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I would like to thank all the young people I have represented whose lives have been shaped by inequitable laws and Susan Butler Plum, Kevin Ryan, Don Robbins, Larry Brown, and Denise O'Donnell for giving me the opportunity to reshape public policy in ways small and large to level the playing field.

CHILDREN'S RIGHTS: AN EMPTY PROMISE FOR NEW YORK STATE'S MOST VULNERABLE YOUTH

*Jacquelyn D. Green**

The evaluation of New York State law through the lens of the primary tenets of the United Nations Convention on the Rights of the Child ("CRC")¹ reveals that New York law is uneven when it comes to non-discrimination against children, the best interests of the child, the child's right to life, survival and development, and the child's rights to be heard and to participate. The articles in this symposium edition clearly reveal that there are some New York State statutes that can be viewed to comply with the CRC. However, there are also areas where the primary objectives of the CRC are absent from New York law. The comparison is troubling in that it reveals how both the law and its implementation deviate from the important protections and rights in the CRC for New York's most vulnerable children.

I spent six years as Assistant Counsel to the New York State Assembly, providing legal counsel to the Assembly Standing Committee on Children and Families. That position required me to draft and review all legislation proposed in New York that related to child welfare and juvenile justice. I was also required to analyze, negotiate and draft the New York State budget as it related to both child welfare and juvenile justice. During those six years, I was consistently surprised by the dearth of advocates for these most vulnerable children. Certainly, there were advocates. The agencies that provide preventive and foster care services for abused and neglected children lobbied. The court system lobbied. Groups representing foster and adoptive parents lobbied. Lawyers who make a living representing children in family court lobbied. The lawyers

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¹ Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3, available at www2.ohchr.org/english/law/crc.htm#art6 [hereinafter CRC].

who sometimes oppose them as they represent parents in family court lobbied. The local counties that actually administer child welfare services in New York lobbied. The labor unions that represent workers in juvenile justice facilities most certainly lobbied.

However, in the sea of advocates and lobbyists who knocked on my door each Tuesday during the legislative session, only a rare one or two had no stake in either the child welfare or the juvenile justice system. Instead, most of these “advocates for children” had allegiances to some group of adults who were stakeholders in the massive child welfare system in New York. Article 3 of the CRC requires that the best interests of the child be a primary consideration in all public and private actions concerning children.² This group-level “best interests” analysis is often missing from the child welfare and juvenile justice policy debates in New York precisely because nearly all of the adults analyzing this public policy have allegiances to some *adult* part of those systems.

While the advocacy community fails to provide a framework for policy analysis that emphasizes the best interests of the child as a primary consideration, there is also no requirement that any child-focused review occur as part of the legislative process. The standard issues considered when legislative staff and members review pending legislation are revealed in the format of the sponsor memoranda that accompany the introduction of each legislative bill. These memoranda include the title of the bill, the bill number, the bill sponsor, indicate whether anyone in the other House of the Legislature has introduced the same legislation, the purpose of the proposal, the sections of law impacted by the bill, a summary of what the bill does, the justification for the proposal, the budget impact, and the bill’s effective date.³ While one could certainly discuss how a piece of legislation may impact children as a whole in the justification section, there is no requirement that a bill memorandum contain any analysis regarding its impact on children as a whole.⁴

With few advocates giving voice to the best interests of chil-

² CRC, *supra* note 1, art. 3.

³ See, e.g., A. 242, 2009–2010 Leg. Sess., Reg. Sess. (N.Y. 2009) (memorandum describing establishing incremental funding for home visiting programs available to children at risk of child abuse and neglect), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A00242&Memo=Y; A. 382, 2009–2010 Leg. Sess., Reg. Sess. (N.Y. 2009) (memorandum describing bill to provide a child who has been or may have been sexually abused direct access to specially trained medical services), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A00382&Memo=Y.

⁴ See, e.g., A. 382, 2009–2010 Leg. Sess., Reg. Sess. (N.Y. 2009), *supra* note 3.

dren and the mechanics of the legislative process making no demand for an impact-on-the-child analysis, the voice for the best interests of children as a group is often left to the merciless process of politics. Children do not usually fit very well into that cluttered process. Certainly, they possess neither strength as a voting bloc nor financial resources to fuel campaigns. It seems to be only after high-profile tragedies involving children that the press is attuned to such tragedies, and politicians talk about the best interests of children.⁵

It is this failure to routinely consider the impact of public policy on children as a group that leads to New York State policies that run afoul of the CRC. This is especially true for children who have been abused or neglected and for children who are adjudicated delinquent. The children in these systems experience significant discrimination, often fail to have their voices heard, and are not nurtured as if they have a basic human right of development.

