

LISTENING TO FOSTER CHILDREN IN ACCORDANCE WITH THE LAW: THE FAILURE TO SERVE CHILDREN IN STATE CARE

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When I talk about the real foster care experts, you probably think I am talking about some overpaid policy makers. Well, that's not who I'm talking about. I'm talking about the youth in the foster care system. We have been the real experts since foster care was first created. We are not acknowledged as the experts, but we know what works and what doesn't.¹

I.

INTRODUCTION

Imagine, for a moment, that you are a teenager in New York City's foster care system. You do not know whether your current living situation is stable, or whether you will be required to move without notice. You are not sure when you might be released from foster care and with whom, if anyone, you might go "home." You know you need help staying in school, going to college, or finding a job, but you do not know how to obtain this help. You want to see your brother, who lives in a foster care home far from you. You would like to see your mother more than twice a month. You would like counseling to talk over your confusion and anger. You have asked for some of these things but have not received assistance. You have never been told that there is a meeting held twice a year, on just these issues, to which you are supposed to be invited. You do not know that there is a written plan that documents your goals, and details services by which to implement them, that you should receive. To imagine yourself in this position is to begin to understand the current state of permanency planning for most older children in the New York City foster care system.²

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1. Sabrina Hines, *We're the Real Foster Care Experts*, FOSTER CARE YOUTH UNITED, July/Aug. 1996, at 1.

2. See Jill Chaifetz, *The New York City Foster Care System in Crisis: The Continued Failure to Plan for Children*, A Report of the Committee to Involve Clients in the SPR/UCR Process 1-2 (Feb. 1998) (unpublished manuscript, on file at The Door—A Center of

How properly to serve children in foster care has been debated and discussed for decades, but rarely have we listened to what children in foster care would like for themselves. There is widespread agreement that permanency planning for children in foster care is necessary for children to be reunited, adopted, or to plan for independent living, yet our system does not include the older foster child's voice in her own case planning. The results of this have been disastrous. If we are to create a brighter future for children in foster care, it is essential that we listen to them and give weight to their thoughts and ideas. In New York state, listening to children is the law. Unfortunately, this law is flouted daily for thousands of children in foster care.

Part II of this article gives an overview of the creation, philosophy and state of our country's child welfare system. Part III discusses the dismal consequences of our dysfunctional system of caring for children in state care. Part IV provides information on the state of New York City's child welfare system, with particular focus on New York State law regarding permanency planning for children. Part V discusses and analyzes the results of a survey given to foster care children in New York City. The survey focused on young people's notice, knowledge, and experience of permanency planning, as well as the general provision of minimally adequate foster care services to these children. Widespread violation of law regarding permanency planning is documented in the survey results. Part VI concludes that one of the major reasons for foster care's failure to provide permanency to its clients is the lack of regard paid to the thoughts or wishes of children in state foster care.

II.

NATIONAL OVERVIEW OF CHILD WELFARE

More than 500,000 children are estimated to have been in foster care in the late 1970s.³ In the early 1980s, perhaps as an initial result of the passage of the federal Adoption Assistance and Child Welfare Act of

Alternatives). The Door is a non-profit youth services organization that provides comprehensive services to poor young people. All Door programs are offered to New York City youth aged 10-21, and include a legal services center, a medical center, educational programs including an alternative high school, mental health counseling, a cafeteria, a nursery, and creative and physical arts instruction. The author was the Legal Director of The Door while preparing this article.

3. NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES (1991) [hereinafter BEYOND RHETORIC]. The commission estimated that in 1977 there were 502,000 children in foster care. See also Marcia Lowry, *Derring-Do in the 1980s: Child Welfare Impact Litigation After the Warren Years*, 20 FAM. L.Q. 255, 256 (1986) (estimating that in the late 1970s there were between 500,000 and 750,000 children in state-funded foster care). But see COMMITTEE ON WAYS AND MEANS, 105TH CONGRESS, 2D SESS., THE 1998 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS (1998) [hereinafter THE 1998 GREEN BOOK], Table 11-14—U.S. Foster Care and AFDC/IV-E Foster Care Population, Total AFDC Children, and U.S. Population Ages 0-18, 1962-2000,

1980,⁴ the national foster care population declined to an estimated low of 275,000 in 1983.⁵ Today, it is generally estimated to have returned to or surpassed the 500,000 mark.⁶ The creation of a child welfare system in the United States can be traced back to the mid-nineteenth century, when a child protection movement began to seek out and “rescue” children designated neglected or cruelly treated. The agencies created for this were modeled after animal rescue societies, and a common outcome was institutional placement. Children from these institutions were often placed outside of their urban environments with farming families, who used the children as laborers.⁷ Because of the changing economic and cultural context, and also because of increasing criticism directed at it, this child welfare system fell out of use. It was replaced by the early 1920s with “boarding homes.” The Social Security Act of 1935⁸ weakened the economic incentives for removing children from their homes, and created a system in which foster families were paid to take care of foster children. The new legislation solidified a new type of child welfare system. This new system was based on the belief, still a cornerstone of the child welfare system today, that aid to families through state assistance is superior to the removal of children from their families.⁹

Direct federal involvement in the support and protection of children is relatively recent. The first federal incursion into this area was what came to be called the Flemming Rule. Adopted in 1961 by the Department of Health, Education and Welfare, the rule required that states either continue to give assistance payments to eligible poor children (Aid to Dependent Children) while making reasonable efforts to improve home conditions which the state found unsuitable, or provide children with alternative living arrangements. Congress encouraged the states’ compliance by

766-67 (placing the number of children in care in 1972 at 319,800, and at 302,000 in 1980. No national numbers are available from 1973 to 1979.).

4. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

5. BEYOND RHETORIC, *supra* note 3, at 283-84.

6. See THE 1998 GREEN BOOK, *supra* note 3, at 776 (estimating that in 1996 there were 502,000 children in foster care nationwide); David Stoesz & Howard Jacob Karger, “Suffer the Children; How Government Fails Its Most Vulnerable Citizens—Abused and Neglected Kids,” WASH. MONTHLY, June 1, 1996, at 22 (estimating that by the end of 1992 the number of children in foster care was nearing 500,000); Carol Marbin Miller, *Some Fear Reform Will Create Crisis in Foster Care*, ST. PETERSBURG TIMES, Nov. 3, 1996, at B1 (quoting the statement of David S. Liederman, Executive Director of the Child Welfare League of America, that the number of children in foster care has almost doubled in the past ten years from 260,000 to 500,000).

7. Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 3-4 (1994-1995); Karoline S. Homer, *Program Abuse in Foster Care: A Search for Solutions*, 1 VA. J. SOC. POL’Y & L. 177, 182 (1993) (providing historical overviews of the child welfare system).

8. Social Security Act, ch. 531, § 401, 49 Stat. 627 (1935) (current version at 42 U.S.C. §§ 601-76 (1988 & Supp. 1999)).

9. Levesque, *supra* note 7, at 4-5; Homer, *supra* note 7, at 182-83.

authorizing federal matching funds for Aid to Dependent Children allocations.¹⁰ Unfortunately, the federal matching funds for foster care created an incentive for states to keep children in foster care. Preventive action to keep children in their homes or to assist in the rehabilitation and reunification of families was discouraged in this manner, as was the pursuit of adoption when reunification was not a viable option.¹¹

A child welfare reform movement arose in response, criticizing a system that took many children into state care for their entire childhoods. Dissatisfaction with this system's policies and actions produced a new theory for child welfare decision making, labeled "permanency planning."¹² Permanency planning is "the systemic process of carrying out, within a brief, time-limited period, a set of goal-directed activities designed to help children live in families that offer continuity of relationships with nurturing parents or caretakers and the opportunity to establish lifetime relationships."¹³ Hallmarks of this approach include: (1) stability and continuous relationships, (2) rearing children in a family setting, preferably with the biological family, and (3) programs for the child that use time-limited and systematic planning to achieve these ends. The goal of permanency planning is to provide children with stable long-term relationships in order to assure their healthy development.¹⁴

In response to the growing recognition of foster care's failures, the Adoption Assistance and Child Welfare Act of 1980 ("AACWA") was passed. The goals of AACWA flowed out of the philosophy of permanency planning. The Act's purpose was to prevent the removal of children from their homes except when absolutely necessary, and through permanency planning return children to their relatives. If return was not possible, adoption or other permanent living arrangements were to be carried out.¹⁵ The legislation was meant to keep children out of foster care through preventive services. If the child had to be taken into care, states were to find a permanent non-foster care solution. The Act's major provisions are found in Title IV-E and IV-B. Title IV-E provides for partial reimbursement by the federal government of foster care maintenance payments made by the states, as long as the states make "reasonable efforts" to prevent the removal of the child from the home.¹⁶ Title IV-B discusses the types of services that should be provided through state child welfare services.¹⁷ In order to receive federal financial assistance under AACWA, states must adopt

10. Levesque, *supra* note 7, at 13.

11. Homer, *supra* note 7, at 184.

12. Levesque, *supra* note 7, at 5; Homer, *supra* note 7, at 184-85.

13. Homer, *supra* note 7, at 185.

14. *Id.* at 185-86.

