

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

J.A.W., a minor child, by his next friend,)	
Wyatt Squires,)	
)	
Plaintiff,)	
)	
v)	No. 3:18-cv-00037-WTL-MPB
)	
EVANSVILLE VANDERBURCH SCHOOL)	
CORPORATION,)	
)	
Defendant.)	

Response in Opposition to Defendant’s Motion to Dismiss

I. Introduction

In an apparent attempt to avoid the fact that it is violating clear and on-all-fours precedent from the Seventh Circuit in prohibiting J.A.W. from using male restrooms, defendant (“EVSC”) has sought to dismiss this case, not on its merits, but because it asserts that the 16-year old plaintiff is not being represented by the appropriate next friend. The motion to dismiss is not well-taken for many reasons. First, the issue here is not, as characterized by EVSC, one of standing, but one of capacity, which is not resolved through a motion to dismiss. Moreover, under Indiana law, upon which J.A.W.’s capacity is based, a guardian ad litem or next friend is not necessary. And, even if it was necessary, Wyatt Squires is an appropriate person to serve as next friend. Finally, if the Court were to concluded that Mr. Squires is not appropriate and that a next friend is necessary, the

remedy is for this Court to appoint someone to serve in that capacity – not to dismiss this action. EVSC’s motion must therefore be denied.

II. The issue in this case is not one of standing but one of capacity, *i.e.* whether the requirements of Fed.R.Civ.P. 17 are met

Although EVSC has characterized its motion as one based on a lack of standing, it is clear that J.A.W. himself has standing inasmuch as he is alleging that he has been injured by the actions of EVSC and that the injury can be addressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). *See also, e.g., T.W. by Enk v. Brophy*, 124 F.3d 893, 896 (7th Cir. 1997) (“Since the constitutional rights of these children may have been infringed by the conduct of the defendants, the suit satisfies the standing requirement in Article III of the Constitution.”).

EVSC’s standing argument appears to be predicated on the Supreme Court’s decision in *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004), where a noncustodial parent was found to lack prudential standing to raise a claim that his daughter’s constitutional rights were violated by a statute requiring that the Pledge of Allegiance be recited by elementary school students. *Id.* at 7-8, 17-18. Although he had originally sought to sue as his daughter’s next friend, he was precluded from doing so by an order from the California Superior Court, in an action by the child’s mother who was her legal custodian, which resulted in an order that the mother exercised final legal control concerning decisions regarding the child. *Id.* at 9, 14. Nevertheless, the father persisted with the litigation, claiming that his parental status allowed him to proceed in the face of the state court order, but Supreme Court rejected the argument that it should

not honor California law, instead concluding that Newdow's status as a parent did not give him the right to raise his claim. *Id.* at 16-18. That is, he personally did not have standing.

Obviously, in this case Wyatt Squires is not claiming that he has standing. The issue is whether J.A.W.'s status as a minor precludes him from proceeding in this case without a representative of some sort and whether Wyatt Squires is an appropriate person to serve as the representative. This, therefore, is not a challenge to standing, but to J.A.W.'s capacity to bring this case. A failure of capacity is to be raised by the defendant pursuant to Federal Rule of Civil Procedure 9(a), not Rule 12.¹

III. J.A.W.'s capacity to bring this case with Wyatt Squires as his next friend is assessed based on the requirements of Indiana law

The Supreme Court in *Newdow* focused on state law and it is appropriate that analysis of the question here focus on state law as well. For, Federal Rule of Civil Procedure 17(b) provides that the question of capacity to sue or be sued must be determined, for an individual, "by the law of the individual's domicile." And, whereas Rule 17(c) allows a minor or incompetent person to through a guardian, next friend, or other fiduciary and requires the court to appoint a guardian ad litem "or issue another appropriate order—to protect a minor . . . who is unrepresented in an action," the language of Rule 17(c) "is sufficiently permissive to accommodate the application of state law in situations in which that is called for by Rule 17(b)." Wright and Miller, 6A Fed.

¹ A challenge to a party's capacity is to be raised by the defendant "by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge." Federal Rule of Civil Procedure 9(a)(2). WVSC has not stated any supporting facts here.

Prac. & Proc. Civ. § 1571—Suits by or Against Infants and Incompetent Persons—Relationship Between Rules 17(b) and 17(c) (3d ed.). Thus, “[s]tate law provides the controlling authority for determining whether an individual has capacity to sue on his own behalf.” *Bowen v. Ruben*, 213 F. Supp. 2d 220, 223 (E.D.N.Y. 2001).

