Volume 12 | Issue 2

Summer 2009

Section Nine: Article 2 of the Convention on the Rights of the Child and New York State Law

Clare M. Wiseman
Albany Law School

Follow this and additional works at: <https://academicworks.cuny.edu/clr>

Part of the [Law Commons](#)

Recommended Citation

Clare M. Wiseman, *Section Nine: Article 2 of the Convention on the Rights of the Child and New York State Law*, 12 N.Y. City L. Rev. 572 (2009).
Available at: 10.31641/clr120221

The CUNY Law Review is published by the Office of Library Services at the City University of New York. For more information please contact cunylr@law.cuny.edu.

are not met because undocumented children and children with pending asylum application are not eligible for federally-funded food stamps. Denying children a potential source of nutrition is contrary to the principles of CRC's Articles 2 and 6, which require States to ensure "to the maximum extent possible the survival and development" of "each child within their jurisdiction" without discrimination.⁷⁵³ While New York cannot offer food stamps to undocumented children and non-immigrant visa holders in violation of federal law, the State could offer a comparable benefit under state law. By not doing so, New York State discriminates against children lawfully residing in the United States and those that are undocumented or have pending asylum applications.

Section Nine: Article 2 of the Convention on the Rights of the Child and New York State Law

*by Clare M. Wiseman*⁷⁵⁴

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, 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. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."⁷⁵⁵

I. BASIC PROVISIONS OF ARTICLE 2 OF THE CONVENTION ON THE RIGHTS OF THE CHILD

A. Paragraph 1: Fundamental Obligation of State Parties

The first paragraph of Article 2 of the CRC outlines is a the "fundamental obligation of State Parties"⁷⁵⁶ to adhere to the rights in relation to the rights set forthout in the remainder of the

⁷⁵³ CRC, *supra* note 2, arts. 2, 6.

⁷⁵⁴ J.D. candidate, Albany Law School of Union University; B.A., University of San Francisco.

⁷⁵⁵ CRC, *supra* note 2, art. 2United Nations Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448, art. 2 [hereinafter CRC].

⁷⁵⁶ UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 19.

CRC.⁷⁵⁷ The preamble to the CRC, states that the:

[T]he United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance.⁷⁵⁸

The preamble thus contains the important principle that children should be afforded the same protections against all the protection of non-discrimination guaranteed to adults.

Article 2 of the CRC provides a non-exclusive list of forms of discrimination that children are to be protected against,⁷⁵⁹ namely: “race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status,” as well as sexual orientation, which has been read into Article 2.⁷⁶⁰

Article 2 provides that the rights embodied within the CRC apply to each child within the jurisdiction.”⁷⁶¹ This is a catchall phrase that asserts “that all the rights in the Convention on the Rights of the Child must apply to all children in the State, including visitors, refugees, children of migrant workers and those in the State illegally.”⁷⁶²

Article 2 also asserts that state parties must “respect and ensure the rights set forth” in the CRC itself.⁷⁶³ This is a requirement that state parties not only protect children against discrimination in opportunity, but must protect children against disparate outcome caused by discrimination as well.⁷⁶⁴ Thus, state parties must enact both negative and positive laws in order to respect and ensure the rights set forth in Article 2. A negative law deals with

⁷⁵⁷ *Id.*

⁷⁵⁸ CRC, *supra* note 2, Preamble.

⁷⁵⁹ *Id.* art. 2(1).

⁷⁶⁰ Douglas Sanders, Human Rights and Sexual Orientation in International Law (July 17, 2005) (unpublished article, International Lesbian & Gay Association Website), *Human Rights and Sexual Orientation in International Law*, INT’L LESBIAN AND GAY ASSOC. (July 17, 2005), available at www.ilga.org/news_results.asp?FileCategory=44&ZoneID=7&FileID=577 (last visited Mar. 23, 2010). Apr. 14, 2009).

⁷⁶¹ CRC, *supra* note 2, art. 2(1).

⁷⁶² UNICEF IMPLEMENTATION HANDBOOK FOR THE CRC, *supra* note 89, at 26.

⁷⁶³ CRC, *supra* note 2, art. 2(1).

⁷⁶⁴ UNICEF IMPLEMENTATION HANDBOOK IMPLEMENTATION HANDBOOK FOR THE CRC, *supra* note 89, at 22.

equality of opportunity; it places an obligation on the state parties to refrain from taking certain actions because of the enumerated basis for discrimination. A positive law deals with equality of outcome; it places an obligation on the state parties to take certain actions with regard to preventing discrimination, otherwise known as affirmative action. In this context, an affirmative right can include affirmative action, which the CRC maintains is a legitimate form of differentiation based on the enumerated classes as long as the aim is in accordance with the purpose of the CRC.⁷⁶⁵ The CRC takes into account that children are in “need [of] special consideration”⁷⁶⁶ and that state parties will need to take affirmative action to alleviate the conditions that “cause or help to perpetuate discrimination.”⁷⁶⁷

B. Paragraph 2: Protection Against Discrimination and Punishment Due to Parents Affiliation or Status and Mandate of “Primary Consideration”

While the first paragraph of Article 2 refers to discrimination only in relation to a child’s enjoyment of rights in the CRC, paragraph 2 requires action against “all forms of discrimination” and is not confined to the issues raised by the CRC.⁷⁶⁸ The second paragraph of Article 2 provides protection from discrimination for such things as the parent’s criminal behavior, parent’s political beliefs, parent’s immigration or marital status or the behavior of a sibling.⁷⁶⁹

The United Nations Committee on the Rights of the Child established that a state party must give “primary consideration” to Article 2 of the CRC when setting its budget and allocating resources.⁷⁷⁰ A state party must protect children from “the adverse effects of economic policies, including the reduction of budgeting allocations in the social sector.”⁷⁷¹ Additionally, Article 2 must apply “equally to private institutions and individuals as well as to the State, and this must be reflected in legislation.”⁷⁷²

⁷⁶⁵ *Id.*

⁷⁶⁶ *Id.* at 19.

⁷⁶⁷ *Id.*

⁷⁶⁸ *Id.* at 33.

⁷⁶⁹ *Id.*

⁷⁷⁰ UNICEF IMPLEMENTATION HANDBOOK IMPLEMENTATION HANDBOOK FOR THE CRC, *supra* note 89, at 33.

⁷⁷¹ *Id.* at 25.

⁷⁷² *Id.* at 23.

II. COMPARATIVE EXAMINATION OF THE ARTICLE 2 AND NEW YORK STATE LAWS

A. *Overview of the Comparison Between CRC and New York State Law*

New York State has a comprehensive set of non-discrimination laws and has already codified some of the most important and fundamental principles established by Article 2 of the CRC.⁷⁷³ This is exemplified by New York State's Human Rights Law which states that: "the state has the responsibility to act to assure that every individual within this state is afforded an *equal opportunity* to enjoy a full and productive life."⁷⁷⁴

There seems to be a discrepancy between the Human Rights Law—the major source of non-discrimination law in New York State—and the interpretive policy of the Law by its enforcement agency, the Division of Human Rights. The actual Human Rights Law allows for the possibility of inclusion of children within its protections⁷⁷⁵ but the Division's policy indicates that the opposite is true. In several interpretative policy documents, the Division states: "[t]he Human Rights Law protects persons age 18 or older."⁷⁷⁶ As discussed *infra*, full compliance with the CRC may require clarification that the Human Rights Law of New York State also covers children.

