

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
MABLE RIVERA and ANTHONY RIVERA, et al.,

Plaintiffs,

06 Civ. 7077 (TPG)

-against-

JOHN MATTINGLY, et al.,

Defendants.

-----X

**PLAINTIFFS' JOINT MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION
FOR RECONSIDERATION OF THE COURT'S SEPTEMBER 12, 2011 OPINION**

Carolyn A. Kubitschek (CK 6415)
Lansner Kubitschek Schaffer
325 Broadway, Suite 201
New York, New York 10007
(212) 349-0900
Ckubitschek@Lanskub.com
Attorneys for Plaintiffs Mabel Rivera, Anthony
Rivera, and Infant Plaintiffs E.S. and B.C.

Steven Banks, Attorney in Chief
The Legal Aid Society
Juvenile Rights Practice
Theresa B. Moser, of counsel
199 Water Street, 12th Floor
New York, NY 10038
(212) 577-3300
Tbmoser@legal-aid.org

Hughes Hubbard & Reed LLP
Sarah L. Cave
Reuben L. Borman
One Battery Park Plaza
New York, NY 10004

(212) 837-6000
cave@hugheshubbard.com
borman@HughesHubbard.com

Attorneys for Infant Plaintiff J.C.

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INTRODUCTION

On September 12, 2011, this Court issued an Opinion (“Opinion”) granting the motion for summary judgment of Defendant Family Support Systems Unlimited, Inc. (“FSSU”) and certain FSSU employees (collectively, “Agency Defendants”) with respect to Plaintiffs’ Due Process and Fourth Amendment claims and denying Plaintiffs’ cross-motion for partial summary judgment. Because this Court committed manifest errors of law and of fact in granting Agency Defendants’ motion for summary judgment and in denying Plaintiffs’ motion for summary judgment, Plaintiffs respectfully request that the Court reconsider and amend its decision to deny Agency Defendants’ motion for summary judgment and grant Plaintiffs’ motion for summary judgment.

ARGUMENT

POINT I

THIS MOTION MEETS THE STANDARD FOR RECONSIDERATION

A motion for reconsideration is appropriate on the basis of manifest errors of law or fact, newly discovered evidence, manifest injustice, or an argument to change the applicable law. See, e.g., U.S. Titan, Inc. v. Guangzhou Men Hua Shipping Co., 182 F.R.D. 97, 100 (S.D.N.Y. 1998) (citations omitted). “Under Local Rule 6.3 . . . the moving party must demonstrate controlling law or factual matters put before the court on the underlying motion that the movant believes the court overlooked and that might reasonably be expected to alter the court’s decision.” Parrish v. Sollecito, 253 F. Supp. 2d 713, 714 (S.D.N.Y. 2003). Plaintiffs respectfully submit that this Court has overlooked controlling law and factual matters, as set forth below, that warrant altering its decision so as to find for Plaintiffs, or, at a minimum, rescinding its decision to grant summary judgment for Agency Defendants.

POINT II

THE CONCLUSION THAT KINSHIP FOSTER PARENTS AND PLAINTIFF CHILDREN DO NOT HAVE A SUBSTANTIVE DUE PROCESS RIGHT TO LIVE TOGETHER WAS A MANIFEST ERROR OF LAW

Substantive due process protects individuals from arbitrary government intrusions by requiring a reasonable basis or justification for such actions. See, e.g., Kia P. v. McIntyre, 235 F.3d 749, 758–59 (2d Cir. 2000); People United for Children, Inc. v. City of New York, 108 F. Supp. 2d 275, 292–93 (S.D.N.Y. 2000). This Court correctly determined that J.C., E.S., B.C. and Mable and Anthony Rivera “possess a constitutionally protected liberty interest in the integrity of their kinship foster family as a matter of law.” (Op. at 16.) In evaluating what measure of protection that liberty interest should be afforded, however, this Court overlooked controlling law that Plaintiffs have a fundamental right to maintain the stability of their kinship foster family that is entitled to substantive due process protections.

