those injuries within the scope of the release. If this were not the law, then class representatives could effectively license defendants to inflict future injuries upon

class members, because the class members would have no access to any avenue of relief from those injuries.

In this case, in which Class counsel sought purely declaratory and injunctive relief for the *Marisol* Class, the ultimate purpose of the lawsuit was to assure the City and State Defendants' future compliance with their constitutional, statutory, and regulatory obligations to the Class members. By approving the City and State Settlement Agreements, however, the district court imposed onerous restrictions on the class members' ability to obtain relief from certain future injuries—indeed, as a practical matter, the Settlement Agreements approved by the district court bar class members from obtaining any relief from many types of future injury, *supra* at 38-53 — without providing any complementary injunctive protection.

The district court nonetheless concluded that the Settlement Agreements were fair, adequate, and reasonable based on its analysis of the Agreements under the "*Grinnell* factors" identified by this Court in *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323-24 (2d Cir. 1990). [JA 1417] The district court observed that only a few objectors appeared out of a class of over 100,000 children, but as the class was composed entirely of children—and children who, by definition are *in extremis*—this factor counts for very little in this case.

The linchpin of the court's analysis, however, was the court's conclusion that "even assuming that plaintiffs had a

strong chance of success at trial with respect to liability" [JA 1422], "the Court may not have been in a position to provide for more relief than simply encouraging continued effort and improvement by ACS." [JA 1423] In addition, the court concluded that the City Settlement Agreement "provides for a streamlined procedure for the plaintiff class to return to this Court if the Advisory Panel finds the City is not acting in good faith in any of the areas designated by the City Settlement Agreement for review by the Advisory Panel or in related areas." [JA 1424] Both conclusions are clearly wrong.

The court offered no support for its conclusion that it might not have been able to enter an order providing more certain relief than the City Settlement Agreement provides [JA 1421-24], and the Court surely could have provided such relief. In an order entered after trial (or even pursuant to a fair, adequate, and reasonable settlement), the court, at least, could have (1) identified the legal rights being violated by the City Defendants, (2) ordered the City Defendants to devise a program to cure these violations, (3) made such modifications to the plan as the Court deemed necessary after hearing objections from the Class, but always giving due deference to the expertise of the City Defendants, and (4) ordered compliance with the plan as modified. The Supreme Court has expressly approved such a procedure. *Lewis v. Casey*, 518 U.S. 343, 362-63 (1996), citing *Bounds v. Smith*, 430 U.S. 817, 818-20, 832-33 (1977). Moreover,

such an order could have applied directly to all City Defendants, including the Mayor of the City of New York in his official capacity.

The court erred also in finding that the City Settlement Agreement benefits the Class by providing "a streamlined procedure for the plaintiff class to return to this Court if the Advisory Panel finds the City is not acting in good faith in any of the areas designated by the City Settlement Agreement." [JA 1424] In light of the extensive discovery taken by Class counsel prior to the Settlements, and in light of Class Counsel's representation that they were prepared to go to trial in July 1998 and are confident that they would have prevailed, supra at 9, the City Settlement Agreement can only be read as creating an obstacle to judicial relief rather than providing the Class with a "streamlined procedure." Under the terms of the City Settlement Agreement, the *Marisol* Class is cut off from judicial relief unless and until (1) the Advisory Panel has issued all five of its Initial Reports, (2) the Panel then issues a Periodic Report finding that ACS is not acting in good faith to reform one of the areas of operation within the scope of the Panel's study, (3) the City Defendants fail adequately to rebut that finding in the district court, and (4) the Class then proves that the City Defendants are in violation of some legal duty to the Class. *Supra* at 12-14. The Panel's finding of bad faith, even if upheld by the district court, does not entitle the Class

to any relief because, in addition to establishing that the City Defendants are not making a good faith effort to reform, the Class must establish that the City Defendants are in violation of their legal obligations to the Class. In this endeavor, the Class would bear all of the burdens of proof it would have born without the Settlement and would be subject to all the same defenses.

