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Sheri Bonstelle

Fordham University School of Law

Christine Schessler

Fordham University School of Law

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Cover Page Footnote

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ADJOURNING JUSTICE: NEW YORK STATE'S FAILURE TO SUPPORT ASSIGNED COUNSEL VIOLATES THE RIGHTS OF FAMILIES IN CHILD ABUSE AND NEGLECT PROCEEDINGS

*Sheri Bonstelle and Christine Schessler**

A wheelchair bound eleven-year-old with cerebral palsy has been sitting in a foster care placement office for seven days and seven nights. Her indigent grandmother was supposed to have a hearing in Family Court at least four days ago to determine if her granddaughter should have been removed from her, and if so, where the child should be placed while the grandmother awaits a trial and disposition of any charges against her. But there have been no attorneys to appoint—so the grandmother has to wait and her granddaughter has to wait—separated from each other for the first time in the child's life.¹

INTRODUCTION

The attorneys who represent parents in child abuse and neglect proceedings in the New York City Family Court (“Family Court”) system enter the lives of parents at critical moments of emotional crisis. These are parents who are too poor to provide food and clothing for themselves and their children, or cannot find affordable, adequate housing for their families, or have been abused themselves, or cannot overcome an addiction to drugs or alcohol. These

* Sheri Bonstelle, J.D. 2001, and Christine Schessler, J.D. 2001, would like to thank Sabrina Flaum, J.D. 2000, and Hilary Gershman, J.D. 2000, for their investigation, writing, and research on the Advanced Seminar in Ethics and Public Interest Law project that provided the basis for this Comment. The authors also thank Professor Ann Moynihan for the conception of this project and for her invaluable guidance and support, and Professor Russell Pearce and Professor Bruce Green for supporting discussion and research concerning public-interest lawyering, and for access to the invaluable resources provided by the Louis Stein Center For Law and Ethics at Fordham University School of Law. In preparation for this report, the authors visited New York Family Courts, interviewed family and welfare attorneys, judges, and legislators, and conducted a survey of the 18-B panel members.

1. Jody Adams, *A Daily Disaster for Children*, N.Y. TIMES, Feb. 19, 2001, at A15. Every week in each New York County, judges adjourn approximately ten to twenty cases because there are no attorneys available for assignment. Mark Green et al., *Justice Denied: The Crisis in Legal Representation of Birth Parents in Child Protective Proceedings*, at iv (May 2000), available at <http://www.pubadvocate.nyc.gov> (citing Hon. Joseph M. Lauria, Administrative Judge of New York City Family Court).

are parents whose children have just been taken from them and placed in the home of a stranger or whose parental rights are about to be terminated permanently. These are parents who desperately need a zealous advocate both in court, to ensure their voices are heard, and out of court, to ensure they receive the services they need to get their children back. However, due to the failure of New York State to provide adequate compensation and other necessary resources for the attorneys who represent them, indigent parents are not receiving the representation they legally and justly deserve.²

The attorneys, known as "18-Bs" based on New York County Law Article 18-B³ authorizing assigned counsel for indigent criminals and Family Court litigants, have not had a raise since 1986. Section 722-b of this Article⁴ currently authorizes each county to pay the attorneys \$25 per hour for out-of-court time and \$40 per hour for in-court time, and places a cap of \$800 on all Family Court cases. The statute does not provide for benefits or malpractice insurance and does not grant reimbursement for overhead costs.⁵ Due to the increased cost of living and working in New York over the past fifteen years, many attorneys simply can no longer afford to take on cases as assigned counsel.⁶ The remaining attorneys are increasingly overburdened with high caseloads and cannot provide the level of representation constitutionally, statutorily, and ethically required.⁷ The New York State Legislature has further compromised the ability of the 18-B attorneys to fulfill their duties effectively by shortening the amount of time parents have to comply with court orders enabling them to get their chil-

2. Joan Biskupic, *Rehnquist Pleads Appointed Lawyers' Case*, THE STAR-LEDGER (Newark, N.J.), Jan. 1, 2000, at 53. Although parents who are respondents in family court do not have a constitutional right to an attorney, New York has provided them with a statutory right to representation. N.Y. FAM. CT. ACT § 262 (McKinney 1998). For further discussion, see *infra* Part I.A.2.a. Such a right to representation entails the right to effective assistance of counsel. N.Y. FAM. CT. ACT § 262 practice cmt. (McKinney 1998). For further discussion, see *infra* Part I.B.1.b.

3. N.Y. COUNTY LAW Art. 18-B (McKinney 1991). This Comment focuses on the specific role and requirements of 18-Bs in Family Court, but the majority of 18-B attorneys work in the criminal court system.

4. N.Y. COUNTY LAW § 722-b (McKinney 1991).

5. See *id.*

6. Anthony M. DeStefano, *Lawyers for Poor Seeking Raises*, NEWSDAY (N.Y.), Jan. 20, 2000, at A6.

7. Robin Topping, *A Lawyer's Case for More Pay*, NEWSDAY (N.Y.), Feb. 9, 2000, at A24.

dren back⁸ without providing for the additional services and funding to support the affected parents and their attorneys.⁹

Most New York attorneys, judges, and child-welfare advocates agree that, at a minimum, 18-B attorneys should receive a pay increase.¹⁰ In her January 2000 State of the Judiciary address, Chief Judge of the State of New York Judith Kaye recommended a pay increase to \$75 per hour for both in-court and out-of-court time.¹¹ However, the following day, Governor George E. Pataki rejected the idea at a press conference on the state budget for fiscal year 2000, stating that “he d[id] ‘not intend’ to do anything to increase assigned counsel rates.”¹²

Frustrated by the lack of government support, the 18-B attorneys have attempted a series of protests,¹³ strikes,¹⁴ and lawsuits¹⁵ to force legislative action, but simultaneously have created a crisis for the indigent defendants in need of assigned legal representation.¹⁶ Lawyers in the Bronx, Brooklyn, Manhattan, and Queens have refused to accept new cases in 2001, some by concerted action, others on an individual basis.¹⁷ As the lack of available assigned counsel has led to adjournments and parents being sent home without representation, a spokesperson for Governor Pataki blamed the attorneys, stating “[i]t’s unfortunate that these attorneys decided to

8. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997). For further discussion, see *infra* Part II.B.

9. John Caher, *Judiciary Gets Boost in Budget of 6 Percent*, N.Y. L.J., May 9, 2000, at 1.

10. Evan A. Davis, *Governor Pataki: Raise Assigned Counsel Rates Now*, 44TH STREET NOTES (ABCNY), Jan. 2001, at 1. There is an entire website specifically established to broadcast the campaign for higher rates at <http://www.internet-esq.com/ny18-b.htm> (last visited Feb. 25, 2001).

11. John Caher, *Raise in Court Fines Would Benefit Victims*, N.Y. L.J., Jan. 12, 2000, at 1 [hereinafter Caher, *Raise in Court Fines*].

12. *Id.*

13. DeStefano, *supra* note 6, at A6.

14. Laura Mansnerus, *A Brake on the Wheels of Justice*, N.Y. TIMES, Jan. 17, 2001, at B1 [hereinafter Mansnerus, *A Brake on the Wheels of Justice*].

15. Topping, *supra* note 7, at A24.

16. Michael A. Riccardi, *Panel to Refuse Family Court Cases*, N.Y. L.J., Dec. 8, 2000, at 1 [hereinafter Riccardi, *Panel to Refuse Family Court Cases*]. Assigned counsel in criminal cases similarly refused new clients a few months later. Daniel Wise, *18-B Lawyers Unavailable For Monday*, N.Y. L.J., Mar. 27, 2001, at 1 (discussing anti-trust fines imposed upon striking assigned counsel in the District of Columbia).

17. *Id.*; Michael A. Riccardi, *Brooklyn 18-B Panel Lawyers Expect to Take Fewer Cases*, N.Y. L.J., Dec. 18, 2000, at 1 [hereinafter Riccardi, *Brooklyn 18-B Panel*]; John D. Feerick, *A Shameful Crisis in the Family Court*, N.Y. L.J., Jan. 11, 2001, at 2.

hold these children hostage. We think that's wrong.'"¹⁸ Still, the Governor and the New York State Legislature did not acknowledge their own role in the Family Court crisis and failed to include any increase in assigned counsel rates in the 2001 budget.¹⁹ Governor Pataki did not even mention the issue in his 2001 State of the State Address.²⁰

Finally, after two weeks with Family Court intake virtually at a standstill, on January 12, 2001, Governor Pataki and legislative leaders announced the creation of a task force to devise a legislative proposal this session for increasing assigned counsel fees.²¹ Governor Pataki reversed his position, committing to raising counsel rates, especially for those attorneys representing children and victims of domestic violence in Family Court.²² The task force will address several issues: the appropriate rate increase; whether there should be different rates for in- and out-of-court work and different rates for felony and non-felony cases; a cap on the total compensation for each case; the sources of funding; and the reliance on institutional providers.²³ Some practitioners believe that the issue is now past the point of needing a task force²⁴ and many attorneys are skeptical that the proposed raise will materialize anytime soon.²⁵ Even if the legislature passed a raise this year for appropriations next year, the new rate would not become effective until January 1, 2003.²⁶

In the meantime, the Governor has called it "critical" for assigned counsel to take on new cases and provide adequate repre-

18. Laura Mansnerus, *Lawyers for the Poor Cite Low Pay in Threat to Refuse New Cases*, N.Y. TIMES, Dec. 9, 2000, at B3 (quoting Michael McKeon, a spokesman for Governor George E. Pataki).

19. OFFICE OF THE GOVERNOR, 2001-2002 N.Y. STATE BUDGET (2001), <http://www.state.ny.us/dob>.

20. See Gov. George E. Pataki, State of the State Address (Jan. 3, 2001), <http://www.state.ny.us/pdfs/sos2001.pdf>.

21. Laura Mansnerus, *State Plans to Raise Fees Paid to Court-Hired Lawyers for the Poor*, N.Y. TIMES, Jan. 13, 2001, at B5 [hereinafter Mansnerus, *State Plans to Raise Fees*].

22. Office of Gov. Pataki, Press Release, *Governor Pataki, Majority Leader Bruno, Speaker Silver Reach Agreement to Study Counsel Compensation Rates* (Jan. 12, 2001) (on file with the Fordham Urban Law Journal).

23. *Id.*

24. Mansnerus, *State Plans to Raise Fees*, *supra* note 21, at B5 (quoting Harvey Fishbein, Chairman of the Bronx and Manhattan Criminal Defense Panel Advisory Committee, "We're past the point where we need a task force. I hope this isn't just a means for more delay").

25. Mansnerus, *A Brake on the Wheels of Justice*, *supra* note 14, at B1.

26. *Id.*

sentation.²⁷ However, many attorneys already are carrying more than 100 cases,²⁸ which borders on malpractice.²⁹ Asking the attorneys to take on more cases places additional burdens on those least empowered to affect real change, while ignoring the greater systematic problems that can only be resolved by legislative action.

This Comment evaluates the current 18-B system in New York City Family Court, analyzes existing proposals to alter the Family Court system, and suggests a plan of action for the legislative task force. Part I of the Comment outlines the evolution of the assigned counsel system in New York and the history of child welfare policy, and discusses the roles of the Family Court attorneys, judges, and the legislature in maintaining adequate representation for parents. Part II examines the aspects of the Family Court and child welfare systems that compromise the ability of 18-B attorneys to provide adequate representation to indigent parents. Part III proposes a spectrum of solutions employing various lawyering and funding models to address the needs of indigent parents and their lawyers. In conclusion, this Comment appeals to the New York State Legislature to implement particular short-term and long-term solutions to remedy the immediate assigned counsel crisis and address the harm that lack of adequate parental representation imposes on entire families.

I. THE 18-B ASSIGNED COUNSEL SYSTEM IN NEW YORK CITY FAMILY COURT

A. Evolution of Parental Representation in Family Court Proceedings

1. Child Welfare Policy and the Family Court System

In 1962, the establishment of the New York City Family Court³⁰ created a unified court for family-related legal matters, combining several existing tribunals such as the Children's Courts and the New York City Domestic Relations Court. The Supreme Court retained divorce and annulment jurisdiction, and concurrent child custody jurisdiction.³¹ Child protection legislation existed as far

27. *Id.*

28. John Caher, *Commission Seeks Solutions to Assigned Counsel Rate Woes*, N.Y. L.J., Feb. 7, 2001, at 1 [hereinafter Caher, *Commission Seeks Solutions*].

29. Daniel Wise, *In Family Court, Representing the Indigent is Daily Struggle*, N.Y. L.J., June 14, 2000, at 1 [hereinafter Wise, *Representing the Indigent*].

30. Merrill Sobie, *The Family Court Organization, Jurisdiction, and Procedures*, in NEW YORK FAMILY COURT PRACTICE, § 1.1, at 2 (Merril Sobie ed., 1996).

31. *Id.* at 3.

back as the Civil War,³² but initially, children's cases were heard in a general civil or criminal court, and by the end of the nineteenth century, the volume of such cases required a specialized court.³³ In 1921, the legislature finally amended the New York State Constitution to establish a separate court system to hear family matters,³⁴ creating distinct juvenile courts that later merged to form the unified Family Court. Distinct from the criminal and civil courts, New York City Family Court "was designed and created to deal with the unique and complex problems facing families."³⁵ Recently, Family Court judges have created special Parts in each borough to hear solely child abuse and neglect cases.

Although the Family Court professes to have a "social nature and rehabilitative intent,"³⁶ the family is not considered as a single entity, but rather as comprised of individual adverse parties, each with its own legal advocate.³⁷ There exists "a tripartite balance of rights and responsibilities among the parent, child, and state,"³⁸ whereby the court system seeks to balance the privacy rights of parents and the preservation of the family unit with the "best interests" of the child. A brief review of the history of child welfare policy illustrates the effect of policies and laws that alternate between favoring each of these interests.

a. Child Welfare Policy

The United States Constitution provides families with privacy rights and protection from state intrusion regarding domestic matters.³⁹ However, this protected interest must be balanced against

32. *Id.* at 3 (citing L. 1851, ch. 332, establishing the Juvenile Asylum; L. 1877, ch. 428, creating "the first comprehensive child neglect and abuse statute").

33. *Id.* at 3 (citing L. 1892, ch. 217, authorizing separate court parts to hear family related cases; L. 1901, ch. 466 and L. 1909, ch. 570, mandating the use of separate parts).

34. *Id.* (citing N.Y. STATE CONST., Art. 6, § 18).

35. Alison B. Vreeland, Note, *The Criminalization of Child Welfare in New York City: Sparing the Child or Spoiling the Family?*, 27 FORDHAM URB. L.J. 1053, 1077 (2000) (citations omitted).

36. Sobie, *supra* note 30, § 1.6, at 8.

37. See Vreeland, *supra* note 35, at 1080 (explaining appointment of law guardians). *Contra* Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253, 1294-01 (1994).

38. Susan Vivian Mangold, *Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 BUFF. L. REV. 1397, 1403 (1999).

39. U.S. CONST. art. I. For further discussion of constitutional rights of families, see *infra* Part I.A.2.a.

the state's compelling interest in the health, welfare, and safety of its citizens.⁴⁰ Thus, the state may intervene and remove children from the home when their parents are suspected of abuse or neglect.⁴¹ Depending on the political and social policy trends of the time, child welfare policy has alternated between laws and procedures favoring family preservation in these instances and those enforcing stricter child protection.⁴² When the pendulum swings toward family preservation, the state generally makes efforts to keep children at home or return them to the parent as soon as possible.⁴³ When the trend returns to child protection, the state removes children more quickly based on less strict standards and pursues more terminations of parental rights.⁴⁴ During periods of policies favoring more stringent child protection measures, it is most critical that parents have access to timely adequate representation to counter the system preference for removal. In recent years, child welfare policy has shifted from protecting children within a family preservation framework to emphasizing the child's health and safety as the paramount concern.⁴⁵ Although current federal policy claims to have a family preservationist goal, it often increases the chances for termination of parental rights.⁴⁶

A review of the drastic shifts in federal policy reveals that a level of representation that may have seemed adequate under policies supporting family preservation fails to provide a sufficient protection under policies disfavoring the parents. In the early 1900s, formal federal policy initially favored family preservation. The federal government announced a family preservation policy at a White House Conference on Children in 1909, which proposed that "parents of worthy character" receive aid to keep their children and maintain suitable homes.⁴⁷ This aid included the development

40. Mary O'Flynn, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 J. CONTEMP. HEALTH L. & POL'Y 243, 248 (1999).

41. Vreeland, *supra* note 35, at 1086-87.

42. ELIZABETH BARTHOLET, *NOBODY'S CHILDREN* 24 (1999).

43. *Infra* notes 58-62 and accompanying text.

44. *Infra* notes 51-54, 66-71 and accompanying text.

45. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115, 2117-18 (1997).

46. For further discussion of current child welfare policy, see *infra* Part II.B.1.

47. Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 270 (2000) (citing a letter from Hastings H. Hart, *Committee on Resolutions, Proceedings on the Conference on the Care of Dependent Children*, to Theodore Roosevelt, President of the United States 1 (Jan. 1909)). This federal policy reflected dissatisfaction with the contemporary methods of Progressive Era "child savers" (1852-1929), who considered poverty "evidence of [the parent's] incompetence and adequate grounds

of a mother's pension program to avoid the use of foster care, thereby validating the value of home life to a child's well-being.⁴⁸ Additional federal funds supported continued family preservation bills, such as the Aid to Dependent Children ("ADC") statutes, enacted in two states by 1911, and forty-six states by 1931, and culminated in the 1935 Social Security Act,⁴⁹ establishing the foundation for federal funding and intervention in social services.⁵⁰ For the next forty years, policies primarily imposed a family preservation outlook. It was during this time, in 1965, that the 18-B assigned counsel system was established.

During the 1970s, policy shifted dramatically toward child protection. The 1974 Child Abuse Prevention and Treatment Act ("CAPTA") required states to develop abuse and neglect reporting systems and to provide protection and court representation for children.⁵¹ Under CAPTA, states could receive federal reimbursement only for cases in which children were physically removed from home and placed in foster care.⁵² Therefore, state child welfare agencies emphasized removing children from any unsafe environment and placing them in custody of the state, rather than focusing on preventive services⁵³ or family reunification.⁵⁴ By the end of the 1970s, too many children were lingering in foster care for long periods of time. Child Welfare Administration workers

on which to break up their families," and, therefore, shipped poor children on "orphan trains" to western farm families, where they could learn "traditional American family values." *Id.* at n.202 (citing MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 106 (1986)). The musical, *Orphan Train*, recalled the history of government policy toward children, and sparked renewed interest in current child welfare policy in Minnesota. Neal Gendler, *Musical Leads to Panels on Child Welfare*, STAR TRIB. (Minneapolis), Nov. 23, 1998, at 7B.

48. Brito, *supra* note 47, at 271 (citing MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 124 (1986)). ADC statutes set the precedent for the Aid to Families with Dependent Children ("AFDC") legislation in the 1990s. *Id.*

49. 42 U.S.C. §§ 301-1397f (1994 & Supp. III 1997); *see also* O'Flynn, *supra* note 40, at 248.

50. O'Flynn, *supra* note 40, at 248.

51. *Id.* at 248-49.

52. *Id.* at 251.

53. Under New York law, "preventive services" means:

supportive and rehabilitative services provided . . . to children and their families for the purpose of: averting an impairment and disruption of a family which will or could result in placement of a child in foster care; enabling a child who has been placed in foster care to return to his family at an earlier time than would otherwise be possible; or reducing the likelihood that a child who has been discharged from foster care would return to such care.

N.Y. SOC. SERV. LAW § 409 (McKinney 1992).

