Volume 12 | Issue 2

Summer 2009

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Recommended Citation

Francis K. Liu, *Section Six: The Integration of Children with Disabilities into Mainstream Society: Convention on the Rights of the Child and New York State Law*, 12 N.Y. City L. Rev. 540 (2009).
Available at: 10.31641/clr120218

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tion is furthering the child's best interests, bad placements do occur. By not requiring post-adoption services there is no method to verify that the adoption has been successful. One method of monitoring adoptive placements after the adoption has been finalized would be to condition receipt of the subsidy on participation in post-adoption services.

The third conflict will be considerably more challenging to remedy. In the context of access to information, the New York legislature has placed the confidentiality of the natural parents above the best interests of the child. This directly contradicts the transparency goals of the CRC, found in Articles 7, 8, and 30. Remediating this conflict would require restructuring New York's law to focus more on the child. However, through amendment, New York State law could become compliant with the standards set forth in the CRC.

Section Six: The Integration of Children with Disabilities into Mainstream Society: Convention on the Rights of the Child and New York State Law

*by Francis K. Liu*⁴⁹⁹

Children with disabilities face significant social and economical obstacles because they are not treated equally. This Section compares the U.N. Convention on the Rights of the Child ("CRC")⁵⁰⁰ and New York State law on protections for children with disabilities.⁵⁰¹ Specifically, this Section will examine how Article 23 of the CRC interacts with New York's Education and Public Health Laws, and the State's mental hygiene regulations in the administrative code.⁵⁰²

Although the United States has not ratified the CRC, children with disabilities are not without protections under U.S. law.⁵⁰³ Arti-

⁴⁹⁹ J.D., Albany Law School, 2009; B.A., University of Rochester, 2005.

⁵⁰⁰ CRC, *supra* note 2.

⁵⁰¹ *Id.* art. 23 (obligating state parties to recognize the rights and needs of children with disabilities).

⁵⁰² Many relevant statutes and regulations pertaining to children with disabilities in New York are located in the State's Education and Public Health Laws. *See* N.Y. EDUC. LAW art. 89 (McKinney 2006) ("Children with Handicapping Conditions"); N.Y. PUB. HEALTH LAW, § 2580 *et seq.* (McKinney 2006).

⁵⁰³ At the federal level, Congress has passed the Americans with Disabilities Act, 42 U.S.C.A. § 12101 *et seq.* (West 2005 & Supp. 2009); as well as the Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. 794 (West 2008); and the Individuals with

cle 23 of the CRC also ensures protections for children with disabilities,⁵⁰⁴ as does New York State. Articles 1 through 4 of the CRC are the guiding principles for protections afforded to children, and this Section will examine how New York applies these principles in its statutory framework to provide for children with disabilities.

I. ARTICLES OF THE CRC AND NEW YORK STATE LAW

A. *Conformity with Article 1 of the CRC*

Under Article 1 of the CRC, a child is “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”⁵⁰⁵ Thus, children with disabilities should enjoy the special care and protections enshrined in the CRC until they are at least eighteen years old.

New York State law has a more expansive definition and scope of protection for children with disabilities. Whereas the CRC applies to individuals up to the age of eighteen, New York defines a child with a disability as:

[A] person under the age of twenty-one who is entitled to attend public schools . . . and who, because of mental, physical, or emotional reasons can only receive appropriate educational opportunities from a program of special education.⁵⁰⁶

B. *Conformity with Article 2 of the CRC*

Article 2 of the CRC espouses the principles of non-discrimination. The first part of the Article states that parties to the CRC must ensure the child’s rights “irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic, or social origin, property, disability, birth or other status.”⁵⁰⁷ The CRC specifically includes disability as one of the protected classes against discrimination.⁵⁰⁸ The second part of Article 2 calls for States Parties to

Disabilities in Education Act, 20 U.S.C.A. § 1400 *et seq.* (West 2010). Although this article only focuses on New York State laws, these additional federal statutes complement New York’s statutory provisions and ensure protections for children with disabilities.

⁵⁰⁴ CRC, *supra* note 2, art. 23.

⁵⁰⁵ *Id.* art. 1.