As a threshold matter, it is well settled that footnotes to the decision of a superior court “should be read within the context of the holding of the Court and the text to which it is appended.” Communications Workers of Am. v. American Tel. & Tel. Co., 513 F.2d 1024, 1028-30 (2d Cir. 1975) (rejecting district court reliance upon footnote and resulting misinterpretation of Supreme Court precedent), rev’d on other grounds and remanded, 429 U.S. 1033 (1977). As discussed further infra, in addressing the issue of substantive due process, this Court improvidently relied upon a footnote in Rivera v. Marcus, 696 F.2d 1016 (2d Cir. 1982), that cited dissenting opinions in Moore v. City of East Cleveland, 431 U.S. 494 (1977), while disregarding the majority holding of Rivera v. Marcus.

In Rivera v. Marcus, the Second Circuit examined the protection due to the liberty interest of members of a biologically-related foster family and repeatedly acknowledged the fundamental nature of this liberty interest:

The private interest at stake in this litigation is *substantial*. Mrs. Rivera and the Ross children seek protection from state action which threatens the integrity and stability of their familial relationship. *This important interest has consistently been recognized and afforded far-reaching due process protection. See Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944) (recognizing that there is a “private realm of family life which the state cannot enter”); *see also Wisconsin v. Yoder*, 406 U.S. 205, 231-33, 92 S.Ct. 1526, 1541-1542, 32 L.Ed.2d 15 (1972) (finding that Amish parents, consistent with religious beliefs and general notions of family privacy, are entitled to *substantive* due process protection when removing their children from public school after the eighth grade).

Rivera v. Marcus, 696 F.2d at 1027 (emphasis added). The Second Circuit further found that Mrs. Rivera, a biologically-related foster parent, possessed “an *important* liberty interest in preserving the integrity and stability of her family,” 696 F.2d at 1024-25 (emphasis added), and equated her right to due process with the substantive and procedural due process rights of the plaintiff grandmother in Moore v. City of East Cleveland, 431 U.S. 494 (1977), stating:

Indeed, we find no legally principled distinction between Mrs. Moore's rights in East Cleveland and Mrs. Rivera's in Hartford. Although separated by several hundred miles, both women carried on the laudable American tradition of providing food, shelter and comfort for members of their respective extended families in times of adversity. Justice Powell's observations in *Moore v. City of East Cleveland* bear repeating:

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition....

Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not lightly be denied by the State. 431 U.S. at 504-06 (footnote omitted).

Rivera v. Marcus, 696 F.2d at 1025 (quotation marks omitted).

Twice reiterating Justice Powell's passages about the nature of family from Moore v. City of East Cleveland, 431 U.S. at 504-06, the Second Circuit's language throughout Rivera v. Marcus reflects its recognition that the liberty interest of the kinship foster family warrants

substantive due process protection. For example, in evaluating whether the plaintiff in Rivera v. Marcus had been provided with an opportunity to be heard “at a meaningful time and in a meaningful manner,” (Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965))), the Second Circuit affirmed that “the *Mathews v. Eldridge* balance tips decidedly in favor of extending *substantial* due process protection to Mrs. Rivera.” Rivera v. Marcus, 696 F.2d at 1028 (emphasis added).

In addition, in Rivera v. Marcus, the Second Circuit rejected the State of Connecticut’s argument that the plaintiff had waived any constitutional rights she may have possessed by contracting with the state as a foster parent, relying upon the principle that “‘courts indulge every reasonable presumption against waiver’ of fundamental constitutional rights.” Rivera v. Marcus, 696 F.2d at 1026 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). This finding further highlights the court’s conclusion that the plaintiff foster parent had a fundamental right to maintaining the stability of her family.

The Second Circuit used even stronger language in evaluating the liberty interests of the children in a biologically-related foster family. It stated that “[t]he liberty interests at stake in this action are rendered more compelling given the important interests that the Ross children maintain in preserving the integrity and stability of their extended family The Ross children surely possess a liberty interest in maintaining, *free from arbitrary state interference*, the family environment that they have known since birth.” Rivera v. Marcus, 696 F.2d at 1026 (emphasis added) (citations omitted). Freedom from arbitrary state interference is a clear invocation of substantive due process protections. See Kia P., 235 F.3d at 758-59.