New York State protects children as a group in other areas of law, such as education, employment and social services law.⁷⁷⁷ However, in most cases these protections do not directly protect children as a group, but provide indirect protection since children make up a large portion of the population to which the law applies. Full compliance with the CRC may require clarification that these laws directly pertain to children.

Article 2 of the CRC emphasizes the importance of providing not only protections for *equal opportunity* but adequate measures to ensure against disparate *outcomes* as well.⁷⁷⁸ New York State has en-

⁷⁷³ CRC, *supra* note 2, art. 2

⁷⁷⁴ N.Y. EXEC. LAW § 290(3) (McKinney 2005) (emphasis added).

⁷⁷⁵ *Id.* §§ 290–301 (providing a specific reference to age-based anti-discrimination protections only in relation to credit: "[t]he provisions of this section, as they relate to age, shall not apply to persons under the age of eighteen years.").

⁷⁷⁶ N. Y. STATE DIV. OF HUMAN RIGHTS, AGE DISCRIMINATION, *available at* http://www.dhr.state.ny.us/publications_other_publications.html (follow "Other Publications, Age Discrimination" hyperlink) (last visited Mar. 23, 2010); *see also* N. Y. STATE DIV. OF HUMAN RIGHTS, ANNUAL REPORT: FISCAL YEAR 2005-2006 16 (2006).

⁷⁷⁷ *See* N.Y. LAB. LAW §§ 130–145 (McKinney 2002); N.Y. EDUC. LAW §§ 3201–3234 (McKinney 2000); N.Y. SOC. SERV. LAW §§ 371–458 (McKinney 2003).

⁷⁷⁸ CRC, *supra* note 2, art. 2(1).

acted some significant affirmative non-discrimination measures, especially regarding minorities and women in the specific areas of employment.⁷⁷⁹ However, due to the definition of those qualified for the affirmative non-discrimination measures, these measures do not include the “child” because children are excluded from the types of employment addressed by these laws.

Article 2 of the CRC emphasizes the importance of economic resources being allocated towards the implementation of non-discrimination legislation.⁷⁸⁰ The New York State Division of Human Rights has suffered under a heavy backlog of cases due to the lack of budgetary coordination⁷⁸¹ and ineffective implementation of statutory standards.⁷⁸²

B. *New York State Constitution*

The CRC requires that “where there is a Constitution, its provisions must be consistent with the Convention.”⁷⁸³ The Bill of Rights in the New York State Constitution makes specific guarantees of equal protection under the law including that:

[n]o person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.⁷⁸⁴

The New York State Constitution is supplemented by the Human Rights Law, which protects against discrimination on the basis of race, creed, color, national origin, sex, marital status, sexual orientation or disability, as such terms are defined under the Human Rights Law.⁷⁸⁵

⁷⁷⁹ See N.Y. EXEC. LAW § 296 (McKinney 2005).

⁷⁸⁰ UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 25–26.

⁷⁸¹ COMPTROLLER ALAN G. HEVESI, A REPORT BY THE NEW YORK STATE OFFICE OF THE STATE COMPTROLLER, NEW YORK STATE DIVISION OF HUMAN RIGHTS INTERNAL CONTROLS OVER FINANCIAL OPERATIONS, 2003-S-55, OFFICE OF THE NEW YORK STATE COMPTROLLER, 17, available at <http://osc.state.ny.us/audits/allaudits/093005/03s55.pdf> (last visited Apr. 14, 2009).

⁷⁸² N. Y. STATE DIV. OF HUMAN RIGHTS, N. Y. STATE OFFICE OF THE STATE COMPTROLLER, INTERNAL CONTROLS OVER FINANCIAL OPERATIONS: 2003-S-55 17 (2005), <http://osc.state.ny.us/audits/allaudits/093005/03s55.pdf>.

⁷⁸³ UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 23.

⁷⁸⁴ N.Y. CONST. art. 1, § 11.

⁷⁸⁵ N.Y. CIV. RIGHTS LAW § 40-c (McKinney 1992) (providing that:
1. All persons within the jurisdiction of this state shall be entitled to the equal protection of the laws of this state or any subdivision thereof.
2. No person shall, because of race, creed, color, national origin, sex, marital status, sexual orientation or disability, as such term is defined in section two hundred ninety-two of the executive law, be subjected to any discrimination in his or her civil rights, or to any harassment, as defined

C. Human Rights Law

The Human Rights Law forms a comprehensive set of non-discrimination laws, but does not appear to include protection of children as a group based on their status as such. There is a discrepancy between the Human Rights Law and the policy of the Division of Human Rights with regard to anti-discrimination protections afforded to children. The Human Rights Law does not contain a specific age requirement in order for a person to fall within the protections of the Human Rights Law,⁷⁸⁶ thus it is possible to read the law as guaranteeing children protection on their own merit. However, as a matter of interpretive policy, the Division of Human Rights has stated that the “Human Rights Law protects persons age 18 or older.”⁷⁸⁷

Although it is possible to read the Human Rights Law as including children on their own merit, this reading is unlikely. The Human Rights Law makes specific protections for “familial status”; which is defined as a person who is pregnant, has a child or in the process of acquiring legal custody of a minor child, or a child under eighteen who is residing with a parent or legal guardian.⁷⁸⁸ Defining familial status in this way implies that children are only protected under the Human Rights Law through the protection of their parents or legal guardians and that children do not have non-discrimination protections unto themselves. The CRC requires that state parties make specific non-discrimination protection for children.⁷⁸⁹ In order for New York State to fully comply with the CRC, it would need to clarify its policy position as to the non-discrimina-

in section 240.25 of the penal law, in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.).

See also N.Y. EXEC. LAW § 292 (McKinney 2005).

⁷⁸⁶ *Id.* § 292 (providing definitions for many key terms of the Human Rights Law but failing to provide a definition of the term “age”); see also *id.* § 296-a(12) (defining “age” as 18 years or older but only in regard to § 296-a of the Human Rights Law, which provides non-discrimination protections in credit transactions).

⁷⁸⁷ NEW YORK STATE DIVISION OF HUMAN RIGHTS ANNUAL REPORT: FISCAL YEAR 2005-2006 16; see also AGE DISCRIMINATION, NEW YORK STATE DIVISION OF HUMAN RIGHTS, available at http://www.dhr.state.ny.us/publications_other_publications.html (last visited Apr. 14, 2009).

⁷⁸⁸ N.Y. EXEC. L. § 292 (26) (McKinney 2005).

⁷⁸⁹ CRC, *supra* note 2, Preamble; see also UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 20 (providing an extract from United Nations Committee on the Rights of the Child Guidelines for Reports to be submitted by State Parties under the Convention); Reports should indicate whether the principle of non-discrimination is included as a binding principle in the Constitution or in domestic legislation specifically for children. UNICEF IMPLEMENTATION HANDBOOK, *supra* note 13, at 20.

tion protection of children under the Human Rights Law and in all areas of non-discrimination.