54. O'Flynn, *supra* note 40, at 249.

made little effort to reunify children with their parents, but at the same time, they generally were reluctant to free them for adoption through termination of parental rights.⁵⁵ Thus, children remained in the system with little hope of either reunification or permanent placement,⁵⁶ shuffling from home to home without a sense of place or permanency. This “foster care drift” prompted consideration of new legislation supporting maintenance of the original home.⁵⁷

In the 1980s policy shifted back to reinforcing family preservation policy with the Adoption Assistance and Child Welfare Act of 1980 (“AACWA” or “the Act”).⁵⁸ The Act made available to the states federal matching funds for foster care and adoption services if the state followed general requirements for abuse and neglect cases.⁵⁹ The Act aimed to prevent unnecessary placement of children in foster care, reunify families whenever possible, and reduce the time that children spent in foster care by encouraging adoption when reunification was not possible.⁶⁰ Focusing on reducing the risk of trauma for a child taken from her parents, AACWA raised the standard for child removal to a demonstration of “substantial risk” of harm or “imminent” danger to the child.⁶¹ The state must demonstrate that “reasonable efforts” were made not only to provide services to prevent removal from the home, but also to reunify the family if separated.⁶² However, the federal government did not offer the states any clear guidance regarding the necessary amount

55. Madelyn Freundlich, *Expediting Termination of Parental Rights: Solving a Problem or Sowing the Seeds of a New Predicament?*, 28 CAP. U. L. REV. 97, 98 (1999); Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is The Problem That Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141, 141 (1999). The Child Welfare Administration was the predecessor of the current Administration for Children’s Services (“ACS”).

56. O’Flynn, *supra* note 40, at 249.

57. Shawn L. Raymond, *Where are the Reasonable Efforts to Enforce the Reasonable Efforts Requirement?: Monitoring State Compliance Under the Adoption Assistance and Child Welfare Act of 1980*, 77 TEX. L. REV. 1235, 1245-58 (1999).

58. Pub. L. No. 96-272, 94 Stat. 500 (codified in 42 U.S.C. §§ 620-628, 670-675 (1994 & Supp. III 1997)).

59. NANCY WALKER ET AL., CHILDREN’S RIGHTS IN THE UNITED STATES 137 (1999). To receive funding, the state must monitor the programs, provide safeguards restricting disclosure of individual information, create a reporting system for suspected instances of child abuse, develop standards for maintaining foster homes, and provide fair hearings for individuals with claims against the state regarding these programs. *Id.* It must also create a foster care review system for every child in the state’s care. 42 U.S.C. § 671(a)(16) (1980).

60. Freundlich, *supra* note 55, at 98.

61. INSTITUTE OF JUDICIAL ADMINISTRATION-AMERICAN BAR ASSOCIATION JOINT COMMISSION, 1981.

62. 42 U.S.C. § 671(a)(15) (1980).

of effort, or the length of time reasonable efforts should be made, before moving foster children into alternative permanent placement.⁶³ The vagueness of the standard caused AACWA to fail in two ways: some children were returned to abusive homes too quickly, resulting in child deaths that were highly publicized nationwide;⁶⁴ conversely, in many more cases, children again lingered in the system as states interpreted the reasonable efforts standard broadly and provided services to parents for extended periods of time.⁶⁵

In an attempt to address these two deficiencies, current federal policy seeks to aid family preservation and protect children by minimizing the time spent in foster care and locating a secure permanent home for the child. In 1997, with the enactment of the Adoption and Safe Families Act ("ASFA"), Congress shifted the focus of the child welfare policy from "reasonable efforts" for family reunification to a mandate that "the child's health and safety shall be of paramount concern."⁶⁶ Due to general dissatisfaction with the performance of the child welfare system in achieving the goals of safety, permanency, and well-being of children and families,⁶⁷ Congress mandated that all states adhere to ASFA guidelines to receive federal funds.⁶⁸ In February 1999, New York implemented legislation in compliance with the federal regulations.⁶⁹ ASFA abbreviates the amount of time that caseworkers are required to make reasonable efforts at reunification before

63. Cristine H. Kim, *Putting Reason Back into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287, 288 (1999).

64. O'Flynn, *supra* note 40, at 254.

65. *Id.* at 253.

66. Pub. L. No. 105-89, 111 Stat. 2115, 2116 (1997).

67. N.Y. SOC. SERV. LAW § 358-a supplementary practice cmt. (McKinney 1999). The dissatisfaction leading to the enactment of ASFA came as a result of (1) a number of high profile child deaths across the country, (2) the growth in foster care caseload, (3) increased costs of foster care, and (4) a need for greater emphasis on individual responsibility by parents and accountability by states moving children to permanency in a timely manner. See Fed. Reg., Vol. 63, No. 181, Sept. 18, 1998, at 5006(1).

68. Pub. L. No. 105-89, 111 Stat. 2115, 2127 (1997).

69. New York State legislation:

implementing the federal Adoption and Safe Families Act . . . was signed into law on February 11, 1999, became effective immediately and is retroactive to all children currently in foster care in voluntary placement, child abuse and neglect, juvenile delinquency and Persons in Need of Supervision (PINS) proceedings, as well as children who are the subjects of termination of parental rights proceedings.

Janet R. Fink, *Implementing the Federal Adoption and Safe Families Act in New York, a Primer in the New Statute*, 183 PLI/CRIM 157, 159 (1999).

other permanency options become the primary goal for child welfare workers, and it also creates a presumption that parental rights will be terminated in certain situations.⁷⁰ To regain custody of their children, parents now “must” reform in compliance with court orders in a briefer time period; however, ASFA has not provided any new resources to ensure parents receive the social services necessary to prepare them for reunification.⁷¹

The court system should react to broad developments in child welfare policy by supplying these additional services. As the trend shifts to favor family preservation, the child needs greater protection by a law guardian to ensure his safety in the home; however, as the laws moves toward greater child protection by the state, the parents require more resources to protect their privacy rights and to facilitate compliance with the state’s service plan to reunify the family. A brief overview of the child protective proceedings in Family Court provides a framework for evaluating these specific needs.

b. Abuse and Neglect Proceedings in Family Court

In New York, Article Ten of the New York Family Court Act governs child protective proceedings.⁷² The article is “designed to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being.”⁷³ However, Article Ten also recognizes the importance of “traditional American values of freedom and legality,”⁷⁴ and therefore, is “designed to provide a due process of law for determining when the state, through its Family Court, may intervene against the wishes of a parent on behalf of a child.”⁷⁵

When the state central registry receives notification of suspected abuse or neglect,⁷⁶ a state worker must determine if the allegation “could reasonably constitute a report of child abuse or maltreatment.”⁷⁷ If so, the state must refer the matter to a local agency for investigation.⁷⁸ In New York City, the local agency is the Adminis-

70. See *infra* Part II.B.1.

71. *Too Fast for Families: Washington’s Get Tough Adoption Law Hits Home*, CHILD WELFARE WATCH, Winter 2000, No. 6, at 2 [hereinafter *Too Fast for Families*].

72. N.Y. FAM. CT. ACT § 1011 (McKinney 1998).

73. *Id.*

74. *Id.* at practice cmt. (McKinney 1998).

75. N.Y. FAM. CT. ACT § 1011 (McKinney 1998).

76. N.Y. SOC. SERV. LAW § 415.

77. *Id.* § 422 (2)(a).

78. *Id.* § 424(6).

tration for Children's Services ("ACS").⁷⁹ If the agency finds that the life or health of the child is in imminent danger, the child may be removed from his home without a court order.⁸⁰ ACS must then file a petition charging abuse or neglect, and the court must serve the petition and a summons upon the respondent parent.⁸¹ The state also must notify the parent of her right to assigned counsel for in-court appearances during abuse and neglect proceedings.⁸²

At the time of removal, the parent must be notified of her right, pursuant to Section 1027 of the Family Court Act, to have a hearing within three days to determine whether the child should remain in the custody of the state while the case against the parent is pending.⁸³ At the "1027" hearing, the parent must again be advised of her right to counsel, and, if eligible, be assigned an attorney.⁸⁴ The parent is not required to attend this preliminary hearing.⁸⁵

If the parent does not attend the 1027 proceeding, or if her child was removed in a non-emergency situation pursuant to court order, the parent may apply to the court for the return of her child pursuant to Section 1028 of the Family Court Act.⁸⁶ The court then must hold a fact-finding hearing, the Family Court equivalent to a trial,⁸⁷

[The] appropriate society for the prevention of cruelty to children [is] to commence, within twenty-four hours, an appropriate investigation which shall include an evaluation of the environment of the child named in the report and any other children in the same home and a determination of the risk to such children if they continue to remain in the existing home environment . . . and, after seeing to the safety of the child or children, forthwith notify the subjects of the report and other persons named in the report in writing of the existence of the report and their respective rights

Id.

79. Green et al., *supra* note 1, at 3.

80. N.Y. FAM. CT. ACT § 1024 (McKinney 1998).

81. *Id.* § 1035.

82. *Id.* § 1024(b)(iii).

83. *Id.* § 1027(a). "In any case involving abuse or in any case where the child has been removed without court order, the court must hold a hearing as soon as practicable . . . to determine whether the child's interests require protection pending a final order of disposition." *Id.*

84. *Id.* § 1033-b(1)(b). "At the initial appearance, the court shall appoint counsel for indigent respondents pursuant to section two hundred sixty-two of this act." *Id.* § 1033-b(1)(c).

85. Parents are required to be present only at the "fact-finding hearing." *Id.* § 1041.

86. *Id.* § 1028(a). If the child was removed pursuant to § 1027 without a hearing, the parent must file a petition to hold a hearing pursuant to § 1028. *Id.*

87. Kathleen A. Bailie, Note, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2300 (1998).

to determine if the parent has abused or neglected her child.⁸⁸ If the parent does not already have an attorney, the court will assign counsel at this stage.⁸⁹ Even though parents are entitled to such a hearing within three days of their application to the court,⁹⁰ attorneys often request an adjournment of the proceeding to prepare more thoroughly.⁹¹

If the court finds that the facts in the petition are insufficient to sustain the allegations, then the charges must be dismissed;⁹² however, if the court makes a finding of abuse and neglect, the court will schedule a dispositional hearing to place the child in an appropriate foster home.⁹³ Once a child is in foster care, ACS caseworkers must assess the needs of the family and maintain a "service plan" that requires the parent to obtain certain social services and complete specific programs before her children can be returned home.⁹⁴ If the parent does not comply with the service plan during the time allowed under the federal and state ASFA regulations,⁹⁵ usually fourteen months, the state may file either for a termination of parental rights ("TPR") or an extension of placement for the child in foster care.⁹⁶ The parent has no right to assigned counsel between the disposition and the TPR or extension hearing, and often ACS does not inform the parent of her right to attend service plan reviews during this period.⁹⁷

2. *Evolution of Parental Representation in Family Court*

a. *Right to Representation*

Prior to 1961, New York had no formal assigned counsel system.⁹⁸ Courts had the authority to appoint counsel to represent indigent criminal defendants, but attorneys received no compensa-

88. N.Y. FAM. CT. ACT § 1044 (McKinney 1998).

89. *Id.* § 1033-a. An attorney is appointed to an indigent parent upon her initial appearance which "means the proceeding on the date the respondent first appears before the court after the petition has been filed." *Id.*

90. N.Y. FAM. CT. ACT § 1028(a) (McKinney 1998).

91. Green et al., *supra* note 1, at 20.

92. N.Y. FAM. CT. ACT § 1051(c) (McKinney 1998).

93. *Id.* § 1051(d).

94. Bailie, *supra* note 87, at 2301.

95. For discussion concerning ASFA regulations, see *supra* Part II.B.

96. N.Y. FAM. CT. ACT § 352.2(c)(6).

97. *Id.* § 409-(e)(2). Although parents in New York meet with social service planners alone during this period, California provides a right to continued representation of parents. CAL. WELF. & INST. CODE § 317(d) (West 1997).

98. HON. JONATHAN LIPPMAN & HON. JUANITA BING NEWTON, STATE OF N.Y. UNIFIED COURT SYS., ASSIGNED COUNSEL COMPENSATION IN NEW YORK: A GROWING CRISIS at 2 (Jan. 2000) (on file with the Fordham Urban Law Journal).

tion except in capital cases.⁹⁹ The New York State Legislature enacted County Law Article 18-A in 1961, "permitting counties to establish public defender offices or contract with legal aid societies to represent indigent criminal defendants."¹⁰⁰ However, in 1963, the United States Supreme Court, in *Gideon v. Wainwright*,¹⁰¹ provided indigent criminal defendants with the right to counsel in felony cases and, in the 1972 decision, *Argersinger v. Hamlin*, extended that right to all criminal cases.¹⁰²

The Supreme Court historically has accorded a high degree of constitutional respect to the interests of natural parents in controlling the details of their children's upbringing¹⁰³ and in retaining the custody and companionship of their children.¹⁰⁴ Additionally, "the concept of family autonomy has been incorporated into the modern right to privacy, which is considered part of the First Amendment's 'penumbra' of associational privacy."¹⁰⁵ This protected interest must be balanced against the state's compelling interest in the health, welfare, and safety of its citizens.¹⁰⁶ Accordingly, a state may intervene in the family on behalf of a child who is alleged to be a victim of parental abuse or neglect.¹⁰⁷ However, parents charged with abuse and neglect in family court do not have a constitutional right to an attorney.¹⁰⁸ In the seminal case, *Lassiter v. Department of Social Services*, the Supreme Court held that an indigent parent does not have a due process right to counsel in family

99. *Id.* (citing Code of Crim. Proc. § 308 (originally enacted by L. 1881, c. 442); *People ex rel. Whedon v. Bd. of Supervisors*, 192 A.D. 705 (App. Div. 1920)).

100. *Id.* (citing L. 1961, c. 365).

101. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring states, pursuant to the Sixth Amendment, to provide assistance of counsel to indigent criminal defendants charged with felony offenses).

102. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

103. *Wisconsin v. Yoder*, 406 U.S. 205, 232-34 (1972). "[The] history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232; *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (striking down an Oregon statute requiring public school attendance that effectively outlawed private and home schooling).

104. *Smith v. Org. of Foster Families*, 431 U.S. 816, 842-47 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

105. Vreeland, *supra* note 35, at 1086 (citing *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (holding that several of the Bill of Rights' guarantees protect privacy interests and create a zone of privacy)). In the majority opinion, Justice Douglas "re-affirm[ed] the principle of the *Pierce* and the *Meyer* cases." *Griswold*, 381 U.S. at 483.

106. *Stanley*, 405 U.S. at 653.

107. Vreeland, *supra* note 35, at 1086-87.

108. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31 (1981).

court proceedings.¹⁰⁹ The Court did note, however, that there could be a strong interest in favor of providing counsel to the parent, for it would assure an “accurate and just decision” that protects the “welfare of the child.”¹¹⁰

Recognizing this interest, the New York State Legislature in 1962 provided parents with the right to representation by enacting Section 262 of the Family Court Act.¹¹¹ Indigent parents in New York Family Courts thus have been guaranteed the right to assigned counsel since that time.¹¹²

b. Establishment of the 18-B Panel

To implement the right to counsel, the New York State Legislature enacted Article 18-B of the County Law in 1965, mandating that each county develop a plan for legal representation for indigent criminal defendants as well as indigent litigants in Family Court.¹¹³ Pursuant to Article 18-B, the First Judicial Department established a Family Court Law Guardian Plan¹¹⁴ to provide attorneys for litigants in Bronx and Manhattan Family Courts.¹¹⁵ Likewise, the Second Judicial Department enacted a plan for the operation of Family Court panels¹¹⁶ providing representation for litigants in Kings, Queens, Richmond, Nassau, Suffolk, Dutchess, Orange, Putnam, Rockland, and Westchester counties.¹¹⁷ In Family Court, the 18-B attorneys primarily represent respondent par-

109. *Id.* at 24-25.

Rather, the phrase [due process] expresses the requirement of “fundamental fairness,” a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what “fundamental fairness” consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Id.

110. *Id.* at 27.

111. N.Y. FAM. CT. ACT § 262 (McKinney 1998).

A respondent has no Federal constitutional right to assigned counsel in an Article Ten proceeding. However, under statutory law, and perhaps under the [New York] State Constitution, an indigent respondent has the right to be represented by assigned counsel. Arguably, the respondent has a right to the effective assistance of counsel.

Gary Solomon, *Child Neglect and Abuse Proceedings*, in NEW YORK FAMILY COURT PRACTICE, § 2.12, at 33-34 (Merril Sobie ed., 1996) (citations omitted).

112. N.Y. FAM. CT. ACT § 262 (McKinney 1998).

113. N.Y. COUNTY LAW § 722 (McKinney 1991).

114. N.Y. COMP. CODES R. & REGS. tit. 22, § 611 (1996).

115. *Id.* § 611.2.

116. *Id.* § 679.1.

117. *Id.* § 679.4(a)-(d).

ents in child abuse and neglect cases but may be called upon to represent juveniles in delinquency or even abuse and neglect matters when the Juvenile Rights Division of the Legal Aid Society cannot take a case due to a conflict of interest.¹¹⁸

Each department has a Law Guardian Director, appointed by the Presiding Justice of the First or Second Department Appellate Division, who administers the Law Guardian Plan to provide counsel for Family Court litigants.¹¹⁹ Both departments also have advisory committees that oversee the operation of the Family Court panels.¹²⁰ In the First Department, when an attorney applies for admission to the panel, the advisory committee assigns a committee member to review the application and contact the judges, adversaries, and colleagues required as references.¹²¹ The committee member then submits a written recommendation to the chair of the advisory committee who can accept the recommendation or refer the application to the entire committee.¹²² If an application is accepted, the attorney is appointed to the panel for one year, subject to recertification.¹²³ In the Second Department, an attorney applying to the panel must be a member in good standing with the New York State Bar Association and have served as counsel or co-counsel in a minimum of three proceedings under Article Three,¹²⁴ Six,¹²⁵ or Ten of the Family Court Act.¹²⁶ As in the First Department, if accepted to the panel, an attorney is appointed for one year subject to reappointment.¹²⁷

Because the 18-B panels do not have supervisory programs as does the Legal Aid Society, for example, generally attorneys are required to be well-trained in the practice of family law before ap-

118. Telephone Interview with Katherine Law, Administrator, Law Guardian Plan, First Department (Feb. 16, 2001) (on file with the Fordham Urban Law Journal) [hereinafter Law Interview].

119. N.Y. COMP. CODES R. & REGS. tit. 22, § 611.1(b) (1996) (governing the First Department); *id.* § 679.2 (governing the Second Department).

120. *Id.* § 611.5 (governing the First Department); *id.* § 679.4 (governing the Second Department).

121. Green, *supra* note 1, at App. A, 3.4(c) (citing New York Rules of Court § 611, App. A, 2.3; 2.4).

122. *Id.* (citing New York Rules of Court § 611, App. A, 2.5).

123. N.Y. COMP. CODES R. & REGS. tit. 22, § 611.4 (1996).

124. N.Y. FAM. CT. ACT Art. 3 (McKinney 1998) (governing juvenile delinquency proceedings).

125. N.Y. FAM. CT. ACT Art. 6 (McKinney 1998) (governing permanent termination of parental rights, adoption, guardianship and custody).