B. The State Agreement

Although the State Settlement Agreement imposes restrictions on Class members' access to the courts that run parallel to the restrictions in the City Settlement Agreement, *supra* at 17, the State Settlement Agreement also fails to provide any direct, concrete, or reasonably certain relief to members of *Marisol* Subclass Three. *Supra* at 16-17. Although the district court stated in its opinion regarding settlement approval that the *Joel A.* Objectors had not explained how the relief provided under the State Settlement Agreement is illusory, *supra* at 24, the *Joel A.* Objectors had, in fact, clearly expressed their position to the district court. *See* Amended Memorandum in Support of Motion to Intervene and Objections to Proposed Class Action Settlement, entered January 19, 1999 (document no. 212) at 11-12.

Conclusion

For the foregoing reasons, the decision of the lower court should be reversed.

Dated: New York, New York
April 15, 1999

Respectfully submitted,
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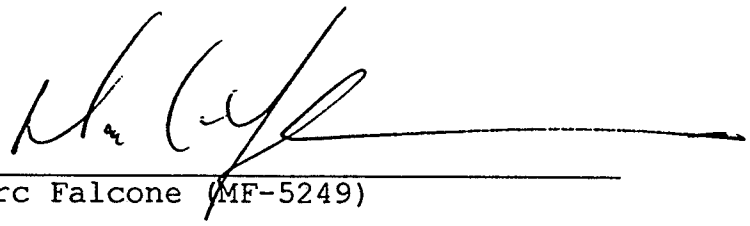
Certificate of Compliance

I, Marc Falcone, attorney of record for Intervenor-Plaintiffs-Appellants Joel A., Michael D., Eric R., David S., Maxx R., and Ray D., do hereby certify that the foregoing brief complies with the type-volume limitation as set forth in Federal Rule of Appellate Procedure 32(a)(7). The total number of words in the foregoing brief is 13,960.



Marc Falcone (MF-5249)

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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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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May 26, 1999

BY MAIL

Ira Burnim
Judge David L. Bazelon Center For Mental Health Law
1101 Fifteenth Street, N.W., Suite 1212
Washington, D.C. 20005

Re: Marisol A. Amicus Brief

Dear Mr. Burnim:

Thank you so much for agreeing to permit Bazelon Center to be one of the *amici* on this brief and for sending me the book concerning the child welfare reform in Alabama and the Bazelon Center's role in it. As you can see, I found the book extremely useful in writing the brief. I have enclosed a copy of the brief that was submitted to the Court.

Thank you again. I'll let you know whether the settlement is upheld.

Sincerely,

Janet Goldberg

Janet Goldberg

URBAN JUSTICE CENTER

666 BROADWAY, 10TH FLOOR NEW YORK, N.Y. 10012 (212) 533-0540 FAX: (212) 533-4598

June 7, 1999

Ira Burnham, Esq.
The Judge David Bazelon Center for Mental Health Law
1101 15th Street, N.W., Suite 1212
Washington, D.C. 20005

Dear Ira:

Please find enclosed copies of the appellate briefs in the Marisol case from the Urban Justice Center and the Legal Aid Society. I look forward to talking to you about the case.

Sincerely,

Douglas Lasdon

4 days
1 month
June - Oct 98

Subject: The situation in New York
Date: Mon, 7 Jun 1999 16:42:52 EDT
From: RWexler648@aol.com
To: irab@bazelon.org
CC: lanskub@pipeline.com, guggenh@turing.law.nyu.edu

Marisol

Ira,

One of the things I'd like to talk to you about next week is the situation in New York, where Paul Vincent (and John Mattingly) are on the advisory panel overseeing the Marisol A. Settlement.

Some background:

The current city child welfare agency, the Administration for Children's Services, was created after the death of Elisa Izquierdo. Mayor Giuliani blamed family preservation, as did the man he named to head the new agency, former City investigations Commissioner Nicholas Scoppetta.

Scoppetta became a media darling, in part because of his attacks on family preservation, and in part because of his personal story - he was a foster child in, as I recall, the 1930s. He came to ACS from the Children's Aid Society. (As it happens, at almost exactly the same time, Marcia Lowry filed the Marisol A. case).

There followed the usual foster care panic. The foster care population soared, and thousands of children wound up sleeping in a city office soon converted into a makeshift "shelter." In Scoppetta's first year in office, child abuse deaths in the city actually went up - reversing a four-year decline. (A fact no NYC daily has yet reported). This did not stop Scoppetta from remaining a hero.