Although the Human Rights Law has not provided children as a group with guaranteed non-discrimination protections, but providing protection to children through their parents, the Human Rights Law has provided for many of the non-discrimination requirements established by Article 2 of the CRC. The Human Rights Law outlines remedies for the violation of any of the provisions contained within the Human Rights Laws, including awards of damages.⁷⁹⁰ The United Nations Committee has stipulated the need to provide challenges to discrimination within the judicial system.⁷⁹¹ The United Nations Committee has also suggested that state parties take measures to study discrimination and develop comprehensive anti-discrimination strategies, such as “information and awareness campaigns to challenge discriminatory attitudes and practices.”⁷⁹² The Human Rights Law accomplishes these suggestions by requiring that the Division on Human Rights “shall formulate policies to effectuate the purposes of this article and may make recommendations to agencies and officers of the state or local subdivisions of government in aid of such policies and purposes.”⁷⁹³ The Human Rights Law also empowers the advisory councils of the Division of Human Rights to study the problems of discrimination based on age, race, creed, color, national origin, sexual orientation, military status, sex, disability or marital status and make recommendations to advance the Division’s policies and procedures.⁷⁹⁴

D. Specific Areas of Non-Discrimination Law

New York State has enacted non-discrimination laws in areas that are particularly important to children, such as in education, employment and social services.⁷⁹⁵

1. Education

The CRC explicitly guarantees all children the right to an education under Article 28.⁷⁹⁶ Similarly, the New York State Constitu-

⁷⁹⁰ N.Y. EXEC. LAW. § 297 (McKinney 2005).

⁷⁹¹ UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 22.

⁷⁹² *Id.* at 25

⁷⁹³ N.Y. EXEC. LAW L. § 294 (McKinney 2005).

⁷⁹⁴ *Id.* § 295(8).

⁷⁹⁵ See N.Y. EDUC. LAW. § 3202 (McKinney 2006); N.Y. LAB. LAW L. §§ 130–134 (McKinney 2006); N.Y. SOC. SERV. LAW L. § 131 (McKinney 2006).

⁷⁹⁶ CRC, *supra* note 2, art. 28(a).

tion has taken an affirmative position on the education of children within its jurisdiction by requiring the legislature to “provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”⁷⁹⁷ New York State has expanded its constitutional guarantees by enacting the Education Law, which provides that attendance at public schools must be available free of charge to children between the ages of five and twenty-one⁷⁹⁸ and stipulates that the:

American ideal of equality of opportunity requires that students, otherwise qualified, be admitted to educational institutions and be given access to all educational programs and course operated or provided by such institutions without regards to race, color, sex, religion, creed, marital status, age, sexual orientation . . . or national origin.⁷⁹⁹

It provides an exception for religious or denominational educational institutions to admit students “exclusively or primarily” based on their religion⁸⁰⁰ and an exception for independent institutions that are established to provide education exclusively to one sex to admit students of only that sex.⁸⁰¹ The last provision is notable in that New York’s allowance of separate schools for boys and girls is typical of Article 2’s special focus on protecting the rights of girl children against discrimination and encouragement of positive discrimination.⁸⁰²

The Education Law includes specific provisions relating to the education of homeless children,⁸⁰³ Native American children,⁸⁰⁴ girl children,⁸⁰⁵ disabled children⁸⁰⁶ and children without families.⁸⁰⁷ It protects the religious beliefs of children⁸⁰⁸ and provides

⁷⁹⁷ N.Y. CONST. art. 11 § 1.

⁷⁹⁸ N.Y. EDUC. LAW L. § 3202 (McKinney 2006).

⁷⁹⁹ *Id.* § 313(3) (b).

⁸⁰⁰ *Id.* §§ 313(3) (a), 3201.

⁸⁰¹ *Id.* § 313(3) (a).

⁸⁰² UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 27–30.

⁸⁰³ N.Y. EDUC. LAW. § 3209 (McKinney 2006).

⁸⁰⁴ *Id.* §§ 111, 4101–4119.

⁸⁰⁵ *Id.* § 3201-a.

⁸⁰⁶ *Id.* §§ 4201–4213 (codifying New York’s Special Schools and Instruction laws); *id.* §§ 4401–4410-b (containing New York’s legal protections for children with handicapping conditions).

⁸⁰⁷ *Id.* § 3202(4) (providing that: “(a). . . cost of instruction of pupils placed in family homes at board by a social services district or a state department or agency shall be borne by the school district in which each such pupil resided at the time the social services district or state department or agency assumed responsibility for the placement, support and maintenance of such pupil. . . (b) Children cared for in free family homes and children cared for in family homes at board, when such family homes are actual and only residence of such children and children are not supported and main-

health and welfare services to children.⁸⁰⁹ The United States Supreme Court has obliged states to provide free education to all children within the state, including undocumented immigrants.⁸¹⁰

2. Employment

Under Article 32, the CRC provides the right of children to be protected from economic exploitation and from performance of work that would be hazardous or interfere with education or harmful to health or development.⁸¹¹ Generally, New York State laws that address the employment of children bar children from employment until the age of fourteen and regulate the type of employment a child under the age of eighteen can engage in.⁸¹² These laws make specific provisions for the employment of disabled children⁸¹³ and provide limitations on the amount of hours a child can work.⁸¹⁴ These labor laws provide a positive discrimination against children based on their age in order to protect them from being exploited.

When a child is permitted to work, the general non-discrimination laws that exist for workers in New York State do not necessarily apply equally to the child as to his or her adult counterparts.⁸¹⁵ The Human Rights Law protection of non-discrimination in employment only protect those 18 years or older⁸¹⁶ while other employment non-discrimination laws seemingly do protect child employees by defining employee as a "laborer working for another for hire"⁸¹⁷ or "any person employed for hire by an employer in any employment."⁸¹⁸

New York statutes that provide non-discrimination protections in the workplace include laws that protect against discrimination

tained at the expense of a social services district or of a state department or agency, shall be deemed residents of the school district in which such family home is located."); *see also id.* §§ 4001–4006.

⁸⁰⁸ *Id.* § 224-a.

⁸⁰⁹ *Id.* § 912.

⁸¹⁰ *Plyler v. Doe*, 457 U.S. 202 (1982).

⁸¹¹ CRC, *supra* note 2, art. 32.

⁸¹² N.Y. LAB. LAW. §§ 130–133 (McKinney 2006).

⁸¹³ *Id.* § 136.

⁸¹⁴ *Id.* §§ 142, 143.

⁸¹⁵ *Id.*

⁸¹⁶ N.Y. STATE DIV. ON HUMAN RIGHTS, ANNUAL REPORT; FISCAL YEAR 2005-2006 *supra* note 33 at 16.

⁸¹⁷ N.Y. LAB. LAW, *supra* note 75, § 2(5).

⁸¹⁸ *Id.* § 190(2).

because of disabilities,⁸¹⁹ sex-based wage discrimination,⁸²⁰ guaranteeing privacy regarding the religion or religious affiliation of a person seeking employment⁸²¹ and non-discrimination in state contracts.⁸²²

3. Social Services

The CRC requires that state parties provide social insurance to children⁸²³ and furnish parents with appropriate assistance to facilitate the parent's child rearing responsibilities.⁸²⁴ The New York State Constitution requires that the "aid, care and support of the needy are public concerns and shall be provided by the state"⁸²⁵ and the Social Service Law makes it the:

[D]uty of social services officials, insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves. . . They shall, whenever possible, administer such care, treatment and service as may restore such persons to a condition of self-support or self-care, and shall further give such service to those liable to become destitute as may prevent the necessity of their becoming public charges.⁸²⁶

The Social Service Law provides for the provision of such services as food, shelter, temporary financial assistance, medical care, counseling, and other services to low-income and homeless individuals and families.⁸²⁷ It provides these services to "[a]ny person" who resides in New York State for one year,⁸²⁸ but qualifies the residency requirement by stating that "no person except a citizen or an alien who has been duly naturalized as a citizen shall be eligible for additional state payments for aged, blind and disabled persons, family assistance, safety net assistance, services funded under title XX of the federal social security act, or medical assistance."⁸²⁹

It provides services to any eligible child⁸³⁰ and specifically pro-

⁸¹⁹ N.Y. CIV. RIGHTS LAW, § 40-c (McKinney 2006); N.Y. CIV. SERV. LAW, §§ 55, 55-a, 55-b, 55-c (McKinney 2006).