IV. Indiana law does not require that a minor plaintiff have a next friend appointed and therefore one does not have to be appointed here

Rule 17(C) of the Indiana Rules of Trial Procedure provides that “[a]n infant or incompetent person may sue or be sued in any action: (1) in his own name; (2) in his own name by a guardian ad litem or a next friend;² (3) in the name of his representative, if the representative is a court-appointed general guardian. . . or other like fiduciary.” Indiana Rules of Trial Procedure, Rule 17(C). The Rule further provides that “[i]f an infant or incompetent person is not represented, or is not adequately represented, the court shall appoint a guardian ad litem for him.” *Id.* However, Indiana courts have noted, specifically referring to this language in Rule 17(C), that “although it is not mandatory for a trial judge to appoint a guardian ad litem for a minor defendant, ‘it is mandatory that the trial judge consider the necessity of appointing a guardian ad litem before permitting a minor defendant to proceed without one.’” *Maurer v. Maurer*, 712 N.E.2d 990, 992 (Ind. Ct. App. 1999) (quoting *Crayne v. M.K.R.L.*, 413 N.E.2d 311, 313 (Ind. Ct.

² In *T.W.* the Seventh Circuit noted that the terms “next friend” and “guardian ad litem” “are essentially interchangeable, but ‘next friend’ is normally used when the child is the plaintiff, and ‘guardian ad litem’ when the child is the defendant.” 124 F.3d at 895. In Indiana the terms appear to be truly interchangeable. For example, Indiana Code § 31-14-5-2(a), governing the filing of paternity actions, provides that “[a] person less than eighteen (18) years of age may file a petition if the person is competent except for the person’s age. A person who is otherwise incompetent may file a petition through the person’s guardian, guardian ad litem, or next friend.”

App. 1980)). Thus, while in some states a minor is unable “to bring suit on his or her own behalf. Indiana on the other hand, allows a minor to sue in his or her own name, or by a guardian or next friend.” *Ledbetter v. Hunter*, 652 N.E.2d 543, 546 (Ind. Ct. App. 1995).³

Therefore, J.A.W. had the right, under Indiana law, to bring this action without a next friend or guardian ad litem. If, at this point, the Court determines that one is necessary for J.A.W. it certainly has the discretion to appoint one and Mr. Squires is willing to serve in that capacity. However, courts have noted that competent counsel can represent the child’s interest without appointment of a guardian ad litem or next friend. *See, e.g., Hendrickson v. Griggs*, 672 F. Supp. 1126, 1132 (N.D. Iowa 1987), *app. dismissed*, 856 F.2d 1041 (8th Cir. 1988) (“the Court concludes that the class [of minors] can be adequately represented by plaintiffs’ counsel, so that a guardian ad litem need not be appointed at this time”). *See also, Ruppert v. Sec’y of U.S. Dep’t of Health and Human Services*, 671 F. Supp. 151, 172, 184 (E.D.N.Y. 1987), *aff’d in part and rev’d in part on other grounds*, 971 F.2d 1172 (2d Cir. 1989) (concluding that guardian ad litem for plaintiffs, some of whom were incompetent and apparently one of whom was under 18 was not necessary as the attorney representing the litigants has “vigorously pursued the legal remedies available to the plaintiffs The need for the oversight of litigation by a guardian *ad litem* is far more pressing where . . . an incompetent becomes involved in litigation without representation or his purported representative’s interest actually or potentially

³ One of the states that requires a minor to appear by next friend or guardian appears to be Wisconsin, the site of the *T.W.* case. *See Jansen ex rel. Stierman v. McPherson*, 655 N.W. 2d 487, 493 (Wisc. Ct. App. 2002) (referring to Wisc. Stat. Ann. 803.01).

conflict with those of the party himself.”). In any event, given Indiana law concerning the ability of J.A.W. to sue in his own name, without a guardian ad litem or next friend, there are no grounds to dismiss this action.

IV. If J.A.W. must proceed with representation, Wyatt Squires is an appropriate person to represent him in this litigation as his next friend

A. Facts⁴

J.A.W. is 16 and resides with his mother who has legal custody of him. (Dkt. 17-1 [“J.A.W. Dec.”] ¶¶ 3, 35). His mother supports his efforts to use the male restrooms within EVSC but is currently involved in a dissolution of marriage case with her current husband and she does not want to be formally involved in any other court proceedings at this point. (*Id.* ¶ 36). She has indicated to J.A.W., however, that she will be willing to serve as next friend in this case once her current divorce is over. (*Id.*).