One basic example of discriminatory treatment of children exists in New York's child welfare system. The structure of child welfare law in New York has created a system in which a child's access to financial resources, service provision and permanency planning are often a function of the county in which the child lives.⁶ An abused child in one county may be placed into foster care with a stipend for the foster parent, a case manager, a service plan, and laws that require that the child's case be moved toward permanency within the timeframes mandated under the federal Adoption and Safe Families Act.⁷ A child who has experienced the exact same abuse in another county may be sent to live with a relative without any financial resources, with little to no case planning, and with no statutory mandate that the child ever achieve a permanent living situation.

New York State law allows this because there is no state policy on how local departments of social services ("LDSS")⁸ must work

⁵ For example, after the highly publicized and tragic death of Nixzmary Brown in New York City in 2006, the New York State Assembly held a series of hearings on the child welfare system throughout the State. *See* Assembly Standing Committees on Children and Families and Oversight, Analysis, and Investigation, Notice of Public Hearing, <http://assembly.state.ny.us/comm/Children/20060125> (last visited Mar. 22, 2010).

⁶ *See* N.Y. SOC. SERV. LAW § 407(2) (McKinney 2003) (allocating and disbursing funds to districts, counties and other local subdivisions).

⁷ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

⁸ In New York State, the child welfare system is overseen by the State and administered by local departments of social services. Each county in New York comprises one

with relatives who step forward to care for abused and neglected children. Section 1017 of the Family Court Act requires LDSS to search for relatives once a child has been removed from his or her home due to abuse or neglect.⁹ Local child protective services workers are required to look for the child's grandparents, all suitable relatives identified by either parent, or any relative identified by a child over the age of five as a relative who has played a significant positive role in his or her life.¹⁰ The workers must tell the relatives they locate that they have an opportunity to become a foster parent for or seek custody or care of the child.¹¹ New York State regulations allow for LDSS to expedite the approval of relatives' foster homes in order to allow children to be placed with such relatives in foster care¹² instead of placing children into "stranger" foster care.¹³ However, LDSS are not required to utilize this expedited process.¹⁴ In addition, there is no state law, regulation or formal guidance directing when a local department of social services should place a child with a relative versus placement in "stranger" foster care.

The broad discretion that LDSS have over the use of relative placements for abused or neglected children is further compounded by a statutory structure that allows for the placement of these children with relatives either in kinship foster care or in a direct relative placement that does not involve foster care.¹⁵ Additionally, while LDSS can choose to approve relatives as foster parents for the purpose of placing abused and neglected relative children in their care, the Family Court also has the authority to place the child in the custody of such relative while the abuse or neglect case is pending in Family Court.¹⁶

If a relative who comes forward to care for an emotionally or physically handicapped child or hard-to-place child becomes an ap-

social services district, except that the entire city of New York functions as one social services district (despite the fact that it is composed of several counties).

⁹ N.Y. FAM. CT. ACT § 1017(1) (McKinney 2010).

¹⁰ N.Y. SOC. SERV. LAW § 384-a(1-a) (McKinney Supp. 2010).

¹¹ *Id.*

¹² N.Y. FAM. CT. ACT § 1017 cmt (McKinney 2009) (Practice Commentary).

¹³ N.Y. FAM. CT. ACT §§ 1017(2)(a)(iii), 1055(a)(k) (McKinney 2010).

¹⁴ N.Y. FAM. CT. ACT, § 1055(a)(i) (McKinney 2009).

¹⁵ *See* N.Y. SOC. SERV. LAW § 358-a(3) (McKinney Supp. 2010). ("If the permanency plan for the child is adoption, guardianship, permanent placement with a fit and willing relative or another planned permanent living arrangement other than reunification with the parent or parents of the child, the court must consider and determine in its order whether reasonable efforts are being made to make and finalize such alternate permanent placement.").