In December, 1996 ACS issued its long-awaited, much ballyhooed "reform plan." In fact, in some respects the document has merit. There are some good ideas, mostly from the Casey Foundation playbook (neighborhood based foster care, family conferencing). But the tone of the document is virulently anti-family. And when it comes to the signal sent to frontline workers, I think the tone means far more in terms of what actually will happen.

Then came the Marisol settlement. Initially, I thought it was wonderful. Just by virtue of who was on the panel, especially Paul, I figured things either would improve, or at least the failures of the Scoppetta approach would be exposed.

In January, 1999 a very good Clark-funded (in part) group called Child Welfare Watch issued a report called "Families in Limbo: Crisis in Family Court." Despite the title, it was really about the foster care panic at ACS. It combined a wealth of data on the huge increase in placements and cuts in preventive services with, among other things, interviews with former ACS employees attesting to the pressure they were under to wrongly remove children from their parents.

One month later, in late February, the first report of the Marisol advisory panel was made public (though it turns out, it actually was written some months earlier). It was a huge disappointment. The report was essentially a love letter to ACS, praising the "reform plan" without reservation and generally attesting to the forward thinking sagacity of ACS management. Among the items endorsed without reservation, or definition, was ACS' enthusiastic embrace of "concurrent planning." But most serious was what wasn't mentioned - the huge increase in placements, or what I have come to call "the elephant in the room."

I was stunned. So was John Courtney at child welfare watch whom I called just to make sure I was wasn't overreacting.

I then called Paul Vincent. The following is a combination of dim recollection and inference, so with that caveat, I recall him indicating:

--He was brand new to the panel, still learning and didn't have much to do with the first report.
--ACS maintained that the panel had no authority to look at the child protective end of the system, only what happens after placement, but the panel would not feel constrained to abide by that.
--He had not yet seen the Child Welfare Watch report. (I faxed it to him on the spot).
--It might be a good idea if NCCPR made a presentation to the panel.

Then I called John Mattingly. This conversation I remember more clearly, because it prompted me to write a letter in response. Mattingly said:

--The panel's mandate was limited.
--He had been assured by ACS officials that they didn't really mean all the stuff they say in public bashing family preservation.
--He was unimpressed with the Child Welfare Watch report. He had attended a forum where some of the ex-ACS employees spoke and he felt they had "axes to grind."
--The huge surge in placements may well mean the placement rate before Scoppetta was too low.
--The panel plans to commission a "case reading."
--Concurrent planning really works and doesn't prompt foster parents to undercut birth parents.

Two other items have happened since:

In April 1999, Child Welfare Watch put out its own critique of the panel's first report. The document puts on the record the statements from the panel about its limited mandate. I have included this critique at the end of this e-mail.

Two weeks ago, the Panel put out its second report. It is somewhat better. It includes a plea not to forget preventive services and a recommendation to aggressively seek state permission to use "flexible funding" in New York.

But it still doesn't mention the elephant.

Below you will find:

--The Child Welfare Watch critique
--My letter to Mattingly
--A follow-up letter I sent to Paul

Child Welfare Watch Fax Sheet
April, 1999. No. 1

THE MARISOL SETTLEMENT:
HAT IT MEANS BEHIND THE SCENES
It has been three months since Marcia Robinson Lowry settled her ambitious class-action lawsuit against the Administration for Children's Services, Marisol v. Giuliani. The deal, ending more than three years of rancorous litigation, was hailed widely as a fair compromise, allowing Commissioner Nicholas Scoppetta to work toward reform unfettered by the courts, advised by well-respected group of outside child welfare professionals.
The first report of the four-member Special Child Welfare Advisory Panel, however, was disappointing. The analysis was overly conciliatory, contained important omissions and ultimately had few helpful recommendations. More important, there are real questions

about what--if anything--the commission has the power to accomplish, given its circumscribed role under the terms of the settlement.

The scope and quality of the panel's work is important because advocates have lost the ability to file class-action lawsuits on behalf of children for the next two years, while the panel exists. Already, the settlement has forced the shelving of one class-action pressing for better services to gay and lesbian children. And both Lowry and ACS have been aggressive in requesting that other policy-oriented litigation against the agency be moved under Marisol's U.S. District Court judge, Robert J. Ward.