15. *Id.* at 186-87. See generally BEYOND RHETORIC, *supra* note 3, at 289; and Social Security Act, ch. 531, §§ 401, 425, 42 U.S.C. § 625(a)(1) (1988 & Supp. 1999) (defining "child welfare services").

16. 42 U.S.C. § 671(a)(15) (1988 & Supp. 1999).

17. 42 U.S.C. § 625(a)(1) (1988 & Supp. 1999).

three separate plans: 1) a child welfare plan to direct the provision of services; 2) a foster care plan to guide operation of the state's foster care system; and 3) a case plan for each child in foster care.¹⁸ The provision requiring an individualized case plan for every foster child is the focus of this article. AACWA states that each child must have a case plan designed to achieve placement in a safe setting. The status of each child is to be reviewed at least every six months by either a court or by administrative review.¹⁹ Case planning meetings coupled with court review are meant to ensure that individual children do not languish in state care, as they too often had prior to the passage of AACWA.²⁰

A. Foster Care Since The Passage Of AACWA

After the initial passage of AACWA the numbers of children in foster care fell precipitously, giving hope that states were implementing the legislation and the goals of permanency planning were being achieved. However, the numbers quickly ballooned again, as did evidence that our foster care system was still dysfunctional on a national scale.

"Foster care is intended to provide a temporary, safe haven for children whose parents are unable to care for them."²¹ However, children in foster care are likely to face instability in the form of multiple placements.²² States fail to provide routine health care for many children, and the majority of those with emotional and developmental problems are not

18. 42 U.S.C. §§ 622(a), 671(a), 671(a)(16), 675 (5)(a)-(c) (1988 & Supp. 1999); and Levesque, *supra* note 7, at 15-16. Major changes to AACWA have occurred with the passage of the Adoption and Safe Families Act of 1997 ("ASFA"), codified at 42 U.S.C. §§ 670-79(b). The Act shifts the primary concern from parental rights to the health and safety of children (ASFA § 101 (H.R. 867), 42 U.S.C. § 671(a)(15) (1988 & Supp. 1999)). An analysis of all the changes is not appropriate here, but a few provisions are of note. Permanency planning hearings must now occur within 12 months of out-of-home placements, as opposed to the 18 months required in the original law. ASFA § 302 (H.R. 867), 42 U.S.C. § 675(5)(c) (1988 & Supp. 1999). Additionally, states must now move to terminate parental rights of children who have spent 15 of the last 22 months in state care, who are abandoned infants, or whose parents commit murder, voluntary manslaughter, or felony assault on one of their children. ASFA § 103 (H.R. 867), 42 U.S.C. §§ 5106a(b)(2)(A)(xiii), 5106a(b)(2)(A)(xi)(I) (1988 & Supp. 1999).

19. 42 U.S.C. § 675(5) (1988 & Supp. 1999).

20. See ASFA § 101 (H.R. 867), 42 U.S.C. § 671(a)(15) (1988 & Supp. 1999).

21. Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 204 (1988).

22. For instance, the 1996 volume of the House Committee on Ways and Means' *The Green Book* reports:

The VCIS [Voluntary Cooperative Information System] collected data on the number of placements during the preceding 3 years experienced by children in care at the end of fiscal year 1990. More than half the children in care at the end of fiscal year 1990 had experienced more than one placement, according to data from 15 States.

A comparison of these data with data from previous years suggests a trend toward more multiple placements between fiscal years 1982 and 1990. Specifically, a total of 43.1 percent of children in care at the end of fiscal year 1982 had been in more than one placement, compared with 57.2 percent at the end of 1990.

properly treated.²³ Foster care caseworkers are overburdened, poorly paid and inadequately trained for their difficult jobs. In addition, many state agencies fail to meet minimum professional standards of practice, resulting in harm to children.²⁴ As one observer explains:

These problems have been labeled “program abuse” and occur when a “foster care system itself fails to provide children with a stable and secure home setting, or when it does not provide for a child’s medical, psychological and emotional needs.” The problems of program abuse are widespread, they are ever-present, and, as recent legal action indicates, they are not going away.²⁵

Stories from practitioners—and from the children themselves—of bad case planning abound.²⁶

COMMITTEE ON WAYS AND MEANS, 104TH CONGRESS, 2D SESS., *THE GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION ON THE COMMITTEE ON WAYS AND MEANS 748-51* (1996) (internal citations omitted) [hereinafter *THE 1996 GREEN BOOK*]. See also Mushlin, *supra* note 21, at 208 (“Stays in four or more foster homes are common.”); *BEYOND RHETORIC*, *supra* note 3, at 287-88 (noting that approximately 55% of foster children experience two or more placements, 8% experience six or more placements, while an estimated 14% stay in the foster care system five or more years); Homer, *supra* note 7, at 179-80, 195 (citing the same study statistics).

23. Mushlin, *supra* note 21, at 208 (citing to a comprehensive study which found 14% of children entering care received no medical examination upon admission, and that the average exam done on children was incomplete). The study cited in Mushlin found that 47% of children in the study had vision problems not evaluated by an optometrist; 40% needed dental care but had not been seen by a dentist; and 75% of those who had emotional and developmental problems had not received any treatment. See also GENERAL ACCOUNTING OFFICE, *FOSTER CARE: HEALTH NEEDS OF MANY YOUNG CHILDREN ARE UNKNOWN AND UNMET* 8, 32 (May 26, 1995) (showing that despite law requiring comprehensive routine health care, an estimated 12% of foster kids receive no such care, 34% receive no immunization, and 32% have identified health needs that are not met).

24. Levesque, *supra* note 7, at 11.

25. Scott J. Preston, “*Can You Hear Me?*”: *The United States Court of Appeals for the Third Circuit Addresses the Systemic Deficiencies of the Philadelphia Child Welfare System in Baby Neal v. Casey*, 29 CREIGHTON L. REV. 1653, 1653-54 (1996). See also Stacy Robinson, *Remedying Our Foster Care System: Recognizing Children’s Voices*, 27 FAM. L.Q. 395, 401-03 (1993) (positing that because many states fail to require a Guardian Ad Litem or Court Appointed Special Advocate countless foster children are unable to enforce permanency plans).

26. As a practitioner assisting foster care children I can attest that the large majority of young people whom I have seen who are in care have had little or no case planning. However, the young people explain their situations better than do I. The following two testimonials from foster care youth illustrate common issues that I have seen in my office. One young woman stated that “[m]y agency’s goal is to let me live back at home with my mother, yet they don’t let me visit her enough while I’m in foster care. They let me see her for only one hour every two weeks (two hours a month).” She explained further why she would want more visitation, and how she feels about her current level of visitation: “This way I can get used to my family again, because we have not been together for about five and a half years and people do change after a long period of time. . . . I am real happy to see them but hate the fact that we only see each other for two hours a month. So when I go back to the foster home, my feelings are hard to deal with because I think of my family . . . and miss them so much.” Samira Hassan, *Two Visits a Month Isn’t Enough*, FOSTER CARE YOUTH UNITED, July/Aug. 1996, at 8-9. A young man critiqued his independent living program,

Worse even than program abuse, is abuse and neglect of children in the foster care system, a problem linked to state child welfare agencies that fail to meet these professional standards.²⁷ A 1986 study conducted by the National Foster Care Education Project found that foster children were ten times more likely to be abused than children among the general population. A follow-up study in 1990 by the same group produced similar results.²⁸ A 1992 Maryland study found that the number of substantiated allegations of sexual abuse in foster care was four times higher than among the general population.²⁹ Numerous surveys, many of which were conducted as part of civil lawsuits against a particular jurisdiction's foster care system, reveal astoundingly high incidences of abuse or neglect within foster care.³⁰

These systemic failures occur across the country.³¹ In 1991, the District Court for the District of Columbia decided *LaShawn A. v. Dixon*.³² The *LaShawn* opinion is representative of many courts' dismay at the state of child welfare administration across the country. The District Court found the evidence presented in that case "nothing less than outrageous. The system's dereliction of its responsibilities to the children in its custody is a travesty. Although these children have committed no wrong, they in

which was supposed to provide him with skills to live on his own once he left foster care: "I.L. had failed me. . . . [A]ll this information was crammed into about *three months of my final year*. . . . I was 20 years old hearing this stuff for the *first time*." Rick Bullard, *Independent Living Should Be Boot Camp or Kicked to the Curb at 21*, FOSTER CARE YOUTH UNITED, Sept./Oct. 1993, at 10-11.

27. Mushlin, *supra* note 21, at 209-10; Levesque, *supra* note 7, at 11.

28. Rick Thoma, *Lifting the Veil, How Widespread a Problem? A Critical Look at the Foster Care System* <<http://www.rica.net/rthomafoster04.htm>> (last modified July 13, 1998) [hereinafter *Lifting the Veil*].