¹⁶ N.Y. FAM. CT. ACT § 1017(2)(a)(ii) (McKinney 2009).

proved foster parent, the relative will receive the foster care stipend for that child.¹⁷ The relative will also be eligible for other financial support such as diaper and clothing allowances and assistance with child care.¹⁸ The child then will have a case manager or service provider assigned to his or her case, in part to provide accountability for monitoring expenditures under this system; case managers are paid by the social services district as well.¹⁹ Family service plans will be required²⁰ and permanency reports will be prepared for permanency hearings that will be scheduled every six months.²¹ State law permits a petition to terminate parental rights to be filed if the child has been in care for the most recent fifteen of twenty-two months and, among other possible situations, there is no compelling reason not to terminate parental rights.²² These children will be counted in state-level data that is reviewed by the federal government in order to determine how well New York State meets the safety, permanency, and wellbeing needs of abused and neglected children.²³ If, however, a relative assumes custody of the child as a direct placement, there is no statutory requirement that the relative receive any financial support a subsidy will be provided

¹⁷ N.Y. SOC. SERV. LAW §§ 451, 453 (McKinney Supp. 2010). "A social services official shall make monthly payments for the care and maintenance of a handicapped or hard to place child whom a social services official has placed for adoption or who has been adopted and for the care and maintenance of a handicapped or hard to place child placed for adoption by a voluntary authorized agency who is residing in such social services district." N.Y. SOC. SERV. LAW § 453(1)(a) (McKinney 2003).

¹⁸ N.Y. COMP. CODES R. & REGS. tit. 18, § 427.3(a) (2009) (noting clothing as an allowable state expenditure); N.Y. COMP. CODES R. & REGS. tit. 18 §427.3(c)(2)(e)(vi),(xii) (2009) (approving state expenditures for "day care and baby-sitting services when necessary for the care and supervision of a child in foster care," and approving state expenditures for the cost of diapers for a child from birth to the child's fourth birthday); N.Y. SOC. SERV. LAW § 410(1) (McKinney 2003) (allowing the allotment of public funds to provide day care if in the best interest of child and parent, where parents are unable to pay all or part of the cost).

¹⁹ See N.Y. SOC. SERV. LAW § 153-k(4)(a)-(c) (McKinney Supp. 2010).

²⁰ N.Y. SOC. SERV. LAW § 409-e(2) (McKinney Supp. 2010).

²¹ N.Y. SOC. SERV. LAW § 409-e(3) (McKinney 2009); see also N.Y. FAM. CT. ACT § 1089(a)(2)-(3) (McKinney 2010).

²² See N.Y. SOC. SERV. LAW § 384-b(3)(1)(i) (McKinney Supp. 2010).

²³ The federal Administration for Children and Families completes a Children and Family Services Review in each state to measure state performance on the safety, permanency, and well-being of children in foster care. New York State was reviewed in 2002 and was found to be out of compliance with the federal standards. New York State underwent its second Review in the spring of 2008 and is expected to be out of compliance with nearly every federal measure. U.S. Department of Health and Human Services: Administration for Children & Families, Reports and Results of the Child and Family Service Reviews, *available at* http://basis.caliber.com/cwig/ws/cwmd/docs/cb_web/SearchForm (select "CFSR Final Reports" for Select Report; "New York" for State; and "All Rounds" for Review Period).

to that relative to care for the child.²⁴ While the relative would be eligible for a small public assistance grant only for the child,²⁵ many child protective service workers are not aware of this option and many relatives never learn of this option.²⁶ While service plans and permanency hearings are technically required for these children, LDSS often do not assign these cases to the same workers who handle foster care cases, and often no one assumes responsibility for permanency planning and the preparation of the permanency hearing report. Laws that require timely permanency for children do not apply, because the child is not technically in foster care. Accordingly, any available data about these children is not evaluated as part of the federal review of the quality of New York's child welfare system.