126. N.Y. COMP. CODES R. & REGS. tit. 22, § 679.6(c) (1996).

127. *Id.* § 679.7.

plying to become a member of the panel.¹²⁸ The panels used to attract attorneys who previously had worked for the Administration for Children's Services or the Juvenile Rights Division of the Legal Aid Society, so the training requirement did not deter attorneys from applying to the Family Court panels.¹²⁹ However, with the current condition of 18-B system, qualified attorneys are no longer applying to the panels.¹³⁰ Therefore, attorneys are now sometimes accepted on the condition that they shadow a mentor for four to eighteen months until they have gained enough experience to practice on their own.¹³¹ Neither the mentor nor the shadowing attorney receive any compensation for time spent on training.¹³²

Once they become members of the panel, attorneys must attend training and education programs.¹³³ The First Department regulations require that panel attorneys complete at least eight hours of training and education programs focusing on Family Court practice every two years.¹³⁴ The Second Department requires that all panel attorneys must attend the specific programs developed by its advisory committee to continue membership on the panel.¹³⁵ Finally, the advisory committees in both departments are responsible for evaluating the representation provided by the attorneys and determining whether they are eligible for reappointment.¹³⁶

Article 18-B, Section 722-b requires that assigned counsel panels for Criminal and Family Courts be compensated and reimbursed for their services by each county with no assistance from the state.¹³⁷ To receive their payments, 18-Bs must submit vouchers to the judge who is hearing a particular case and indicate by sworn

128. Law Interview, *supra* note 118.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. N.Y. COMP. CODES R. & REGS. tit. 22, § 611.9 (1996) (governing the First Department); *Id.* § 679.9 (governing the Second Department).

134. *Id.* § 611.9(b).

135. *Id.* § 679.9.

136. *Id.* § 611.10 (governing the First Department); *id.* § 679.8 (governing the Second Department).

137. N.Y. COUNTY LAW § 722 (McKinney 1991).

The governing body of each county and the governing body of the city in which a county is wholly contained shall place in operation throughout the county a plan providing counsel to persons . . . who are entitled to counsel pursuant to section two hundred sixty-two or section eleven hundred twenty of the family court act . . . who are financially unable to obtain counsel.

Id.

statement the in-court and out-of-court time expended, services rendered, and expenses incurred.¹³⁸ Generally, judges are confined to approving payment at the rate set by the legislature, unless an attorney claims and can prove “extraordinary circumstances” requiring payment at a higher rate.¹³⁹

The rates originally were set in 1965 at \$15 per hour for in-court and \$10 per hour for out-of-court costs with a \$300 per client cap.¹⁴⁰ The low rates replaced what had previously been an entirely pro bono system to support the professional charitable obligation to represent the indigent.¹⁴¹ Thus, “18-B compensation [wa]s intended not so much to pay for the reasonable value of the services rendered as to prevent an attorney from losing too much money while donating time.”¹⁴² However, the number of cases the attorneys now must handle and the time and experience the cases require mandates the availability of representation comparable to that available for the city and the children in Family Court proceedings. The state can no longer rely on a pro bono based parental representation model where the number of parents in need is vast and their cases are complex.¹⁴³ Still, the compensation remains at the rate set in 1986—\$40 per hour for in-court work and \$25 per hour for out-of-court work.¹⁴⁴ There also is a monetary cap of \$800 for all misdemeanor and Family Court cases and \$1,200 for all felonies and appellate matters.¹⁴⁵ Moreover, attorneys participating in the assigned counsel programs are independent contractors. Therefore, they receive neither benefits nor malpractice insurance from the government and are responsible for their own general overhead costs.¹⁴⁶ Thus, although the county has estab-

138. *Id.* § 722-b.

139. *Id.* For further discussion of higher rates of compensation in extraordinary circumstances, see *infra* Part I.B.2.

140. ROBERT HERMANN ET AL., COUNSEL FOR THE POOR 77 (1975). The upper limit per case may be exceeded for “extraordinary circumstances,” but the judge may not increase the hourly rate of the attorney. *Id.*

141. *Id.* at 77.

142. *Id.* (noting one practitioner’s rejection of the criticism of the fee structure because, as he stated, “we used to do it for nothing”).

143. For further discussion of burdensome caseloads the attorneys must carry, see *infra* Part I.B.1.d.i. For further discussion of the complex nature of Family Court proceedings and the importance of adequate parental representation, see generally *infra* Part II.

144. HERMANN, *supra* note 140, at 77.

145. *Id.*

146. Telephone Interview with Katherine Law, Administrator, Law Guardian Plan, First Department (Jan. 12, 2001); Association of Assigned Counsel website, at <http://www.internet-esq.com/ny-18b.html> (last visited Feb. 25, 2001).

lished a system to provide representation as required by statute, the state has failed to ensure that attorneys have been able to adjust to the changing system and provide representation to the extent needed.

B. Role of the Attorneys, Judges, and Legislature in Upholding the Parents' Right to Representation

The Family Court judge has a duty to assign counsel to all indigent parents in child abuse and neglect proceedings. The parent's attorney has a duty to provide adequate representation for every parent assigned to him. However, both judges and attorneys are constrained by their particular roles and the systemic problems in the Family Court and child welfare systems. Amid the current crisis in the assigned counsel system, without support from the New York State Legislature, judges and attorneys can no longer fulfill their duties to provide parents with their guaranteed right to representation. Only immediate action by the legislature will allow all actors in the Family Court system to uphold their obligations to indigent parents.

1. The Role of the Attorney

In New York City Family Court Article Ten proceedings,¹⁴⁷ the city, the child, and the parent are each represented by separate counsel. Representing ACS, the attorneys in the City Law Department's Division of Legal Services ("DLS") prosecute the charges of abuse or neglect.¹⁴⁸ A law guardian from the Legal Aid Society or another institutional provider represents the child¹⁴⁹ and advocates for either the child's wishes or his best interests.¹⁵⁰ An attorney from the 18-B panel, or, in some cases, from a Legal Services of New York office,¹⁵¹ defends the parent against the city's charges.

147. *See supra* Part I.A.1.b.

148. The attorneys for ACS are a part of the Division of Legal Services ("DLS"), which is a subsection of the New York City Law Department, commonly called "Corporation Counsel." Green et al., *supra* note 1, at 8.

149. N.Y. FAM. CT. ACT § 243 (McKinney 1998) (stating that the New York Office of Court Administration may contract with a legal aid society, and that the Appellate Division of the Supreme Court for the judicial department of the county can contract with a qualified attorney or designate a panel of law guardians).

150. Bailie, *supra* note 87, at 2299.

151. Interview with Nanette Schorr, Family Law Unit Director and Education Law Unit Director, Bronx Legal Services, at Fordham University School of Law in New York, N.Y. (Apr. 18, 2000) (on file with the Fordham Urban Law Journal).

a. *The 18-B Attorney in Article Ten Proceedings*

In New York, an indigent parent has a statutory right to representation by assigned counsel only during certain Article Ten proceedings.¹⁵² Assigned counsel is provided for the 1027 preliminary hearing, a 1028 fact finding hearing, and the disposition.¹⁵³ The parent does not have a right to assigned counsel during service plan reviews with ACS, even though many decisions regarding the parent's obligations to enable the return of her children are made at this time.¹⁵⁴ The right to counsel applies, again, at hearings to extend a child's placement in foster care or at proceedings to terminate parental rights.¹⁵⁵ However, the parent has no access to legal assistance in between court appearances during the time she is supposed to be complying with her service plan.¹⁵⁶ Moreover, often a respondent will be assigned a new attorney for the extension of placement or termination of parental rights proceedings so the attorney is unaware of the parent's situation prior to this phase.¹⁵⁷

b. *Ethical Obligations of the 18-B Attorney*

The attorney has several ethical obligations to the parent as a client. First, the attorney must determine if there are any conflicts of interest in representing a parent, which may arise if, for example, both the mother and father want the same attorney to represent them.¹⁵⁸ Different 18-B attorneys may represent each parent, because members of the 18-B panel work as independent

152. N.Y. FAM. CT. ACT § 262(a)(i) (McKinney 1998). The respondent has a right to counsel under the State Constitution, *see, e.g.*, *Matter of Ella B.*, 285 N.E.2d 288 (N.Y. 1972), but the respondent does not have a Federal constitutional right to counsel, *see Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981). If a parent does not want to retain the attorney initially assigned, she has no right to a new a attorney and may be forced to waive representation altogether. *Matter of Child Welfare Admin. v. Jennifer A.*, 630 N.Y.S.2d 379 (App. Div. 1994) (respondent waived right to counsel when requesting dismissal of her attorney and assignment of a female attorney).

153. N.Y. FAM. CT. ACT § 262(a) (McKinney 1998); *id.* § 1033-b(c).

154. *Id.* § 1052-b (providing that, after disposition of the fact-finding phase of the case, counsel's only remaining duty is to advise the respondent parent of her right to appeal).

155. *Id.* § 1024(b)(iii).

156. *Id.* § 1052-b.

157. Interview with Hon. Rhoda Cohen, Manhattan Family Court, in New York, N.Y. (Jan. 21, 2000) [hereinafter Judge Cohen Interview]. A parent may not demand to have the same attorney from earlier proceedings. *See Matter of C.D.*, N.Y. L.J., Dec. 8, 1998, at 29 (N.Y. Fam. Ct. 1998) (denying mid-trial motion to replace court-appointed attorney with previous attorney from a criminal case).

158. MODEL CODE OF PROF'L RESPONSIBILITY EC 5-15 (1999); MODEL RULES OF PROF'L CONDUCT R. 1.7 (1999).

contractors.¹⁵⁹ Second, the attorney must provide “competent representation.”¹⁶⁰ Although this is a vague term, it usually requires spending sufficient time and resources to provide each client with effective assistance of counsel.¹⁶¹ Carrying excessive caseloads,¹⁶² failing to communicate with clients, or appearing in court unprepared may cause attorneys to breach this duty.¹⁶³

The attorney has an additional obligation to advocate zealously for the client.¹⁶⁴ In abuse and neglect hearings, the attorney must call for rigorous assertions of the client’s innocence, investigate the charges, prepare witnesses, and present a case on behalf of the client.¹⁶⁵ This may include seeking dismissal of charges and return of the child to the respondent, without considering the best interests of the child.¹⁶⁶ For example, if a child welfare agency claims that, despite attempts by the agency, the parent did not follow through with treatment or visitation plans, the parent advocate should counter these accusations against the parent.¹⁶⁷ The attorney

159. Interview with William Anshen, Head of Manhattan Family Court 18-B Panel, Manhattan Family Court, in New York, N.Y. (Feb. 9, 2000) (on file with the Fordham Urban Law Journal) [hereinafter Anshen Interview]. If the parents refuse to have separate attorneys, the attorney must inform the clients that a potential conflict exists, and then determine whether the conflict is substantial enough to refuse representation.

160. MODEL CODE OF PROF’L RESPONSIBILITY CANON 6 (1999); MODEL RULES OF PROF’L CONDUCT R. 1.1 (1999).

161. See MODEL RULES OF PROF’L CONDUCT R. 1.1, cmt. 5 (1999).

162. Michael A. Riccardi, *Assigned Counsel Face the Cold to Protest Frozen Fee Schedule*, N.Y. L.J., Jan. 19, 2000, at 1 (quoting Robert Lederer, attorney from the Bronx 18-B panel stating, “We have to provide quality representation . . . [b]ut it is difficult to do this if you have to carry a caseload of 100 to 150.”) [hereinafter Riccardi, *Assigned Counsel Face the Cold*].

163. Manserus, *A Brake on the Wheels of Justice*, *supra* note 14, at B1 (“The court-appointed lawyers are screened and many are experienced, but some other lawyers and judges say that they are sloppy and unreliable. . . . The court-appointed lawyers agree that they are often under-prepared, but they note that their caseloads have ballooned as their numbers declined.”); Wise, *Representing the Indigent*, *supra* note 29, at 1 (citing Judge Lynch noting that the magnitude of cases “create a danger of malpractice”). *Contra* Richard M. Berman, *Tell What Can Be Done About Family Court*, N.Y. TIMES, June 15, 1996, at 18 (quoting Richard Berman, Judge, N.Y. State Family Court as supporting assigned counsel: “My experience with assigned counsel is favorable—they are dedicated and talented people who do a difficult job.”); Interview with Hon. Ruth Zuckerman, former Bronx Family Court Judge, at Fordham University School of Law, in New York, N.Y. (Jan. 17, 2000) (stating that 18-B attorneys are well-trained and professional in carrying out their responsibilities).

164. MODEL CODE OF PROF’L RESPONSIBILITY CANON 7 (1999); MODEL RULES OF PROF’L CONDUCT Rule 1.3, cmt. 1 (1999).

165. Gary Solomon, *Role of Counsel in Abuse and Neglect Proceedings*, 184 PLI/CRIM. 637, 642 (2000).

166. *Id.* at 641.

167. *Id.*

should attempt to show that “the parent did visit and plan for the child, or if the parent did not visit or plan for the child, that the agency did not use its best effort to strengthen the parental ties between the parent and child.”¹⁶⁸

c. The Role of the 18-B Attorney as Counselor

Often competing with the role of zealous advocate is the attorney's role as counselor. Although the ultimate goal of the representation is to secure the return of the child to his parent, the lawyer also must advise the client to make good faith efforts to comply with the ACS service plan and provide a safe home for the child. Fulfilling this dual role requires an attorney to provide many services that are not clearly or easily defined.¹⁶⁹

As an advocate, the attorney must act zealously to promote the client's wishes,¹⁷⁰ however, as a counselor,¹⁷¹ the lawyer should balance the client's expressed goals with what may be the ultimate best interests of both the parent and the child.¹⁷² The lawyer may suggest ways in which a parent can work toward getting her children returned home by attending parenting classes, counseling, or a drug program.¹⁷³ The lawyer also should be able to explain the convoluted Family Court system to the parent in a way that ensures the parent understands both her rights and roadblocks, and bridges the gap “[both] between what the client says and what can be said in the language of the law . . . [and] from what is said by the judge or other lawyers back to the client.”¹⁷⁴ This interdisciplinary role

168. Joseph R. Carrieri, *The Legal Handbook of Foster Care, Termination of Parental Rights, and Adoptions*, 171 PLI/CRIM. 9, 84 (1995).

169. See, e.g., Donald N. Duquette et al., *We Know Better Than We Do: A Policy Framework for Child Welfare Reform*, 31 U. MICH. J.L. REFORM 93, 123 (1997) (“Ambiguity of role and lack of clear practice standards is not only a problem for lawyers representing children, it is also a challenge for attorneys who represent parents or the child welfare agency.”).

170. Solomon, *supra* note 165, at 641.

171. Bruce A. Boyer, *Ethical Issues in the Representation of Parents in Child Welfare Cases*, 64 FORDHAM L. REV. 1621, 1650 (1996).

172. *Id.* at 1627 (noting that “while the parent may often seek to vindicate his or her own interests through the judicial process, the parent's lawyer may at times be obligated to cast arguments less in terms of what is in the interests of the parent than what is in the interests of the child”).

173. For a discussion of the lawyer's role as counselor, see *id.* (noting that a lawyer can counsel the parent to pursue a path that allows her to stay as involved with her children as the law permits).

174. Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459, 2491-92 (1989).

of the lawyer is necessary to protect the fair process for the parent in these proceedings.¹⁷⁵

Understanding the complexity of these roles, as advocate, counselor and translator, in this uniquely interdisciplinary forum,¹⁷⁶ will better allow the 18-B attorney to aid the parent in receiving the services she needs and deserves. The responsibilities of the parent's lawyer inside and outside the courtroom should include suggesting a range of options¹⁷⁷ and solutions to the parent and the court.¹⁷⁸

d. Obstacles to Adequate Representation by 18-B Attorneys

i. Too Many Cases for Too Few Attorneys

At a February 6, 2001 forum on the impact of inadequate compensation for assigned counsel, Judge Joseph Lauria, Chief Administrative Judge of the New York City Family Court, brought with him a stack of 100 files, representing the average caseload of 18-B attorneys. "This is what [the attorneys] face on a daily basis," Judge Lauria said. "How can one attorney be expected to deal with the desperate issues of Family Court under these circumstances?"¹⁷⁹

Given that the Family Court caseload has increased by more than thirty percent between 1989 and 1998, to roughly 230,000 filings, the New York City Family Court system cannot function effectively with the fewer than 100 attorneys practicing in each borough.¹⁸⁰ However, caseloads continue to increase tremendously as the number of attorneys willing to take assigned cases

175. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 30 (1981) (stating that counselors must be available to help parents with little education and poor coping skills in a distressed situation).

176. For an in-depth analysis of the ways lawyers and social workers can collaborate, see generally Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-examining the Nature and Potential of the Relationship*, 67 *FORDHAM L. REV.* 2123 (1999).

177. See generally Forrest S. Mosten, *Mediation and the Process of Family Law Reform*, 37 *FAM. & CONCILIATION CTS. REV.* 429 (1999) (proposing mediation as a means of providing low-cost resolution of family disputes).

178. Sandra Anderson Garcia & Robert Batey, *The Roles of Counsel for the Parent in Child Dependency Proceedings*, 22 *GA. L. REV.* 1079, 1079 (1988) (citing Donald N. Duquette, *Liberty and Lawyers in Child Protection*, in *THE BATTERED CHILD* 316, 316-17 (C. Kempe & R. Helfer eds., 3d ed., 1980)) ("Attorneys come from a background of reliance on the adversarial system and must adjust their thinking in juvenile court to a less adversarial approach and greater reliance on negotiation and mediation.").

179. Caher, *Commission Seeks Solutions*, *supra* note 28, at 1.

180. Green et al., *supra* note 1, at 14.

continues to decrease.¹⁸¹ If attorneys agree to be primary attorneys, meaning they are required to pick up any new cases that come in on a given day, they likely will have to take on twenty-five to thirty new cases, which would "kill [their] calendar[s]."¹⁸² Additionally, attorneys avoid picking up cases that are difficult and time consuming, because their total hourly fees will exceed the \$800 per case compensation cap.¹⁸³ Such cases may prevent them from taking on any other work and thereby extensively limit their income.¹⁸⁴

Court officials estimate that, as a result of the attorneys' current unwillingness or inability to take on new clients, as many as 50 to 100 cases per day are being adjourned.¹⁸⁵ Parents whose children have been taken away from them on abuse or neglect charges sometimes must make two or three court appearances before they are assigned a lawyer.¹⁸⁶ Within seventy-two hours of a parent's request for a hearing after her children have been removed, the state is statutorily required to show that children removed from home are in imminent danger.¹⁸⁷ However, seventy-two hours can turn into as much as three weeks if no attorney is available.¹⁸⁸ Meanwhile, the children remain in the custody of ACS even though the court has not yet ruled that their removal from home was warranted.¹⁸⁹

When an attorney eventually is assigned, he has very little time to become acquainted with a parent before the upcoming court appearance. During a typical day in court, an 18-B attorney runs from one courtroom to the next trying to cover all of his cases and most likely being persuaded by a judge to pick up a few more.¹⁹⁰

181. Victoria Rivkin, *Experts Say Lack of Respect, Low Pay Cause Exodus in System for Assigning Counsel*, N.Y. L.J., June 15, 2000, at 1 [hereinafter Rivkin, *Exodus in System for Assigning Counsel*].

182. Wise, *Representing the Indigent*, *supra* note 29, at 1.

183. Interview with Judith Carlin, 18-B Attorney, Manhattan Family Court, in New York, N.Y. (Apr. 6, 2000) (on file with the Fordham Urban Law Journal) [hereinafter Carlin Interview].

184. Telephone Interview with Rosemary Riviuccio, 18-B Attorney, Manhattan Family Court, New York, N.Y. (Apr. 3, 2000). Ms. Riviuccio lost \$4,500 in one year due to a complicated termination of parental rights case that required substantial out-of-court work. *Id.*

185. Mansnerus, *A Brake on the Wheels of Justice*, *supra* note 14, at B1.

186. *Id.*

187. *Id.*; N.Y. FAM. CT. ACT § 1024 (McKinney 1998).

188. Wise, *Representing the Indigent*, *supra* note 29, at 1.

189. *Id.*

190. Victoria Rivkin, *Family Court Counsel's Day Filled with Frustrations*, N.Y. L.J., June 19, 2000, at 1 [hereinafter Rivkin, *Family Court Counsel's Day*].