29. *Id.* Cf. Mushlin, *supra* note 21, at 205 (stating that foster children are particularly vulnerable to sexual abuse, especially since the "traditional taboo" against incest does not apply).

30. See *Lifting the Veil*, *supra* note 28. A comprehensive survey in Baltimore in 1988 determined that over 28% of children in care had been abused while in the system. A 1998 Louisiana study found that 21% of abuse or neglect cases involved foster homes. In Missouri, a 1981 study found that 57% of the children in their study sample were placed in foster care settings that put them at high risk of abuse or neglect. A 1987 follow-up study found that 25% of those surveyed had been victims of "abuse or inappropriate punishment." Of these reports, 88% were not properly investigated. See also Mushlin, *supra* note 21, at 206 (citing a non-litigation related study which reported that the rate of substantiated abuse and neglect in New York City foster family care was more than one and a half times that of children in the general population).

31. See *Lifting the Veil*, *supra* note 28. In 1988, only 55% of the children in Kentucky state care had legally mandated case plans. See also SANTA CLARA COUNTY GRAND JURY, FINAL REPORT, INVESTIGATION: THE DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES (1992-93) (reporting that the Grand Jury did not find clear and convincing evidence that the Department's foster care system operated with the best interest of the children in mind). See also Lisa Demer, *Caseload Swamps DFYS Staff; 5,000 Reports Go Uninvestigated*, ANCHORAGE DAILY NEWS, Nov. 4, 1997, at A1 (detailing how the State's Division of Family and Youth Services violated the law by failing to investigate a third of all child abuse and neglect reports as a result of staff shortages).

32. 762 F. Supp. 959, 998 (D.D.C. 1991).

effect have been punished as though they had."³³ As of 1995, courts had found foster care systems in twenty-two states and the District of Columbia to be inadequate, and placed them under some form of judicial supervision.³⁴

III.

OUTCOMES OF FOSTER CARE FAILURE

The human loss here is incalculable.³⁵ Aside from the individual hurt, pain and loss experienced by tens of thousands of children in foster care, there are tangible, detrimental societal costs.³⁶ Children who have grown up or left foster care fill the nation's jails, mental hospitals and welfare rolls.³⁷ One study that charted the exit outcomes of California foster care youth painted a bleak picture of former foster care youth unable to meet minimum levels of self-sufficiency and socially acceptable behaviors.³⁸ More than 23% of the study sample exited from care unsuccessfully: they ran away, refused services, landed in prison, received psychiatric or other hospital treatment, were abducted, or died.³⁹ Another writer contends that foster care systems feed 40% of their children onto welfare rolls or into prison, and that former foster children are three times more likely to become homeless than the general population.⁴⁰ A study published in 1997 found that youth known to the child welfare system are sixty-seven times more likely to be arrested than youth from the general population.⁴¹ A

33. *Id.* at 998. In 1995, after years of continued lack of progress to remedy these systemic problems, the plaintiffs' attorneys, Children's Rights, Inc., were successful in placing the District of Columbia child welfare system into receivership. The system was the first in the country to come under court control. See *Lashawn A. v. Barry*, 69 F.3d 556, 558 (D.C. Cir. 1995) for a discussion of the case's disposition.

34. Jill Smolowe, *Making the Tough Calls*, TIME, Dec. 11, 1995, at 41.

35. See BEYOND RHETORIC, *supra* note 3, at 283 (discussing how foster children can "develop an impaired self-image, encounter difficulty in establishing emotional intimacy and suffer an unresolved sense of loss").

36. Mushlin, *supra* note 21, at 211.

37. Lowry, *supra* note 3, at 257.

38. Mark E. Courtney & Richard P. Barth, *Pathways of Older Adolescents Out of Foster Care: Implications for Independent Living Services*, 41 SOCIAL WORK 75, 76 (Jan. 1996) (citing T. P. McDONALD, R.I. ALLEN, A. WESTERFELT & I. PILAVIN, INSTITUTE FOR RESEARCH ON POVERTY, IRP SPECIAL REPORT NO. 57: ASSESSING THE LONG-TERM EFFECTS OF FOSTER CARE: A RESEARCH SYNTHESIS (1993)).

39. Courtney & Barth, *supra* note 38, at 77. Nearly 90% of the children with unsuccessful exits either ran away or refused services. *Id.*

40. Elaine Rivera, *Children at Risk: An Alarming Look at America's Foster Care System*, CHI. TRIB., Aug. 31, 1997, §14, at 4 (reviewing JENNIFER TOTH, ORPHANS OF THE LIVING (1997)).

41. PARTNERS IN CHILD WELFARE, LAW ENFORCEMENT, JUVENILE JUSTICE AND THE CHILD WELFARE LEAGUE OF AMERICA, SACRAMENTO COUNTY COMMUNITY INTERVENTION PROGRAM, FINDINGS FROM A COMPREHENSIVE STUDY 1 (June 19, 1997) (on file with the Child Welfare League of America). The author notes that a one year follow-up of the original study indicated that 50% of the group had a subsequent arrest or probation. *Id.* at 14.

New York study published in 1998 found that 15% of the juveniles interviewed who were in juvenile detention in New York City were in the child welfare system. This was a rate eight times higher than census data would predict.⁴²

What happened to the promise of AACWA? Why are children not speedily reunified with their families when possible, or parental ties severed and adoptions facilitated? Most commentators and child welfare experts agree that there are three primary reasons. First, by trying to reform the old foster care system that provided economic incentives to place and keep children in foster care, Congress inadvertently created a new incentive system that did the same thing. Title IV-E of AACWA has no fiscal cap and provides reimbursement for funds spent on foster care placements. By contrast, Title IV-B, which concentrates on preventive and reunification services, has always had a fiscal cap.⁴³ Second, states have serious problems implementing AACWA's requirements, mainly because of a lack of funds, but also because states fail to find enough foster homes. What has occurred, in several cases, is "superficial compliance" without substance.⁴⁴ Finally, lax federal monitoring of state programs has allowed states to continue violating AACWA provisions. The federal government has not made good its statutory threat of withdrawing federal funds when states do not comply with its requirements.⁴⁵

AACWA itself can not be blamed for the sad state of our child welfare system. It was created to repair a system already in crisis. As one analyst astutely observed, "the American foster care system has developed a remarkable immunity to reform."⁴⁶ In 1979, Marion Wright Edelman, President of the Children's Defense Fund, declared that conditions in our national foster care system remained a "national disgrace."⁴⁷ Sadly, these words still hold true today. Child welfare experts have offered many explanations for our current system's deficiencies. Some argue that ever higher numbers of children entering the system hamper change because they create a constant crisis mentality. Many others see lack of funds as the main problem. Central to this latter notion is the idea that fewer resources are being devoted to foster care, which serves poor children, many of whom

42. M.L. Armstrong, *Adolescent Pathways: Exploring the Intersections between Child Welfare and Juvenile Justice, PINS, and Mental Health 18* (1998) (unpublished manuscript, on file with the Vera Institute of Justice).

43. Homer, *supra* note 7, at 196. See also Larry Bivens, *Thousands Languish in Foster Care: Michigan Ranks 19th in Placing Children*, DET. NEWS, Aug. 8, 1997, at A1 (detailing a study by the Institute for Children in Boston that cited a federal payment system that encourages state agencies to keep children in foster care).

44. Homer, *supra* note 7, at 198-200.

45. *Id.* at 200-01; Levesque, *supra* note 7, at 18.

46. Mushlin, *supra* note 21, at 212.

47. *Id.*

are children of color, than would be allocated if the system served a mostly affluent, white population.⁴⁸

It is true that more and more children are coming into the system each year, and there is not enough funding to serve them properly. However, I would suggest there is another failure, so blinding in its simplicity, so fundamental to the success of any service initiative, that it amazes me that I rarely see it mentioned in the literature of child welfare experts. What is missing is the voice of the children themselves. Children are almost always treated as passive objects by the system. The child is rarely, even when the law requires it, given any choice or explanation about what happens to her or him. More than one third of children in foster care are ten or older, and could have significant votes both in their permanency goals as well as in their day-to-day lives in foster care.⁴⁹ The fundamental lack of care and respect shown these children is a major reason so many of them will never reach their full potential as contributing members of our society. Consideration of their lack of access to decision-making about their own lives must be added to the discussion of the failures of the foster care system and how it can be improved.

The next section will discuss how New York State law has mandated the inclusion of the child's voice in a child's permanency planning, but how that promise has never been fulfilled because of the culture of disrespect toward foster children that permeates the child welfare system. This discussion will focus on the results of a service and permanency planning survey undertaken to determine the level of state compliance with permanency planning requirements, examining knowledge and participation of young people in their own plans. The adequacy of foster care services for those who completed the survey will also be discussed.