The use of kinship foster care varies dramatically from county to county in New York. In 2008, New York City had the highest rate of use of kinship foster care with 31% of its foster children in kinship foster care.²⁷ At the same time, several New York State counties have no approved kinship foster parents at all. Outside of New York City, only 7.3% of children in foster care at the end of 2008 were living in kinship foster care.²⁸ While no systematic study has been done to explain the varied levels of use of kinship foster care, those in the field often surmise that the variable patterns are related both to the use of scarce county resources and to local attitudes about the practice of using relatives as foster parents. Therefore, a child who has experienced abuse in one county may receive the full set of resources and protections that come with the formal foster care status, while a child who has experienced the exact same abuse in another county may not receive any such resources or protections. This disparate treatment, based solely on where a child happens to live, runs directly counter to the anti-

²⁴ See N.Y. SOC. SERV. LAW § 349 (McKinney 2003).

²⁵ *Id.*

²⁶ See, e.g. ANITA M. STOWELL-RITTER, AARP, AARP NEW YORK REPORT ON BARRIERS TO SUCCESSFUL KIN CAREGIVING OF CHILDREN 5–8 (2004), available at http://assets.aarp.org/rgcenter/il/ny_caregiving.pdf.

²⁷ N. Y. CITY ADMIN. FOR CHILDREN SERVS., FIVE YEAR REPORT 2004–2008 2, available at http://www.nyc.gov/html/acs/downloads/pdf/stats_5_year_2008.pdf (see “Grand Total” statistics in bottom graph; 5,399 children in kinship foster care services [lowest column] is 31% of 16,701 total children in foster care in New York City [top column]).

²⁸ See N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., 2008 MONITORING AND ANALYSIS PROFILES WITH SELECTED TREND DATA: 2004–2008, UPSTATE 16 (2009) New York State Kinship Navigator: County Resources, available at <http://www.ocfs.state.ny.us/main/reports/2008%20Monitoring%20and%20Analysis%20Profiles%20Upstate.pdf> <http://www.nysnavigator.org/county>.

discrimination mandate in Article 2 of the CRC.²⁹

A second form of discrimination prevalent in New York for both child welfare and juvenile justice involved youth is racial discrimination. There is disproportionate minority representation for children in the care and custody of LDSS ("LDSS"), as foster children or as persons in need of supervision,³⁰ and for children who are adjudicated delinquent and placed in juvenile justice facilities. Data reveals that for the quarter ending March 31, 2007, 67% of the children in the care and custody of LDSS were either African American or Hispanic.³¹ On that same date, over 88% of the youth in custody of the Office of Children and Family Services in the juvenile justice system were African American, Latino, or Native American.³²

New York State is not alone when it comes to issues of disproportionality. Nationally, about 40% of children are children of color, but they account for *half* of the nation's foster care population.³³ At the same time, research has shown that rates of abuse are not higher for children of color than for white children.³⁴ In addition, children of color have been found to be both over-represented in the child welfare system³⁵ and to receive disparate treatment once they become involved in this system.³⁶ Finally, research has also shown that this discrimination may be most pronounced for the youngest children, as African American babies have been found to be placed in foster care at twice the rate of white babies.³⁷ This national evidence of discrimination against children based on race is mirrored in the experiences of New

²⁹ CRC, *supra* note 1, art. 2.

³⁰ New York State law calls children under eighteen who commit status offenses such as truancy or running away, or who are "beyond the lawful control" of their parents "persons in need of supervision" ("PINS"). See N.Y. FAM. CT. ACT § 712(a) (McKinney 2010).

³¹ See N.Y. STATE OFFICE OF CHILDREN AND FAMILY SERVICES, CHILDREN IN CARE AND CUSTODY OF LDSS 1 (2007), available at www.ocfs.state.ny.us/main/reports/QRcare-2007-03.pdf (see "ETHNICITY," third data column below "IN CARE" heading).

³² THE CORRECTIONAL ASSOCIATION OF NEW YORK, YOUTH CONFINED IN OCFS FACILITIES 1 (2007), available at prisonpolicy.org/scans/Youth_in_OCFS_Nov07.pdf.

³³ See ROBERT B. HILL, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN THE CHILD WELFARE SYSTEM, SYNTHESIS OF RESEARCH ON DISPROPORTIONALITY IN CHILD WELFARE: AN UPDATE 7 (2007), available at www.racemattersconsortium.org/docs/BobHillPaper_FINAL.pdf.

³⁴ *Id.*

³⁵ *Id.* at 15.

³⁶ *Id.* at 28-34.