⁸²⁰ N.Y. LAB. LAW,, *supra* note 75, § 194.

⁸²¹ N.Y. CIV. RIGHTS LAW, § 40-a (McKinney 2006).

⁸²² N.Y. LAB. LAW, *supra* note 75, §§ 220-e, 239.

⁸²³ CRC, *supra* note 2, art. 26.

⁸²⁴ *Id.* art. 18(2).

⁸²⁵ N.Y. CONST. art. 17 § 1.

⁸²⁶ N.Y. SOC. SERV. LAW, § 131(1) (McKinney 2006).

⁸²⁷ *See generally*, N.Y. State Office of Temporary and Disabled Assistance, *available at* www.otda.state.ny.us/main/programs.asp (last visited March 23, 2010).

⁸²⁸ N.Y. SOC. SERV. LAW, *supra* note 90, § 117(1).

⁸²⁹ *Id.* § 122(1) (providing exceptions to the citizen or naturalized alien requirement).

⁸³⁰ *Id.* § 2511.

vides services to runaway⁸³¹ and homeless children,⁸³² Native American children,⁸³³ those involved in adoption proceedings,⁸³⁴ pregnant adolescents,⁸³⁵ illegitimate children,⁸³⁶ foster children⁸³⁷ and protection of the religious faith of children in custody of the State.⁸³⁸

E. Particularly Disadvantaged and Vulnerable Groups

The United Nations Committee has expressed that state parties “need to identify the most vulnerable and disadvantaged children in a State”⁸³⁹ jurisdiction so as to address the needs of those children with regard to discrimination.⁸⁴⁰ New York has directly and indirectly addressed such needs by passing into law a number of provisions affecting children who are especially vulnerable to discrimination.

1. Alien and Refugees

The CRC has expressed its concerns over alien and refugee children directly in Article 2 but also in the UN Committee reports;⁸⁴¹ it has “emphasized among general concerns about discrimination that, for example, children of migrant workers, non-nationals, undocumented immigrant children and children of minorities or indigenous communities must enjoy the rights guaranteed by the Convention without discrimination.”⁸⁴²

New York State’s general non-discrimination legislation includes nationality, in its protected categories of non-discrimination.⁸⁴³ Most of the specific provisions that regard non-U.S.

⁸³¹ *Id.* §§ 44(3), 460-g, 462(2), 462-a(1), 462-b(1) (creating runaway programs in New York).

⁸³² *Id.* §§ 17(f) (providing for the education of homeless children), 62(6) (providing for the transportation of homeless children to places of education).

⁸³³ *Id.* §§ 39, 473, 153.

⁸³⁴ *Id.* §§ 372-d-g, 540-458 (creating economic subsidies for adoptive children).

⁸³⁵ *Id.* § 409-i–409-n; *see also id.* §§ 465–465-e (codifying the Adolescent Pregnancy Prevention and Services Act).

⁸³⁶ *Id.* §§ 132-a, 384-c.

⁸³⁷ *Id.* §§ 383-c (providing for guardianship of children in foster care); 393–393-b (providing regulations for the quality of foster care provided to children in foster care settings).

⁸³⁸ *Id.* § 373.

⁸³⁹ UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89.

⁸⁴⁰ *Id.*

⁸⁴¹ CRC *supra* note 2, art. 2(1); *see also* UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 26-27.

⁸⁴² UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 27.

⁸⁴³ *See* N.Y. LAB. LAW §§ 130–145 (McKinney 2002); N.Y. EDUC. LAW §§ 3201–3234 (McKinney 2000); N.Y. SOC. SERV. LAW §§ 371–458 (McKinney 2003).

nationals protect persons with legal alien status, but there are important provisions regarding undocumented immigrants.⁸⁴⁴

The United States Supreme Court has inadvertently adopted the CRC protection of all children from discrimination in education, including immigrants regardless of their legal status,⁸⁴⁵ by holding that the right to free public education extends beyond those children who are United States citizens.⁸⁴⁶ In *Plyler v. Doe*,⁸⁴⁷ the Court held that children illegally in the United States have the same rights to a free public school education as American citizens and legal aliens.⁸⁴⁸ New York State Education Law makes no specific mention of educating all children within its borders regardless of their status as legal residents within the state. However, New York State does require that the Commissioner of Education compile a “complete list giving the names, ages and destination within the state of all alien children of school age and such other facts as will tend to identify them,” in order to comply with the compulsory educational requirements.⁸⁴⁹

Persons with refugee status, legal permanent resident aliens and undocumented immigrants may be eligible to receive financial aid for higher education.⁸⁵⁰ Students who do not have legal immigrant status can receive financial aid for higher education if they file an affidavit with the institution of higher education, stating that they have or will file an application to legalize his or her immigrant status and have either attended an approved New York State high school or general equivalency program, have received a diploma from such a school or program and have applied to an institute of higher education within five years of receiving such a diploma.⁸⁵¹

Generally, to receive public assistance for aged, blind and disabled persons, family assistance, safety net assistance, and services funded under Title XX of the Federal Social Security Act, or medical assistance a person must be a citizen or a naturalized alien, unless a person is exempt in the U.S. due to immigration status because they are asylees, Amerasians, Cuban/Haitian, conditional entrants, victims of trafficking, and those who have Temporary Protected Status, lawful permanent residents, domestic violence vic-

⁸⁴⁴ *Id.*

⁸⁴⁵ *Plyler v. Doe*, 457 U.S. 202 (1982).

⁸⁴⁶ *Id.*

⁸⁴⁷ *Id.*

⁸⁴⁸ *Id.*

⁸⁴⁹ N.Y. EDUC. L. § 305(9) (McKinney 2006).

⁸⁵⁰ *Id.* §§ 661, 355.

⁸⁵¹ *Id.* § 355.

tims of U.S. citizens or lawful permanent residents, immigrants given a suspension of deportation or cancellation of removal, registry immigrants, individuals paroled into the United States, Native Americans born in Canada, immigrants from territories with special relationships with the United States, on active duty or veterans and immediate family.⁸⁵² Undocumented immigrants and non-immigrants (those with student, medical, business or tourist status) are only eligible for social services, in cases of emergencies,⁸⁵³ and public assistance, but ineligible for aid to dependent children, home relief or medical assistance because he or she is an undocumented immigrant will be immediately referred to the United States immigration and naturalization service.⁸⁵⁴ There is a special provision for undocumented immigrants who arrived in New York State as a result of human trafficking,⁸⁵⁵ which include such services as “case management, emergency temporary housing, health care, mental health counseling, drug addiction screening and treatment, language interpretation and translation services, English language instruction, job training and placement assistance, post-employment services for job retention, and services to assist the individual and any of his or her family members to establish a permanent residence in New York state or the United States.”⁸⁵⁶

While social service workers are required to report the undocumented immigrant status of aliens, health care workers are not allowed to report a person’s undocumented immigrant status to authorities when a person is seeking medical assistance⁸⁵⁷ and hospital workers are required to provide language assistance to persons who are unable to understand English free of charge.⁸⁵⁸ Landlords are prohibited from making threats to tenants that they

⁸⁵² N.Y. SOC. SERV. LAW, *supra* note 826, § 122.