48. Mushlin, *supra* note 21, at 213; Preston, *supra* note 25, at 1706-07 (“[F]oster children, commonly representing disadvantaged and minority groups, lack the necessary influence to compel a legislative or executive branch to take action. . . . Furthermore, because the majority of foster care children come from economically deprived backgrounds, the children are twice denied access to the legislative process because they can not financially afford to let their voices be heard in the halls of Congress the same way other public interest groups can.”). See also Nancy Goldhill, *Ties That Bind: The Impact of Psychological and Legal Debates on the Child Welfare System*, 22 N.Y.U. REV. L. & SOC. CHANGE 295, 310 (1996) (“Finally, one cannot escape the conclusion, implicit in these articles, that the crisis of the child welfare system is at root a crisis of resources and priorities. At a time when the very idea of government itself is under attack and when services for low-income people are a first target of budget cutbacks, significant improvements in the child welfare system is unlikely to occur. . . . In short, government has turned its back on poor families and children.”).

49. See generally TOSHIO TATARA, CHARACTERISTICS OF CHILDREN IN SUBSTITUTE AND ADOPTIVE CARE: A STATISTICAL SUMMARY OF THE VCIS NATIONAL CHILD WELFARE DATA BASE BASED ON FY 82 THROUGH FY 1990 DATA x (Oct. 1993) (“[I]n FY 90, about one-third (31.1%) of the children were between 13 and 18 years of age.”). This analysis does not calculate the number of children between 18 and 21 years of age who are still in state care, nor does it give a breakdown for children between 10 and 12.

IV.
THE NEW YORK CITY CHILD WELFARE SYSTEM

In 1996 there were approximately 40,000 children in New York City's foster care system.⁵⁰ The system had so many problems that in 1995, child advocates brought suit alleging multiple violations of law regarding child protective services, preventive services, foster care, and adoption.⁵¹ Plaintiffs in *Marisol A. v. Giuliani* described the system thus:

New York City has perhaps the most dysfunctional child welfare system in the country, despite the fact that New York State spends more per capita than any other state on child welfare and most of this expense is incurred in New York City. Children in need of foster care placement often get turned away at the door, while those children who wind up in placement spend a substantial part of their childhood growing up in government custody.⁵²

In New York City, the average length of stay in foster care is now 4.2 years, as compared to a national average of 1.4 years.⁵³ Case record reviews conducted by an independent team of researchers found that in numerous areas the city's child welfare system fell below legal standards and standards of good practice.⁵⁴ Reports outside the *Marisol* litigation also confirm that many problems remain within New York City's child welfare system.⁵⁵ While young people in the system have spoken more eloquently than statistics and reports ever can about the lack of assistance in abusive

50. NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, 1997 MONITORING AND ANALYSIS PROFILES WITH SELECTED TREND DATA 1993-1997: CHILD PROTECTIVE SERVICES, PREVENTIVE SERVICES, FOSTER CARE, ADOPTION, NYC-UPSTATE-STATEWIDE 14 (Aug. 1998) [hereinafter 1997 MONITORING AND ANALYSIS PROFILES]. In 1997 there were 39,094 children in New York City's care. *Id.*

51. Plaintiff's Complaint for Declaratory and Injunctive Relief, *Marisol A. v. Giuliani*, 185 F.R.D. 152 (S.D.N.Y. 1999) (No. 95-Civ. 10533). See also Judge Ward's decision granting class certification, 929 F. Supp. 662 (S.D.N.Y. 1996). This suit is now settled. *Marisol A. v. Giuliani*, 185 F.R.D. 152 (S.D.N.Y. 1999).

52. Plaintiff's Complaint for Declaratory and Injunctive Relief, *supra* note 51, at 2.

53. *Id.* The plaintiffs note that the average length of stay since 1988 has increased 75% for New York City children in foster care. *Id.*

54. MARISOL JOINT CASE REVIEW TEAM, REPORT NUMBER ONE: INVESTIGATIONS OF REPORTS OF SUSPECTED CHILD ABUSE AND MALTREATMENT BY NEW YORK CITY'S ADMINISTRATION FOR CHILDREN'S SERVICES (ACS) 3 (Aug. 12, 1997).

55. MARK GREEN, PUBLIC ADVOCATE OF THE CITY OF NEW YORK, THE CHILD WELFARE SCORECARD 1 (Apr. 1998). This report measured the progress of ACS from January 1996 onwards, noting that at best, progress has been limited, while the Agency's "significant problems remain unaddressed." See generally Chaifetz, *supra* note 2 (documenting the widespread violations of law in New York City by not properly holding Service Plan Review meetings as required by law).

homes,⁵⁶ instability of placements, lack of placement options, and placement in unacceptable conditions,⁵⁷ it has been to little avail.

A. New York State Law and Permanency Planning

Since New York state receives federal funds, it is required to follow the permanency planning requirements under AACWA, including the provisions that require an individualized case plan, reviewed every six months, for every foster child.⁵⁸ This has been codified into state law and regulation.⁵⁹ New York State regulation requires that young people, ten years of

56. A young man describing life with his former foster mother who adopted him and his siblings confided that “[s]he beat us with any object she could get her hands on, and she never had mercy for our faces. . . . No matter how much we begged and pleaded to CWA [ACS’s predecessor], police officers, and the Child Abuse Registry Hotline, no one reached out to help us.” James R. Knight, *I Could Have Been Elisa*, FOSTER CARE YOUTH UNITED, Jan./Feb. 1996, at 1-2.

57. One young woman described her experience at the emergency foster care placement office in New York City as follows: “[D]uring the last three years I’ve been to Laight Street five times, and I had to sleep on a couch or on chairs four of those five times. The other time I slept on the floor. . . . It was an experience that reminded me of the bad times with my mother. No one listened or acted like they cared for the children they were dealing with. If this is the respect that adults give, what are we supposed to give back?” Monique Martin, *I Survived Laight Street!*, FOSTER CARE YOUTH UNITED, Jan./Feb. 1998, at 2, 4. Another young woman being bounced around the system admitted, “I was in the system for 15 months, from September 1995 to December 1996, and during that time I moved to 15 different places (6 foster homes, 5 group homes, 2 diagnostic centers, and 2 residential facilities).” There need not have been multiple placements for this young woman. As she explained, “[t]his could have been prevented had my social worker listened and talked with me, instead of not taking my phone calls. I didn’t deserve to be in the placements I was in, no one did. I said enough is enough, so I went AWOL and left the system for good.” Younique Symone, *Fifteen Months in Care—And Fifteen Placements!*, FOSTER CARE YOUTH UNITED, May/June, 1996, at 1-2. Another young person explained that because of lack of placements, teen mothers in care are often separated from their infants. She found that over one-third of sixty young women surveyed were separated from their children while awaiting mother-child placements in foster care. Michelle Brown-Glover (with Betsy Krebs), *Making the System Work for Teen Mothers (and their Children)*, FOSTER CARE YOUTH UNITED, Jan./Feb. 1996, at 14. A high school student struggling to stay in school described thus the barriers and insensitivity she faced: “During last May and June, I had to travel two and a half hours (each way) from my foster home to get to my school. . . . I begged my social worker . . . to place me somewhere else, because the foster mother and I didn’t get along. . . . This kind of problem can be avoided if my social worker would sit down and actually listen to what I’m saying. . . .” Terry DaCosta, *Placed Too Far From School*, FOSTER CARE YOUTH UNITED, Mar./Apr. 1997, at 26. Another foster care youth described the unacceptability of one of her placements. She asked her caseworker “Do you see how filthy this place is and you’re gonna leave me here?” There was no response. . . . I shared that small room with six other people. . . .” Giselle John, *Would You Place Your Child There?*, FOSTER CARE YOUTH UNITED, May/June 1997, at 18-19. Another young person discusses how her independent living placement is totally inadequate: “I always thought that they made Independent Living houses to prepare teens to live on their own. The only thing I’m being prepared for is welfare.” The Informer, *Someone Please Get Me Out Of Here! It May Be Living, But It Ain’t Independent!*, FOSTER CARE YOUTH UNITED, May/June 1995, at 22.

58. 42 U.S.C. § 675(5) (1998).

59. N.Y. SOC. SERV. LAW §§ 409-e, 409-f (McKinney 1998); N.Y. COMP. CODES R. & REGS. tit. 18, §§ 428.3, 430.12 (1998).

age or older, must be involved in the development and review of their service plans.⁶⁰ This is particularly significant for young people participating in permanency planning, as more than 40% of New York City children in foster care are at least ten years old.⁶¹ Indications are strong that more adolescents are entering the system than ever before.⁶² Of those currently in foster care who are ten or older, more than 85% have been in care for more than three years, indicating poor permanency planning.⁶³

As a children's advocate, I see every day that young people in foster care are rarely offered a chance to help plan their own futures. To find out if my anecdotal experiences and those of other child advocates had validity, my office developed and conducted a written survey to determine the level of knowledge of young people in care about their own permanency planning, as well as to solicit their views on the quality of their care under state supervision. As will be discussed below, the survey results document widespread violations of New York State law, and an approach to taking care of and planning for children that leaves the most affected parties out of the process.