Despite the Second Circuit’s holding in Rivera v. Marcus, this Court overlooked the majority opinion, and instead quoted from a footnote that at first blush appears to contradict the

majority opinion. This Court noted that “the Second Circuit suggested that [the biologically-related foster parent’s liberty interest in maintaining her family integrity] may not implicate a fundamental right as required for ‘far-reaching substantive due process protection.’” (Op. at 21) (quoting Rivera v. Marcus, 696 F.2d at 1022 n.10). Contrary to that interpretation, however, the Second Circuit did not suggest that the liberty interest might not implicate a fundamental right, but simply – while describing how due process protections have been expanded as the concept of family has evolved over time – acknowledged that the determinations involved have not always been unanimous. Rivera v. Marcus, 696 F.2d at 1022 n.10. In footnote 10, the Second Circuit recognized as evidence of this point that Justices Stewart and White had dissented from the plurality in Moore v. City of East Cleveland, 431 U.S. 494.

The U.S. Supreme Court’s holding in Smith v. OFFER, 431 U.S. 816 (1977), which addressed the due process rights of *non-kinship* foster parents, is not controlling in Rivera v. Marcus. Indeed, in OFFER, the U.S. Supreme Court acknowledged that “[t]here does exist a ‘private realm of family life which the state cannot enter,’ Prince v. Massachusetts, 321 U.S. 158, 166 . . . (1944), that has been afforded *both substantive and procedural* protection.” 431 U.S. 816, 842, 843 n.46 (citing Moore v. City of East Cleveland, 431 U.S. 494 (plurality opinion) and other cases) (emphasis added). To the extent that this Court relied upon a footnote in OFFER, 431 U.S. at 843 n.48, to support the conclusion that the plaintiffs in this case are not entitled to substantive due process protections (Op. at 21) the Court appears both to misread OFFER and to overlook the fact that the Second Circuit distinguished Rivera v. Marcus from OFFER. In OFFER, footnote 48 merely leaves open the possibility that *non-kinship* foster families, assuming they possess a liberty interest in their relationships, might not be entitled to the same substantive due process protections as biologically-related families. 431 U.S. at 843

n.48. In contrast with OFFER, the Second Circuit in Rivera v. Marcus found substantive due process protections appropriate *because of* the biological relationship between the kinship foster parent and the children, the length of their relationship, and the absence of tension between the kinship foster parent and the mother. 696 F.2d at 1024. These characteristics are all equally attributable to the plaintiffs in this case.

A thorough reading of Rivera v. Marcus compels the conclusion that the Second Circuit determined that the kinship foster family had a fundamental right to remain together that required far-reaching substantive due process protection. Although this Court appeared to be unaware of any case in this circuit that held that a kinship foster parent has such a fundamental right, this very Court has so held in a prior case: Johnson v. City of New York, 99CIV.0048(LTS)(THK), 2003 WL 1826122, *9 (S.D.N.Y. Apr. 8, 2003) (following the reasoning in Rivera v. Marcus, 696 F.2d 1016, holding that plaintiffs' substantive due process right required an objectively reasonable basis for the removal of the children).

In the case before this Court, the kinship foster parents, Mable and Anthony Rivera, are blood relatives who provided a loving home and family for J.C., E.S. and B.C. from the girls' infancies until they were taken from their home at the ages of 8, 8, and 7, respectively. In addition, their mothers wanted J.C., E.S. and B.C. to be with the Riveras. Under Rivera v. Marcus, this family is entitled to the protection of both the substantive and procedural due process guarantees of the Fourteenth Amendment. To conclude otherwise is a clear error of law that Plaintiffs respectfully request that this Court correct.

POINT III

THE CONCLUSION THAT REMOVAL OF THE CHILDREN WAS NOT A VIOLATION OF PROCEDURAL DUE PROCESS WAS A MANIFEST ERROR OF LAW

In reaching its holding that the FSSU's decision to remove the children did not violate