⁵⁰⁶ N.Y. EDUC. LAW § 4401(1) (McKinney 2006).

⁵⁰⁷ CRC, *supra* note 2, art. 2.

⁵⁰⁸ The CRC and the U.N. Convention on the Rights of Persons with Disabilities are the only two international documents that expressly include the term “disability” in their non-discrimination clauses. *See* Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006), *available at* <http://www.un.org/disabilities/default.asp?id=259>.

take all "appropriate measures to ensure that a child is protected from all forms of discrimination."⁵⁰⁹

Unfortunately, New York does not entirely follow the principles of Article 2. Under the New York Constitution, although the principle of non-discrimination is included, it does not specifically state disability as one of the prohibited forms of discrimination.⁵¹⁰ The regulations promulgated as part of the Mental Hygiene Law states, "[s]taff of facilities shall provide services in such a manner as to assure that they do not discriminate against a patient in terms of his or her race, color, sex, creed, religion, age, or national origin."⁵¹¹ This regulation also does not expressly require the state government to protect all individuals with disabilities, but only patients who are currently in facilities.⁵¹² While children with disabilities who are currently patients at state facilities are thus protected from discrimination, many children with disabilities are excluded from this coverage. While these initial provisions against discrimination are an important step, New York has not enacted appropriate measures to ensure that children with disabilities will be protected from all forms of discrimination.

New York also fails to fully protect children with disabilities from discrimination in education. Beyond standard appeals or mediation procedures, New York State's Education Law does not specify a process to address discriminatory practices faced by children with disabilities.⁵¹³ The appeals and mediation procedures in place primarily serve as a means by which parents and children resolve disputes and problems with respect to a child's education placement and plan, also known as an Individualized Education Program ("IEP").⁵¹⁴ However, they are not tailored specifically towards resolving discriminatory practices faced by children with disabilities.

While a satisfactory anti-discrimination provision is lacking in the Education Law, it should be noted that New York has enacted a number of measures to ensure protections for children with specific disabilities in the education system.⁵¹⁵ For example, New York

⁵⁰⁹ CRC, *supra* note 2, art. 2.

⁵¹⁰ N.Y. CONST. art. 1, § 11. Section 1 of Article 11 does not explicitly state that individuals with disabilities are protected from discrimination.

⁵¹¹ N.Y. COMP. CODES R. & REGS. tit. 14, § 27.4(a) (2009).

⁵¹² *Id.* The definition of "patient" is "a person receiving services for the mentally disabled at a facility. It includes a resident at a school." *Id.* § 27.2(b).

⁵¹³ N.Y. EDUC. LAW §§ 4404, 4404-a.

⁵¹⁴ *Id.*

⁵¹⁵ *Id.* § 4401 *et seq.*

has laid out specific sections in the Education Law and Mental Hygiene regulations that provide for children with hearing disabilities,⁵¹⁶ children with speaking disabilities,⁵¹⁷ and children with other “handicapping” conditions.⁵¹⁸ Furthermore, the State has also taken steps to provide medical coverage to children with physical disabilities under the Public Health Law.⁵¹⁹ Finally, New York does have some measures in place to assist low-income families with children that have disabilities. For example, New York offers Medicaid waiver services that can help offset costs for individuals with developmental disabilities.⁵²⁰ New York also provides supplemental income to augment federal Supplemental Security Income benefits for families if they qualify.⁵²¹ New York also provides IEPs⁵²² and assistance to families with children with disabilities.⁵²³

C. Conformity with Article 3 of the CRC

The CRC states that the best interests of the child must always be considered. In other words, when committees, agencies, schools, or even government bodies are making decisions on matters affecting a child with a disability, the best interests of the child should have significant weight in the entity’s thought process before any decision is made.⁵²⁴ New York does not embrace a best interests of the child standard during administrative proceedings involving children with disabilities.⁵²⁵

Despite this, New York has enacted a number of education

⁵¹⁶ N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(zz)(2), (5). New York State also provides state-funded education for individuals who are deaf and blind. *See* N.Y. EDUC. LAW §§ 4301, 4351.

⁵¹⁷ N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(zz)(11).