The idea was to allow the city breathing room to make substantive reforms. Lowry, director of Children's Rights, Inc., has had a long history of filing lawsuits that force agencies into court receivership--a legal tactic that in recent years has been viewed by many as counterproductive. Given Scoppetta's popularity and prior efforts at turning the system around, there was some doubt that Lowry would actually win her case. Finally, Lowry herself clearly has some faith that the city will make headway toward reform.

"I think the city now has a wonderful opportunity to do the things they say they want to do," she told Child Welfare Watch. Everyone already knows what the problems are, she argues. "But is it our goal to smash our fists in their faces or get better services for the children?"

This change of heart would be fine--if Lowry hadn't negotiated away the rights of other children's groups to keep legal pressure on the city. A lawsuit filed by the Urban Justice Center on behalf of gay and lesbian children sought concrete remedies-like special housing and staff training-for these particular kids. That case is unlikely to go forward as a class-action now. Moreover, plaintiffs in ACS class-actions having nothing to do with children are facing the Marisol judge. At Lowry's request, a lawsuit filed by the Center for Law and Social Justice on behalf of parents who allege that their children were removed for no reason was moved under Judge Ward and is expected to be influenced by the context of the Marisol agreement.

"Our only chance is the faith and hope that these guys will come up with good recommendations--and Nick Scoppetta will follow them," says Doug Lasdon, executive director of the Urban Justice Center, which filed the Joel A. lawsuit. "To us, that's not worth a whole lot."

The role of the Marisol panel, by the panelists own admission, is to help ACS implement the goals that Nicholas Scoppetta has already set--such as establishing neighborhood-based networks of services and increasing the accountability of employees. That means that important Scoppetta-driven changes, like the sharp increase in child removals and the decline in preventive services, are not slated for discussion. The panel's staff director Steve Cohen says members may attempt to look at these issues in some way, but points to a clause in the settlement stating "the Advisory Panel will not attempt to suggest approaches that would differ from the [ACS] Reform Plan's overall goals and principles."

Issues to be examined in the panel's next four reports include: foster care placement procedures, how to hold contract foster care agencies accountable, tracking the work of front-line workers at ACS, and evaluating the role of the supervisors. The panel's first report has already drawn criticism for being overly vague and the product of a questionable collaboration between Lowry and ACS [see sidebar below]. Panel members acknowledge these problems and say future reports will be more substantial.

Even so, there remain serious questions about the limits of the commission. Certainly, the panelists are respected and well-versed on child welfare issues. But none are from New York. They lack direct experience in a complicated and highly political system that relies on more than 100 contract agencies to carry out the bulk of its services.

More importantly, if this is to be anything more than a consulting relationship, the panel will have to be very critical at times-and willing to help bring the agency back to court if ACS fails to follow through on its recommendations. So far, there is little in the current rhetoric indicating that the panel will press ACS to make the dramatic changes needed to improve the system.

"The effort is predicated on the conviction that there is a strong, capable, committed group of people leading ACS," says panelist John Mattingly. The mission is "not to chop someone's head off," adds Cohen, but to create a "continued dialogue." Only time will tell if this dialogue is any different from the many others that have preceded it.

THE MARISOL'S PANEL'S FIRST REPORT: AN ANALYSIS

Considering the sweeping nature of the Marisol lawsuit, the first report of the panel appointed in Marisol's name has proven to be a serious disappointment for those seeking ACS reform. The 24-page document, focusing on the agency's ability to move children back into permanent homes, lacked vision and was too abstract to be useful.

This probably has something to do with the fact that Marcia Lowry and ACS hashed out the details of the report long before the Marisol panel released it. A draft was submitted to both parties in September 1998-four months before the settlement was announced-for their approval. "The first report was developed in draft as sort of a trial run," explains panel director Steve Cohen. "If either of the parties had thrown up their hands at the draft, there wouldn't have been a settlement." Panel member Doug Nelson emphasizes that the process will different in the future. "[ACS and Lowry] will have the chance to review and comment, but not to approve or veto anything."