J.A.W. has no other adult relatives who can serve as a next friend in this case. (*Id.* ¶ 37). He has known Wyatt Squires for a year or more and has frequently stayed overnight at the home he shares with his fiancé. (*Id.* ¶ 38). Mr. Squires, an adult resident of Warrick County, is a transgender adult who leads a weekly group for transgender persons, and has spoken publicly on numerous occasions concerning transgender issues. (Dkt. 17-2 [“Squires Dec.”] ¶¶ 1, 3, 4). J.A.W. is a regular attendee at this group and he

⁴ In its memorandum EVSC asserts that in assessing the sufficiency of a complaint following a motion to dismiss a court is to assume that all allegations are true. (Dkt. 13 at 1 [citing *DuRocher v. Riddell, Inc.*, 97 F. Supp. 3d 1006, 1013 (S.D. Ind. 2015)]). However, as noted above, EVSC’s motion should properly be viewed not as a motion addressing J.A.W.’s standing to bring the case or its merits, but addressing whether J.A.W. has the capacity to bring this case with Wyatt Squires as next friend. “Questions involving a party’s capacity to sue or be sued . . . turn upon issues of fact.” *Swaim v. Moltan Co.*, 73 F.3d 711, 718 (7th Cir. 1996). It is therefore appropriate for this Court to review the declarations submitted by J.A.W. and Mr. Squires.

and Mr. Squires have become friends. (*Id.* ¶ 5; J.A.W. Dec. ¶ 39). J.A.W. views Mr. Squires as a mentor who J.A.W. turns to regularly for assistance and advice. (J.A.W. Dec. ¶ 40). Mr. Squires knows it is helpful for J.A.W. to discuss his experiences as a transgender youth. (Squires Dec. ¶ 6).

Mr. Squires is more than willing to serve as J.A.W.'s next friend in this litigation. (*Id.* ¶ 9). He supports J.A.W.'s efforts to use the male restrooms in EVSC and believes that he can, and will, proceed with his best interests in mind in proceeding in this case. (*Id.* ¶ 10). Mr. Squires shares J.A.W.'s belief that the issue here is an extremely important one and the failure to allow him to use the male restrooms is injurious to J.A.W. (*Id.* ¶ 11; J.A.W. Dec. ¶ 34). J.A.W.'s mother has noted that she agrees that in her absence Mr. Squires should serve as his next friend. (J.A.W. Dec. ¶ 41).

B. Mr. Squires should be allowed to be J.A.W.'s next friend in this matter

In this case J.A.W. has sought to proceed with Wyatt Squires as his next friend. Mr. Squires has not sought permission to proceed as J.A.W.'s next friend, but that is not unusual as "[t]he court does not unusually appoint a next friend; it is usually the next friend who has taken the initiative in suing on the child's behalf; but appointed or not, he can be challenged as not being a suitable representative." *T.W.*, 124 F.3d at 895. EVSC argues that Mr. Squires is not an appropriate person to be the next friend. This is erroneous.

EVSC claims that there is no evidence that Mr. Squires is "particularly devoted to advancing the specific interests of J.A.W. or even transgender students." (Dkt. 13 at 5). Of course, as is demonstrated by Mr. Squires' and J.A.W.'s declaration, this simply is not the

case.⁵ Not only does Mr. Squires have a clear and demonstrated commitment to, and understanding of, transgender issues, but he is a friend and mentor of J.A.W. who has frequent contact with him. EVSC seeks to compare Mr. Squires to the person seeking to be a next friend in *T.W.* There is no comparison. In *T.W.* the person seeking next friend status was “a self-described, and so far as relates to this case self-appointed, children’s advocate” who was a stranger to the children involved in the case but was, at best a “purely ideological ‘friend[].’” *T.W.*, 124 F.3d at 896-97. The contrast here is clear; Mr. Squires is an actual friend of J.A.W. and will represent his best interests.

In *T.W.* the court stated that

we think the proper rule is that the next friend must be an appropriate alter ego for a plaintiff who is not able to litigate in his own right; that ordinarily the eligible will be confined to the plaintiff’s parents, older sibling (if there are no parents), or a conservator or other guardian, akin to a trustee; that person having only an ideological stake in the child’s case are never eligible; but that if a close relative is unavailable and the child has no conflict-free general representative the court may appoint a personal friend of the plaintiff or his family, a professional who has worked with the child, or, in desperate circumstances, a stranger whom the court finds to be especially suitable to represent the child’s interests in the litigation.

Id. at 897. As noted in J.A.W.’s declaration, his mother, who is his legal custodian, is unable to serve as his next friend at this time and he has no other adult relatives who can serve in that capacity. In such a case it is appropriate to allow a non-relative to proceed as a next friend. *Id.*; see also, e.g., *Sam M. ex. rel. Elliott v. Carcieri*, 608 F.3d 77, 88 (1st Cir.

⁵ As noted above, given that EVSC bears the burden of pleading a lack of capacity, Fed.R.Civ.P. 9(a), J.A.W. cannot be faulted for not introducing the evidence until this point, although his complaint does allege, at paragraph 9, that Mr. Squires is a transgender advocate and a friend of J.A.W.