The attorneys usually consult with their clients only briefly in the waiting rooms, surrounded by other litigants and attorneys, shortly before court appearances.¹⁹¹ The assigned counsel members admit that they are often unprepared, but note that with their tremendously high caseloads, they have virtually no time to catch up.¹⁹²

The lack of time and effort the attorneys can devote to any one case often causes parents to feel ignored by the one person in the system who is supposed to be on their side. Additionally, the attorneys only know minimal information about their clients' situations and, therefore, are unable to advocate effectively for them.¹⁹³

ii. *Inadequate Facilities Hinder Adequate Preparation*

The lack of facilities provided for assigned counsel further hampers the ability of the 18-Bs to prepare for court appearances. Unlike the law guardians and ACS attorneys, who have offices with support staff, telephones, fax machines, photocopiers, libraries, and computer access in or near the courthouses, many court-appointed lawyers do not have independent practices large enough to support their own office space. The 18-B attorneys must pay for their own overhead costs including medical, life, and malpractice insurance,¹⁹⁴ office supplies, utilities, and rent. The current rates do not

191. *Id.*; Mansnerus, *State Plans to Raise Fees*, *supra* note 21, at B5.

192. Mansnerus, *State Plans to Raise Fees*, *supra* note 21, at B5.

193. Ms. J, a Bronx parent, was a victim of domestic violence. She was charged with neglect based on "failure to protect" her young daughters and infant son from harm, and her children were placed in foster care. Ms. J spoke only Spanish but was appointed an 18-B attorney who spoke no Spanish at all. The attorney never returned her phone calls and never arranged for a meeting with a translator before the actual day Ms. J was to appear in court. Even when the attorney did meet with Ms. J, it was only for a few minutes immediately before they were called into court. The court ordered Ms. J to secure housing away from her abuser before the state would consider returning her children to her. Despite calling the domestic violence hotline and numerous shelters several times a day for more than four weeks, Ms. J could not find temporary shelter space. Ms. J's attorney provided her with no assistance in securing shelter, nor did the attorney document all the efforts Ms. J had been making. Furthermore, the attorney did not provide Ms. J with any other recommendations or referrals for assistance in obtaining permanent housing.

Frustrated with the lack of assistance she was receiving, Ms. J wanted a new attorney. However, there was no guarantee that a new attorney would be appointed in a timely manner, if at all. Though the court has an obligation to appoint Ms. J with an attorney who would zealously advocate on her behalf, the New York City Family Court system left her to seek help elsewhere. Christine Schessler, co-author of this Comment, worked as an intern during the Fall Semester 2000 for the law guardian from the Bronx Juvenile Rights Division of the Legal Aid Society who represented Ms. J's children.

194. It is difficult for an attorney to obtain malpractice insurance if he has more than 100 active cases. Riccardi, *Panel to Refuse Family Court Cases*, *supra* note 16, at 1

cover the cost of a small office in New York, so many 18-Bs work out of their homes, relying on a cell phone for client contact.¹⁹⁵ Additionally, the 18-B attorneys' support staff is typically nonexistent outside of an impersonal and uninformed answering service.¹⁹⁶

In most New York City Family Court buildings, the attorneys have only the small common room from which to work during the time between their court appearances.¹⁹⁷ In Manhattan Family Court, the assigned counsel room has one telephone, a desk, and a few chairs. The attorneys have no access to a computer or a photocopy machine.¹⁹⁸ Thus, they must rely on the court officers to make any copies of documents brought in by their clients or to supply their clients with copies of documents from other parties or the court.¹⁹⁹ One reporter described the 18-B office in the Queens Family Court facility as "more a coat room than an office."²⁰⁰

Furthermore, assigned counsel have no private rooms in which to interview their clients and prepare for court appearances. The one room that might have been useful for interviews in the Manhattan courthouse has had a gaping hole in the wall for months.²⁰¹ When architects were planning the structure of the new Queens Family Court, the 18-B panel specifically requested that interview rooms be provided, however, this request was either overlooked or ignored.²⁰² Thus, attorneys are forced to conduct confidential in-

(noting the Bronx Family Court Association President's observation that legal malpractice insurers are unwilling to cover lawyers who have more than 100 open cases).

195. The lack of facilities provided for the attorneys compel many 18-Bs to cut corners when they can. See David Rohde, *Critical Shortage of Lawyers for Poor Seen*, N.Y. TIMES, Dec. 12, 1999, at 59 (citing a Manhattan defense lawyer who claimed that in order to make ends meet, "you either cut corners, do huge volume or inflate your hours").

196. *Id.* According to Fabiola Jean-Gilles, an 18-B attorney in Manhattan Family Court, she cannot hire support staff. Her pay is too low, and she "would have to pay them what [she] get[s] paid." See *18-B Questionnaire* (taken Feb. 14, 2000) (on file with the Fordham Urban Law Journal).

197. *Id.* When the 18-B attorneys meet as a group, they have to wait until the lunch recess to use a courtroom during the hour it is unoccupied. This was observed during a visit by the authors to the Manhattan Family Court, New York, N.Y. (Feb. 14, 2000).

198. This, too, the authors observed during a visit to Manhattan Family Court, New York, N.Y. (Jan. 17, 2000).

199. *Id.*

200. Mansnerus, *A Brake on the Wheels of Justice*, *supra* note 14, at B1.

201. The authors observed the condition of the interview room during a visit to Manhattan Family Court, New York, N.Y. (Jan. 17, 2000).

202. Law Interview, *supra* note 118.

interviews and counsel their clients in the open hallways, among other bystanders.²⁰³

This lack of resources, combined with the increasing caseloads and decreasing number of attorneys accepting new cases, compromise the ability of the 18-B attorneys to provide the required competent representation. However, the 18-B attorneys have only a limited ability to secure the resources necessary to meet their ethical and statutory obligations. The attorneys have tried to reduce their caseloads in order to provide adequate time and attention for their existing clients by refusing to take on new clients; however, this action breaches their contract with the city.²⁰⁴ Many 18-B attorneys provide the thorough representation needed, and then petition the judge for payment for these services above the compensation cap; however, not all judges will award these extra fees.²⁰⁵ The New York County Lawyers' Association even has requested the New York Supreme Court to mandate that the state fulfill its obligation to parents by providing sufficient resources for their attorneys.²⁰⁶ Finally, the attorneys have sought change by petitioning city and state officials,²⁰⁷ and testifying at city²⁰⁸ and state hearings.²⁰⁹ However, none of these actions can produce the immediate and comprehensive changes necessary to guarantee parents the right to adequate representation and ensure a fair Family Court process.

203. For one description of the waiting rooms and lawyers' use of them, see Joe Sexton, *As Courts Remove Children, Lawyers for Parents Stumble*, N.Y. TIMES, June 10, 1996, at A1.

Early one morning in Brooklyn Family Court, a woman began to cry loudly in the crowded second-floor waiting room. 'I want my baby,' she screamed. People stared; some laughed. Nearby, a mother, her son and two lawyers, all trying to be heard over the din, discussed a plea agreement for the son. . . . Through it all, lawyers wandered the aisles, calling out names, looking for their clients.

Id.

204. Riccardi, *Panel to Refuse Family Court Cases*, *supra* note 16, at 1.

205. For discussion about the role of the judge, see *infra* Part I.B.2.

206. *New York County Lawyers' Ass'n v. Pataki and State of New York*, No. 102987/00 (N.Y. Sup. Ct. Jan. 16, 2001). For further discussion of the lawsuit, see *infra* Part I.B.3.

207. Davis, *Governor Pataki: Raise Assigned Counsel Rates Now*, *supra* note 10, at 1.

208. Marvin E. Schechter, Testimony before the New York City Council (Jan. 24, 2000).

209. Caher, *Commission Seeks Solutions*, *supra* note 28, at 1.

2. *The Role of the Family Court Judge*

At the initial appearance of a parent in Family Court, the judge must inform the parent of her right to counsel, and her right to have counsel assigned by the court if she cannot afford an attorney.²¹⁰ However, under the current 18-B system, judges have become increasingly unable to ensure that the respondents in their courts receive guaranteed adequate representation.²¹¹ The Appellate Divisions for the First and Second Departments prepare daily lists of primary attorneys who are supposed to take on any new cases that come in on a particular day.²¹² As more and more attorneys are refusing to add new clients to their already overburdened caseloads,²¹³ several judges have been forced to send court personnel to find any 18-B attorney who happens to be in the courthouse and try to persuade him to take on one more case.²¹⁴ One Family Court judge noted that court personnel often have to “‘corner’” attorneys and “‘engage in a lot of creative begging’” to provide statutorily mandated representation.²¹⁵

Beginning in January 2001, as many 18-B attorneys in the Bronx, Brooklyn, Manhattan, and Queens have refused to take on new clients,²¹⁶ hundreds of cases are being adjourned each week and, consequently, the constitutional and statutory rights of numerous parents in the Family Court system are being violated.²¹⁷ The

210. N.Y. FAM CT. ACT § 262(a) (McKinney 1998).

211. Daniel Wise, *Dutchess Judge Orders Broad 18-B Fee Hike*, N.Y. L.J., Jan. 23, 2001, at 1.

There have been instances cited where judges have literally been reduced to personally collaring attorneys in the halls of the courthouse to represent a child or litigant because willing counsel could not be found or the overburdened attorney originally assigned has not appeared due to commitments before another Judge in the same or different courthouse.

Id. (quoting Judge James Brands); Rivkin, *Family Court Counsel's Day*, *supra* note 190, at 1 (“Although counsel is constitutionally mandated to parents accused of child neglect or abuse, under the current system . . . the only guarantee these parents have is that an attorney will be provided eventually.”).

212. Wise, *Representing the Indigent*, *supra* note 29, at 1 (discussing the shortage of attorneys available to represent the indigent).

213. Mansnerus, *A Brake on the Wheels of Justice*, *supra* note 14, at B1.

214. Wise, *Representing the Indigent*, *supra* note 29, at 1.

215. *Id.* (quoting Family Court Judge Margarita Lopez-Torres).

216. Riccardi, *Brooklyn 18-B Panel*, *supra* note 17, at 1 (noting that 18-B attorneys in Manhattan have formally refused to accept new cases and Brooklyn and Bronx attorneys are individually declining new cases); Feerick, *supra* note 17, at 2 (observing that attorneys in Manhattan and Queens voted to stop accepting new cases due to high caseloads and economic hardships, and that Brooklyn attorneys have expressed similar concerns).

217. Mansnerus, *A Brake on the Wheels of Justice*, *supra* note 14, at B1 (referring to comments by Queens Family Court Judge Mary Ellen Fitzmaurice).

Brooklyn Association of Assigned Counsel reported that refusals to take new cases do not reflect a formal strike, but rather are individual decisions by attorneys who need to control their high caseloads or free some time to take on more private clients at higher rates.²¹⁸ However, the Manhattan assigned counsel panel informed Family Court officials in December 2000 that, collectively, the 18-Bs would not accept new cases in the new year.²¹⁹

Whether as a formal protest or in response to economic constraints, the main reason attorneys are refusing to take on new cases or fleeing the 18-B panel altogether is the grossly inadequate pay—a matter over which Family Court judges have only limited control.²²⁰ New York County Law Article 18-B, Section 722-b permits compensation beyond statutory limits only where extraordinary circumstances exist.²²¹ To determine these circumstances, judges consider the time spent on a case, the nature and complexity of the issues involved, the services provided, the professional standing of the counsel, and the outcome achieved.²²² Taking these factors into consideration, judges have granted higher rates of compensation only where 18-Bs have worked efficiently and expeditiously on complex matters and have attained favorable outcomes for their clients. This allows the judges to support their decisions to award higher fees by citing the time and resources the attorneys saved by enabling a quick resolution favorable to all parties and expunging the case from the system.²²³

218. Riccardi, *Brooklyn 18-B Panel*, *supra* note 17, at 1.

219. *Id.*

220. *Matter of Vouchers for Compensation*, N.Y. L.J., Dec. 8, 2000, at 25 (“Due to the failure of the legislature since 1985 (sic) to increase the rate of compensation for assigned counsel, the Family Court finds it increasingly difficult to find sufficient numbers of counsel to represent all of the indigent litigants who appear in this forum.”).

221. N.Y. COUNTY LAW § 722-b (McKinney 1991).

222. *Matter of Sheppard*, N.Y. L.J., Nov. 17, 2000, at 28.

223. *Dep’t of Soc. Servs. v. Mitchell*, Nos. NN-10171-99/ NN-10172-99/ NN-10173-99 (N.Y. Fam. Ct. Jan. 31, 2000) (granting compensation at the rate of \$75 per hour for in-court and out-of-court time, based on a finding that the vast experience and efforts of the parent’s attorney contributed to the matter moving through the system expeditiously, to saving the court, the litigant and Dutchess County considerable funds, and to the immediate return of the children to their mother), *available at* http://www.nysda.org/Hot_Topics/Assigned_Counsel_Rates/DSSvMitchell_00.pdf; *Matter of Vouchers for Compensation*, N.Y. L.J., Dec. 8, 2000, at 25 (N.Y. Fam. Ct. 2000).

By achieving a favorable outcome for the client with extraordinary efficiency, assigned counsel actually benefits the county to be charged, both professionally and economically. Therefore, the court will review the submitted vouchers with (sic) view to the complexity of the matter, the outcome for the respondent; and the efficiency with which the outcome has been achieved in terms of hours spent in and out of court.

Generally, the criteria the judges must apply virtually has precluded them from granting higher rates in cases that take an extended amount of time to resolve or result in a negative outcome for parents, even if such a delay or outcome is not the fault of the attorney.²²⁴ As the lack of available attorneys has begun to create chaos in New York Family Courts,²²⁵ some members of the Family Court bench have sought alternate ways to grant greater compensation or have read the “extraordinary circumstances” requirement more broadly.

For example, in one instance, a Manhattan Family Court judge did not find extraordinary circumstances warranting the \$75 per hour rate requested by the assigned counsel. However, he did grant compensation beyond the statutory \$800 per case cap,²²⁶ noting that the number of counsel hours required to complete most litigated Family Court cases, even at the \$40 per hour in-court and \$25 per hour out-of-court rate, will exceed the compensation cap.²²⁷

In Dutchess County, two Family Court judges have held that in all cases before them, assigned counsel will be granted compensation at the rate of \$75 per hour for all services rendered.²²⁸ In a decision and order regarding an application by an 18-B attorney for counsel fees in excess of the statutory amount, Judge James V. Brands noted that “the rights of litigants . . . are violated when the right to adequate representation is denied them. Historically it has been the Courts that have protected those most in need who lack

Id.; Kevin v. Deborah, No. V0356/57-92M, (N.Y. Fam. Ct. Jan. 31, 2001) (awarding compensation at the rate of \$75 per hour for in-court and out-of-court time where efforts of the parent’s attorney resulted in a stipulated settlement and positive outcome of the matter), available at http://www.nysda.org/Hot_Topics/Assigned_Counsel_Rates/KevinvDeborah_01.pdf.

224. Matter of Vouchers for Compensation, N.Y. L.J., Dec. 8, 2000, at 25 (N.Y. Fam. Ct. 2000) (denying higher rate of compensation in *Matter of M. Child* where it was “not a case in which it may be said that the respondents’ counsel were able to proceed with extraordinary efficiency to resolve an exceedingly complex matter which otherwise would have required a much greater expenditure of time and resources”).

225. Sweat v. Skinner, No. B-1508-00 (N.Y. Fam. Ct. Jan. 12, 2001) (citing instances where judges have fought with one another regarding before whom an attorney should appear first), available at http://www.nysda.org/Hot_Topics/Assigned_Counsel_Rates/SweatvSkinner_01.pdf.

226. N.Y. COUNTY LAW § 722-b (McKinney 1991).

227. Matter of Sheppard, N.Y. L.J., Nov. 17, 2000, at 28 (N.Y. Fam. Ct. 2000).

228. Sweat v. Skinner, No. B-1508-00 (N.Y. Fam. Ct. Jan. 12, 2001); Anthony S. and Patricia K. v. Patricia S., Nos. X-8438-NA/NN-0182-98; X-8439-NA/NN-0181-98 and Laniqua C. v. Lisa C., No. NN-00373-2000 (N.Y. Fam. Ct. Jan. 30, 2001), available at http://www.nysda.org/Hot_Topics/Assigned_Counsel_Rates/AnthonysVPatricias_01_pdf.

an effective voice.”²²⁹ Judge Brands held that the shortage of attorneys willing to take new cases presents extraordinary circumstances in the Family Court system warranting court intervention to ensure adequate representation is available.²³⁰ The court found that “in order to meet requirements placed on this court both by statute and case law and to attract and retain competent counsel to represent those needs, it is necessary to provide proper remuneration.”²³¹ Thus, the court directed that assigned counsel be paid \$75 per hour for all time spent representing their clients.²³²

In another application for higher counsel rates, Dutchess County Family Court Judge Damien J. Amodeo found an array of extraordinary circumstances persuading him to grant compensation at \$75 per hour for all assigned counsel in his court.²³³ Judge Amodeo listed many factors supporting his decision: every person performing a service in the judicial system—legislators, staff persons, members of the executive branch, and individuals in the general workforce—have gotten at least one raise, if not more, since 1986; assigned counsel are fleeing the panels; the attorneys remaining are becoming less prepared for court appearances due to overburdened caseloads; time is wasted daily just trying to persuade attorneys to take cases; and the parents whose rights are at stake are given little empathy by the general public and have no effective way to influence the members of the political community who determine the limits on attorney compensation.²³⁴

Even though many judges find that the current 18-B compensation is inadequate,²³⁵ and some have taken steps to award attorneys more appropriate pay,²³⁶ the legislature ultimately constrains their

229. *Sweat v. Skinner*, No. B-1508-00 (N.Y. Fam. Ct. Jan. 12, 2001).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Anthony S. and Patricia K. v. Patricia S.*, Nos. X-8438-NA/NN-0182-98; X-8439-NA/NN-0181-98 and *Laniqua C. v. Lisa C.*, No. NN-00373-2000 (N.Y. Fam. Ct. Jan. 30, 2001).

234. *Id.*

235. *Matter of Sheppard*, N.Y. L.J., Nov. 17, 2000, at 28 (N.Y. Fam. Ct. 2000) (concurring with a comment by Chief Judge Kaye that the current rates are “absolutely ludicrous and completely out of line with economic reality . . . [and] with the positions of the Unified Court System and various bar associations that such rates should be raised to meaningful levels”) (citations omitted).

236. *Supra* notes 227-234 and accompanying text. In light of a surge in applications for compensation in excess of the statutory amount and the increase in the number of cases in which judges granted the requests, the Administrative Board of the Courts voted to amend Part 127.2 of the Rules of the Chief Administrator of the Courts. A trial judge’s order granting excess compensation will now be reviewed by an adminis-

ability to alter the situation significantly. In *Matter of Vouchers for Compensation*, Kings County Family Court Judge Lee Elkins wrote that in evaluating “claims against the public purse, it is necessary to bear in mind . . . [that] compensation for counsel assigned to represent indigent litigants is determined by the legislature and not by the courts. In the absence of a legislative grant, the court has no authority to allow any compensation to attorneys assigned to represent indigent litigants.”²³⁷ Judge Elkins acknowledged the sentiment among many practitioners that the Family Court simply should set compensation at the current Federal Criminal Justice Act rate of \$75 per hour for in-court and out-of-court time, but held that such action was not authorized by the state and would thereby violate the separation of powers doctrine.²³⁸

Though supporting the positions of the Unified Court System and various bar associations that “such rates should be raised to meaningful levels,”²³⁹ Manhattan Family Court Judge George L. Jurow found the court “bound to apply the County Law and its language to the circumstances of a particular case”²⁴⁰ and noted that “the broader solution to the underlying problem must come from elsewhere.”²⁴¹ Moreover, even if more judges broaden the meaning of “extraordinary circumstances” or grant compensation beyond the cap, both judges and attorneys agree that case-by-case and even court-by-court solutions cannot address systemic problems.²⁴² Thus, the ability of judges to fulfill their duty of providing representation for the indigent respondents in their courts, and thereby, their ability to ensure that the constitutional and statutory rights of the respondents are not violated, is ultimately in the hands of the New York State Legislature.

trative judge who may modify the award if the trial judge abused his discretion. Chief Administrative Judge Jonathan Lippman reported that the new rule, effective April 16, 2001, is meant to provide “a clear review process and clear standards so we can deal with what has become an unprecedented large number of applications.” John Caher, *Standards Set for 18-B Compensation*, N.Y. L.J., Mar. 20, 2001, at 1.