³⁷ See FRED WULCZYN & BRIDGETTE LERY, CHAPIN HALL CTR. FOR CHILDREN, RACIAL DISPARITY IN FOSTER CARE ADMISSIONS 24 (2007) available at <http://www.chapinhall.org/research/report/racial-disparity-foster-care-admissions>.

York's children of color and fails to meet the anti-discrimination standard set by the CRC.³⁸

The mandate for an active child voice that is present in Article 12 of the CRC is another area where New York has fallen short. Children are afforded legal representation rather liberally under New York State law. Children have a right to an attorney to represent them, called a law guardian in New York State statute, in abuse and neglect proceedings, in juvenile delinquency proceedings and in proceedings alleging that the child is a person in need of supervision.³⁹ In addition, judges have the discretion to appoint law guardians to represent children in custody proceedings and in any other proceeding where the judge determines that the appointment will serve the purposes of the Family Court Act,⁴⁰ for example, law guardians are often appointed to represent children in domestic violence and custody cases.⁴¹

The role of the law guardian in New York has been evolving over the last several years, moving away from a substituted judgment, "best interests" model toward a pure advocacy model in which the law guardian is the attorney for the child, and assumes all ethical obligations to vigorously advocate for the client's position. This evolution can be seen both in a recent court rule issued by the Office of Court Administration⁴² and in standards that the New York State Bar Association has issued for attorneys representing children in child welfare proceedings.⁴³ Both the role and the standards for representation make clear that law guardians are to function as attorneys for children. This means that law guardians are charged with representing the wishes of their child-clients in court, whether or not they personally agree with those wishes or deem them in the best interest of their child-client.⁴⁴ One would think that this model of representation of children would provide New York State's children with strong voices in court proceedings.

However, this model of representation is only as strong as the

³⁸ CRC, *supra* note 1, art. 2.

³⁹ N.Y. SOC. SERV. LAW § 358-a(6) (McKinney Supp. 2010).

⁴⁰ N.Y. FAM. CT. ACT § 249(a) (McKinney 2008).

⁴¹ *See generally*, N.Y. FAM. CT. ACT § 243 (McKinney 2008) (describing the process by which a law guardian is provided for family court proceedings or appeals).

⁴² N.Y. COMP. CODES R. & REGS. tit. 22, § 7.2 (2009).

⁴³ NYSBA COMM. ON CHILDREN AND THE LAW: STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK CHILD PROTECTIVE, FOSTER CARE, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS (2007), available at <http://www.courts.state.ny.us/ad3/lg/June2007CoverandStandards.pdf>.

⁴⁴ *See* Diane Somberg, Comment, *Defining the Role of Law Guardian in New York State by Statute, Standards and Case Law*, 19 TOURO L. REV. 529, 546–49 (2003).

individuals engaged in law guardian practice. There are two basic models of law guardian practice in New York. In some localities, institutional providers employ law guardians and receive all the law guardian appointments made by the courts.⁴⁵ In other localities, independent attorneys are named to law guardian panels and judges choose to appoint law guardians for children from these panels of attorneys.⁴⁶ While each appellate division within New York State offers training for law guardians and provides for varying oversight of law guardian practice,⁴⁷ many law guardians, who are on law guardian panels, function without the aid of social work or administrative support. The level of practice varies dramatically from one law guardian to the next. One law guardian may interview each child-client at length, visit the child-client at home or in placement and spend significant time preparing his or her child-client for court. However, another law guardian may spend no time with his or her child-client or he or she may speak with his or her client for five minutes in the courthouse waiting room before entering the courtroom.

These widely divergent levels of practice persist in law guardian practice because children rarely, if ever, have the knowledge and the ability to hold their law guardians accountable for their practice. Children usually do not know what the obligations of their law guardians are and, even if they are aware that their law guardians are not living up to professional standards, children rarely know how to report ineffective and unprofessional counsel. Because parents are often parties in the same matters in which the law guardians are representing the children, parental complaints about law guardian practice are often assumed to be the result of a parent who is unhappy that the law guardian is not taking his or her side and not treated with the same level of concern that would accompany an adult complaint about his or her attorney.