The report did make several good suggestions, among them that the agency establish principles and targets governing the duration and quality of foster care stays. The panel also requested that ACS set up a better system for holding contract agencies responsible for getting children back into permanent homes. That said, there were several major issues that were conspicuous in their absence. Among them:

The decline of preventive services. Keeping children in their homes is the best form of permanency. Despite their importance to the well-being of children and their families, preventive services received only glancing references.

The "per-diem" problem. The foster care agencies are paid for each day a child is kept in care with payment ending the day the child leaves, building in a financial incentive not to return children to their families. It's yet another obstacle to permanency--one of many reasons the average stay of a child in New York City's foster care system is four years.

The strain that a surge new cases has put on private agencies. Although ACS has been working to reduce the caseloads of its own workers, the private foster care agencies have discretion in how many cases they assign each staffer. Overwhelmed caseworkers are slow to take the steps needed to reunify the family or get children placed into adoption.

The overrepresentation of minority children in the system. An estimated 3 percent of the more than 40,000 children in foster care are white, 73 percent are African American, and 24 percent are Latino. In cases of confirmed neglect or abuse, ACS is twice as likely to remove black children from their families as it is to remove white children. The entirely-white panel ignored this issue.

WHAT TO WATCH

The Marisol panel's next report will examine ACS placement and

foster care issues.
To contact the panel or get on the mailing list, call (212) 509-2718
MORE TO KNOW
Members of the Marisol Panel

Judith Goodhand, consultant, University of North Carolina Graduate School of Social Work.
John Mattingly, former executive director of Lucas County Children's Services in Toledo, Ohio.
Douglas Nelson, president, Annie E. Casey Foundation.
Paul Vincent, director, Child Welfare Policy and Protective Group in Montgomery, Alabama.

/

Mr. John Mattingly
Annie E. Casey Foundation
701 St. Paul Street
Baltimore MD 21202

Dear John,

I'm glad I had the chance to talk to you yesterday afternoon about the first report of the Special Child Welfare Advisory Panel. Our talks are always stimulating and I always learn something. As you know, I also discussed some the report with Paul Vincent.

As it happens, the creation of your panel was announced the day before the National Coalition for Child Protection Reform made the lead presentation at a New York City Council public hearing. NCCPR President Carolyn Kubitschek began the presentation as follows:

"Until yesterday, I was prepared to offer a pessimistic assessment of the prospects for change within the Administration for Children's Services. Frankly, there still is plenty of cause for pessimism. But yesterday we all received some very good news in the form of the settlement of the Marisol A. v. Giuliani lawsuit.

It is not the settlement itself which is so good; indeed we wish it were tougher on the city. But we are extremely encouraged by who has been chosen to oversee the system. The four people who have been chosen are among the finest minds in child welfare today."

We continue to view your panel as the best hope for meaningful change in New York City in decades. We want to help ensure that the expertise that all of you bring to bear will have the kind of lasting impact all of us seek.

With that in mind, there are a few points from our conversation on which I'd like to follow up:

1. Regardless of what anyone at ACS may believe in private, the public posture of Commissioner Scoppetta is aptly summed up in that "mission statement" on Page 8 of his plan, which says in part: "Any ambiguity regarding the safety of the child will be resolved in favor of removing the child from harm's way. Only when families demonstrate to the satisfaction of ACS that their homes are safe and secure, will the children be permitted to remain or be returned to the home..."

This statement aptly reflects the tone of the entire document. It also is what the public and media know best about Scoppetta's approach; in some cases it's all they know.

In your report, you refer to the Scoppetta document as "a thoughtful, coherent, broad and appropriately ambitious vision and framework to guide the implementation of the ... changes that will be required to dramatically improve the city's child welfare system." Later you refer to "the Plan's robust

articulation of child protection and safety goals..."

However unintended, it's hard to see how this can avoid leaving the impression with frontline workers, media, and the public at large that the Panel shares the philosophy of the Scoppetta "mission statement," and is pleased with, or at least undisturbed by, the results.

2. In discussing those results, as described by the most recent Child Welfare Watch report, you raised the issue of whether the huge recent increases in placements simply indicate that there were too few placements before Scoppetta took over. You noted the extremely poor quality of casework at the time.