⁵¹⁸ *See id.* § 200.1(zz).

⁵¹⁹ N.Y. PUB. HEALTH LAW §§ 2580, 2581(2) (McKinney 2007) (providing medical services including diagnostic, therapeutic, rehabilitative care by medical and paramedical personnel, hospital and related care, drugs, prostheses, appliances, equipment, and devices that are necessary). *See also id.* § 2582 (1) (“The department shall, on its own initiative provide, within the limits of the appropriations made therefore, such medical service for children with physical disabilities as in the judgment of the commissioner is needed.”).

⁵²⁰ N.Y. COMP. CODES R. & REGS. tit. 14, § 671.1.

⁵²¹ Social Security Online, Electronic Fact Sheets: Supplemental Security Income (SSI) in New York, <http://www.ssa.gov/pubs/11146.html> (last visited Mar. 24, 2010).

⁵²² N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(e).

⁵²³ N.Y. COMP. CODES R. & REGS. tit. 8, § 200.8; *see also* N.Y.C.R.R. tit. 14, § 635.

⁵²⁴ CRC, *supra* note 2, art. 3.

⁵²⁵ Individualized Education Plans (IEPs) are designed to meet the unique educational needs of students with disabilities. Each student who is diagnosed with a disability is eligible for an IEP. New York State Education Department, Individualized Education Program Guidance, <http://www.vesid.nysed.gov/specialed/publications/iepguidance/present.htm> (last visited Mar. 24, 2010).

and public health statutes that promote protections and accommodations for children with disabilities.⁵²⁶ For example, New York laws provide parents of children with disabilities additional child support and resources, delineate funding for educational services for children with disabilities, and provide the child with medical and rehabilitation services to help treat his or her disability.⁵²⁷

New York has also established standards for state institutions, as well as teachers and support staff who work with children with disabilities.⁵²⁸ While these statutes do not espouse an express best interests of the child standard, such laws purport to specifically serve children with disabilities in accordance with their needs.⁵²⁹

New York also has measures in place to provide for the protection and care of children with disabilities to ensure their well-being and prevent abuse and neglect of disabled children who are placed in residential facilities.⁵³⁰ Additionally, New York has taken steps to establish appropriate standards for public and private institutions, services, and facilities responsible for the care and protection of patients with disabilities, which includes children.⁵³¹ Such measures include staff trainings and workshops,⁵³² establishing standards for the kinds of services that institutions serving children with disabilities should meet,⁵³³ and providing standards for the types of treatment and rehabilitative programs patients are to participate in.⁵³⁴ Again, children with disabilities are a subgroup within the category "patient." This distinction is important to note because children with disabilities who are receiving services from these facilities and programs will be protected against abuse or neglect, even though the statute does not use the term "children." New York has put into effect a considerable amount of legislation to protect individuals with disabilities, including children with disabilities.⁵³⁵

⁵²⁶ N.Y. EDUC. LAW § 4401 *et seq.*; *see also* N.Y. PUB. HEALTH LAW § 2580 *et seq.*

⁵²⁷ *Id.*

⁵²⁸ N.Y. COMP. CODES R. & REGS. tit. 14, § 81.7.

⁵²⁹ *See* N.Y. COMP. CODES R. & REGS. tit. 14, § 81.1(a) (assisting individuals with disabilities to "achieve maximum self-sufficiency while assuring their safety and general well-being.").

⁵³⁰ *Id.* tit. 8, § 200.15.

⁵³¹ *Id.* tit. 14, § 81.1.

⁵³² *Id.* at § 81.7.

⁵³³ *Id.* at § 81.6.

⁵³⁴ *Id.*

⁵³⁵ The New York education and public health statutes discussed earlier in this Section are examples of legislation protecting individuals with disabilities, including children.