In New York State the main permanency planning meeting is called a service plan review ("SPR"). At this meeting the overall permanency goal is determined. There are five possible goals: reunification with parent(s), adoption, independent living, discharge to relatives, and, rarely, discharge to an adult residential care facility.⁶⁴ In order to reach these goals, specific services, meetings, and tasks are outlined in the SPR. Services outlined might include visitation, counseling, educational and medical assistance as they relate to the reunification plan.⁶⁵ The SPR is a cornerstone of all permanency planning for young people in foster care.

60. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12 (c)(2)(i)(a)(1) (1998).

61. 1997 MONITORING AND ANALYSIS PROFILES, *supra* note 50, at 14. In the New York City foster care system in 1997, there were 7542 young people between 10-13 (19.3%), 7201 young people between 14-17 (18.4%), and 2287 who were over 18 (5.6%), for a total of 43.3%.

62. David Lewis, *A Tidal Wave of Needy Teens: Hosps, Jails Left Holding Overflow of Abused Kids*, N.Y. DAILY NEWS, July 19, 1998, at 18. Lewis notes that:

Teens are languishing in hospital maternity wards, psychiatric hospitals, child-welfare offices, unsuitable group homes and even jails because there are not enough safe places to put them. . . . A total of 166 kids 10 or older were placed in foster care in April—more than five times the number that age placed during that month two years ago. Of the 166, the number of 14-17 year-olds more than tripled from April of 1997—to 80 from 26, state records show. The surge has gone on for months, causing a huge shift in the foster-care population.

Id.

63. 1997 MONITORING AND ANALYSIS PROFILES, *supra* note 50, at 17. As of December 31, 1997, 80.9% of 10-13 year olds had been in care over three years, 83.7% of 14-17 year olds had been in care for over three years, and 94.4% of those 18 and older had been in care for over three years.

64. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.11(d)(6)(i) (1998).

65. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12 (1998).

A young person who is ten or older must be invited to this meeting, in writing, at least two weeks prior to the date of the meeting.⁶⁶ The young person's case planner and an independent third party reviewer are both required to attend the meeting.⁶⁷ In order to create an environment at the SPR that is open and invites the participation of parents and children, the law also requires that parents and children be informed of their right to be accompanied to the meeting by a person(s) of their choice.⁶⁸ These provisions are meant to ensure that young people are notified about their SPR meetings, and that they know they may bring someone with them, either to assist in explaining their viewpoints, or just to help them feel comfortable.

One of the primary goals during an SPR, especially where the focus is reunification, is to determine frequency of visitation, both with siblings and with parents. The statutory minimum, absent danger to the child, is twice per month.⁶⁹ Young people who have siblings also in foster care are supposed to be placed together "unless placement together is determined to be detrimental to the best interests of the siblings."⁷⁰

At the conclusion of an SPR in New York State a document called a Uniform Case Record ("UCR") is completed. The SPR/UCR process is the procedure through which a child should have her permanency planning needs fulfilled. The UCR is meant to document what was discussed and agreed upon at the SPR meeting. It details the permanency goals determined at the SPR, as well as the services that will be used to achieve those goals.⁷¹ If a service is not listed in the UCR, then it is unlikely to be provided. In addition, if the service which is meant to assist in reaching a permanency goal does not appear in the UCR, it becomes difficult to use the fair hearing procedure set out in federal and state provisions to obtain the service.⁷² In determining whether or not a child's stay in foster care should be extended, judges are legally required to consider compliance with the UCR as a factor during twelve month foster care reviews.⁷³ Parents and children affected by, but unable to attend, the SPR are supposed to receive a copy of the family services plan portion of the UCR.⁷⁴

66. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(c)(2)(i)(b)(1)(a)(i) (1998).

67. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(c)(2)(i) (1998).

68. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(c)(2)(i)(b)(1)(i) (1998).

69. N.Y. COMP. CODES R. & REGS. tit. 18, §§ 430.12 (d)(1)(i), 430.10(e) (1998).

70. N.Y. COMP. CODES R. & REGS. tit. 18, §§ 430.10(a), 430.10(c) (1998).

71. N.Y. SOC. SERV. LAW § 409-e (McKinney 1998).

72. See generally N.Y. SOC. SERV. LAW § 22 (McKinney 1998); N.Y. COMP. CODES R. & REGS. tit 18, §§ 358, 407, 407.5 (1998).

73. N.Y. FAM. CT. ACT §§ 1055, 1065 (Gould 1999).

74. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(c)(2)(i)(b)(2) (1998).

V.

THE FOSTER CARE YOUTH SURVEY

A. *Survey Methodology*

In order to determine whether the legal requirements of SPR/UCR were being met, as well as to determine the level of participation of young people in care when requirements were being met, my office conducted a survey ("Survey") (attached as Appendix A) during the months of June and July of 1998. Fifty-four surveys were completed. Survey respondents were all young people in foster care. Surveys were mailed to young people who had participated in programs at The Door—A Center of Alternatives,⁷⁵ and were given out at workshops for foster care youth at The Door and other agencies. Young people who responded had been placed in twelve different non-profit foster care agencies; none was in the direct care of the Administration for Children's Services ("ACS").⁷⁶ The surveys were tabulated and analyzed using the SPSS database program.

B. *Demographics*

The young people who responded were between the ages of eleven and twenty; nearly two-thirds were between fifteen and seventeen.⁷⁷ Seventy-seven percent of the foster care youth were female, and 23% were male. Forty-seven percent were African American, 35.3% were Latino, 13.7% were Afro-Caribbean, 2% were white, and 2% were Asian American. The level of educational involvement was high: 58.5% of respondents were in high school, 15.1% had graduated from high school, 5.7% had dropped out of high school, 13.2% had completed their GEDs, 3.8% were in college, and 3.8% were "other."

C. *Survey Results*

The findings focus on three areas: (1) adequate notice, knowledge and experience of SPR Meetings, (2) knowledge and access to UCR, and (3) minimal adequacy of foster care services and placement.

75. See *supra* note 2 for a description of the The Door and its programs.

76. In New York approximately 75% of all foster care placements are overseen by non-profit agencies. The rest are directly overseen by ACS. The twelve agencies from which Survey respondents came were Ohel, PRACA, Center For Children and Families, Graham Windham, Good Shepherd, Boys Town, Angel Guardian Home, New York Foundling, Catholic Guardian, Sheltering Arms, St. Christopher's-Jennie Clarkson, Brookwood Child Care, Coalition for Hispanic Services, and Child Development Support Center.

77. Forty-two young people responded to the optional age question on the Survey, with the following age percentage breakdown: 2.4% were 11, 2.4% were 13, 9.5% were 14, 14.3% were 15, 33.3% were 16, 16.7% were 17, 9.5% were 18, 7.1% were 19, and 4.8% were 20. Unless otherwise noted, all statistics discussed in this section come from The Door's Survey, and are on file at The Door.

1. SPRs

As discussed earlier, New York state law provides a legal right to notice of SPR meetings, the right to be present at meetings, and the right to bring someone to the meetings. Despite these clear legal mandates, our survey indicates that children often have never heard of an SPR, and infrequently receive adequate notice of such a meeting. Therefore, unsurprisingly, young people are often alone at their SPRs, or simply do not attend. Fifty percent of the young people surveyed indicated that they had never heard “of a meeting to discuss your goals and services that foster care provides called a Service Plan Review (SPR).”⁷⁸ Over 57% responded that they had never been asked to go to their SPR. Given the importance of SPR meetings to their day-to-day lives, as well as to their permanency goals, this percentage is extremely disturbing and is clearly unacceptable.

Asked how they had found out about their SPR meetings, 37% of those who responded said they had never learned about it. Of the remainder, 18.5% found out through personal contact, 11.1% by phone, 14.8% found out in some other way, and only 13% were notified by mail.⁷⁹ For those who knew of their meetings, 40% said that the meeting was scheduled at an inconvenient time, and 74.2% stated the meeting was not rescheduled to fit their schedules. When asked how much notice the foster care youth were given before the scheduled meeting, nearly 70% of those who responded received notice between one and thirteen days before the meeting. This violates New York state law, which requires notice “at least two weeks prior to the case conference.”⁸⁰ Additionally, contrary to state law, over 76 % of respondents were not told that they could bring someone to the SPR meeting.⁸¹ Even for those children actually given notice of their SPRs, Survey results attest that invitations did not satisfy legal requirements designed to make attendance feasible and attractive.

The majority of respondents had never been to an SPR meeting, but for those who could attend, there was involvement in the meeting. Of those who were asked if they had ever attended an SPR meeting, 54% had

78. See Appendix A for the Survey's exact phrasings.

79. This break-down seems odd, since mail is the most logical way to fill the regulatory requirement of receiving written notice of the SPR.

80. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(c)(2)(i)(b)(1)(a)(i) (1998). Our survey showed that 43.5% of respondents received notice between 7 and 13 days before the case conference, 17.4% received notice between 3 and 6 days prior to the scheduled SPR, and 8.7% received notice of the SPR meeting only 1 or 2 days before it was to be held.