237. *Matter of Vouchers for Compensation*, N.Y. L.J., Dec. 8, 2000, at 25 (N.Y. Fam. Ct. 2000).

238. *Id.* The separation of powers doctrine ensures that power is not concentrated in a single branch of government—executive, legislative or judicial—and thereby counteracts the tendency of government officials to increase their own power at the expense of public interest. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 364 (2d ed. 1991).

239. *Matter of Sheppard*, N.Y. L.J., Nov. 17, 2000, at 28 (N.Y. Fam. Ct. 2000).

240. *Id.*

241. *Id.*

242. Riccardi, *Panel to Refuse Family Court Cases*, *supra* note 16, at 1.

3. *The Role of the Legislature*

When the New York State Legislature enacted Article 18-B of the County Law in 1965, the statute provided for compensation of \$15 per hour for in-court work and \$10 per hour for out-of-court work.²⁴³ These rates were equal to those provided for attorneys under the Federal Criminal Justice Act of 1964 (“CJA”).²⁴⁴ In 1977, the legislature raised the rates to \$25 per hour for in-court work and \$15 per hour for out-of-court work.²⁴⁵ Currently, compensation remains at the rate set in 1986, which is \$25 per hour for in-court time and \$40 per hour for out-of-court time.²⁴⁶ CJA rates are now \$75 per hour for both in-court and out-of-court work.²⁴⁷

On January 10, 2000, in her State of the Judiciary address, Chief Judge of the New York Court of Appeals Judith Kaye explicitly recommended that the legislature increase the 18-B pay rate to \$75 per hour for both in-court and out-of-court work and eliminate caps on compensation.²⁴⁸ Under the current system, due to average overhead costs of \$34.75 per hour as calculated by the New York State Bar Association (“NYSBA”), 18-B attorneys lose \$9.75 for every out-of-court hour they work and make only \$5.75 for every in-court hour.²⁴⁹ Furthermore, because the NYSBA figure is an average drawn from overhead expenses throughout the entire state, attorneys in regions of the state with higher than average overhead costs, especially New York City, lose even more money. The attorneys can barely cover their costs, let alone make a living.²⁵⁰

Attorneys and judges are constrained by their roles within the system and can do little more to meet their obligations to their clients and the litigants in their courts.²⁵¹ Therefore, only the legis-

243. LIPPMAN & NEWTON, *supra* note 98, at 5.

244. *Matter of Vouchers for Compensation*, N.Y. L.J., Dec. 8, 2000, at 25 (N.Y. Fam. Ct. 2000).

245. LIPPMAN & NEWTON, *supra* note 98, at 5.

246. N.Y. COUNTY LAW § 722-b (McKinney 1991).

247. *Matter of Vouchers for Compensation*, N.Y. L.J., Dec. 8, 2000, at 25 (N.Y. Fam. Ct. 2000).

248. John Caher, *Chief Judge Calls for Raise in 18-B Fees*, N.Y. L.J., Jan. 11, 2000, at 1. Judge Kaye suggested an increase to \$75 per hour for felony and Family Court cases, and \$60 per hour for misdemeanor cases. *Id.*

249. LIPPMAN & NEWTON, *supra* note 98, at 8.

250. *Id.*; see also Riccardi, *Assigned Counsel Face the Cold*, *supra* note 162, at 1 (quoting Kings County assigned counsel panel member Robert Greenfield, “The cost of living has increased by more than 50 percent since January 1986, when the rates were last adjusted. . . . Those who remain on the panels often must pack their caseloads to make a living”).

251. *Supra* Parts I.B.1, 2.

lature can make the changes necessary to ensure that judges can appoint attorneys for every indigent respondent and that attorneys can provide adequate and comprehensive legal representation in accord with constitutional and statutory mandates. Despite this reality, just one day after Judge Kaye's address, Governor Pataki announced his opposition to any increase in assigned counsel rates.²⁵²

Recognizing the dire need for legislative action, on February 18, 2000, the New York County Lawyers' Association ("NYCLA") filed suit against Governor Pataki and the State of New York. In its complaint, the NYCLA alleged that "through their inaction, Defendants have allowed New York City's system of representation by assigned private counsel to deteriorate to a point where it now subjects children and indigent adults to a severe and unacceptably high risk that meaningful and effective representation no longer will be provided."²⁵³ The complaint requested "an injunction setting new rates, abolishing the distinction between the rates paid for in-court and out-of-court work, and removing the current limits on compensation for private counsel who participate in the assigned counsel program."²⁵⁴ Still, neither Governor Pataki nor the legislature took action in response to the suit.

Finally, two weeks after 18-B attorneys stopped accepting new cases, forcing judges to turn away parents entitled to counsel in abuse and neglect cases, as well as children in delinquency cases,²⁵⁵ Governor Pataki and legislative leaders announced on January 12, 2001, that during this legislative session they planned to introduce legislation to increase fees for private lawyers appointed by the court to represent the poor.²⁵⁶ Thus far, the state only has decided to create a task force to devise a legislative proposal.²⁵⁷ Advocates for a rate increase remain skeptical that any real change will result from the state's announcement.²⁵⁸ Legislative proposals already have been made and have died regularly in the legislature due to

252. Caher, *Raise in Court Fines*, *supra* note 11, at 1.

253. Plaintiff's Complaint, *New York County Lawyers' Ass'n v. Pataki*, at 2 (N.Y. Sup. Ct. filed Feb. 18, 2000), available at http://www.nycla.org/publications/18b_complaint.pdf.

254. *Id.* at 5-6.

255. Mansnerus, *A Brake on the Wheels of Justice*, *supra* note 14, at B1.

256. Mansnerus, *State Plans to Raise Fees*, *supra* note 21, at B5.

257. The special three-member commission charged by Governor Pataki with resolving the crisis over assigned counsel rates consists of Assemblywoman Helene E. Weinstein, D-Brooklyn, Senate Judiciary Committee Chair James J. Lack, R-Suffolk, and Director of Criminal Justice Katherine N. Lapp. Caher, *Commission Seeks Solutions*, *supra* note 28, at 1.

258. Mansnerus, *State Plans to Raise Fees*, *supra* note 21, at B5.

deadlocks over whether the extra cost would be borne by the state or by local governments.²⁵⁹ Though the task force is hopeful that the crisis can be resolved this year, Assemblywoman Helene E. Weinstein (D-Brooklyn), one of the three legislative leaders commissioned by Governor Pataki to find a solution,²⁶⁰ conceded that even with widespread recognition that rates must be increased, the task force itself is concerned that significant policy and fiscal issues could hamper the progress.²⁶¹

Thus, despite the creation of the task force, the NYCLA is pushing forward with its lawsuit. On January 16, 2001, the New York State Supreme Court granted the state's motion to strike Governor Pataki as a defendant, but denied the motion to dismiss the suit against the state.²⁶² The court recognized that "when the Legislature creates a duty of compensation 'it is within the court's competence to ascertain whether [the State] has satisfied [that] duty . . . and, if it has not, to direct that the [State] proceed forthwith to do so.'"²⁶³ Craig Landy, President of NYCLA, announced:

We are encouraged by the court's decision. The situation has only worsened since the lawsuit was filed, as overburdened attorneys continue to flee the failing system. Governor Pataki and legislative leaders finally have acknowledged that the shameful rates paid to attorneys who represent indigent litigants must be raised, and NYCLA is gratified by this hopeful development. However, no new rates have been set and a mere agreement to study the issue does not alter the pressing need to immediately remedy the constitutional violations occurring daily. Until New York State fulfills its constitutional duties to children and indigent adults, NYCLA will press forward with its lawsuit with unyielding vigor and seek appropriate relief from the court.²⁶⁴

259. *Id.*; see, e.g., N.Y. Assembly Bill 10083 (2000).

260. Caher, *Commission Seeks Solutions*, *supra* note 28, at 1.

261. *Id.*

262. *New York County Lawyers' Association v. Pataki*, No. 102987/00 (N.Y. Sup. Ct. Jan. 16, 2001), available at <http://www.nycla.org/publications/nycla71.pdf>.

263. *Id.* at 7 (citation omitted).

264. Press Release, New York County Lawyers' Association, Court Upholds NYCLA'S Lawsuit Against New York State Challenging Assigned Counsel Rates (Jan. 18, 2001), available at <http://www.nycla.org/publications/press71.htm>.

II. SYSTEMIC PROBLEMS IN THE FAMILY COURT AND CHILD WELFARE SYSTEMS INCREASE THE IMPORTANCE OF ADEQUATE PARENTAL REPRESENTATION

The New York Family Court was established with a remedial purpose and was designed to protect children by providing services and treatment for their parents.²⁶⁵ However, the court system and state social welfare policy have evolved in such a way that the multi-layered needs of parents charged with abuse and neglect are overlooked rather than addressed. Although professing not to be punitive, the court process is adversarial and the lack of support parents receive places them at a distinct disadvantage in all Family Court proceedings. Moreover, federal and state child welfare policy recently shortened the amount of time parents have to get their children back, but provided them with no additional resources to attain the services they need. Additionally, many parents involved in Family Court are struggling through the New York City welfare system, which imposes additional hurdles to providing adequate care for their children and to attaining adequate representation when their children are removed. The state should recognize that losing focus of the remedial purposes of the system directly harms the children who are forced to remain in foster care for a longer period of time than may be necessary or who may be separated permanently from their parents though such separation may have been avoided had their parents' needs been properly addressed. The state also should consider that the costs of providing funding to ensure effective representation and services are available for all parents would be offset by a cost savings from an efficient court process and shorter foster care stays for children.

A. Unbalanced Tripartite System of Representation

1. *Government-Funded Uneven Playing Field*

From the outset of child abuse and neglect proceedings, parents in New York City are usually at a distinct disadvantage in defending their rights to keep their children at home. They often are viewed as criminals, as opposed to parents in need of services to provide a better home for their children.²⁶⁶ Even though the ultimate goal of the proceedings may be for the children to return home, parents are subject first to a highly adversarial process. An attorney from the Administration for Children's Services ("ACS"),

265. N.Y. FAM. CT. ACT § 1011, practice cmt. (McKinney 1998).

266. See generally Vreeland, *supra* note 35.

in his prosecutorial role, seeks a finding of abuse or neglect against the parent.²⁶⁷ In Family Court, the ACS attorney is not obligated to turn over evidence that is favorable to the accused, but the attorney should not thoughtlessly carry out agency policy such that the result will be a risk of serious harm to the child or unnecessary removal from the home.²⁶⁸ The ACS attorney works with an agency caseworker, who makes home visits, and determines the needs of the child and an appropriate recovery plan for the parent.²⁶⁹ The ACS attorney reports the parent's progress to the court to assist the judge in determining if the child should be removed, remain in foster care, or be returned home.²⁷⁰

The children usually are represented by law guardians from the state-funded Juvenile Rights Division of the Legal Aid Society.²⁷¹ In New York, the child has a right to counsel from the first court appearance through the entire proceeding and after a dispositional order until the child is permanently returned home or adopted.²⁷² The Family Court Act does not define the role of the law guardian; generally, however, the attorney must assess the child's wishes and weigh this information when determining a course of action.²⁷³ If the child is very young, the attorney may advocate for what he believes is in the child's best interest,²⁷⁴ but an older, more intelligent child's wishes will have greater impact on the law guardian's decisions.²⁷⁵ A law guardian also may be assigned to represent more than one child in a family, and thus, should consider the extent of the conflicts of interest between the children,²⁷⁶ if, for example, one of the children will provide testimony on behalf of a parent.²⁷⁷

267. *Id.* at 1079.

268. Solomon, *supra* note 165, at 639.

269. NICHOLAS SCOPPETTA, N.Y. CITY ADMIN. FOR CHILDREN'S SERVS., OUTCOME AND PERFORMANCE INDICATORS June 1998, available at <http://www.ci.nyc.ny.us/html/acs/home.html>.

270. *Id.*

271. Green et al., *supra* note 1, at 6-7.

272. N.Y. FAM. CT. ACT § 249(a) (McKinney 1998).

273. Matter of Scott L. v. Bruce N., 509 N.Y.S.2d 971 (Fam Ct. 1986).

274. Matter of Dewey S., 573 N.Y.S.2d 769 (App. Div. 1991).

275. Merrill Sobie, *Representing Child Clients: Role of Counsel or Law Guardian*, N.Y. L.J., Oct. 6, 1992, at 1. Another approach forces the law guardian to disclose all relevant information to the court, so that the judge may make a more informed decision. Matter of Scott L., 509 N.Y.S.2d at 974 (indicating the law guardian must reveal evidence of abuse and neglect). However, this action may force the attorney to reveal facts that would lead the court to come to a decision that he believes is not in his client's best interest.

276. MODEL CODE OF PROF'L RESPONSIBILITY EC 5-15 (1999); MODEL RULES OF PROF'L CONDUCT R. 1.7 (1999).

277. Matter of H. Children, 608 N.Y.S.2d 784 (Fam. Ct. 1994).

If a conflict arises, some children may have to be represented by an attorney from another institutional organization, or even the 18-B panel.²⁷⁸

The attorney for the parent must defend against the ACS charges and advocate for the parent to regain custody when her children have been removed, or to retain custody when her children are still at home.²⁷⁹ However, the proceedings take place on an uneven playing field and parents have the disadvantage; of the three parties represented in court, the parents have the most at stake, yet the attorneys for the parents are the most under-resourced.²⁸⁰

The ACS attorneys and law guardians have the benefits of offices in or near the courts. The offices are staffed with social workers, investigators, secretaries, paralegals, and interns. They are equipped with telephones, fax machines, photocopiers, and computers linked to a common database with basic information about all clients, access (though limited) to Westlaw and Lexis/Nexis, and libraries.²⁸¹ Both ACS and Legal Aid have a supervisory structure and a system to ensure that attorneys can cover for each other when someone is on sick leave, on vacation, or at another hearing. Additionally, the computer databases in both offices allow attorneys to share information and facilitate the production of standard documents, such as motion papers, orders, and subpoenas.²⁸² The Legal Aid and ACS attorneys also receive salaries, benefits, and vacation time.²⁸³

The 18-B attorneys, on the other hand, receive only a per hour payment from the city, no benefits, and no paid vacation time.²⁸⁴ Moreover, the only space they have near the court, where they spend a majority of their time, is one small office, equipped with a few desks, a couple of chairs, and one phone.²⁸⁵ They have no pri-

278. Anshen Interview, *supra* note 159.

279. Bailie, *supra* note 87, at 2302.

280. *Id.*

281. Interview with Hilary Gershman, former intern for the Manhattan Juvenile Rights Division of the Legal Aid Society, at Fordham University School of Law, in New York, N.Y. (Apr. 11, 2000) [hereinafter Gershman Interview]; Interview with Sabrina Flaum, former intern for the New York City Administration for Children's Services, at Fordham University School of Law, New York, N.Y. (Apr. 11, 2000) [hereinafter Flaum Interview].

282. Gershman Interview, *supra* note 281; Flaum Interview, *supra* note 281.

283. Green et al., *supra* note 1, at 7-8.

284. Law Interview, *supra* note 118.

285. The authors observed this during a visit to the Manhattan Family Court, New York, N.Y. (Jan. 21, 2000).

vacy when meeting with clients, no support staff, and no computers to use while waiting for their court appearances.²⁸⁶

Although the Legal Aid and ACS offices are by no means plush, unlike the 18-Bs, the attorneys there share offices with only one or two other people. They usually can find a private place to interview clients if necessary. Even basic necessities such as filing cabinets, provided for both law guardians and ACS attorneys, would benefit the 18-Bs, who have to carry their files to court and back home every day. Additionally, to conduct any research or to make photocopies during the day, 18-B attorneys have to rely on the generosity of their opposing counsel or court officials to share their resources.²⁸⁷

2. *Continuity of Representation: Only Parents Bounce from One Attorney to the Next*

Unlike the law guardians and ACS attorneys who remain on a case through its conclusion, the 18-B attorney's responsibility to his client ends after the initial finding of abuse or neglect and placement of the child in foster care.²⁸⁸ If a parent is found to be abusive or neglectful after the fact-finding hearing, she will have to comply with a court-ordered "service plan" before her children may be returned home.²⁸⁹ Such a plan may include parenting classes, drug counseling, domestic violence counseling, or even securing a new home appropriate for her family.²⁹⁰ However, because attorneys are not required to follow up with clients post-disposition, the parent has no advocate to keep a record of social services provided to the parent or of the parent's compliance with court orders.

In one Manhattan Family Court case, the court ordered a single mother to complete a drug treatment program before she could get her children out of foster care. At a court hearing to determine whether the children should remain in foster care, the ACS attorney argued that foster care placement should be extended because the mother was not complying with the service plan. The mother

286. *Id.*

287. *Id.*

288. N.Y. FAM. CT. ACT § 1052-b (McKinney 1998) (providing that after disposition, counsel's only remaining responsibility is to advise the respondent parent of her right to appeal, explain the appeal process and the possible grounds upon which an appeal may be based, ascertain whether the respondent wants to appeal, and if necessary, serve and file the notice of appeal).

289. Bailie, *supra* note 87, at 2301.

290. *Id.*

explained that she was unable to attend the program initially arranged by the ACS caseworker because she no longer had a car and had been unable to get in touch with the caseworker to notify her. The mother eventually found a treatment program on her own that was more accessible. While she was waiting to be admitted, ACS did nothing to ensure that she was receiving adequate services, and the mother had no attorney either to hold ACS accountable or document the mother's own efforts. Instead, the mother had to wait until the court appearance to get another attorney and inform ACS about the status of her compliance with the service plan. As a result, her children remained in foster care longer than they would have if services to the mother had not lapsed.²⁹¹

As implemented in New York, the new ASFA regulations provide that parents have a right to have an attorney or another companion at conferences with ACS caseworkers to develop a plan of appropriate services for the parents with the goal of regaining their children.²⁹² However, one 18-B attorney in Manhattan Family Court noted that parents rarely take advantage of this right. The attorney conceded that most parents probably do not even know that they have this right and attorneys rarely volunteer to take part in such planning because they would be paid only \$25 per hour for this out-of-court time.²⁹³

3. *Adversarial Nature of the Family Court System*

Not only are parents provided with fewer resources than the other parties, but also, the adversarial nature of the system, pitting state and child against parent, diminishes the chances for parents to receive the help they need. The Family Court's emphasis is skewed toward determining the guilt or innocence of parents, and the imposition of punishment for their acts, with far less consideration for the broader well-being of their children.²⁹⁴ The rehabilitation of parents, along with issues of visitation with children in care, are

291. The authors observed this during a visit to the Manhattan Family Court, New York, N.Y. (Jan. 21, 2000).

292. Lauren Shapiro, *Adoption and Safe Families Act: New York State Implementation Law*, 183 PLI/CRIM. 175 (1999).

293. Telephone Interview with Anonymous 18-B Attorney, Manhattan Family Court (Mar. 20, 2000) (attorney asked that his name not be used in publication) (on file with the Fordham Urban Law Journal) [hereinafter Anonymous Interview].