But the surge in foster care placements began almost immediately after the death of Elisa Izquierdo. The first news story I know of documenting a huge increase in removals appeared less than three months after that death. Casework couldn't have improved that quickly. In addition, poor casework can cause investigators to miss exculpatory as well as inculpatory evidence, to move too quickly as well as too slowly.
And even when poor casework might create incentives to wrongfully leave children at home, there is an intense, counterbalancing set of incentives: the fear on the part of every worker that their case will be the next Elisa Izquierdo. They fear that they will face suspension, dismissal, and trial by media if they fail to remove a child and something goes wrong, while if they wrongfully remove a child they will suffer no harm (though much harm may befall the child). And they're right.

3. A case-reading will certainly be a useful source of information to add to the mix. But though the evaluation of case records will be objective, the raw information is no more objective than what you heard from the people who spoke to Child Welfare Watch. The case record is only that worker's account of what the parents were like, what the children said, and what the home looked like. If indeed the people who spoke to Child Welfare Watch had an agenda, so do the workers whose ideas - and prejudices - are behind those reports. And that may be the best that can be said. A 1989 New York City comptroller's report found that in more than 20 percent of the cases workers falsified case records "by altering dates and backdating forms" in order to appear to be in compliance with deadlines that had been missed. If the dates are falsified, how accurate is what the report says about the children and the parents? .

4. It is encouraging to see that in praising ACS administrators, you singled out their sophistication about "the incentive environment governing contract agency behavior..." But I was sorry to see no further discussion of this issue.

The first time I read about how those agencies are reimbursed - and the results - was in a New York Daily News series entitled "Big Money, Little Victims." It was published in 1975. (I still have it, and would be glad to send you a copy). As far as I can tell, nothing has changed. And I believe nothing will change until these incentives change. I hope you will consider raising the priority and the profile of this issue.

This issue also needs to be discussed in the context of "concurrent planning." During our discussion I explained my concerns about it as commonly defined. One of those concerns was reinforced by an NPR story about the pioneering Lutheran Social Services concurrent planning program in Seattle. When it comes to foster care in general, the majority of children are returned home. NPR reported that the majority of the children placed through the concurrent planning program never return home. There are many possible reasons, but I believe one of those reasons is suggested by a Seattle Times story I have enclosed. All of the problems with concurrent planning would be magnified if it were added to a system in which all financial incentives already favor foster care or adoption.

I hope that in future reports you will be able to turn your attention to preventing placements, with the same admirable detail you applied to the discussion of other aspects of permanence. When we spoke I said prevention is one of the pillars of permanence. Perhaps that was the wrong analogy. Prevention is the foundation on which all the other pillars of permanence are built. Without a sustained effort to prevent placement, everything else will be blown away by the tornado of sheer numbers of children entering the system. And it's very hard to build bridges during a tornado.

Sincerely,

Richard Wexler

Cc: Douglas W. Nelson
Judith Goodhand
Paul Vincent
Steven D. Cohen

April 19, 1999

Mr. Paul Vincent
2033 East Second Street
Montgomery, Alabama 36106

Dear Paul,

I hope the Child Welfare Watch material I sent last month was helpful. There are two other, new items, I wanted to call to your attention concerning New York City. The first is the enclosed article from the Village Voice.

The second item follows up on our discussion of "concurrent planning." The New Jersey weekly section of The New York Times ran an article earlier this month concerning New Jersey's implementation of the ASFA. The article included a section on New Jersey's version of "concurrent planning," which they call Fostadopt. Though the quote from a foster parent in the following excerpt may be commendable for its candor, I think it reinforces our concerns about how this concept is implemented:

Some [children] are candidates for the Fostadopt program, which matches adoptive
families with children up to age 5 who are unlikely to be returned to their biological parents. Already, foster parents account for 80 percent of the approximately 700 adoptions that the division handles each year. But the new program maps out an adoption plan even before the child goes to the foster home ...
.
The sharpest anxiety, Sue [a "fostadopt" parent] said, came in the three months between the time the couple took the baby home and the time the biological mother's rights were
terminated. "We just had to sit by the phone," she said. "I think it's the mantra of the Fostadopt parent: I'm on a plane to South America if they think they're getting this baby back."

I've enclosed the entire article.

Sincerely,

Richard Wexler

Cc: John Mattingly