81. See generally N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(c)(2)(i)(b)(1)(a)(i) (1998). All participants must be given notice that they may bring with them a person of their choosing. Knowledge that one could bring a friend, ally, or advocate is especially helpful for young people who may be particularly susceptible to adult pressures. Indeed, one young person responded to our question regarding whether there were any issues that affected the young person's interest in attending an SPR by saying, “I was scared to speak up. My foster mother feels if I disapprove of anything she does, I can move from her house.”(Survey 21).

never gone, and only 46% had attended. More than 80% did not bring anyone with them to the SPR meeting. Of those who were accompanied, 53% told us that this person was not allowed to stay at the meeting, in direct violation of state law. However, when these people were allowed to stay, they were also allowed to speak. More than 56% of respondents who went to the SPR were told that they could voice their concerns, opinions, or questions at the meeting (though nearly 43% were not), and of those told they could speak, over 42% did so. This indicates that when young people are informed of their rights, nearly one in two will exercise them.

Knowledge of how the SPR process works appears to be relatively rare for these foster care youth. For example, more than three quarters of respondents did not know what a third party reviewer ("TPR") is. This reviewer is required to be at every SPR and is meant to be a neutral party who assures that all questions and issues are addressed fully and fairly.⁸² More than 70% said there was no TPR at their meeting, and for 30% of those who had a TPR, the TPR was involved in their case, again in violation of law. Lack of notification has been a serious problem in the foster care system. It is true that 34% of those responding said they had been to an SPR meeting in the last six months, which indicates that the large majority of those in the survey sample who have ever gone to an SPR had done so within six months of filling out the Survey in June and July of 1998. This may indicate that compliance with New York state law is improving. Of those who went to their SPR, a full quarter of respondents were very satisfied by the meeting, 62.5% were somewhat satisfied, and 12.5% were not at all satisfied. Over 80% of respondents said they had not missed any SPRs of which they were aware. Fifty percent of respondents, however, had never attended an SPR.⁸³ Only 11.7% had attended more than three SPR meetings. The main reason given for non-attendance was lack of notification. This makes evident that these young people have missed the majority of their planning meetings.⁸⁴

SPR meetings are designed to involve the child in her permanency planning. If the group of young people in this survey is, as is likely, representative of the foster care population, it is clear that the foster care system, wittingly or not, violates state law. The system ensures that most children in care will not have a significant, continuous voice in their own permanency planning. As one young person responded when asked if she had had problems with the SPR/UCR process, and what might make the system easier to deal with, "they could at least let me in [in] terms of my future. It's my life and only I can decide what to do with it, not them."⁸⁵

82. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(c)(2) (1998).

83. This presents a slight discrepancy with our question, which asked if the respondent had ever gone to an SPR meeting; 46% had responded that they had attended their SPRs.

84. Of the respondents, 50% had attended no SPR meetings, 11.8% had attended one, 14.7% had attended two, and 11.8% had attended three meetings.

85. Survey 15.

2. UCRs

As discussed above, the UCR is the written compilation of the issues discussed and agreements made at the SPR meeting. The UCR is the roadmap for permanency planning. All services that will be provided to the young person (assistance with schooling, finding a job, or learning skills for living on her own, etc.) should be included in a UCR geared to independent living. Many young people, however, have no idea what is written in their UCRs and so cannot enforce their rights to services, nor make changes to their plans.⁸⁶

A stunning 64% of Survey respondents had never heard of this document. Eighty percent of those who responded had never seen their UCRs. Thirteen percent of respondents had asked for a copy of their UCR, but only half of those asking for it actually received a copy.⁸⁷ Twenty-five percent of those who had seen their UCR said they had not received all the services included in their UCR. These results indicate a fundamental breakdown of the permanency planning process.

Sadly, the problems documented in this survey are not new, but are part of an ongoing pattern in New York. A report by the New York State Comptroller found that of the thirty-two cases analyzed in which the child was eligible to participate in the SPR, 80% of the children were not present at the SPR. One commentator found, in an informal survey of foster care administrators at foster care agencies, that in practice over 90% of foster care children under the age of fifteen do not attend their own case reviews.⁸⁸

The recently released court-ordered reports assessing the New York City child welfare system prepared for the *Marisol A. v. Giuliani* class action support the findings in this survey documenting the breakdown of the SPR/UCR process. The second of three reports found that 24% of the cases reviewed had no UCR in the child's case record for the most recent six month period,⁸⁹ and only 19% of the UCRs sampled completely address all legally required elements.⁹⁰ The third *Marisol* case review report assessed over 400 randomly sampled foster care cases and found that 60%

86. As a practitioner who has seen hundreds of foster care involved adolescents, I cannot remember a single instance of a client actually having seen a copy of the family services portion of her UCR prior to my request to an agency for the client's UCR.

87. Of the fourteen written responses we received from young people on these UCR issues, ten of them either stated that they either had never heard of a UCR ("No one ever told me about an UCR, first time I hear [sic] about it." (Survey 15)), or were never given it ("They said I wasn't allowed to have a copy." (Survey 36)). Only one survey respondent actually saw her UCR (Survey 45).

88. Leonard T. Gries, *Decision-Making in Foster Care: The Child as the Primary Source of Data*, in CHILD ABUSE, NEGLECT, AND THE FOSTER CARE SYSTEM, 73, 97-98 (PLI Litig. and Admin. Practice Course Handbook Series No. 158 (1991)).

89. MARISOL Joint Case Review Team, *Marisol A. v. Giuliani* Case Record Review: Services to Families with Open Indicated Cases 35 (Sept. 5, 1997).

90. *Id.* at 33.

of the most recent case plans for children in care were not completely appropriate to promote optimal child outcomes,⁹¹ 23% of case plans reviewed were not updated to reflect current case progress,⁹² 18% of the cases reviewed had inappropriate permanency planning goals,⁹³ and 41% of cases had no third party reviewer signature on file, indicating the absence of a third party reviewer.⁹⁴

3. *Minimal Adequacy of Foster Care Services and Placement*

Survey questions were designed to find out if experiential anecdotes of client problems in foster care could be validated in a systematic manner. Because the state has stepped in as parent for these children it is obligated to provide the minimum of food, clothing, shelter and medical care.⁹⁵ Visitations and preparation for living outside of foster care (either family reunification or independent living) are areas that are meant to be covered in an SPR meeting. However, clients consistently come to us with problems regarding lack of basics such as food and clothing, insufficient visitation of family members, and a deficiency of services to prepare clients for the world outside of foster care.

When asked if they were getting enough food in foster care, over 22% stated they were not. Some of the comments made clear how little these children were cared for.⁹⁶ Asked if they had proper seasonal clothing, 26% said they did not. Comments from respondents in this area also showed a pattern of institutional lack of care.⁹⁷

Many of those surveyed talked about being abandoned by parents, or having parents or siblings who were far away or did not wish to see them. Others discussed unacceptable barriers that foster care created to seeing

91. MARISOL Joint Case Review Team, *Marisol A. v. Giuliani* Case Record Review: Services to Children in Foster Care and Their Families 88 (Dec. 1997).

92. *Id.*

93. *Id.* at 13.

94. *Id.* at 92.

95. See, e.g., N.Y. DOM. REL. LAW § 32 (McKinney 1999); N.Y. FAM. CT. ACT §§ 413, 1054 (Gould 1999); N.Y. SOC. SERV. LAW § 384-b(3) (McKinney 1998).

96. A number of respondents wrote that the food was either bad or inadequate. As one person wrote, “[w]hen my foster mother leaves on weekends I’m left alone and no food is left for me. And if I cook something then next day food is hide. Or sometimes I eat at 9 o’clock at night. There’s nothing to eat in the morning. No milk or juice lately. Cannot cook my own meals because she’ll get mad. Sometimes won’t cook at all.” (Survey 24). Another wrote, “I was denied lunch at the center for children and families in 1998. I called the police but nothing helped. The staff Ms. Baines said I was emotionally disturbed and needed to be removed. (I was hungry and needed to eat.)” (Survey 36).