294. SPECIAL CHILD WELFARE ADVISORY PANEL, ADVISORY REPORT ON FRONT LINE AND SUPERVISORY PRACTICE 46 (2000)(on file with the Fordham Urban Law Journal) [hereinafter ADVISORY REPORT].

typically considered in terms of whether a parent deserves such reward or punishment, rather than whether removal, visits, or reunification are in the child's best interests based on his safety and emotional health.²⁹⁵

The 18-B attorneys do not have automatic assistance from social workers or access to psychologists to conduct evaluations and provide testimony at fact-finding hearings. The attorney may request that such professionals be appointed, however, judges rarely grant the requests, and if they do, they often limit the amount of money that may be spent on social or psychological services.²⁹⁶ Therefore, parents are usually entirely reliant on the services that the ACS caseworkers provide. Paradoxically, the parents are expected to cooperate with the same agency that removed their children and is prosecuting them in Family Court. The caseworkers, in turn, are forced to switch gears from protecting the children from their parents to working with parents to return the children home.

Dependence on ACS caseworkers also compromises a parent's chance for a fair hearing. When parents return to court for extension of placement or termination of parental rights proceedings, the court's decision about where a child should be placed often depends on the word of the caseworker against the word of the parent.²⁹⁷ Because the 18-Bs have no first-hand knowledge about whether the caseworkers provided the parent with proper services, the attorney's ability to advocate zealously for his client is greatly hampered.

When judges do order ACS to provide a parent with certain services, it is common for court orders not to be carried out and neither the courts nor ACS sufficiently track these services or hold anyone accountable.²⁹⁸ Even when caseworkers are in technical compliance with court orders, the services they recommend are usually of a standard set, such as parenting skills classes or drug treatment programs, rather than tailored to the needs of a particular parent. Therefore, the assistance given does little to address underlying issues parents need to resolve.²⁹⁹

295. *Id.* at 46-47.

296. Anonymous Interview, *supra* note 293.

297. *Id.*

298. ADVISORY REPORT, *supra* note 294, at 45.

299. *Id.* at 10. The agencies responsible for providing services are typically "bureaucracies" where there is "protocol with little imagination." Cohen interview, *supra* note 157. "Overwhelmed, underfunded, highly bureaucratic child welfare agencies provide little if any useful assistance in solving the real problems that face families." Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 438 (1996). From

Due to the adversarial nature of the Family Court system, 18-Bs cannot hold the ACS caseworkers directly accountable for the services they are to provide for the parents. The caseworker is employed by or contracts with ACS, so a parent's attorney is prohibited ethically from speaking with the caseworker without permission from opposing counsel.³⁰⁰ Having the ACS lawyer as an intermediary unnecessarily hinders proper provision of services and lessens the direct accountability the caseworker has toward the parent.³⁰¹

With ASFA regulations shortening the amount of time parents have to comply with court-ordered service plans before they face termination of parental rights, the provision of appropriate services is vital to enable parents to avoid unnecessary terminations. ASFA does contain a provision allowing agencies to pull children off the termination track if the parents have not been getting adequate assistance.³⁰² However, in order for this to happen, an agency lawyer must submit voluntarily a statement in court admitting failure of the agency's caseworkers to make reasonable efforts to meet the needs of the parents.³⁰³ One attorney told Child Welfare Watch that "[i]t won't happen."³⁰⁴ Moreover, caseworkers are rarely even held accountable to the "reasonable efforts" requirement because judges generally rely exclusively on the testimony and recommen-

September through December 2000, Christine Schessler, co-author of this Comment and former intern working on a domestic violence project at the Juvenile Rights Division of the Legal Aid Society in Bronx, N.Y., observed that, in many cases in which the only charge against mothers was "failure to protect" because their children witnessed domestic violence, caseworkers in the Bronx routinely recommended parenting skills classes but did little to secure counseling or shelter or new homes for the mothers.

300. See MODEL RULES OF PROF'L CONDUCT R. 4.2 (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104 (1999).

301. While working as an intern on a domestic violence project at the Bronx Juvenile Rights Division of the Legal Aid Society, Christine Schessler, co-author of this Comment, observed that in domestic violence cases, New York Family Courts have begun to relax the restrictions on communication between parties, allowing law guardians to speak directly to respondent mothers to facilitate faster reunification.

302. Pub. L. No. 105-89, 111 Stat. 2115, 2118 (1997). There are three exceptions to the requirement that termination petitions be filed in the instance where a child has been in foster care fifteen out of the past twenty-two months. First, if the child is placed with relatives (kinship care), ASFA suspends the rule. Secondly, the legislation also grants extensions to parents who can prove they have not been given access to necessary services that could help a child return home, such as drug treatment or caseworker visits to the home. Lastly, if the court finds there is a "compelling reason" that splitting up a family would be detrimental to a child, it can keep foster care placements temporary for as long as necessary. *Id.*

303. See *Too Fast for Families*, *supra* note 71, at 11.

304. *Id.*

dations from the caseworker in deciding whether reasonable efforts have been made.³⁰⁵ Some judges routinely rubber stamp assertions by social service agencies.³⁰⁶ A report released in March, 2000, by a team of leading national child welfare experts, found that in New York City Family Courts, the question of whether reasonable efforts have been made is "very rarely addressed."³⁰⁷ Several judges admitted that they often approve requests to remove children from their homes even if they are not entirely convinced that a caseworker made adequate efforts at family reunification because they "could not risk making a mistake and having a child die"³⁰⁸

While the Family Court may tend to focus on attaining the best possible outcome for the children involved in abuse and neglect proceedings, the rights of parents should not be sacrificed. It is only logical that to secure a just outcome, all parties must have adequate representation. The state does not provide parents with the same level of representation given to the city and to the children, which not only unfairly impinges upon the constitutional rights of parents to raise their children and invades the parents' constitutional rights to privacy in their families,³⁰⁹ but also may harm the children rather than further their best interests.³¹⁰

B. Adoption and Safe Families Act of 1997 Further Compromises the Rights and Interests of Parents in Family Court

In 1997, Congress enacted ASFA, with a goal of promoting safe and permanent placements for children, and mandated that all states comply with ASFA guidelines in order to receive federal funds.³¹¹ In February 1999, New York implemented legislation in compliance with federal ASFA regulations.³¹²

The Act requires states to comply with truncated time limits to achieve permanency for children placed in foster care, pushing many proceedings onto the fast track to termination of parental

305. Raymond, *supra* note 57, at 1263.

306. *The Unreasonable Assault on "Reasonable Efforts,"* NCCPR: ISSUE PAPER 8, at <http://www.nccpr.org/newissues/8.html> [hereinafter *Reasonable Efforts*].

307. ADVISORY REPORT, *supra* note 294, at 47.

308. *Id.* at 48.

309. *See supra* notes 103-105 and accompanying text.

310. *See infra* Part II.C.

311. Pub. L. No. 105-89, 111 Stat. 2115 (1997).

312. Fink, *supra* note 69 and accompanying text.

rights.³¹³ Decisions to terminate the rights of a parent have been characterized as “the ultimate interference by the state . . . with the family’s constitutionally protected rights to privacy and the parents’ constitutionally protected right to raise their children.”³¹⁴ The United States Supreme Court established that terminating parental rights is a “unique kind of deprivation.”³¹⁵ A parent’s interest in a just and accurate decision regarding her parental rights is, therefore, of utmost importance.³¹⁶ Thus, parents facing possible termination of their parental rights should be afforded appropriate procedural protections.³¹⁷ However, neither the federal nor the state government has assured parents that they will be provided with the assistance they need to comply with the new child welfare policy.

1. *The Requirements of ASFA*

ASFA requires that, while making reasonable efforts to preserve and reunify families, states must consider the health and safety of the children as the “paramount concern.”³¹⁸ On its face, the Act has laudable goals: (1) ensuring that children are not returned to abusive or neglectful homes; and (2) providing alternative permanent placements in a shorter period of time than previously has been mandated so that children do not linger in foster care for years.³¹⁹ However, implicit in the required focus on the well-being of the child is the shift away from the rights of biological parents.³²⁰ Thus, the legislation further compromises the due process rights of parents in abuse and neglect proceedings. Moreover, ASFA also

313. See *Too Fast for Families*, *supra* note 71, at 6.

314. O’Flynn, *supra* note 40, at 265 (quoting Jamie D. Manasco, *Parent Child Relationships: The Impetus Behind the Gregory K. Decision*, 17 LAW & PSYCHOL. REV. 243 (1993)); *supra* notes 103-105 and accompanying text.

315. *Lassiter v. Dep’t of Soc. Serv.*, 452 U.S. 18, 27 (1981).

316. *Id.*

317. See O’Flynn, *supra* note 40, at 266.

318. Pub. L. No. 105-89, 111 Stat. 2115, 2117-18 (1997).

In accordance with the federal statute, the [New York] legislation amends Social Services Law § 384-b to include a legislative finding “that the health and safety of children is of paramount importance.” All references to return of a child home for all categories of cases have been modified to include “return safely home.”

Fink, *supra* note 69, at 171-72.

319. *The New Adoption Law: Washington’s Parent Trap*, CHILD WELFARE WATCH, Winter 1999, http://www.nycfuture.org/child_welfare/cww_04.htm [hereinafter *The New Adoption Law*].

320. See N.Y. SOC. SERV. LAW § 358-a, supplementary practice cmt. (McKinney 1999).

causes the permanent removal of many children from their parents' custody though such action may not truly be in the best interests of the children.³²¹

Several provisions of ASFA intended to secure quickly permanent placement for foster children, have pushed a greater number of cases toward termination of parental rights. ASFA regulations create a presumption that parental rights will be terminated and mandate that steps toward adoptive placement be initiated for three categories of foster care children: (1) a child in foster care for fifteen out of the last twenty-two months;³²² (2) a child whom the court has determined to be an abandoned child;³²³ and (3) a child whose parent has committed certain crimes against the child or a sibling.³²⁴

After the initial fact-finding hearing, if the court has held that the circumstances of the case do not fall within one of the presumptions for termination of parental rights, then the agency is mandated to make reasonable efforts at family preservation or

321. For example, parental rights often are terminated before an adoptive home is secured. "The end result [of ASFA legislation], child advocates say, could be a population of legal orphans who are trapped in perpetual foster care, getting older and less adoptable." *The New Adoption Law*, *supra* note 319.

322. See Douglas H. Reiniger, *The Adoption and Safe Families Act/ New York Practical Implications for Foster Care Agencies and Caseworkers*, 182 PLI/CRIM. 647, 659 (1999).

In the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months . . . the State shall file a petition to terminate the parental rights of the child's parents . . . and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption"

Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2116, 2118 (1997). The date of foster care entry is the earlier of 60 days after the date the child was removed from the home; or the date of the court's finding of neglect and abuse by the parent. Reiniger, 182 PLI/CRIM, *supra* note 322, at 659.

323. Reiniger, *supra* note 322, at 659.

324. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2116, 2117 (1997).

Reasonable efforts . . . shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that . . . the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse); (ii) the parent has . . . committed murder . . . of another child of the parent; (iii) committed voluntary manslaughter . . . of another child of the parent; (iv) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or (v) committed a felony assault that results in serious bodily injury to the child or another child of the parent.

Id.

reunification.³²⁵ However, now permanency hearings must take place within twelve months of the child's placement in foster care instead of eighteen months, as previously provided.³²⁶ At the permanency hearing, the court should evaluate the agency's long-term plan for the child and modify the plan if necessary. The court also should mandate adherence to the time-frame within which permanency should be achieved, whether through reunification, placement for adoption, filing of termination of parental rights proceedings, or implementation of an alternative permanent living arrangement.³²⁷ Parents now have less time to ready themselves for reunification before they are threatened with possible permanent removal of their children from their custody.

2. *Flaws in ASFA: Placing Demands on Parents Without Providing the Resources Necessary for Parents to Comply*

Although the enacted permanency provisions may seem the most effective method to ensure that children do not remain in foster care for extended periods of time, ASFA's main flaw is that it pushes proceedings toward the termination track more quickly than ever before, but does "virtually nothing to assure that parents get equally speedy access to the services they need to get their kids back."³²⁸ In attempting to clarify the "reasonable efforts" requirement with the purpose of preventing long term foster care stays, ASFA specifies circumstances in which reasonable efforts at family reunification may be abandoned.³²⁹ However, the legislation does not provide guidelines regarding what "reasonable efforts" should entail when such efforts are still required.³³⁰ Because the requirement is vague, agencies often get away with making little or no

325. Fink, *supra* note 69, at 165.

326. *Id.*

327. *Id.* at 166.

328. *Too Fast for Families*, *supra* note 71, at 3.

329. *See supra* note 322 and accompanying text.

330. Raymond, *supra* note 57, at 1260.

The new law will make important strides toward providing solutions to the reasonable efforts problem as it affects children suffering from the most severe forms of child abuse and neglect. Unfortunately, the law does not address how the reasonable efforts standard will apply to those cases that do not qualify under the "aggravated circumstances" category. In short, while the law outlines when states do not have to undertake reasonable efforts, it does not articulate a definition of the types of reasonable efforts state child welfare officials should undertake and state youth court judges should consider in the judicial determination process. For most children in foster care, ASFA will not create a meaningful change unless [the U.S. Department of

effort to keep families together.³³¹ Caseworkers spend only five to twenty percent of their time locating services for parents.³³² A director of a New York foster care agency noted that “[biological] parents are virtually an afterthought. You’re sanctioned if you don’t get services to the child, but if you don’t go with a parent to a drug treatment program you won’t get into trouble.”³³³ Arranging visitations between parents and their children, which is key to reuniting families, is also a fairly low priority, receiving only about fifteen percent of caseworker time.³³⁴

ASFA legislation further serves to divert caseworker attention away from biological parents in three ways. First, in accordance with the requirement that termination petitions be filed for children who have been in foster care for fifteen of the past twenty-two months, New York child welfare agencies have been instructed to review all their cases to determine how long a child has been in care and whether a petition to terminate parental rights is warranted.³³⁵ As a result, in the first year after the implementation of ASFA, the number of termination petitions filed in New York increased by one-third.³³⁶ As demanding termination cases take priority, caseworkers will have even less time to devote to cases aimed at reunification.

Second, the ASFA regulations have mandated “concurrent planning,” requiring that agencies simultaneously work toward discharging the child to his parent *and* planning for adoption from the initial placement of a child in foster care.³³⁷ Before the enactment of ASFA, foster care had been governed by the concept of “contin-

Health and Human Services] addresses the more fundamental issue of enforcement guidelines.

Id.

331. *Reasonable Efforts*, *supra* note 306.

332. *Too Fast for Families*, *supra* note 71, at 11.

333. *Id.*

334. *Id.* Paperwork is the most time-consuming activity, taking up about forty to fifty percent of caseworker activity. *Id.*

335. Fink, *supra* note 69, at 167-68.

In accordance with the federal Adoption and Safe Families Act, local social services districts . . . have 18 months from the effective date of the New York statute (February 11, 1999) to file termination of parental rights petitions thus required for all children in care as of the effective date of the federal law (November 19, 1997); one-third of this backlog of cases must be filed during each six-month period and cases must be filed immediately as required for all children who came into care after November 19, 1997.

Id.

336. *Too Fast for Families*, *supra* note 71, at 10.

337. Pub. L. No. 105-89, 111 Stat. 2115, 2118 (1997). “In New York City, ACS should develop concurrent planning guidelines for ACS and agency workers to follow

gency planning," emphasizing the primacy of parental rights.³³⁸ Social service agencies would work with parents for an unspecified period of time, usually eighteen months or more, and if, at the end of that period, they concluded discharge to the parent was not possible, they would consider alternative permanency plans.³³⁹ Now, however, caseworkers will be under pressure to work constructively with foster parents eager to adopt and retain their commitment to adopt while also working in good faith toward discharging the child to his biological parents.³⁴⁰ Inevitably, caseworkers will have less time to spend working with the biological parents toward the goal of reunification.

Third, ASFA legislation further encourages removing children from home rather than providing preventive services to keep families together because, instead of providing funds to improve access to the resources poor parents need, ASFA has granted more money to states only when children are adopted out of foster care.³⁴¹ The law's incentives package provides \$4,000 to \$6,000 in bonus money to states for every child adopted out of foster care, but no additional money for reunifying children with their parents in safe homes.³⁴²

Under the current system, parents in New York City are not receiving their due protection. The lack of attention given to parents and the lack of resources provided to their attorneys suggest that the state assigns counsel to respondent parents merely to create a façade of compliance with a state statutory requirement rather than to fulfill the parents' rights to adequate representation by attorneys who are able to advocate zealously on behalf of their clients. Although comprehensive representation is a right due to the parents, meeting the needs of respondent parents efficiently and effectively is usually in the best interests of the children as well,

in implementing concurrent planning." Lauren Shapiro, *Adoption and Safe Families Act: New York State Implementation Law*, 183 PLI/CRIM. 175, 183 (1999).

338. Reiniger, *supra* note 322, at 649.

339. *Id.*

340. *Id.* at 650. The practical implications of the concurrent planning requirement mandate that agencies must meet with parents immediately and be very clear about the new strict time limits. All correspondence to the parents should have warning language referring to the consequences of the parent's failure to resolve problems within twelve months and the legal mandate to file a petition for the termination of parental rights if the child remains in foster care for fifteen of the most recent twenty-two months. *Id.*

341. O'Flynn, *supra* note 40, at 265.

342. *The New Adoption Law*, *supra* note 319.

and therefore is vital to the state's ability to comply with ASFA mandates.

C. Welfare of Children is Harmed When Parental Representation is Inadequate

The traditional federal family preservation policy recognizes the symbiotic relationship between addressing individual needs of household members and promoting the health of the cohesive family unit.³⁴³ The provision of sufficient preventive social services is vital to a parent's ability to acquire counseling to address personal trauma and basic necessities for her family.³⁴⁴ The parent's legal representation in abuse and neglect proceedings directly affects her access to counseling, welfare benefits, job training, or other social services that are required by the court before her children may be returned home or allowed to remain in her care.³⁴⁵ A parent's inability to access these services because of lack of adequate counsel, deficiency of information about social services, or bureaucratic backlog, produces an unstable and unfavorable situation for the children.³⁴⁶ For children, removal from the home causes severe trauma, which is exacerbated by placement in understaffed and inadequately funded group homes that cannot address their physical and psychological needs. The use of intensive preventive services provides a much better possibility for healthy family relationships in the long run; however, acquiring such services usually requires the intervention of an attorney.

Children do have their own counsel, a law guardian, to advocate their views in Family Court.³⁴⁷ This representation, however, may not fully protect their interests, because the attorneys do not ensure the welfare and rehabilitation of the parents³⁴⁸ to facilitate re-

343. BARTHOLET, *supra* note 42.

344. ADVISORY REPORT, *supra* note 294.

345. *Separation Anxiety: Parent Lawyers at a Loss*, CHILD WELFARE WATCH, Winter, 1999, http://www.nycfuture.org/child_welfare/cww_04.htm#5.

346. *Id.*

347. N.Y. FAM. CT. ACT § 1033-b (McKinney 1998). Law guardians are appointed to children in all abuse and neglect proceedings from the first date the case is in court through the entire time the child is in the Family Court system. *Id.* Courts have recognized a child's right to independent counsel in: juvenile delinquency hearings, *In re Gault*, 387 U.S. 1 (1966); parental termination cases, *In re Orlando F.*, 351 N.E.2d 711 (N.Y. 1976); and extensions to a variety of other court actions, such as abuse and neglect proceedings. Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255 (1991).