procedural due process, the Court concluded: “With regard to plaintiffs’ allegations of pre-removal due process violations, the regulations provide for immediate removal of children from a foster home *when allegations of child abuse are presented.*” (Op. at 17) (emphasis added). However, this statement is not consistent with the applicable regulation, which specifies that notification of intent to remove a child from a foster family “must be given at least 10 days prior to the proposed effective date of the removal, except *where the health or safety of the child requires that the child be removed immediately from the foster home.*” 18 N.Y.C.R.R. § 443.5(a)(1)) (emphasis added). This regulation follows the courts’ holding that kinship foster children may be removed without notice only in “emergency circumstances” meaning that government officials believe a threat to the child’s health or safety is imminent. See, e.g., Johnson v. City of New York, 2003 WL 1826122 at *8. Thus, neither the applicable regulation nor the applicable caselaw permits immediate removal of foster children on the basis of bare allegations of child abuse. Because this Court’s decision appears to erroneously hold that mere allegations suffice to justify removal, Plaintiffs respectfully submit that the Court has misapplied the regulation, which is a manifest error of law.

This error undermines the Court’s finding on due process all the more because the record here shows no evidence at the time of the removal of an imminent threat to the health or safety of the children, beyond bare allegation. Physical examination of the children at Franklin General Hospital showed no evidence of physical or sexual abuse. (R 56.1 ¶ 229.) Nor did anyone else who interviewed the children at the time of removal – a hospital social worker, a police detective, and an OCI investigator – find any evidence of physical or sexual abuse. Id. Nor did the alleged perpetrator even reside in the home of the foster children. (R 56.1 ¶ 200.) Finally, the foster parents volunteered to bar the alleged perpetrator from not only their apartment, but

from the building itself, which they own. (R 56.1 ¶ 242.)

In finding that FSSU's decision to remove the children did not violate procedural due process, it is not clear whether this Court implicitly found that the health and safety of the children required them to be removed immediately. However, to the extent that the Court did make such a factual finding, Plaintiffs submit that the Court misapplied the law with respect to deciding a motion for summary judgment. In deciding such a motion, the Court is obligated to interpret the facts in the light most favorable to the non-moving party, and where there is a disputed issue of material fact, summary judgment may not be granted. Fed. R. Civ. P. 56(a); Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 300 (2d Cir. 2003). In this instance, Plaintiffs maintain that in light of the evidence cited above, there is no basis for finding that a threat to the health or safety of the children existed and therefore summary judgment for the Plaintiffs is appropriate. However, at a minimum, when the facts are considered in the light most favorable to the Plaintiffs, any purported threat to the children is at best a disputed issue of material fact. As a result, Plaintiffs respectfully submit that the Court respectfully an error of law in granting summary judgment to Agency Defendants on this issue.

Collateral estoppel also further precludes this Court finding that the children faced a risk warranting removal, as required by the applicable regulations, given the opposite finding of the Administrative Law Judge (ALJ) at the Fair Hearing. (Decl. of Carolyn A. Kubitschek, Exh. 13 at OCFS-746) (“[T]here was no rational basis for immediate removal of the children [B.S., E.S., and J.C.] based upon risk to the health and safety of the children.”) The U.S. Supreme Court has held that “when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . . federal courts must give the agency’s factfinding the same preclusive effect to which it would be entitled

in the State's courts.” Univ. of Tennessee v. Elliott, 478 U.S. 788, 799 (1986) (determination of state ALJ was entitled to preclusive effect in claims under 42 U.S.C. § 1983 and other civil rights statutes) (quoting United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966), quotation marks omitted); see also Chauffeur's Training Sch., Inc. v. Spellings, 478 F.3d 117, 132 (2d Cir. 2007) (“an administrative determination may be given collateral estoppel effect in a subsequent civil action when an administrative agency acted in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had adequate opportunity to litigate.”) (quotation and citation omitted). New York State courts “give conclusive effect to an administrative agency's quasi-judicial determination when two basic conditions are met: (1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal.” Jeffreys v. Griffin, 801 N.E. 2d 404, 407 (N.Y. 2003). To the extent this Court found that there was risk of imminent harm to the children, there can be no doubt that the conditions for collateral estoppel are satisfied: the ALJ was acting in a judicial capacity by deciding whether the agency acted within its discretion in removing the children without notice, and the Agency, as a party to the Fair Hearing, had a full and fair opportunity to contest the issue.