D. Conformity with Article 4 of the CRC

Article 4 of the CRC states that state parties will undertake “all appropriate legislative, administrative, and other measures for the implementation of rights recognized in the present convention.”⁵³⁶ Article 4 seems to be partially met by the Education Law, which states that New York will provide education to handicapped children to meet the “physical and educational needs of such children, as provided by law.”⁵³⁷ However, the last phrase under section 4403 of the Education Law—“as provided by law”—means that a child must be categorized as disabled or handicapped due to “physical, mental, or emotional reasons” to receive the appropriate services.⁵³⁸ This qualification poses a potential problem because of how the term “disabled” is defined. There are many children who may experience limited cognitive functioning, yet may not meet a strict definition of disabled and thus will not be eligible for the services necessary for that child to more fully enjoy a decent life and integrate into society successfully. This definition presents a clear discrepancy with the CRC because children who have a disability that is not recognized under the law may not be eligible for services in New York. For children who are not recognized as having a disability under New York law, the only remedy available is an arduous process of filing an administrative appeal with the State Department of Education.⁵³⁹

E. Conformity with Article 12 of the CRC

The CRC states that a child should be given the opportunity to be heard and express her “views freely in all matters that concern the child, the views of the child being given due weight in accordance with the age and maturity of the child.”⁵⁴⁰ It goes on to specifically state that the child should be given the opportunity to be heard in judicial or administrative.⁵⁴¹

While New York does not explicitly provide for the participation of children with disabilities in their IEPs, the children can participate through their parents.⁵⁴² The mediation program and the appeals process for students with disabilities also gives parents the

⁵³⁶ CRC, *supra* note 2, art. 4.

⁵³⁷ N.Y. EDUC. LAW § 4403.

⁵³⁸ *Id.* § 4401.

⁵³⁹ *Id.* § 4404-a.

⁵⁴⁰ CRC, *supra* note 2, art. 12.

⁵⁴¹ *Id.*

⁵⁴² N.Y. COMP. CODES R. & REGS. tit. 8 § 200.4(d), (e).

option to object to proposed plans, and gives parents the right to be heard during a dispute regarding their child's IEP.⁵⁴³ While children may be able to participate in the IEP process through their parents, there are no processes in place to ensure that children are directly heard in matters concerning them. Because there is no indication that children with disabilities have a right to be heard in such matters, it is difficult to judge how much weight their views would be given if they were to express an opinion or perspective. Beyond IEP planning, there is also no indication that children with disabilities have a right to be heard regarding appeals or mediation.⁵⁴⁴ However, it is implied, through the phrase "presents a complaint,"⁵⁴⁵ that the child can be the source of the complaint and, during the complaint process, the child's views would be taken into consideration. The parent can then decide on the appropriate course of action.⁵⁴⁶

By allowing children to participate in the development of their IEPs through their parents,⁵⁴⁷ New York at least facially complies with a major principle of Article 12 in allowing a child to express her views.⁵⁴⁸ This participation is very important because children with disabilities should be ensured meaningful participation in their lives and allowed opportunities to express their views towards reaching their goals.⁵⁴⁹

II. OVERALL CONFORMITY WITH ARTICLE 23 OF THE CRC

As shown above, New York has taken substantial steps to ensure the protection of children with disabilities and their right to "a full and decent life."⁵⁵⁰ Notably, New York has adopted and implemented many legislative and programmatic measures that coincide with Article 23 of the CRC relating to children with disabilities. Children with disabilities generally have access to education,⁵⁵¹ health care,⁵⁵² rehabilitation services,⁵⁵³ and recreational opportu-

⁵⁴³ See N.Y. EDUC. LAW § 4404-a.

⁵⁴⁴ *Id.* § 4404.

⁵⁴⁵ See *id.* § 4404(1)(a).

⁵⁴⁶ See generally *id.* § 4404.

⁵⁴⁷ N.Y. COMP. CODES R. & REGS. tit. 8 § 200.4(d), (e).

⁵⁴⁸ CRC, *supra* note 2, art. 12.

⁵⁴⁹ *Id.* art. 23.

⁵⁵⁰ *Id.*

⁵⁵¹ N.Y. EDUC. LAW § 4401 *et seq.*

⁵⁵² See, e.g., N.Y. PUB. HEALTH LAW §§ 2580, 2581(2), 2582 (1) (providing certain medical service for children with physical disabilities); see also N.Y. COMP. CODES R. & REGS. tit. 14, § 671.1 (providing Medicaid waiver services to offset costs for individuals with developmental disabilities). See also Social Security Online, *supra* note 24.

nities.⁵⁵⁴ New York's comprehensive laws indicate a principle of trying to assist a person with disabilities to achieve the fullest possible social integration, while providing them with necessary services and treatments.