348. Angela D. Lurie, Note, *Representing the Child-Client: Kids are People Too*, 11 N.Y.L. SCH. J. HUM. RTS. 205 (1993). This Note discusses conflicts where a child's attorney attempts to act both as a guardian *ad litem*, who represents "the best interest

turn of the children. Some scholars even consider the presence of attorneys for the child as creating an adversarial system in the Family Court that potentially harms children by presenting additional obstacles for the parents to confront.³⁴⁹

1. *Foster Care is Not Always a Good Alternative*

The foster care system serves the important state role of providing temporary protection and social services for a child, but it often creates a traumatic and substantially detrimental effect on the child's well-being. Child welfare professionals agree that children need and benefit from stable home environments.³⁵⁰ Lingering in foster care, limited to a degree under ASFA time regulations, produces an unsatisfactory situation of constant turmoil and unrest.³⁵¹ Studies suggest foster care children suffer fears of inadequacy, abandonment, and lack of control when they are removed from parents who are a main source of identity and self-esteem.³⁵² State agencies often ignore the significant harm caused by psychological and emotional neglect and abuse. Some harmed children act out in the foster care homes through physical and verbal harassment of their peers. This continued abuse has a profound cumulative effect of eroding the other children's sense of self-worth, self-esteem, and ability to assimilate to a community.³⁵³ For children commonly rejected by their peers, such as gay and lesbian youth, constant harassment from other children and, often, administrators, initiates a cycle of poor self-image, depression, substance abuse, homelessness, increased exposure to sexually transmitted disease, and suicide.³⁵⁴ Studies additionally show that a child's outlook may not improve even after adoption, and some adopted children have ex-

of the child," expressed by a guardian for a young child, and a law guardian, who represents the child's express interests, if the child is old enough to communicate. *See id.* at 205, 229-36.

349. Pearce, *supra* note 37, 1294-01 (discussing models of "Optimal Family Representation" that recognize the decidedly adversarial role of individual representation, and the opportunity where "a lawyer for the family will seek to do what is best for the family as a group").

350. Brito, *supra* note 47, at 271.

351. Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 578 (1997).

352. O'Flynn, *supra* note 40, at 266 ("Permanent separation from a biological parent can severely damage a child by eliminating that child's main source of identity and self-esteem.").

353. GERALD MALLON, WE DON'T EXACTLY GET THE WELCOME WAGON 88 (1998).

354. *See* Colleen A. Sullivan, *Kids, Courts and Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems*, 6 LAW & SEXUALITY 31 (1996).

hibited higher levels of depression and behavioral problems than those in foster care.³⁵⁵

There is a presumption that placement by state agencies provides a superior environment to an abusive home, making additional protective measures unnecessary, yet foster care children often are subject to significant abuse and neglect while in group homes or placed with foster families.³⁵⁶ The lack of screening of foster parents, insufficient monitoring of homes, and violence among children in care contribute to the abuse and neglect children suffer while in the custody of the state.³⁵⁷

Many of the foster care agencies hold hundreds of beds, with only a few underpaid staff members who have difficulty providing and ensuring a safe environment.³⁵⁸ Though the court's policy expresses a preference for placing children in a smaller, home-like setting, many foster families are on welfare, and have numerous children of their own.³⁵⁹ Such families—primarily unemployed, single parent households—seek the foster care stipend as a vital additional source of income, yet they may not have the resources to address the emotional and physical needs of the child.³⁶⁰ In a recent Family Court proceeding, Manhattan Family Court Judge Rhoda Cohen listened as an ACS attorney described a potential foster care home of a single mother on welfare with seven children of her own, and four foster care children already in her care. Judge Cohen exclaimed, "There are eleven children already under one roof, and you are presenting this as an option for this child?"³⁶¹

The New York City child welfare system has been subject to scrutiny through continuous class action lawsuits over the past two decades concerning ongoing complaints of safety for youth.³⁶² In *Marisol v. Giuliani*,³⁶³ eleven named plaintiffs brought a class action suit based on claims of abuse and neglect they suffered while in foster care. The recent *Marisol Settlement Agreement* created a

355. O'Flynn, *supra* note 40, at 266.

356. MALLON, *supra* note 353, at 85.

357. ACS maintains and publishes charts comparing rates of child mortality in foster care. Scoppetta, *supra* note 269.

358. *Bidding for Beds*, CHILD WELFARE WATCH, Summer 1999, available at <http://www.nycfuture.org/5/index.html>.

359. JUDY SCHEINDLIN, DON'T PEE ON MY LEG AND TELL ME IT'S RAINING: AMERICA'S TOUGHEST FAMILY COURT JUDGE SPEAKS OUT, at Ch. 5 (1996).

360. *Id.*

361. This was observed by the authors during a visit to Manhattan Family Court, New York, N.Y. (Jan. 17, 2000).

362. *Marisol v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996).

363. *Id.*

panel of experts to author a series of five advisory reports, which offer expansive reviews of general areas of administration, policy, and performance of the foster care system.³⁶⁴ The reports note the important issues of welfare and minority representation,³⁶⁵ but fail to discuss matters such as the safety of the child from peer or administrative abuse,³⁶⁶ or the mental and physical health needs of the child.³⁶⁷ The reports set out a mechanism for reporting and accountability to institute fundamental changes to the child welfare system, but many practitioners are skeptical that any of the proposed solutions will provide substantial change to such a bureaucratically entrenched system.³⁶⁸

2. *Parent Services Necessary to Prevent Unnecessary Placement of Children*

In an attempt to promote child protection, many welfare and family law policies separate potentially reparable families. To deny parents access to basic social and legal services, necessarily harms the child through traumatic foster care stays, adoption proceedings, and adaptation to a new family and surroundings. The state's inability to provide for the family places accountability on the shoulders of the parents, who lack resources to defend themselves and protect their families. As a critic noted, "the beauty of presenting this as a battle of competing interests—family preservationists versus child protectionists—is that politicians and community leaders can paint themselves as crusaders for children but never have to put their money where their mouth is."³⁶⁹

364. Steven D. Cohen, *Advisory Report on Placement Issues in the New York City Child Welfare System*, 183 PLI/CRIM. 117, 123.

365. *Id.* at 125-44 (discussing the value of visitation and contact with biological families, and attention to racial, ethnic and class differences, and listing eight improvement goals accompanied by specific action recommendations and corresponding timetables).

366. *Id.*

367. Shannon DeRouselle, *Welfare Reform and the Administration for Children's Services: Subjecting Children and Families to Poverty and then Punishing Them For It*, 25 N.Y.U. REV. L. & SOC. CHG. 402, 424 (1999).

368. Interview with David Pumo, lead attorney at The Urban Justice Center ("UJC") on the *Joel A.* case. The UJC filed a class action representing systematic abuse to gay and lesbian youth in New York City foster care but was denied intervention into the *Marisol* proceedings, and now awaits completion of a two-year moratorium on class actions against ACS to refile their complaint. *Joel A. v. Giuliani*, 218 F.3d 132 (2d Cir. 2000). *The Marisol Settlement*, CHILD WELFARE WATCH, Apr. 1999 (citing Doug Lasdon, Executive Director of the Urban Justice Center, "Our only chance is the faith and hope that these guys will come up with good recommendations—and Nick Scoppetta will follow them . . . To us, that's not worth a whole lot").

369. Karen Houppert, *Crisis in Family Court*, VILLAGE VOICE, Apr. 20, 1999, at 41.

There are many cases in which placement could be shortened or eliminated altogether if caseworkers paid more attention to the needs of parents and the state provided enough resources for parents to obtain services quickly. A study of New York City cases in which children were removed for “lack of supervision” by their parents found that in fifty-two percent of the cases, the service needed most was day care or babysitting,³⁷⁰ “[b]ut the ‘service’ offered most often was foster care.”³⁷¹

Several studies have shown that intense family preservation programs safely prevent placement in foster care³⁷² and are, therefore, beneficial not only to parents, but also to children who are spared the emotional trauma and instability of foster care. The “Homebuilders” intervention model is a short but extremely intense preventive services program and is designed for families whose children otherwise face imminent removal to foster care.³⁷³ Homebuilders workers assist only two families at a time and spend several hours with each family throughout a four to six week period.³⁷⁴ The worker comes to the family’s home and addresses whichever problem the family identifies first, rather than just suggesting the standard services.³⁷⁵ Workers combine traditional counseling and parent education with a strong emphasis on provid-

370. Mary Ann Jones, *Parental Lack of Supervision: Nature and Consequences of a Major Child Neglect Problem*, in CHILD WELFARE LEAGUE OF AMERICA 2 (1987).

371. *Reasonable Efforts*, *supra* note 306. In recent years, particularly after the 1996 welfare overhaul sent millions of parents into the workforce, many on shifts at odd hours, dozens of cities and states have taken steps to supply working parents with round-the-clock child care. But New York City and New York State are “behind in the world of night care.” New York, still in the early stages of a plan to encourage childcare for parent whose workday is not “9-to-5,” has only begun to get involved. Sarah Kershaw, *Day Care at Night?: New York Lags Behind*, N.Y. TIMES, Apr. 2, 2000, at A1.

372. *Does Family Preservation Work?*, NCCPR: ISSUE PAPER 10, available at <http://www.nccpr.org/newissues/10.html> [hereinafter *Does Family Preservation Work?*].

373. BARTHOLET, *supra* note 42, at 42. In the 1970s and 1980s, the Homebuilders Model featured “intense family preservation services,” in which social workers with limited caseloads were assigned to work with at-risk families for an intensive six-week period to prevent the removal of children from the home. *Id.* CAROL BERQUIST ET AL., *EVALUATION OF MICHIGAN’S FAMILIES FIRST PROGRAM* (1993); MARK W. FRASER ET AL., *FAMILIES IN CRISIS: THE IMPACT OF INTENSIVE FAMILY PRESERVATION SERVICES* 168 (1991).

374. *Does Family Preservation Work?*, *supra* note 372. The Homebuilders model has proven successful in Michigan, Utah, Washington, California, Minnesota, and Alabama. *Id.*

375. ACS and New York foster care agencies often recommend boilerplate services rather than assessing the unique and often multi-layered needs of individual parents. ADVISORY REPORT, *supra* note 294, at 10.

ing services to ameliorate the worst aspects of poverty.³⁷⁶ Family preservation workers help families find day care and job training and get whatever special educational help their children may require.³⁷⁷ They teach practical skills, even something as basic as how to keep the house clean, and help with financial problems as well.³⁷⁸ Less intensive support after the initial intervention helps maintain the gains made by the family.³⁷⁹

Although this model focuses on situations in which children have not yet been removed from the home, such an intensive approach would be beneficial immediately after the children have been removed as well, especially because ASFA has shortened the amount of time parents are given to get their lives back on track and meet the requirements of the service plan. Once basic needs are taken care of, a troubled parent can start to work on other problems: "It's a lot easier to concentrate on how to be the best possible parent when one isn't worrying about where your next meal is coming from or whether your family is about to be evicted."³⁸⁰ Intense preventive services models treat parents with the respect they deserve and offer the hope they need to rebuild their own lives.

Even in cases in which parents are substance abusers or have physically mistreated their children, and thus are perhaps a less sympathetic group, child welfare agencies in many instances still are required to make "reasonable efforts" at reunification.³⁸¹ Intense and early intervention may be even more vital to successful reunification under these circumstances. Parents often turn to drugs or alcohol because they cannot deal with a myriad of underlying problems, not the least of which may be lack of housing or food.³⁸² Similarly, child abuse is linked to stress, and poor families tend to be under more stress than financially secure families.³⁸³ Drug treatment programs and counseling for parents can be effective, especially if the parent's underlying problems are addressed

376. *Does Family Preservation Work?*, *supra* note 372.

377. *Id.*

378. *Id.*

379. *What is "Family Preservation"?*, NCCPR: ISSUE PAPER 9, available at <http://www.nccpr.org/newissues/9.html>.

380. *Id.*

381. The reasonable efforts requirement is lifted only in extreme circumstances. See *supra* text accompanying notes 322-324.

382. *Family Preservation and Substance Abuse*, NCCPR: ISSUE PAPER 12, <http://www.nccpr.org/newissues/12.html>.

383. *Child Abuse and Poverty*, NCCPR: ISSUE PAPER 6, <http://www.nccpr.org/newissues/6.html>.

simultaneously.³⁸⁴ To recreate a truly safe home for children, however, caseworkers will have to devote more than five to twenty percent of their time to the needs of the parents, and the parents may need more than one year to be ready to care for their children.³⁸⁵ One New York City caseworker observed, “[W]hen you are working to reunify families . . . [y]ou need time. You can’t change a parent in five minutes. You need time and support and resources to make it work.”³⁸⁶

3. *Access to Services Varies with the Foster Care Agency*

Although a parent’s chances of getting her child out of foster care do depend on her own efforts, her progress relies upon necessary assistance and support. In New York, the services a parent is offered often depend on the foster care agency where her children have been placed.³⁸⁷ A *Child Welfare Watch* report noted, “Some agencies have a strong commitment to putting families back together. Others don’t. It’s a game of chance that can be the difference between whether a family is saved or pulled apart.”³⁸⁸ When faced with the onslaught of termination petitions caused by ASFA legislation, some agencies have made concerted efforts at reunification by focusing on what the families need and delivering it to them as fast as possible.³⁸⁹ Other agencies, however, have a lingering negative attitude toward birth parents. The director of foster care and adoption at a Manhattan foster care agency commented, “It’s usually a certain bias that says, for instance, substance abusers can’t be rehabilitated.”³⁹⁰ Caseworker bias easily can affect the chances of a child returning home, because the caseworker has the most contact with the family. In reporting on the progress of a parent to the ACS attorney or to the court, a worker who has a bias

384. *Id.*

385. *Id.*

386. *Too Fast for Families*, *supra* note 71, at 2.

387. In some cases, ACS directly provides services for parents and their children who are in foster care. However, ACS also contracts with several voluntary foster care agencies throughout New York City whose social workers are the primary providers of services for the whole family. *See generally* ADVISORY REPORT, *supra* note 294.

388. *Id.* at 8.

389. *Id.* St. Christopher’s, Inc., in the Bronx, and New York Foundling Hospital are among the agencies emphasizing reunification and both agencies assigned fewer than twenty percent of their children to adoption in 1999. *Id.*

390. *Id.* Some foster care agencies have adoption track rates near fifty percent. ACS’s own caseload is among the highest at fifty-seven percent, although that may be due in part to a recent push to increase kinship adoptions for children in the care of ACS. *Id.*

against reunifying a child with her parent could cover up information that would increase the parent's chance for reunification.³⁹¹

Moreover, the requirements shortening the amount of time children can remain in foster care harm parents whose children are placed in smaller agencies with less clout who must compete for limited resources with parents whose children are in larger agencies with more connections with social services providers.³⁹² Under ASFA, all parents are on the same timeline for permanency hearings and required filings of termination of parental rights petitions.³⁹³ Therefore, because the Act provides no additional funding to increase access to services for all parents, the most important determination in a parent's life and the direction of her child's future often comes down to the luck of the draw.

D. The "Welfarization" of Family Law

Family law concerns matters related to all spouses, parents, and children, but the state disproportionately intervenes in the lives of families of economically disadvantaged, minority, and ethnic groups.³⁹⁴ Therefore, the inadequate funding for legal services for the poor has a much greater negative impact on these communities. The Fourteenth Amendment affords minorities equal protection under the law, a protection that extends to the right to counsel.³⁹⁵ Funding restrictions in this context may rise to the level of constitutional violation, because there is discrimination against a class of definably poor persons.³⁹⁶

In addition to the obligations imposed by the Family Court system, many of these indigent clients must conform to the state regu-

391. *Id.*

392. *Id.*

393. Pub. L. No. 105-89, 111 Stat. 2115, 2118 (1997).

394. Scoppetta, *supra* note 269. Indigent clients in criminal court are similarly disadvantaged, and for an interesting series on this troubling area of the criminal justice system, see the *Two Tiered Justice Series*: Jane Fritch & Davide Rhode, *Lawyers Often Fail New York Poor*, N.Y. TIMES, Apr. 8, 2001, at A1; Jane Fritch & Davide Rhode, *For the Poor, A Lawyer with 1600 Clients*, N.Y. TIMES, Apr. 9, 2001, at A1; Jane Fritch & Davide Rhode, *For the Poor, Appeals are Luck of the Draw*, N.Y. TIMES, Apr. 10, 2001, at A1.

395. U.S. CONST. amend. XIV; *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31 (1981).

396. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23-24 (1972) (finding for the school district in a school funding case, but stating that a constitutional violation would exist if "the system operates to the peculiar disadvantage of any class fairly definable as indigent"); see *Papasan v. Allain*, 478 U.S. 265 (1986) (holding that the unequal distribution of public school funds violated the Equal Protection Clause if such differential treatment was not rationally related to a legitimate state interest).

lations for welfare recipients. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996³⁹⁷ (“Personal Responsibility Act”) claims a “family preservationist goal,” but creates requirements for receiving welfare aid that make it difficult simultaneously to comply with the ACS service plans.³⁹⁸ President Clinton and other politicians claim political success for the steep decrease in welfare rolls through the use of mandatory work requirements, but this analysis ignores the reality that the new obligations directly affect family health and lead to an increased need for child social services.³⁹⁹

1. *The Impact of Race*

*If there were white kids in foster care, you know we'd get the money.*⁴⁰⁰

Current child welfare policy undeniably affects significantly more black and Hispanic families than white ones.⁴⁰¹ Black parents are far more likely than white parents to be reported for abuse and neglect, even when their children exhibit similar symptoms,⁴⁰² and authorities are twice as likely to remove a black child from home than a white child after a confirmed report of abuse or neglect.⁴⁰³ Seventy-one percent of all foster children in New York City are black, twenty-four percent Hispanic, and only three percent white.⁴⁰⁴ In central Harlem, one out of every ten children is in foster care.⁴⁰⁵ Black and Hispanic children also spend considerably

397. 42 U.S.C. § 608 [hereinafter Personal Responsibility Act].

398. Jason DeParle, *Wisconsin Welfare Overhaul Justifies Hope and Some Fear*, N.Y. TIMES, Jan. 15, 1999, at A1 (stating that in Wisconsin five percent of mothers taken off public assistance have been forced to abandon their children); Dorothy E. Roberts, *Is There Justice in Children's Rights: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 133 (1999) (“Welfare reform may cause a net increase in the number of children entering foster care.”).

399. Robert Pear, *Most States Meet Work Requirement of Welfare Law*, N.Y. TIMES, Dec. 30, 1998, at A1 (stating that in reality poor families are actually worse off economically when they fulfill the mandatory work requirements).

400. *Introduction: The Race Factor in Child Welfare*, CHILD WELFARE WATCH, Spring/Summer 1998.

401. *Id.*

402. *Id. Contra* BARTHOLET, *supra* note 42, at 4 (noting that while abuse and neglect occur at all socioeconomic levels, they are most highly concentrated among the most disadvantaged).

403. *Child Removals: Dislocating the Black Family*, CHILD WELFARE WATCH, Spring/Summer 1998.

404. *Race, Bias & Power In Child Welfare: Report Highlights*, CHILD WELFARE WATCH, Spring/Summer 1998.

405. *Longer Stays, Fewer Services: Blacks in Foster Care*, CHILD WELFARE WATCH, Spring/Summer 1998 (citing a 1994 survey conducted by the U.S. Department of

longer time, on average forty-two percent longer, than white children in the state's custody.⁴⁰⁶ Sometimes the longer stays result from positive kinship care experiences, but often it is due to lack of adequate counsel for the parents, language barriers, and insufficient support from caseworkers.⁴⁰⁷ Historically, racial and cultural bias have plagued the child welfare system, and encouraged the stereotype that black children need saving from "inherently" broken families.⁴⁰⁸ Moreover, the persistence of systemic problems without successful reform attempts by the state or advocacy groups suggests that the minority recipients of these services lack the political power to demand and effect the necessary improvements.⁴⁰⁹

The *Wilder v. Bernstein*⁴¹⁰ litigation in the early 1970s resulted in the *Wilder Decree*, a framework of mandatory placement categories designed to eliminate discrimination against minority children. It created a process that automatically would determine a child's placement, on a "first-come first-served basis," and minimize the discretion of the referring service or foster care agency, which could show prejudice against the child's race, religion, and ethnicity.⁴¹¹ Critics argue such an objective approach prevents necessary subjective assessment of individual children's needs, and the recent *Marisol Settlement Agreement*⁴¹² abandoned these policies in favor of a comprehensive overhaul of the placement procedures. The *Marisol Settlement Advisory Report* stresses the importance of placement discretion to balance the number of complex factors re-

Health and Human Services, which found that black children spent 42 percent more time in care than whites when placed with non-relative foster parents).