⁸⁵³ *Id.*

⁸⁵⁴ *Id.* § 131-k; *see also id.* § 122(2) (“Each social services district shall report to the department, in accordance with regulations of the department, the name and address and other identifying information known to it with respect to any alien known to be unlawfully in the United States.”).

⁸⁵⁵ *Id.* §§ 483-aa–ee.

⁸⁵⁶ *Id.* § 483-bb(b).

⁸⁵⁷ THE NEW YORK IMMIGRATION COALITION, *Policy Update: Federal Government Affirms Undocumented Immigrants’ Right to Emergency Medical Care*, (May 16, 2005), http://www.thenyc.org/images/uploads/NYIC_Section1011_051605.pdf; *see also* THE NEW YORK IMMIGRATION COALITION, *Access to Health Care for Uninsured Immigrants*, available at <http://www.thenyc.org/templates/documentFinder.asp?did=168> (last visited March 23, 2010).

⁸⁵⁸ PUB. HEALTH LAW § 2303-s (McKinney 2006); *see also* A. 05301, Gen. Assem., Reg. Sess. (N.Y. 2007) NEW YORK STATE ASSEMBLY, 2007-2008 Regular Sessions, Bill Number A05301, February 13, 2007, available at <http://assembly.state.ny.us/leg/?bn=A05301&sh=t> (last visited March 23, 2010).

will report their immigrant status to the authorities if the tenant complains or requests improvements or repairs, with the threat of money damages to the landlord if he or she violates the provision.⁸⁵⁹

The major issue concerning the undocumented status of aliens in New York State is that, even when laws provide protection against discrimination due to such undocumented status, the person's status as undocumented can and often is reported to authorities.⁸⁶⁰ This occurs in public education and social services.⁸⁶¹ Even when it is prohibited to disclose or makes threats of disclosing the undocumented status of an alien there is a danger of being "turned in" indirectly.⁸⁶² The threat of deportation has the effect of denying undocumented immigrants protections against discrimination because they will not report discrimination to authorities if they think they will be deported.⁸⁶³

2. Native American Children

The CRC has made specific mention of special need to protect the right of indigenous people to enjoy their culture⁸⁶⁴ and the importance of the right of education, including that of cultural identity.⁸⁶⁵

The education of Native American children in New York is codified under the Education Law in a section entitled Indian Schools.⁸⁶⁶ The education of Native American children residing on reservations is under the direction of the New York State Department of Education.⁸⁶⁷ The Education Commissioner is required to attempt to secure the cooperation of the Indian tribes in the education of Indian children and, in pursuit of such cooperation, must

[invite] them to assist either by appropriating their public moneys to this object, or by setting apart lands and erecting suitable buildings, or by furnishing labor or materials for such buildings, or in any other way which he or they may suggest as most effec-

⁸⁵⁹ REAL PROP. LAW. § 235-d (McKinney 2006); *see also* THE NEW YORK IMMIGRATION COALITION, "Immigrant Housing Concerns Fact Sheet, *available at* <http://www.thenyic.org/templates/documentFinder.asp?did=723> (last visited March 23, 2010).

⁸⁶⁰ THE NEW YORK IMMIGRATION COALITION, *supra* note 857.

⁸⁶¹ *See* THE NEW YORK IMMIGRATION COALITION, <http://www.thenyic.org/issue.asp?cid=75> (last visited March 23, 2010).

⁸⁶² *Id.*

⁸⁶³ *Id.*

⁸⁶⁴ CRC, *supra* note 2, art. 30.

⁸⁶⁵ *Id.* art. 28(c).

⁸⁶⁶ N.Y. EDUC. LAW §§ 111, 4101-4119 (McKinney 2006).

⁸⁶⁷ *Id.* § 111.

tual for the promotion of this object.⁸⁶⁸

The Department is not required to maintain schools on Indian reservations but can choose to do so or to contract the education of such children out to any school district.⁸⁶⁹ The State takes responsibility for the cost of educating Native American children attending public school on or off a reservation.⁸⁷⁰ School attendance is mandatory for Native American children between the ages of six and sixteen⁸⁷¹ and parents are required to ensure that their children attend school⁸⁷² on threat of penalty if they do not.⁸⁷³ The State also provides special financial aid to Native American children attending schools of higher education.⁸⁷⁴

3. Homeless Children

The United Nations Committee has classified homeless children as "being among the most disadvantaged and vulnerable children"⁸⁷⁵ and has found that "strict compliance with the provisions of the Convention on the Rights of the Child would constitute a significant step towards solving the problems" in connection with homeless children.⁸⁷⁶

The New York State Department of Social Welfare, in coordination with the Department of Education, is required "to ensure coordination and access to education for homeless children. . . and monitor compliance of local social services districts with such plan."⁸⁷⁷ The agency must provide indigent children with the necessities required to enable the child to attend school, such as clothing, shoes, books, food and transportation.⁸⁷⁸ A homeless child⁸⁷⁹ is entitled to free public school education,⁸⁸⁰ including

⁸⁶⁸ *Id.* § 4116.

⁸⁶⁹ *Id.* § 4101(2).

⁸⁷⁰ *Id.* §§ 4101(2), 4115; *see also id.* § 4103 (stating that Native American children residing on a reservation are not entitled to free tuition in districts outside the reservation).

⁸⁷¹ *Id.* § 3205.

⁸⁷² *Id.* § 4106.

⁸⁷³ *Id.* § 4107.

⁸⁷⁴ *Id.* § 4118.

⁸⁷⁵ UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 30.

⁸⁷⁶ *Id.*

⁸⁷⁷ N.Y. SOC. SERV. LAW § 17(f); *see also* N.Y. EDUC. LAW § 3209.

⁸⁷⁸ N.Y. EDUC. LAW § 3209(6).

⁸⁷⁹ Defined as lacking "a fixed, regular, and adequate night-time residence" or whose primary night-time location is a shelter or a place "not designed for, or ordinarily used as, a regular sleeping accommodation." *See id.* §§ 3209(2)(1), (2)(ii).