To the extent that this Court implicitly may have found that the health and safety of the children did *not* require them to be removed immediately, or simply made no finding on the question at all, Plaintiffs respectfully submit that either possibility would constitute manifest error. The first possibility directly contradicts the regulatory requirement, indeed the justification for depriving a family of a protected liberty interest, and cannot be reconciled with due process. The second possibility implies that all the process that is due before or at the time

of an immediate removal of kinship foster children is nothing more than “allegations of child abuse.” (Op. at 17.) Such a conclusion cannot be reconciled with the rights of the members of a kinship foster family under substantive due process to be free from arbitrary state interference. (See supra at 2-4).

POINT IV

THE CONCLUSION THAT THE DELAYED HEARING WAS NOT A VIOLATION OF DUE PROCESS WAS A MANIFEST ERROR OF LAW AND FACT

A. This Court overlooked controlling law that delay such as occurred in this case violates due process.

Procedural due process requires notice and an opportunity to be heard “at a meaningful time and in a meaningful manner.” Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

Specifically, if the government does not provide a pre-removal hearing, *i.e.*, a hearing before removing children from their families, the government must provide a “timely and adequate” post-deprivation hearing. Southerland v. City of New York, ___ F.3d ___, 2011 WL 2279186, at *23 n. 18 (2d Cir. June 10, 2011). To comply with due process, hearings on the government’s removal of children from their families must take place in days, not weeks or, as here, months.

Similarly, the Seventh Circuit requires that the government provide a hearing on the removal of a child within two days after the removal, in order to comport with procedural due process.

Hernandez ex rel. Hernandez v. Foster, ___ F.3d ___, 2011 WL 3802667 at *19 (7th Cir. Aug. 26, 2011) (citing Jensen v. Foley, 295 F.3d 745, 747 (7th Cir. 2002)). Other circuits agree. See Whisman ex rel. Whisman v. Rinehart, 119 F.3d 1303, 1310 (8th Cir. 1997) (holding that a hearing 17 days after removal was not sufficiently prompt); Weller v. Dep’t of Soc. Servs. for the City of Baltimore, 901 F.2d 387, 396 (4th Cir. 1990) (four-month delay violates the Constitution).

Even when the only interest at stake is a property interest, the Second Circuit has found

that a delay of 58 days “exceeded the bounds of due process.” Spinelli v. City of New York, 579 F.3d 160, 172-74 (2d Cir. 2009), accord, Kuck v. Danaher, 600 F.3d 159, 164 (2d Cir. 2010).

The right of a family to live together without the government sundering it is “far more precious than property rights.” Stanley v. Illinois, 405 U.S. 645, 651 (1972).

When the government deprives a parent of a liberty interest, it cannot constitutionally “sit back and wait” for the parent to institute judicial proceedings.” Duchesne v. Sugarman, 566 F.2d 817, 828 (2d Cir. 1977). It cannot “[adopt] for itself an attitude of ‘if you don't like it, sue.’” Kimbrough v. O'Neil, 523 F.2d 1057, 1061 n. 3 (7th Cir. 1975) (Swygert, J., concurring); accord, Duchesne, 566 F.2d at 828. The “burden of initiating judicial review must be shouldered by the government.” Id. at 828; accord, Weller, 901 F.2d at 395. See also K.D. v. County of Crow Wing, 434 F.3d 1051, 1056 n. 6 (8th Cir.2006) (“Once a child is removed from parental custody without a court order, the state bears the burden to initiate prompt judicial proceedings to provide a post-deprivation hearing.”); accord, Hernandez, 2011 WL 3802267, *21. Notably, when a foster care agency detains children from their family without providing notice and an opportunity to be heard, as in the instant case, the agency may be held liable under Section 1983. Duchesne v. Sugarman, 566 F.2d at 822 n.4.

In this case, Defendants delayed nearly six months in providing a hearing (and nearly nine months to issue a determination that the removal was arbitrary and capricious). That delay was unconstitutional, and it was manifest error, as a matter of law, for this Court to rule otherwise.

B. This Court erred in finding that there was not a delay.

In ruling in favor of Agency Defendants, this Court held, “it cannot be said that there was a ‘delay’ which deprived plaintiffs of due process.” (Op. at 20.) Plaintiffs respectfully submit that that holding constituted manifest error, requiring reconsideration.