97. One client, speaking in the third person, said, “she first arrived in April without clothes and was not taken shopping until July.” (Survey 1). Another respondent said, “I didn’t have jeans for the winter and no underclothes (bras, underwear, etc.)” (Survey 22). Another told her story of being cold in the winter: “In 1996 I was in Brookwood child care and didn’t receive a coat. I had to wear my foster mother’s hand-down light jacket which she asked me to return in the middle of the winter” (Survey 36).

their families.⁹⁸ Eighty percent of surveyed clients told us that they wanted to see family members more often. Thirty percent had asked to see family members and were denied, and over 65% stated they had other problems with visiting family members. More than 92% of clients had siblings, but only just over 21% of those with siblings were living with them. Some 23% had siblings who were also in foster care but not living with them,⁹⁹ and over 53% had siblings still living with their families. A little over 21% stated their siblings were living some other place. A disturbing 42.4% of respondents said they never visited their siblings.¹⁰⁰

Educational preparation is key to the success of any child. When asked if they had ever asked for tutoring or special educational help while in foster care, over 44% of respondents said they had. A little more than 42% said that they did not receive such help. Seventeen percent said no one had ever talked about college with them, and of those who had received information, nearly 40% had not received information on financial aid opportunities, a necessity for almost every child in foster care who will go to college. More than 46% said they had had no opportunity to participate in job training programs. Tellingly, more than 52% said that they were not prepared to support themselves after they left care.¹⁰¹

98. Some responses to the question of whether a young person was denied a request to see family members included: "because I was misbehaving" (Survey 6), "[p]asses aren't allowed during the week" (Survey 28), "ACS had to return paperwork. It took almost two months" (Survey 36), and "I don't know why they just say no" (Survey 48). When asked if they had any other problems visiting family members, some clients again discussed how some family members didn't want to see them or how they were unavailable because they were far away. However, there were also comments that exposed unacceptable barriers caused by the foster care system. "My grandmother was sick with cancer and my group home would not let me go to see her." (Survey 19). "My mother has 8 children all together. She has 1 living with her. She doesn't know where the other 6 are. I want to try to find them and my father." (Survey 22). "When I lived in Brooklyn and my family in Manhattan. It was really hard for me to see them and for them to see me." (Survey 43).

99. See generally N.Y. COMP. CODES R. & REGS. tit. 18, §§ 430.10(a), 430.10(c) (1998) (placing siblings apart is prohibited, unless it is in the best interests of the siblings to be separated).

100. See generally N.Y. COMP. CODES R. & REGS. tit. 18, §§ 430.12 (d)(1)(i), 430.10(e) (1998) (declaring the legal minimum for visitation is twice per month). Despite this statutory requirement, 6.1% of respondents indicated that they only saw their sibling(s) once per month, which is also a likely legal violation.

101. Respondents were very outspoken in response to this question. Comments were split nearly in half, with some saying they were prepared, and others saying they were ill prepared. Interestingly there were only a few comments (four) that attributed the young person's ability to be self-supporting to a foster care agency. One young person wrote, "[y]es because I have the proper knowledge and experience thanks to the foster care home I am in now" (Survey 39). Most, however, attributed their ability to be self-supporting to their own inner resources: "After being separated from my own family and the [sic] my sisters I believe I can handle almost anything." (Survey 27). Those who stated they were not prepared often cited concrete reasons why: "No, because I haven't had any job training or skills used for finding a job." (Survey 16); "No! For one, I don't have a job. And will not be able to afford college." (Survey 28); "No. I am 17 and have not been given basic life lessons. All I am being taught is how to better do my chores." (Survey 36).

We asked Survey respondents what they saw as the best and worst aspects of foster care. The most common response to what was best was unfortunately "nothing."¹⁰² However, some respondents spoke eloquently about caring assistance in their placements.¹⁰³ Most respondents who saw good in the foster system saw it in terms of leaving bad situations and getting basic needs: safe shelter, food, and medical care.¹⁰⁴ When discussing the worst things, the largest number of respondents talked about not being heard, the lack of services, and uncaring attitudes of people working for the foster care system.¹⁰⁵ Others discussed the shame and stigma of being in foster care and the pain of being separated from their families.¹⁰⁶ Some young people indicated that the worst part of foster care was a lack of safety for their possessions and themselves.¹⁰⁷ Finally, nearly a quarter were "not at all satisfied" with their overall experiences in foster care, nearly 57% were somewhat satisfied, and only about 19% were very much satisfied.

102. Surveys 3, 5, 6, 19, 33 ("There isn't none"), 44 ("No"). In pleasant contrast one respondent did write "everything" (Survey 26).

103. "[T]hey are good people and I have learned a lot of discipline and they have helped me a lot." (translated from Spanish) (Survey 13); "Having a nice foster parent like Mari." (Survey 27); "The staff at St. Christopher's Jenny Clarkson who took out time to help and support me." (Survey 36); "My foster mother was the sweetest thing. She really cared about me. . . ." (Survey 43); "My group home in Staten Island. Mosel Avenue the staff really care about helping us out." (Survey 45).

104. "I had the chance to get away from being mistreated as a child and teenager." (Survey 15); "They try to their best ability to satisfy your essential needs." (Survey 18); "Having a roof over my head and a bed to sleep in." (Survey 22); "'I'm not homeless in the street begging on the train." (Survey 23); "They pay for almost all my needs, I got my glasses. Go to dentist every six months." (Survey 24); "Having someone to take care of you." (Survey 37); "My job training." (Survey 40); "The best thing about being in foster care is the fact that as long as you're under 21, you'll always have a roof over your head." (Survey 50).

105. A sample of some comments: "They don't care—it's just another dollar in their pockets." (Survey 3); "You don't get much attention unless you fight and demand for it. They always say they're too busy or are taking care of someone else." (Survey 15); "My staff acts like they don't care. And they talk about you behind your back to other girls in the house." (Survey 22); "Foster mothers. Sometime they treat you different from their own kids. They keep your money (weekly allowance, or won't give you carfare). Sometimes I do my laundry every month because she say I don't have any money. I won't get my full clothing allowance. They just treat you bad at home but when they at the agency or SW [social worker] comes to visit the home, they try to be nice with you." (Survey 24); "Most of all the disrespect from staff." (Survey 28); "Who really care about me? No one in the system does." (Survey 33); "The worst thing about being in foster care is going from foster home to foster home and knowing that half of the foster parents are only doing it for the money." (Survey 50).

106. Examples of the worst things in foster care in this area: "The separation from my mother an [sic] my sisters." (Survey 27); "Ever having to be in it [foster care]." (Survey 38); "When people like saying your are a foster child, over and over" (Survey 53).

107. Examples of these issues: "Girls stealing clothes." (Survey 16); "The worst thing that I do not like is for people to touch my stuff and that they stole my jewelry." (Survey 34); "When I was sexually harassed in one of my foster homes." (Survey 54).

VI.
LISTENING TO CHILDREN

It is clear from the results of this survey and from the general breakdown of our child welfare system nationally, that the voices of children in foster care go unheard despite statutory and regulatory law to the contrary.¹⁰⁸ Child welfare reform impact litigation has been going on for over twenty years, and though improvements have been made, the fundamental lack of respect for children remains.¹⁰⁹ As discussed above, child welfare experts have pointed to numerous reasons for the state of disarray in our child welfare system.¹¹⁰ But the lack of regard to the thoughts or wishes of children has rarely been investigated as a fundamental cause for many of foster care's ills. Although children have been recognized as having rights of their own, separate from the family or state,¹¹¹ the right of the child to be heard on a day-to-day basis is nearly non-existent in the permanency planning context in foster care.

In New York State new laws do not need to be passed. What does need to occur is a fundamental shift in how foster care clients are viewed. As one critic has observed,

There is a fundamental difference between respecting children because they are powerful and protecting children because they are vulnerable. . . . [It is] realistic to believe that the nature and frequency of the harms inflicted upon children would change substantially if we envision children as powerful beings.¹¹²

The rights of children in foster care are consistently trampled. As a result, fundamental services to clients are never delivered. The law is useless if there is no enforcement. The severe dysfunction of the SPR/UCR process when it comes to young people's participation in their own case

108. See *supra* notes 55, 56, 80, 81, 85, 86, 96-98, 105-07.

109. See generally Lowry, *supra* note 3; Homer, *supra* note 7; BEYOND RHETORIC, *supra* note 3; Mushlin, *supra* note 21.

110. See Ellen Borgersen & Stephen Shapiro, G.L. v. Stangler: A Case Study in Court Ordered Child Welfare Reform, 1997 J. DISP. RESOL. 189, 191 (1997). ("It is no mystery why child welfare services are in such a state of disarray nationwide, notwithstanding the high level of rhetorical support they enjoy all across the political spectrum. Children do not vote and do not have the power to hold politicians or bureaucrats accountable for mandated child welfare services.").

111. See *In re Gault*, 387 U.S. 1 (1967) (holding that constitutional due process guarantee applies to proceedings in which juveniles are charged as delinquents); *In re Winship*, 397 U.S. 358 (1970) (holding that when juvenile is charged with an act that would constitute a crime if charged to an adult, the standard of proof must be proof beyond a reasonable doubt); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (holding that high school students have First Amendment rights).

112. Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REV. 1585, 1597 (1995).

planning demonstrates the system's lack of respect for these young people and its failure to recognize the legal rights they possess.¹¹³

Too many working in the child welfare field still operate with a "child rescue" mentality, regarding the child as merely the object to be protected, instead of the client to be listened to and assisted.¹¹⁴ More than 40% of children in New York are eligible to have a voice in their permanency planning. The federal government fails to do substantive oversight and does not sanction the state for violations. The overall effect of each of these failures is the creation of a second class status for children in foster care.¹¹⁵

There are legal and ethical violations in failing to listen to foster care children; conversely, there are many advantages to providing a youth development perspective. When a young person is heard, she learns that she can affect her environment. The foster care client's recommendations can improve her day-to-day life in foster care and should speed the permanency planning process to a positive conclusion. Lastly, a young person's input is likely to enhance her ownership of her own permanency plan, thereby increasing the likelihood of its success. Such esteem-building practices are supported by psychological literature and are concordant with permanency planning philosophy.¹¹⁶

113. One young person stated, "[t]he system is punishment. They look at you as a file or paperwork, not as a person." Another said, "[n]o one listens to you, no one believes you." Richard Danford & Ana Espana, *The Foster Care System Swallows Up Children*, SAN DIEGO UNION-TRIB., Dec. 8, 1995, at B7. Young people in the Survey also made clear their feelings of powerlessness. One Survey respondent, when asked if she had any additional concerns about foster care, asked to have some idea of the status of her foster care situation (Survey 1). Another wrote, "I now live in a group home. It seems like partly prison." (Survey 33).