⁸⁸⁰ *Id.* §§ 3202(8), 3209(3).

free transportation,⁸⁸¹ free disability education⁸⁸² and the right to choose the district in which he or she will attend school.⁸⁸³ These special provisions for homeless children with regard to education fall in line with Article 2 of the CRC's protections against discrimination based on status,⁸⁸⁴ especially considering the extra emphasis the United Nations Committee has placed on the protection of homeless children.⁸⁸⁵

The Executive Law has made special provisions to protect runaway and homeless children by enacting the Runaway Homeless Youth Act.⁸⁸⁶ The Act is a conscious effort by New York State to provide equal opportunity to homeless and runaway children and to protect against discrimination based on their status as such.⁸⁸⁷ The Act defines a runaway youth as a minor less than eighteen years of age, who is absent from his or her legal residence without consent⁸⁸⁸ and as a homeless youth under twenty-one years of age, who is without a place of shelter and in need of services.⁸⁸⁹ The Act provides for a determination of the cause and reasons for running away or homelessness and explanations of the youth's legal rights and options, as well as assistance to youths and their families, including food, shelter, clothing, medical care, education and counseling.⁸⁹⁰

Another specific provision for homeless children is the Employment Training program, which provides employment training to disadvantaged children between the ages of fourteen and twenty-one whether they are in or out of school.⁸⁹¹ It also provides that out of school youth programs employment training will be made available to disadvantaged children.⁸⁹²

4. Adopted Children

Article 21 of the CRC protects the system of adoption within state party's jurisdiction⁸⁹³ and Article 2 of the CRC protects

⁸⁸¹ *Id.* § 3209(4).

⁸⁸² *Id.* § 4402.

⁸⁸³ *Id.* §§ 3209(1)(b), 3209(2).

⁸⁸⁴ CRC, *supra* note 2, art. 2(1).

⁸⁸⁵ UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 30.

⁸⁸⁶ N.Y. EXEC. LAW § 532-a (McKinney 2005).

⁸⁸⁷ *Id.*

⁸⁸⁸ *Id.* § 532-a(1).

⁸⁸⁹ *Id.* § 532-a(2).

⁸⁹⁰ *Id.* § 532-b.

⁸⁹¹ N.Y. LAB. LAW § 42.

⁸⁹² *Id.* § 42(14).

⁸⁹³ CRC, *supra* note 2, at art. 21.

against discrimination based on status such as adoption⁸⁹⁴ or discrimination within the adoption system.⁸⁹⁵ New York State provides subsidies—to be paid to the person to whom the child has been placed⁸⁹⁶—for adoptive children to “promote permanency of family status through adoption for children who might not otherwise derive the benefits of that status.”⁸⁹⁷ By providing for these subsidies, the State has attempted:

[T]o eliminate, or at the very least substantially reduce, unnecessary and inappropriate long-term foster care situations which have proven financially burdensome to the state and, more importantly, inimical to the best interests of many children who have not been placed for adoption because of emotional or physical handicaps, age or other factors, in accordance with regulations of the department.⁸⁹⁸

The effects of an adoption are that the birth parents relinquish all parental rights and responsibilities,⁸⁹⁹ the adoptive child’s right to inherit from the birth parents is terminated⁹⁰⁰ and the adoptive parents and the adoptive child are given all legal rights and responsibilities of a parent/child relationship, including the right to inherit.⁹⁰¹

5. Illegitimate Children

The New York State laws that protect the legitimacy of children and protect against discrimination of children based on their illegitimate status fall in line with specific concerns that the United Nations Committee has regarding discrimination that is written into law, for example a child’s status legitimacy, and the need to “challenge discrimination on a particular ground.”⁹⁰²

The laws that protect illegitimate children—a term which refers to such children born out of wedlock or non-marital children—include laws dealing with the rights and responsibilities of the parents and the right of the child to inherit from the parents.⁹⁰³

The laws that protect the legitimacy of the child provide that if

⁸⁹⁴ *Id.* art. 2.

⁸⁹⁵ *Id.*

⁸⁹⁶ N.Y. SOC. SERV. LAW § 143(1)(a).

⁸⁹⁷ *Id.* § 450.

⁸⁹⁸ *Id.* § 450.

⁸⁹⁹ N.Y. DOM. REL. LAW § 117(1)(a) (McKinney 2006).

⁹⁰⁰ *Id.* § 117(1)(b).

⁹⁰¹ *Id.* § 117(1)(c); N.Y. EST. POWERS & TRUSTS L. § 2-1.3 (McKinney 2006).

⁹⁰² UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 23.

⁹⁰³ N.Y. FAM. CT. ACT § 417 (McKinney 2006); N.Y. DOM. REL. LAW §§ 24, 73, 175.

the parents of a child born out of wedlock are subsequently married, the child is subsequently considered the legitimate child of both parents;⁹⁰⁴ divorce of a child's parents will not affect the legitimacy of the child;⁹⁰⁵ and a child conceived through artificial insemination to a married woman is deemed the legitimate natural child of the husband and wife if both have given written consent to the insemination.⁹⁰⁶

The laws that pertain to illegitimate children protect them by maintaining that each parent can be held liable for the support of the child born out of wedlock, including economic support.⁹⁰⁷ If the paternity of a child is contested, a court can order a genetic marker or DNA test.⁹⁰⁸ If the test indicates the putative father's paternity then he is presumed to be the father and will be liable for supporting the child.⁹⁰⁹ If the parents neglect or are unable to support a child, regardless of the parents' marital status, the government must provide for the support of the child.⁹¹⁰

Under the New York State Estates Powers and Trusts Law, non-marital children are the legitimate children of the mother for inheritance purposes⁹¹¹ but not of the putative father unless certain actions have been taken to prove paternity during the life of the putative father.⁹¹² An agreement between the mother and putative father for the putative father to support the non-marital child, outside of a court order or a legal acknowledgment of paternity, does not qualify the non-marital child to inherit from the father.⁹¹³ Under the Insurance Law, no employer or health insurer can deny enrollment of a child under his or her parent's plan because the child was born out of wedlock.⁹¹⁴

6. Girl Children

The United Nations Committee has made the discrimination of girl children a special focus of Article 2 of the CRC.⁹¹⁵ The United Nations Committee views girls as a special group entitled to

⁹⁰⁴ N.Y. FAM. CT. ACT § 417; N.Y. DOM. REL. LAW § 24.

⁹⁰⁵ N.Y. DOM. REL. LAW § 175.

⁹⁰⁶ *Id.* § 73.

⁹⁰⁷ N.Y. FAM. CT. ACT §§ 442, 513, 514, 545; *see also* N.Y. SOC. SERV. LAW § 132-a.

⁹⁰⁸ N.Y. FAM. CT. ACT §§ 418(a), 532.

⁹⁰⁹ *Id.*

⁹¹⁰ *Id.* § 515.

⁹¹¹ N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(1).

⁹¹² *Id.* § 4-1.2(a)(2).

⁹¹³ *Id.* § 4-1.2(a)(3).

⁹¹⁴ N.Y. INS. LAW § 2608-a (McKinney 2006).

⁹¹⁵ UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 27-30.

special protection and requires that state parties take measures to insure that girls are not merely seen as “as daughters, sisters, wives or mothers”⁹¹⁶ but also that they “should fully enjoy fundamental rights inherent to their human dignity.”⁹¹⁷ The United Nations Committee has stated that “[w]ithin the larger movement for the realization of women’s rights, history had clearly shown that it was essential to focus on the girl child in order to break down the cycle of harmful traditions and prejudices against women.”⁹¹⁸ To this effect, the United Nations Committee has suggested that state parties should give special attention to implementing measures that provide girls with “effective access to education”⁹¹⁹ and reform legislation regarding minimum age of marriage for girls.⁹²⁰

There are several New York laws that comport with the principles expressed in the CRC regarding girl children. The anti-sex discrimination statement contained in the Education Law is one example.⁹²¹ This law is gender neutral and does not specifically address girl children, but still provides a positive protection for girl children because it requires all educational institutions to provide equal education to both boys and girls, while also allowing an exception for independent institutions that are established to provide education exclusively to one sex to admit students of only that sex.⁹²² Another New York State law that addresses the United Nations Committee’s special protection of girl children is the prevention of and protection for adolescent pregnancy.⁹²³ These laws provides that there is no minimum age of consent for medical, dental, health or hospital services for prenatal care, to any pregnant persons or in a “person of any age without consent of legal guardian” when an emergency requires immediate treatment and an attempt to get such consent would delay treatment.⁹²⁴

New York may fail, however, to meet the UN Committee’s requirement to reform legislation regarding minimum age of marriage and sexual consent for girls.⁹²⁵ The New York State set the

⁹¹⁶ *Id.*

⁹¹⁷ *Id.*

⁹¹⁸ *Id.* at 29.