Therefore, many law guardians in New York do not represent the voices of their child-clients vigorously or accurately. While New York State law does seem to provide children the opportunity to be heard through their law guardians, as the CRC demands, the call for free expression of the child's views is far from reality for many New York State children. Poor law guardian representation would not be such a significant factor in the ability of a child to express

⁴⁵ For example, in New York City, the Juvenile Rights Division of the Legal Aid Society represents New York City children alleged to be delinquent or PINS and children who are the subjects of abuse or neglect proceedings.

⁴⁶ See N.Y. FAM. CT. ACT § 243(b), (c) (McKinney 2008).

⁴⁷ See generally N.Y. COMP. CODES R. & REGS. tit. 22, § 7.1 (2009).

his or her views if the child was actually in court and could speak to the judge directly. While children alleged to be delinquent or “persons in need of supervision” are afforded that opportunity routinely, children in child welfare and custody matters are not.

In 2007, New York State amended its law to expressly require that the Court consult with the child who is the subject of an abuse or neglect proceeding in an age-appropriate manner when approving permanency goals and plans for those children.⁴⁸ However, this consultation requirement has not been interpreted to mean that children must be present at their permanency hearings in order to engage in this age-appropriate consultation.⁴⁹ Instead, judges and law guardians have been left to decide for themselves on a case-by-case basis whether or not to require a child’s presence in court for their permanency hearings.⁵⁰ Some feel that the presence of the law guardian in court is sufficient to meet the consultation requirement. Thus, even a statute that requires age-appropriate consultation with children has not ensured that the child’s voice is heard. The call for the child’s opportunity to be heard and the right to express their views that is embedded in Article 12 of the CRC⁵¹ sets a standard for the active inclusion of children in issues affecting them that is beyond current practice in New York. Finally, while there are facets of law in New York State that can be viewed as ensuring the survival and development of the child to the maximum extent possible, the call on states in Article 6 of the CRC to ensure such development⁵² has not yet been fully realized.

An example of a law that comports with the spirit of Article 6 is New York State’s Child Health Insurance Plus (“CHIP”) program.⁵³ Over the course of many years, New York’s CHIP program has been expanded to cover more and more children who would not otherwise have access to health insurance. In 2007, then-Governor Spitzer convened a Children’s Cabinet; one of its first goals was

⁴⁸ See N.Y. FAM. CT. ACT § 1089(d) (McKinney 2010).

⁴⁹ N.Y. FAM. CT. ACT § 1089 cmt (McKinney 2009) (Practice Commentary). See, e.g. *Matter of Pedro M.*, 21 Misc. 3d 645 (Fam. Ct. Albany Co. 2008) (evidencing the call for this ad hoc decision making, and establishing a rebuttable presumption of age seven as the age at which it is appropriate for a child to begin appearing at their permanency review proceedings).

⁵⁰ *Id.*

⁵¹ CRC, *supra* note 1, art. 12.

⁵² CRC, *supra* note 1, art. 6.

⁵³ State Children’s Health Insurance Program, 42 U.S.C. §§ 1397aa-1397mm (2009). CHIP was formerly the State Children’s Health Insurance Program (“SCHIP”) created by the Balanced Budget Act of 1997 and enacted by Title XXI of the Social Security Act.

to attain universal health insurance for children in New York.⁵⁴ Providing all children access to health care is a major step toward ensuring the survival and development of the child as called for in the CRC.

However, when one analyzes other areas of New York State law and the real life experience of children, it becomes clear that New York has a long way to go to truly ensure the development of every child. The area of education provides a strong example. Generally, children in New York have been given a constitutional right to a free and appropriate public education.⁵⁵ However, this right becomes abridged for children once they enter the juvenile justice system. In New York State, children who are charged as juvenile delinquents and are awaiting trial while placed out of their homes are sent to either secure or non-secure detention placements.⁵⁶ These placements can be in either institutional programs or, if they are non-secure, in non-institutional settings.⁵⁷ Pursuant to regulations, children in institutional detention facilities must receive suitable education instruction.⁵⁸ However, the regulations go on to state that a minimum of three hours of educational activity instruction each weekday shall be provided to each child.⁵⁹ In addition, the regulations for children in non-institutional detention settings do not set any mandatory educational requirements. Instead, those regulations merely require that provisions be made to meet the educational needs of children in care.⁶⁰

It is extremely troubling that neither of those regulations is framed in the context of a child's constitutional right to a free and appropriate public education. It is also troubling that New York State would condone three hours of education each weekday as an adequate level of educational activity to meet the developmental needs of children, and that children in non-institutional detention settings do not even have the protection of any mandated minimum standard. Children who end up in detention are very often the same children who struggle academically, who have poor school attendance and who have special education needs. They

⁵⁴ See New York State Council on Children and Families, Children's Cabinet on Universal Healthcare, *available at* www.ccf.state.ny.us/Initiatives/CabRelate/UnivHealth.htm.