III. MAIN AREAS WHERE NEW YORK DOES NOT COMPLY WITH THE CRC

New York does not have a non-discrimination clause that explicitly includes children with disabilities.⁵⁵⁵ There are other non-discrimination clauses in effect, and a number of state laws and regulations specifically provide for and protect children with disabilities.⁵⁵⁶ However, the failure to include express language in various state statutes to prohibit discrimination against children with disabilities do not erect a full and complete barrier from discrimination under state law.⁵⁵⁷ Additionally, the exclusion of many children who are ineligible for services because they do not meet the definition of "disabled" is concerning as this potentially denies government services to many children who suffer from disabilities not recognized under the law.⁵⁵⁸

It seems that children with disabilities are not afforded enough opportunities to be heard or have their views expressed in matters affecting them, especially judicial and administrative hearings. What opportunities children have to participate in their IEPs, for example, come through the participation of their parents.⁵⁵⁹ This appears to be a divergence from the CRC that can be remedied by having New York amend various provisions of their statutes and regulations to simply make room for children to express their views.

New York deserves credit for the various provisions that afford children with disabilities opportunities to lead "full and decent lives" and that assist children with integrating themselves into society. New York's statutes and regulations comprehensively lay out what children with disabilities are entitled to, as well as the applica-

⁵⁵³ N.Y. COMP. CODES R. & REGS. tit. 14, § 81.6.

⁵⁵⁴ *Id.* § 81.6(3).

⁵⁵⁵ CRC, *supra* note 2, art. 2.; N.Y. CONST. art. 1 § 11.

⁵⁵⁶ *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit 14, § 27.4(a).

⁵⁵⁷ It should be noted again that federal statutes such as the Americans with Disabilities Act, the Rehabilitation Act, and Individuals with Disabilities in Education Act address aspects of the law not covered by New York statutes. *See* text accompanying *supra* note 6.

⁵⁵⁸ N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(zz).

⁵⁵⁹ *Id.* tit. 8 § 200.4(d), (e).

ble standards of care to which children with disabilities are guaranteed.

Section Seven: Compliance Issues Between New York State Education Law and the Convention on the Rights of the Child

*by Matthew P. Miller*⁵⁶⁰

Article 28 of the CRC recognizes a child's right of access to education.⁵⁶¹ In New York, Article XI of the Constitution of the State of the New York states: "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."⁵⁶² Education in New York is governed by the Education Law ("NYEL") and Article 65, Part I, of the NYEL governs compulsory education for New York's children.⁵⁶³ The constitutional and statutory provisions bring New York into compliance with the CRC for recognizing and ensuring a child's right to education, and to achieving this right progressively and on the basis of equal opportunity. Using the Committee on the Rights of the Child's reporting guidelines, this Section will compare a child's right to education under the NYEL and the CRC.

I. CONVENTION ON THE RIGHTS OF THE CHILD

Generally, the Articles of the CRC provide broad protection for the rights of the child, some of which are reflected in New York State's education laws. Measures adopted in New York reflecting principles of the non-discrimination provisions under Article 2 of the CRC,⁵⁶⁴ for example, are NYEL sections 3201 and 3201-a.⁵⁶⁵ Under NYEL section 3201, "[n]o person shall be refused admission into or be excluded from any public school in the state of New York on account of race, creed, color or national origin."⁵⁶⁶ Section 3201-a protects a child's right to not be discriminated against

⁵⁶⁰ J.D., Albany Law School, 2009; B.A., George Washington University, 2006.

⁵⁶¹ See generally CRC, *supra* note 2, art. 28.

⁵⁶² N.Y. CONST. art. XI, § 1.

⁵⁶³ See generally N.Y. EDUC. LAW §§ 3201–34 (2009).

⁵⁶⁴ See generally CRC, *supra* note 2, art. 2.

⁵⁶⁵ N.Y. EDUC. LAW § 3201.

⁵⁶⁶ *Id.*