⁹¹⁹ *Id.* at 30.

⁹²⁰ *Id.*

⁹²¹ N.Y. EDUC. LAW §313(3)(a) (McKinney 2006).

⁹²² *Id.*

⁹²³ N.Y. PUB. HEALTH LAW § 2504(3),(4) (McKinney 2009); *see also* N.Y. EXEC. LAW § 516 (McKinney 2005).

⁹²⁴ *Id.*

⁹²⁵ UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 30.

minimum age to marriage at 18.⁹²⁶ However, children under 18 may marry with the consent of a parent or legal guardian⁹²⁷ and children under 16 may marry with the consent of a parent or other legal guardian and a court.⁹²⁸ New York sets the age of sexual consent at seventeen, except when a child under seventeen is married.⁹²⁹ Because girl children are more likely to marry under the age of eighteen than boy children, these laws have a negative impact on girl children.

7. Laws that Protect Children from Discrimination or Punishment Due to Parental Status

Paragraph two of Article 2 of the CRC requires that state parties take action to protect against the punishment of children due to the beliefs or status of their parents or legal guardians.⁹³⁰ In addition to the Human Rights Law, one of the most protective areas of New York State law requires special protection against discrimination of children, through their parents, in the area of insurance coverage.⁹³¹ It requires that no insurance company can refuse to issue a policy or cancel or decline to renew an existing policy because of discrimination based on race, color, creed, national origin, disability⁹³² (including a past history of mental disability⁹³³ or any type of cancer),⁹³⁴ sex and marital status,⁹³⁵ status of

⁹²⁶ N.Y. DOM. REL. LAW §§ 7, 15(2) (McKinney 2009).

⁹²⁷ *Id.* §§ 7, 15(2).

⁹²⁸ *Id.* § 15(3).

⁹²⁹ N.Y. PENAL LAW §§ 130.05, 130.25 (McKinney 2006).

⁹³⁰ CRC, *supra* note 2, at art. 2(2)

⁹³¹ N.Y. INS. LAW § 2608-a (prohibiting discrimination in health insurance enrollment against children through their parents).

⁹³² *Id.* §§ 2606, 4224 (providing that no life insurance company may refuse to insure or make “unfair discrimination between individuals of the same class and of equal expectation of life” in amount of premiums, rate, dividends, or other benefits of the policy or refuse to insure, continue insurance or limit the amount of an individual solely “because of the physical or mental disability, impairment or disease, or prior history thereof, of the insured or potential insured, except where the refusal, limitation or rate differential is permitted by law or regulation and is based on sound actuarial principles or is related to actual or reasonably anticipated experience.”); *id.* § 3434; 2613 (establishing that insurers cannot cancel, refusing to issue or renew a motor vehicle insurance policy to a person with a disability, nor may an insurer refuse to issue a “policy of life or non-canceled disability insurance, cancel or decline to renew” because the individual has cancer if diagnosis occurred three years prior to application “unless based on sound underwriting and actuarial principles reasonably related to actual or anticipated loss experience.”).

⁹³³ *Id.* at § 2608.

⁹³⁴ *Id.* at § 2613.

⁹³⁵ *Id.* at § 2607.

the child⁹³⁶ or status as a victim of domestic violence.⁹³⁷

The laws that protect children based on the status of their parents or guardians as women or because of family or minority status⁹³⁸ provide working mothers with the right to express breast milk⁹³⁹ and breast feed in public,⁹⁴⁰ prevents discrimination against families with children in housing and mobile homes⁹⁴¹ and protects families from leases or lease renewals that discriminate based on the fact that they have or will have children.⁹⁴²

F. *Affirmative Provisions of the CRC and New York Laws*

Article 2 of the CRC asserts that state parties must “respect and ensure the rights set forth” in the CRC itself.⁹⁴³ This is a requirement that state parties not only provide the child with protection against discrimination in opportunity but must also protect against disparate outcomes caused by discrimination. In its interpretation of this requirement, the Committee stated that: “[t]he Committee on the Rights of the Child recognizes that the reflection of the principle of non-discrimination in the law, while fundamental to implementation, is not itself sufficient; other strategies are needed to implement the principle, in particular to challenge traditional and other discriminatory attitudes and customs.”⁹⁴⁴ These other strategies include affirmative action and ensuring that non-discrimination laws and protections are implemented effectively by state parties.⁹⁴⁵ In effect, Article 2 of the CRC requires a dual pronged approach by its state parties to combat discrimination. Article 2 of the CRC requires that state parties enact measures that address the

⁹³⁶ *Id.* at § 2608-a (“(i) the child was born out of wedlock, (ii) the child is not claimed as a dependent on the parent’s federal income tax return, or (iii) the child does not reside with the parent or in the insurer’s service area.”).

⁹³⁷ *Id.* at § 2612.

⁹³⁸ N.Y. EXEC. LAW § 312 (McKinney 2005): (8) (defining a “minority group member” as a “United States citizen or permanent resident alien who is and can demonstrate membership in one of the following groups: (a) Black persons having origins in any of the Black African racial groups; (b) Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race; (c) Native American or Alaskan native persons having origins in any of the original peoples of North America; (d) Asian and Pacific Islander persons having origins in any of the Far East countries, South East Asia, the Indian subcontinent or the Pacific Islands.”).

⁹³⁹ N.Y. LAB. LAW § 206-c.

⁹⁴⁰ N.Y. CIV. RIGHTS LAW § 79-e.

⁹⁴¹ N.Y. REAL PROP. LAW § 236 (McKinney 2006).

⁹⁴² *Id.* § 237.

⁹⁴³ CRC, *supra* note 2, at art. 2(1).

⁹⁴⁴ UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89 at 23-24.

⁹⁴⁵ *Id.* at 23.

source of discrimination by requiring equality of opportunity without regard to “race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”⁹⁴⁶ Article 2 also requires state parties to enact measures that address the inequalities of outcome that have become embedded in state parties’ social structure due to historical discrimination,⁹⁴⁷ such as the statically low number of women and minorities employed.⁹⁴⁸ In other words, Article 2 of the CRC encourages state parties to enact affirmative action legislation as well as non-discrimination legislation, as one way to implement the requirement to “ensure” non-discrimination.⁹⁴⁹

New York State Human Rights Law states that the:

[S]tate has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.⁹⁵⁰

New York law plainly establishes that it has a responsibility to provide equal opportunity to “every individual”⁹⁵¹ within the state, however it has not so plainly established its responsibility to impose equality of outcome as required by Article 2 of the CRC.⁹⁵² Even though New York State has not taken a positive policy position on affirmative action it has implemented significant affirmative measures.