2010) (it was appropriate to appoint a non-relative next friend for plaintiffs where “there is no indication that [relatives] are willing or able to represent them; and Plaintiffs have alleged that these relatives either refused or are unable to sue on their behalf” [footnote omitted]); *Doe v. Carnival Corp.*, 37 F. Supp. 3d 1254, 1258-59 (S.D. Fla. 2012) (“although a minor is represented *a priori* by a general guardian, the court may in its discretion appoint a non-parent next friend as better serving the child’s interest” [citations omitted]).

EVSC raises a final argument against the appointment, arguing that it would interfere with the fundamental right of J.A.W.’s mother to the care and control of her child. (Dkt. 13 at 5-6). But, the facts demonstrate that this is not a situation where J.A.W.’s mother opposes his litigation. Indeed, it appears that she supports it, but is unable to serve as his next friend at this time. Moreover, J.A.W. is 16 and is certainly old enough to articulate his constitutional and statutory rights. As the Supreme Court has noted “[c]onstitutional rights do not mature and come into being only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.” *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (further citations omitted), *overruled in part on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). Indeed, a parent in his or her capacity as next friend, should not be allowed to stand in the way of a child’s assertion of his constitutional or statutory rights. In *M.S. v. Wermers*, 557 F.2d 170 (8th Cir. 1977), the court noted that it would be improper to have parents represent the interests of their daughter who was asserting the right to obtain prescription contraceptives without parental consent as “[w]hen there is a potential conflict between a perceived responsibility and an

obligation to assist the court in achieving a just and speedy determination of the action, parents have no right to act as guardians ad litem. District courts have been alert to recognize and guard against this type of conflict." *Id.* at 175 (citations omitted). Therefore, if appointing a parent as next friend would thwart the child's ability to raise his constitutional rights, the appointment should not occur.

EVSC cites to the admonition in *Newdow* against federal courts entering into a dispute where the standing of the plaintiff "is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing." 542 U.S. at 17. (Dkt. 13 at 6). As noted above, *Newdow* is of no relevance here in that it was not a case concerning next friend status. Moreover, this is not a situation, like *Newdow*, where there has been a state court dispute to resolve who can speak for the young child who, according to her mother, "has no objection either to reciting or hearing others recite the Pledge of Allegiance, or its reference to God." 542 U.S. at 9. That is, this is not a case where "hard questions of domestic relations are sure to affect the outcome." *Id.* at 17.

Instead, this is a case where EVSC appears to be flagrantly ignoring the holding of the Seventh Circuit in *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *pet. for certiorari dismissed*, resulting in a violation of J.A.W. rights under both equal protection and Title IV of the Education Amendments Act of 1972. If this Court believes that a next friend is necessary for J.A.W., Wyatt Squires is certainly an appropriate person to serve in this capacity so that J.A.W. may safeguard and vindicate his rights.

V. Even if this Court determines that a next friend is necessary and that Mr. Squires is not an appropriate person to serve in that capacity dismissal is not the appropriate remedy

In *T.W.* the court, after determining that the purported next friend was not an adequate representative of the child, allowed the case to be dismissed without prejudice. 124 F.3d at 899. The dismissal, however, was not solely because of the next friend determination, but because federal courts could not have subject matter jurisdiction of the case as a result of the *Rooker-Feldman* doctrine inasmuch as the federal case attacked a judgment of Wisconsin state courts. *Id.* at 898. Absent that, the court seemed inclined to follow the “principle of prudence” specifying “that a court should not enter a dispositive order in a case in which the party that would be harmed by the order is legally incapacitated and does not have a representative.” *Id.* Here, there can be no doubt that this Court has subject matter jurisdiction over J.A.W.’s claim. Accordingly, if this Court believes that J.A.W. must have a representative and that Mr. Squires is, for some reason, not appropriate, then the remedy is not dismissal but for this Court to appoint a representative as authorized by Federal Rule Civil Procedure 17(c)(2). *See, e.g., Beall v. Ujoatuonu*, No. GJH-16-3438, 2018 WL 1474180. at *3 (D. Md. March 26, 2018) (“Although Rule 17(c)(2) allows the court to appoint a guardian ad litem, it does not compel appointment. Rather, it grants the court discretion to issue an ‘appropriate order; to protect the interest of an unrepresented, incompetent litigant.’” [citation omitted]).

VI. Conclusion

For all of the foregoing reasons, the motion to dismiss filed by EVSC must be denied.

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Certificate of Service

I hereby certify that on this 10th day of April, 2018, a copy of the foregoing was filed electronically with the Clerk of this Court. A copy will be served by the Court's system on:

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