⁵⁵ See N.Y. CONST., art. XI, § 1.

⁵⁶ See N.Y. FAM. CT. ACT § 320.5 cmt (McKinney 2008) (Practice Commentary).

⁵⁷ See *id.*

⁵⁸ N.Y. COMP. CODES R. & REGS. tit. 9, § 180.9(a)(1) (2009).

⁵⁹ N.Y. COMP. CODES R. & REGS. tit. 9, § 180.9(a)(2) (2009).

⁶⁰ N.Y. COMP. CODES R. & REGS. tit. 9, § 180.10(1)(xiv)(c) (2009).

sometimes remain in detention for several weeks while they await trial, evaluations, and often placement in a juvenile justice facility or a not-for-profit agency. If New York State were to truly ensure the development of all children to the maximum extent possible, the educational requirements for providers of juvenile detention would be significantly enhanced. I am hard-pressed. It is difficult to understand why these standards are allowed to persist when most parents of children who are successful at school would consider three hours of school per day radically insufficient. It seems clear that the laws of New York are not close to ensuring the development of children who end up in detention due to these minimal educational requirements.

It is also difficult to understand how New York State ensures the development of children in foster care to the maximum extent possible when one looks at the funding scheme for foster care. New York State utilizes a block grant for foster care funding.⁶¹ This means that the State establishes a capped level of funding for foster care each year statewide and provides an allocation of a portion of that block grant to each local social services district annually.⁶² The local social services districts, which are the entities that administer foster care services in New York, receive this predetermined capped amount for its foster care services regardless of the number of children who are in foster care in that locality during that year.⁶³ Therefore, if the number of children in foster care declines, the locality has more funding to spend on each child in care. If, however, the number of children in foster care increases, the locality has less state funding to spend per child and either must add local funding to their foster care program or reduce the amount of money it spends on each child in care.

This sort of funding mechanism might be rational if it were supporting non-essential services that New York State wanted to discourage. In the world of foster care, however, this funding structure can be highly inequitable and undermine the development of children in foster care. Most children are in foster care in New York because they have been victims of child abuse or maltreatment.⁶⁴ They are extremely needy children whose healthy development is seriously at risk. Despite the often dire needs of this

⁶¹ See N.Y. SOC. SERV. LAW § 153-k(2) (McKinney Supp. 2010).

⁶² *Id.* §153-k(2)(b).

⁶³ *Id.*

⁶⁴ PREVENT CHILD ABUSE NEW YORK, THE COSTS OF CHILD ABUSE AND THE URGENT NEED FOR PREVENTION 11 (Jan. 2003), available at <http://www.preventchildabuseny.org/pdf/cancost.pdf>.

population, the State does not fund foster care on a child-specific basis. Instead of creating a funding stream that wraps funds (and therefore services) around each child, the State supports a funding mechanism that encourages the rationing of services and disadvantages children in localities where placements in foster care are on the rise. While some see this as sound public policy that discourages the placement of children out of their homes, it is also a policy that fails to treat each child as a valuable entity in need of specialized services to ensure his or her healthy development. If New York State were to truly ensure development of children in foster care to the maximum extent possible, funding for foster care would follow each child, be sufficient to establish a foster care system with a well-trained and paid workforce, and provide robust services targeted to meet the special needs of victims of child abuse and maltreatment.

In conclusion, there are clearly some areas of law in New York that are consistent with the CRC. However, when one looks at the issues of discrimination, active child voice and development of the child, New York seems to have a long way to go to meet the mandates of the CRC. This is especially true when one analyzes these issues in light of the experience of children in the foster care and juvenile justice systems. I believe these failures to be largely the result of the political process in New York and the lack of power that children and their advocates have in that process. The CRC establishes a strong framework for the rights of children. It is a framework that should be embraced in New York. Our children and our communities would all benefit.