114. See Gries, *supra* note 88, at 76 ("The child is frequently overlooked, misunderstood, or discounted when the most serious matters concerning his or her future are deliberated.") Gries goes on to note that

[t]he most insidious obstacle interfering with input from the child is inherent in the patronizing, 'we know best' attitude adopted by some in the foster care field. Superior insight and judgment presumably emanate from the years of college, graduate school, law school, and on-the-job experience enjoyed by such foster care players.

Id. at 99-100. See also Federle, *supra* note 112, at 1588 ("Practical experience has proven that children are seldom better off when enforcement of their rights has been left to those who owe duties to those children.").

115. Gries, *supra* note 88, at 103. Specifically, a system is created in which [t]he child's word simply carries less weight than that of the adult. If this is true, then beneath the foster care system's general guiding principle of best interests of the child we have a de facto policy which subjugates the rights and powers of the child to a secondary status.

Id.

116. See ALBERT BANDURA, *SOCIAL FOUNDATIONS OF THOUGHT AND ACTION: A SOCIAL COGNITIVE THEORY* 25 (1986) (discussing the concept of "self efficacy," the theory that individuals possess beliefs that enable them to exercise control over their thoughts, feelings and actions, and that what other people think and believe affects how the individual behaves); STEVEN J. WOLIN & SYBIL WOLIN, *THE RESILIENT SELF: HOW SURVIVORS OF TROUBLED FAMILIES RISE ABOVE ADVERSITY* 101-03, 136-40 (1993) (explaining that people can best deal with difficult situations by taking the initiative in dealing with their situations, and by remembering that the situations will eventually end).

There are system-wide remedies to the problem. The appropriate government agency, which in New York is ACS, could track and substantively monitor the SPR/UCR process.¹¹⁷ A system of trained advocates could accompany young people to their SPRs to assure that the young person's views and thoughts are respected and heeded.¹¹⁸ A cadre of third party reviewers could be trained, who could then attend each client's SPR and act in an independent manner to assure that everyone in the meeting is heard, and the permanency goals and services are outlined correctly and fully.¹¹⁹ All of this would require a much needed and long overdue change of approach towards older children in foster care: one in which the child becomes a partner in her own case planning.

117. Chaifetz, *supra* note 2, at 15-16.

118. *Id.* at 16.

119. *Id.*

APPENDIX A

SURVEY FOR FOSTER CARE YOUTH

SECTION 1

1. Date.
2. How long have you been in Foster Care?

VISITATION

3. Do you have brothers or sisters? ((Yes/No))
4. If yes, where do they live?
 - With me
 - In Foster Care, but not with me
 - With my family
 - Other
5. How often do you visit them?
6. Have you ever wanted to see family members
 - More often ((Yes/No))
 - Less often ((Yes/No))
7. Have you ever asked to see family members and were denied? ((Yes/No))
 - If yes, what reasons were you given?
8. Have you ever had any other problems with visiting your family members? (EXAMPLE: your family could not afford transportation or they live far from you.) Please explain.

MATERIAL NEEDS

9. Do you feel as though you get enough food? ((Yes/No))
10. Have you ever not had proper seasonal clothing? ((Yes/No)) (EXAMPLE: no winter coat during the winter, etc.)
 - If yes, please explain.
11. Have you ever experienced other problems with food and/or clothing?
 - Please explain.

EDUCATION/INDEPENDENT LIVING SKILLS

12. Educational level:
 - High school
 - Graduated
 - Dropped out
 - GED
 - In college
 - Vocational
 - Other
13. Have you ever tried to get tutoring or special educational help from someone while in Foster Care? (Yes/No)
 - Did you get it? ((Yes/No))

If not, please explain.

14. Has anyone ever talked about college with you? (Yes/No)
15. Has anyone ever talked about financial aid opportunities for college with you? (Yes/No)
16. Have you ever had any opportunities for job training programs? (Yes/No)
17. Do you feel prepared to support yourself after you leave foster care? Please explain.
18. How do you feel overall about your experience in the Foster Care System?
 - Not at all satisfied
 - Somewhat satisfied
 - Very much satisfied
19. What is (was) the best thing in Foster Care? Please explain.
20. What is (was) the worst thing in Foster Care? Please explain.

SECTION 2

21. Have you ever heard of a meeting to discuss your goals and services that Foster Care provides called a Service Plan Review (SPR)? (Yes/No)
22. Have you ever been asked to go to your SPR? (Yes/No)
23. How did you find out about the SPR meeting?
 - Mail
 - Phone
 - Personal contact
 - Never knew about it
 - Other
24. Has your Case Worker ever contacted you to schedule your SPR meeting? (Yes/No)
25. If Yes:
 - Was the meeting(s) scheduled at a time that was good for you? (Yes/No)
26. If No:
 - Was the meeting(s) rescheduled to fit your own schedule? (Yes/No)
27. Have you ever received notice telling you about a scheduled meeting? (Yes/No)
28. How much notice were you given before the scheduled meeting?
 - More than 30 days
 - 21-30 days
 - 14-20 days
 - 7-13 days
 - 3-6 days
 - 1-2 days
29. Have you ever gone to one of these SPR meetings? (Yes/No)
30. Were you told that you could bring someone with you to the meeting? (Yes/No)
31. Did you bring anyone to the meeting? (Yes/No)
 - If yes, was the person allowed to stay? (Yes/No)
 - If yes, was the person allowed to speak? (Yes/No)

32. Were you told that you could give your ideas, concerns, opinions and/or questions at this meeting? (Yes/No)
33. If yes, did you give any ideas, concerns, opinions and/or questions? (Yes/No)
If no, please explain why not.
34. Do you know what a Third Party Reviewer (TPR) is? (Yes/No)
35. Was there a TPR at the meeting? (Yes/No)
36. Was the TPR anyone involved with your case? (Yes/No)
37. If yes, was it:
- An agency caseworker
 - An agency caseworker's supervisor
 - Other agency staff
 - An ACS worker
 - House supervisor
 - Other
38. Have you been to an SPR meeting in the last 6 months? (Yes/No)
39. Who attended the last meeting you attended?
- The agency caseworker
 - The caseworker's supervisor
 - The ACS worker
 - A person identified as a third party reviewer
 - Your parent
 - Someone I brought with me
 - Other
40. Were you satisfied by the meeting?
- Not at all satisfied
 - Somewhat satisfied
 - Very much satisfied
41. How many SPR's have you attended?
42. Have you missed any SPR's that you were aware of? (Yes/No)
43. Why did you miss the SPR meeting(s)? (Indicate all relevant answers.)
- Not notified of meeting
 - Not interested
 - Not given enough notice of meeting
 - Couldn't attend meeting and they wouldn't reschedule
 - Not enough information given concerning meeting date, time and place
 - Other (explain)
44. Have any of the following issues affected your interest in attending an SPR meeting?
- Previous meetings were not helpful
 - Caseworker failed to talk about goal changes with me during previous meetings

- Previous meetings were not useful in helping me to achieve goals
 I could not get a copy of the Uniform Case Record (UCR)
 I had limited chances to talk during my previous meetings
 Other

SECTION 3

45. Did you know there was a written document created every six months that contains your goals and services called a Uniform Case Record (UCR) or Family Services Plan? (Yes/No)
46. If yes, have you ever seen your UCR? (Yes/No)
47. Have you ever asked for a copy of your UCR? (Yes/No)
 If yes, did you receive it? (Yes/No)
 If no, why not?
48. Have you ever been asked to sign a UCR? (Yes/No)
49. Have you ever been asked to sign a blank UCR? (Yes/No)
50. If yes, did you sign it? (Yes/No)
51. Have you received all services included in your UCR? (Yes/No)
52. If you have had problems, what do you think would make the SPR/UCR process easier?
53. Do you have any additional concerns that were not addressed by the previous questions? Please explain.

DEMOGRAPHIC INFORMATION

54. Are you: Male Female
55. How would you describe yourself:
 White (not Latino/a)
 African-American
 Afro-Caribbean
 Asian American
 Latino/a
 Native American
 Other
56. Where were you born?
57. How long have you been in the United States?

OPTIONAL INFORMATION (You do not have to give this information)

58. Name
59. Address
60. Phone number
 Beeper number
61. Age
62. Agency name
63. Do you have any children? (Yes/No)
 If so, how many?