As a preliminary factual matter, there was a delay of nine months before the Fair Hearing decision that the children had been arbitrarily removed from their home was issued, and before this Court, in response to Defendants' proposed further delay of 60 days, ordered the children home. In deciding that this nine month delay did not violate due process requirements, this Court overlooked the fact that nine months might be an infinity for a child of seven or eight years old, as well as the fact that nearly every regulatory deadline established to provide procedural due process was violated in this case. First, the Independent Review was requested on April 3, 2006 (R. 56.1 ¶ 102), and scheduled for April 18, 2006 (Op. at 18), in violation of 18 N.Y.C.R.R. § 443.5(b), which requires the Independent Review to be scheduled within ten days. Second, the Independent Review Decision is required to be issued within five days, 18 N.Y.C.R.R. § 443.5(c), but was not issued until May 8, 2006 (Op. at 18), thirty days after the Independent Review. Third, the OCI investigation was required to be completed within 60 days of the March 31, 2006 report, N.Y. Social Services Law §§ 424-b and 424-c(7); see also Kubitschek Decl. dated Nov. 5, 2010, Exh. 9, at IV.A. Nevertheless, the OCI investigation was not completed until July 14, 2006 (Op. at 18), 105 days later.

Regardless of the cascade of broken deadlines, this Court concluded that "more important than all of this was something about which the court record contains almost no details, but which surely occurred – and that is resolving Ashley, Laporsha, E.S., and B.C. would return to their mother and that J.C. would be adopted by the Riveras." (Op. at 20.) This statement cannot be characterized as anything other than an assumption of facts which is simply unsupported by any evidence in the record before the Court. As such, this Court's conclusion that there was no delay which deprived Plaintiffs of due process is based upon a factual inference in Defendants' favor and against Plaintiffs, which is impermissible on a motion for summary judgment. Miller v.

Wolpoff & Abramson, L.L.P., 321 F.3d 292, 300 (2d Cir. 2003).

Even if Agency Defendants were busily planning for the plaintiff children's futures during this extended period of time, such activity could by no means be considered the equivalent of a prompt, post-deprivation remedy that would absolve Agency Defendants of the responsibility of providing Plaintiffs with due process. Armstrong v. Manzo, 380 U.S. 545. Accordingly, the conclusion that Plaintiffs were not deprived of procedural due process is a manifest error of law which Plaintiffs respectfully request this Court to correct.

Plaintiffs recognize that there are other defendants in this case. Plaintiffs submit that those defendants, as well as Agency Defendants, had an affirmative constitutional obligation to provide due process of law, in the form of either a pre-deprivation hearing or a prompt post-deprivation hearing. Southerland, 2011 WL 2279186, at *23 n. 18; Duchesne, 566 F.2d at 822 n.4. Plaintiffs submit that the question of which defendant or defendants was responsible for causing the nine-month delay between removal and return of the children is one for the jury. See Vann v. City of New York, 72 F.3d 1040, 1051 (2d Cir. 1995) (in a civil rights case, issue of causation is for the jury to decide).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court (1) grant Plaintiffs' joint motion to reconsider its decision of September 12, 2011 in which it granted summary judgment for Agency Defendants, and (2) grant summary judgment in favor of Plaintiffs.

Dated: New York, New York
September 26, 2011

_____/s/_____
Carolyn A. Kubitschek (CK6415)
Lansner Kubitschek Schaffer
Attorneys for Plaintiffs Mable Rivera,
Anthony Rivera, E.S., and B.C.
325 Broadway, Suite 201
New York, New York 10007
(212) 349-0900
Ckubitschek@Lanskub.com

The Legal Aid Society
Steven Banks, Attorney-in-Chief
Theresa B. Moser, of counsel
By: _____/s/_____
Theresa B. Moser
199 Water Street, 3rd Floor
New York, NY 10038
(212)577-3300
TBMoser@legal-aid.org

Hughes Hubbard & Reed LLP
Sarah L. Cave
Reuben L. Borman
One Battery Park Plaza
New York, NY 10004
(212) 837-6000
cave@hugheshubbard.com
borman@hugheshubbard.com

Attorneys for Infant Plaintiff J.C.