The most important affirmative action measure regarding children under New York law is the employment of minors, which discriminates against children based on their age.⁹⁵³ This is a legitimate form of differentiation or affirmative action, which is in line with the requirements of Article 32 of the CRC.⁹⁵⁴ The provi-

⁹⁴⁶ CRC, *supra* note 2, at art. 2(1).

⁹⁴⁷ *Id.*; see also, UNICEF IMPLEMENTATION HANDBOOK, *supra* note 13, at 24. (United Nations Children’s Fund 2002) (noting “in particular to challenge traditional and other discriminatory attitudes and practices.”).

⁹⁴⁸ See N.Y. EXEC. LAW, art 15-a.

⁹⁴⁹ UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 22-24.

⁹⁵⁰ N.Y. EXEC. LAW § 290 (McKinney 2005).

⁹⁵¹ *Id.*

⁹⁵² CRC, *supra* note 2, at art. 2 (stating that the state parties shall “respect and ensure the rights” of the child “without discrimination of any kind”).

⁹⁵³ N.Y. LAB. LAW §§ 130–133 (McKinney 2002).

⁹⁵⁴ CRC *supra* note 2, at art. 32.

sions of Article 32 of the CRC require that the child be “protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”⁹⁵⁵ New York’s age-based employment laws also comport with Article 28 of the CRC— making education mandatory⁹⁵⁶—in that they give primacy to a child’s education over a child’s employment and Article 31 of the CRC, which affirms a child’s right to rest and leisure.⁹⁵⁷

Another relevant area of New York law which can be viewed as a type of affirmative action is the Employment Training program.⁹⁵⁸ This program provides employment training to disadvantaged children between the ages of fourteen and twenty-one whether they are in or out of school.⁹⁵⁹ The authorizing laws creating the Employment Training program further provide that out of school youth programs will give preference to homeless youths or adolescent parents.⁹⁶⁰ In order to participate in this program, employment and training providers must include an educational component⁹⁶¹ that is approved by the New York State Department of Education.⁹⁶² This is in accordance with the CRC’s aim of providing education to all children, contained in Article 28 of the CRC,⁹⁶³ as well as Article 2’s specific references to assisting homeless and girl children.⁹⁶⁴ The Employment Training Program also requires that an annual evaluation of the stated objectives of the Program be submitted to the governor and legislature.⁹⁶⁵ The report must identify the outcome of the program and the program’s effectiveness.⁹⁶⁶ This is similar to the UN Committee’s suggestion that state parties take measures to study discrimination against children occurring within their territories and develop comprehensive strategies to combat it.⁹⁶⁷ Examples of such strategies include “information and awareness-raising campaigns. . . to challenge dis-

⁹⁵⁵ *Id.*

⁹⁵⁶ *Id.* at art. 28.

⁹⁵⁷ *Id.* at art. 31.

⁹⁵⁸ N.Y. LAB. LAW § 42 (McKinney 2002).

⁹⁵⁹ *Id.*

⁹⁶⁰ *Id.* at § 42(14).

⁹⁶¹ *Id.* at § 42(10).

⁹⁶² *Id.* § 42(9).

⁹⁶³ CRC, *supra* note 2, at art. 28.

⁹⁶⁴ UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 27-29; 31-32.

⁹⁶⁵ N.Y. LAB. LAW § 42(15) (McKinney 2002).

⁹⁶⁶ *Id.*

⁹⁶⁷ UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 25.

criminatory attitudes and practices.”⁹⁶⁸

Another New York law that embodies the affirmative action provisions relating to children is the Teenage Service Act.⁹⁶⁹ The enacting legislation for this Act explained that it was created:

[due to] the rising incidence of adolescent pregnancy and teenage parenthood. . . . As a result of early pregnancy, the attainment of needed education and job skills is often curtailed. Coupled with the added responsibilities accompanying parenthood, these young families are often locked into long term public dependency. Studies have confirmed that up to sixty percent of the current aid to families with dependent children cases in New York State are headed by mothers who were teenagers when they gave birth to their first child. In fact, the predominant cause of welfare dependency in New York State may well be due to the result of teenage pregnancy and adolescent motherhood. The objective of this title is to increase the potential of these youths to become financially independent by helping the teenager to complete her education, and receive sufficient manpower skills for participation in the labor market.”⁹⁷⁰

The Act requires that the New York Department of Social Services provide financial support, counseling services and other support services to strengthen the family and provide opportunities for financial independence to teenagers and their children.⁹⁷¹ The Social Services Laws “stress the development and expansion”⁹⁷² of prevention programs to curtail adolescent pregnancy and “to deal more effectively with the consequences associated with adolescent parenting.”⁹⁷³ These laws are in line with Article 2 of the CRC’s requirements that state parties take special measure to protect girls from discrimination, as well, as take affirmative measure to protect against disparate outcome;⁹⁷⁴ especially with regard to “problems associated early pregnancy”.⁹⁷⁵

One of the most innovative pieces of New York law that indirectly protects children from discrimination based on parental status is the Displaced Homemakers Act, which provides educational

⁹⁶⁸ *Id.*

⁹⁶⁹ N.Y. SOC. SERV. LAW § 409-i (McKinney 2003).

⁹⁷⁰ N.Y. SOC. SERV. LAW § 409-i(2) (McKinney 2003).

⁹⁷¹ *Id.*

⁹⁷² *Id.* § 465-a(2)(a) (repealed 2008).

⁹⁷³ *Id.*

⁹⁷⁴ UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 31.

⁹⁷⁵ Committee on the Rights of the Child, January 21, 1995, *The Girl Child*, ¶ 286, available at <http://www.ohchr.org/EN/HRBodies/CRC/Documents/Recommendations/girl.pdf>.

training for displaced homemakers.⁹⁷⁶ A “displaced homemaker” is defined as an individual who:

(a) has worked in the home, providing unpaid household services for family members; (b) is not gainfully employed; (c) has had, or would have difficulty in securing employment; and (d) has been dependent on the income of another family member but is no longer supported by such income, or has been dependent on federal assistance but is no longer eligible for such assistance, or is supported as the parent of minor children by government assistance or spousal support.⁹⁷⁷

This is an important protection for children because it provides their parents with a means to escape domestic violence by reducing the parents’ concerns that escaping such a situation would be economically impossible or impracticable. These legal protections are in line with Article 39 of the CRC—protecting children from abuse—as well as with Article 2 of the CRC’s non-discrimination for parental status provisions.⁹⁷⁸

The expansive non-discrimination principles expressed in Article 2 are found to some extent in both positive and negative laws of New York State, many of which are innovative and provide additional security for children—especially those in vulnerable situations. However, explicit coverage of children under state statute varies upon an examination of specific areas of law, such as education, employment, and social services. Moreover, Article 2’s concern about the multiple forms of discrimination that children in particular face does not appear to overlap with the primary non-discrimination framework within New York law, the Human Rights Law, since executive interpretation of New York’s otherwise comprehensive Human Rights Law does not expressly contemplate coverage of individuals under the age of 18. Should the United States adopt the CRC, New York and other state governments subject to CRC jurisdiction should reexamine whether their approaches are in line with the approaches of Article 2’s non-discrimination obligations.

⁹⁷⁶ N.Y. LAB. LAW § 825 (McKinney 2002).

⁹⁷⁷ *Id.* § 826(1).

⁹⁷⁸ CRC, *supra* note 2, at art. 39, 2(2).