406. *Id.* A number of African American children remained in foster care for excessive lengths of time due to state agencies' attempts to place children of minority heritage in foster and adoptive homes of similar racial or ethnic background. In 1994, Congress passed the Multiethnic Placement Act ("MEPA"), Pub. L. No. 103-382 (as amended 104-188), forbidding the delay or denial of a foster or adoptive placement solely on the basis of the race, color, or national origin of the child, adoptive parent, or prospective foster parent involved. Administration for Children and Families, 45 CFR §§ 1355, 1356 (1996); *Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews*, 63 FR 01-50058, 50060 (1998).

407. *Id.*

408. *Id.*; see also Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM U. J. GENDER & L. 1, 15 (1993) (noting that African American women cannot meet the perceived ideal of white motherhood, creating an acceptable rationale for prosecuting them as bad mothers).

409. *Introduction: The Race Factor in Child Welfare*, *supra* note 400.

410. 499 F. Supp. 980 (S.D.N.Y. 1980).

411. *Id.* The class of plaintiffs included "all those New York City children who are black, and who are Protestant, of other non-Catholic or non-Jewish faiths, or are of no religion, and are in need of child-care services outside their home." *Id.* at 994.

412. See *infra* Part II.C.2.

lated to the child's needs.⁴¹³ Effective legal representation of parents requires the attorney to address such recent history and bias towards a client from a disadvantaged group by identifying any abuse of discretion, and proactively confronting the continuing systemic bias toward a significant portion of affected minority families.⁴¹⁴

2. *The Impact of Welfare Policy*

The welfare administration and child protective services are inextricably linked because a majority of families charged in abuse and neglect cases in New York City are dependant on public assistance benefits.⁴¹⁵ This may occur for several reasons: child protection agencies target poor families;⁴¹⁶ the lack of adequate welfare services forces families to give up their children;⁴¹⁷ or, the same factors related to the need for child protective services, such as drug abuse, also affect a person's ability to be financially self reliant.⁴¹⁸ In all three situations, attorney representation is necessary to advocate for due process rights, to address legal consequences of welfare law mandates, and to acquire social services to benefit the health of the entire family.⁴¹⁹

Recent welfare changes further burden a family's ability to provide child protection. The block grant program, Temporary Assistance for Needy Families ("TANF"), which is a part of the Personal Responsibility Act, and its state counterparts "seek to regulate

413. Cohen, *supra* note 364, at 144.

414. Roberts, *supra* note 398, at 140 ("The excessive disruption of black families affects the stability of the group as a whole, weakening its ability to struggle against the many forms of institutional discrimination.")

415. SCOPETTA, *supra* note 269.

416. Appell, *supra* note 351, at 578. "This 'othering' of poor families, particularly when they are of color, makes it easy for the dominant culture to devalue them: to view them as dysfunctional and not families at all." *Id.* at 579.

417. *Id.* at 584.

418. U.S. GEN. ACCOUNTING OFFICE, PARENTAL SUBSTANCE ABUSE IMPLICATIONS FOR CHILDREN, THE CHILD WELFARE SYSTEM, AND FOSTER CARE OUTCOMES 4 (1997) [hereinafter GAO REPORT]. The Office of Child Abuse and Neglect reports that drug abusing parents often neglect their children because their drug use leads to physical or psychological absence. *Id.*

419. O'Flynn, *supra* note 40, at 267 (noting that due process rights are especially critical in parental substance abuse cases, because many parents cannot neatly wrap up their substance abuse problems within the fifteen months they are given to remedy the circumstances of neglect). Without proper systems in place, families struggling with substance abuse will be unable to challenge termination of parental rights proceedings. *Id.*

family behavior.”⁴²⁰ Funding restrictions create unavoidable conflicts for poor families by demanding employment, yet not providing easy access to sufficient childcare.⁴²¹ This necessitates a rise in the removal of poor children from their homes.⁴²² Under regulations in Aid to Families With Dependent Children (“AFDC”), the predecessor to TANF, an eligible single parent could receive welfare until her child reached eighteen, but the Personal Responsibility Act creates a two-year mandatory work requirement and limits the amount of time a person can receive benefits to five years.⁴²³ This eliminates any long-term reliance on the welfare system, but potentially increases the need for child protective services.⁴²⁴ Adhering to simultaneous requirements of child protection plans and welfare benefit programs often causes conflicts that require a multidisciplinary response.

There is an inherent conflict for clients who must work according to current “workfare” regulations, but also must adhere to random drug testing as part of the ACS plan to get their children returned home.⁴²⁵ If these mothers leave work to comply with random testing, they will be fired and lose welfare benefits. However, if they are not tested, they will not be able to get their children back. One 18-B attorney considered a class action claim on their behalf in New York Supreme Court to address these conflicting obligations, but the state does not provide attorney compensation for claims outside of Family Court, and the attorney could not afford pro-bono service on his minimal, hourly wage-based income.⁴²⁶

420. Brito, *supra* note 47, at 234. The Personal Responsibility Act cited *supra* note 397, replaced the Aid to Families with Dependent Children program (“AFDC”) with the Temporary Assistance for Needy Families program (“TANF”) and ended the states’ former obligation to provide benefits. *Id.* at 233 n.8.

421. Brito, *supra* note 47, at 278-79.

422. *Id.* Child care is provided to New York City welfare recipients during workfare hours, but the employee must know the right and means to request it. *Id.*

423. 42 U.S.C. § 608 (2000).

424. Brito, *supra* note 47, at 250 n.88. Addressing the “equity argument” of workfare, Brito notes that for years “welfare mothers who worked were charged with cheating the system.” Now, unlike most mothers, they are forced to work in order to receive subsistence benefits. *Id.*

425. Judge Cohen Interview, *supra* note 157. In a Manhattan Family Court appearance on January 21, 2000, one mother claimed she could not attend a random drug test session due to a conflicting job interview. She asked if she could schedule a drug test session. Judge Cohen explained, “You cannot schedule a random drug test, or else it wouldn’t be random.” *Id.*

426. Anonymous Interview, *supra* note 293.

3. *The Impact of Neglect Classifications*

Although poverty alone is no longer a basis for neglect findings,⁴²⁷ the incidental effects of poverty often lead to findings of neglect by ACS.⁴²⁸ Neglect cases outnumber abuse cases in New York City by eight to one, rising from 6658 cases in 1995 to 10,395 cases in 1998.⁴²⁹ In a *Child Welfare Watch* report, Doreen Davis, an ACS investigator comments, "The city doesn't recognize that the indicators of neglect are so closely aligned to the indicators of poverty that they are sometimes impossible to separate [T]he city is basically punishing parents for being poor without giving them the tools to keep their families together."⁴³⁰ The term "neglected child" includes the failure of the legally responsible guardian to provide "adequate food, clothing, shelter or education . . . medical, dental, optometrical or surgical care . . . or in providing the child with proper supervision or guardianship."⁴³¹ Many impoverished families cannot meet these standards, because the city has redefined its obligation to provide public assistance in housing, food and medical care. Often, a person's inability to obtain these necessities from the state will affect her ability to care for her child.⁴³² Additionally, families that remain together as a unit are

427. N.Y. SOC. SERV. LAW § 131(3) (1999) ("As far as possible families shall be kept together, they shall not be separated for reasons of poverty alone, and they shall be provided services to maintain and strengthen family life."). Neglect can be found due to lack of basic care after the care taker is determined to be financially able or has been given reasonable means to care for the child. N.Y. FAM. CT. ACT § 1012(f)(i)(A) (McKinney 1999).

428. Despite this, then Speaker of the House of Representatives Newt Gingrich, in a 1994 plan, proposed building orphanages for "children of impoverished women" who no longer qualify for welfare benefits under new regulations. The plan would finance these orphanages with money saved from denying benefits to unwed teens, and it would promote adoptions to parents who can care for their children. Brito, *supra* note 47, at 282 n.278. One child protection group responds, "Gingrich, at least, is honest about his agenda: He wants to take children away from their parents just because they are poor. The child savers claim no such intent, but their proposals amount to the same thing." *Just Say No to the Orphanage*, NCCPR: ISSUE PAPER 10, <http://www.nccpr.org/newissues/14.html>.

429. SCOPETTA, *supra* note 269; see also GAO REPORT, *supra* note 418, at 4 ("Neglect is most frequently cited as the primary reason children are removed from the custody of their parents and placed in foster care.").

430. *When in Doubt, Yank Them Out*, CHILD WELFARE WATCH, Winter 1999.

431. N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 1998). The act concedes that where the respondent is voluntarily participating in a rehabilitation program, evidence of drug misuse shall not establish neglect, unless a child is in imminent harm. *Id.*

432. *Separation Anxiety, Parent Lawyers at a Loss*, CHILD WELFARE WATCH, Winter 1999. In the case of Agatha Sibley, a grandmother who lost custody of her three grandchildren when the roof of her city-owned apartment literally collapsed, a case

often better able to combat the secondary effects of poverty, such as depression and drug and alcohol abuse.⁴³³ More than forty percent of neglect cases involve some form of drug addiction, and studies show that keeping children at home serves as strong motivation for mothers in drug treatment programs to recover.⁴³⁴ However, the presumption that the child and parents have different short-term interests prohibits solutions promoting more successful long-term visions of creating familial obligations, strengthening family bonds, and promoting reunification.

Many caseworkers admit a tendency to remove children,⁴³⁵ despite a statutory presumption against removal unless the children face "imminent" harm.⁴³⁶ This informal policy results from a reaction to child abuse deaths reported in the media, such as the 1995 beating death of Elisa Izquierdo by her mother.⁴³⁷ It also reflects caseworker knowledge that their caseloads may prohibit frequent return visits to monitor a potentially abusive situation.⁴³⁸ After a mandate by ACS Commissioner Nicholas Scoppetta to remove a child from harm's way if there is any ambiguity whether a child is safe, one ACS attorney commented that "[c]aseworkers are so scared now that they don't offer any preventive services Removals are done way too quickly, without any investigation. I would fight so hard not to file certain cases. But then my supervisor would make me file it."⁴³⁹ Judges and lawyers both agree that

worker determined her incapable of providing adequate housing. Ms. Sibley had contacted the Housing Authority, the Housing Court, and her political representative to responsibly address the danger, but it took many months, even after repairing the apartment, to regain custody of her grandchildren. Her appointed court representative aggravated the situation by not returning her phone calls for six weeks. She never spoken to him extensively, and she was assigned a new lawyer for the disposition phase of the proceeding. *Id.*

433. Appell, *supra* note 351, at 597. A drug abusing mother, Janice, suffered depression after a recent separation from her partner. The state removed her children, depriving her not only of emotional support and a reason for sobriety, but also denying her government supported medical insurance that was paying for her therapy, depression medication, and car-fare to attend her after care drug program. *Id.*

434. Margaret Beyer, *Too Little, Too Late: Designing Family Support to Succeed*, 22 N.Y.U. REV. L. & SOC. CHANGE 311, 330 (1996).

435. *Id.* at 312 (describing a social workers need to "rescue" children from parents); *When in Doubt, Yank Them Out*, *supra* note 430 (noting one caseworker from the Administration for Children's Services admitted that the office policy had become, "When in doubt, snatch 'em out.").

436. N.Y. FAM. CT. ACT § 1024(a) (McKinney 1998).

437. *Aggressive Prosecutions Flooding the System*, CHILD WELFARE WATCH, Winter 1999.

438. Beyer, *supra* note 434, at 313 (noting that caseworkers are often undereducated and undertrained).

439. *Id.*

many cases of removal did not involve situations of imminent danger, and worse, “many cases [of abuse and neglect] are made not because the parents were neglectful or abusive, but because they didn’t have anyone to present their side of the case.”⁴⁴⁰

Parents face an additional burden in that “neglect” findings may concurrently result in criminal prosecution. New York Penal Law, which looks to the Family Court Act for its definition of neglect,⁴⁴¹ criminalizes a parent’s behavior that “endangers the welfare of a child.”⁴⁴² A recent mandate from former New York City Police Commissioner Howard Safir to “take action . . . when [the case-workers] see children in dangerous situations,”⁴⁴³ has led to an increase in criminal child neglect arrests,⁴⁴⁴ and may reflect an expansive reading of the domestic violence mandatory arrest policy.⁴⁴⁵ This has a dramatic effect on children’s rights within a family, where a “punitive” setting promotes punishing individuals, in the criminal context, not mending families, in the Family Court setting.⁴⁴⁶ If a parent is arrested for abuse or neglect, discretion is often removed from ACS whether to file a neglect petition in Family Court in sympathetic situations; on the other hand, if a Family Court petition is not filed, the Criminal Court still may hear a case and will not necessarily consider the best interests of the child, or of the family unit.⁴⁴⁷

4. *A Need For Comprehensive Legal Representation*

The public antipathy toward parents accused of abuse or neglect compounds the difficulties poor and minority families face in the Family Court, which, in turn, make the parent’s lawyer’s job even more difficult. In the face of “unrelenting media coverage of children ravaged in and by the child welfare system”⁴⁴⁸ and politically-

440. *Separation Anxiety: Parent Lawyers at a Loss*, *supra* note 345 (quoting David Lansner, Counsel to the New York State Assembly Committee on Children and Families).

441. N.Y. PENAL LAW § 260.10(2) (McKinney 2001).

442. *Id.* § 260.10(1).

443. Vreeland, *supra* note 35, at 1063 (quoting Joanne Wasserman, *More Kids Left Alone, State Says*, N.Y. DAILY NEWS, July 27, 1997, at 4).

444. Rachel L. Swarns, *In a Policy Shift, More Parents Are Arrested for Child Neglect*, N.Y. TIMES, Oct. 25, 1997, at A1 (noting that mothers who left their children alone were arrested for child endangerment).

445. Vreeland, *supra* note 35, at 1053-54.

446. *Id.* at 1066-72 (discussing the difference between neglect in a family law setting, and child endangerment under penal law).

447. *Id.* at 1082-83.

448. *Id.* at 1062.

motivated diatribes vividly recounting the most extreme cases of child abuse and neglect,⁴⁴⁹ public opinion leans decidedly away from the parent and the parent's lawyer. Therefore, effective assistance of counsel and zealous advocacy become even more important for these parents.

Additionally, the new restrictive welfare policies indicate a growing interrelationship between welfare rights and its impact on child and parent rights.⁴⁵⁰ As welfare reformers take the regulatory lead, they reveal an emerging conflict in family law. To preserve the family rights, legal representation must be able to address the comprehensive needs of the client: (1) the attorney must possess sufficient understanding of welfare policies and obligations, and advocate for due process and equal protection rights for underprivileged clients;⁴⁵¹ (2) the attorney potentially must understand the criminal claims associated with these actions;⁴⁵² (3) the attorney should have access to all related information and court systems in order to provide consistent, ongoing representation for a parent or family unit;⁴⁵³ and (4) the attorney should be appointed early enough to initiate preventive social services and on-going counseling for the parent to ensure a healthy familial relationship that prevents recidivism, and supports eventual freedom from the reliance on government assistance.⁴⁵⁴

E. Cost Inefficiency

An analysis of the financial costs of the assigned counsel system requires not only an accounting of the 18-B rates, but also a look at the associated costs of the foster care and child welfare system. Spending increases to fund more efficient parental representation could be significantly offset by resultant cost savings in other parts of the child welfare system, for example, by faster family reunification. The total child welfare system would be more cost efficient if

449. The examples of abuse given by the Senate in support of ASFA demonstrate the political use of the worst cases. *Supra* Part II.D. Similar political reactions occur in New York City as well. Vreeland, *supra* note 35, at 1054.

450. Brito, *supra* note 47, at 282. The welfare reformers, not the family law policy-makers, are at the forefront of uncovering these inconsistencies. *Id.*

451. *Id.*

452. *Id.*

453. Green et al., *supra* note 1, at 21 (stating that while § 1052-b of the Family Court Act does not mandate that assignment of counsel end upon entry of the dispositional order, it is standard practice in Family Court).

454. LIPPMAN & NEWTON, *supra* note 98, at 8 (noting that when counsel is not assigned to indigent petitioners, victims of domestic violence must make critical decisions on their own).

some funding shifted from foster care and adoption, back to preventive care and more comprehensive parental legal representation; however, the inequity between the city, state, and federal funding schemes for each of these areas makes it difficult to transfer funds for the overall benefit of the system. Indeed, numerous proposals for assigned counsel rate increases have deadlocked in the state legislature on the question of the source of the funding—the state or the locality.⁴⁵⁵

New York City currently pays for 18-B services rendered in New York City Family Courts; however, Legal Aid, Legal Services organizations, and foster care agencies receive state and sometimes even federal funds.⁴⁵⁶ Although the state partially took over the Family Court system in the late 1970s,⁴⁵⁷ the locality retained the responsibility for paying the 18-B rates, while the legislature gained the authority for setting those rates.⁴⁵⁸ The legislature is hesitant to impose an unfunded mandate on localities to raise rates, but it similarly does not want to place a funding burden on the state when it has no procedural control over the 18-B system.⁴⁵⁹ In a recent budget committee hearing, State Senator James Lack, Chairman of the Senate Judiciary Committee, conceded that the state will need to contribute funding, but suggested that it may come at the expense of statewide standardization of procedures, which were previously left to the discretion of the individual locality and attorney.⁴⁶⁰

The 18-B rates initially were set to coincide with the rates set in the Federal Criminal Justice Act (“CJA”), but subsequent pay raises did not keep pace with the increases in the CJA rates. Chief Judge Kaye’s recent proposal to raise rates to \$75 per hour would equalize the 18-Bs with their CJA counterparts.⁴⁶¹ The new total

455. Mansnerus, *State Plans to Raise Fees*, *supra* note 21, at B5.

456. *See infra* notes 478-486.

457. HERMANN ET AL., *supra* note 140, at 77.

458. John Caher, *18-B Fee Rates are Hot Topic at Budget Talk*, N.Y. L.J., Feb. 6, 2001, at 1 [hereinafter, Caher, *18-B Fee Rates are Hot Topic*].

459. *Id.*

460. *Id.*

461. LIPPMAN & NEWTON, *supra* note 98, at 8. Since the creation of the panel in 1965, 18-B attorneys have received only two pay raises: in 1977 (\$25 for in-court and \$10 for out-of-court costs), and in 1986. New York State Association of Criminal Defense Lawyers (“NYSACDL”) President Marvin E. Schechter, Testimony before the New York City Council (Jan. 24, 2000), at <http://www.nysacdl.org/html/hotnews/schechter-nyc-ensl-18-b-response-01-24-2000.html>. The \$75 rate still would trail significantly the cost of other city contracted attorneys. For example: bond counsel hired by the State Dormitory Authority receives \$175 per hour; bond work for the Division of the Budget is \$225 per hour; the Metropolitan Transit Authority pays \$250 per hour;

would expand the state judiciary's annual budget from \$65.7 million to \$147.3 million.⁴⁶²

The increase in assigned counsel rates may be directly offset by the benefit of timely and adequate representation.⁴⁶³ If all children in foster care were returned to their parents three months earlier, the city would save \$13 million each year.⁴⁶⁴ The ability of the attorney to obtain preventive services for the family instead of foster care may save the city additional money.⁴⁶⁵ Also, if a state does not comply with the limited timeline for parental conformity with the federal ASFA regulations, the state could lose essential federal judiciary funds.⁴⁶⁶ Ultimately, if the family is reunited and provided the services to regain self-sufficiency, it would result in a savings for the welfare system as a whole.

and, the New York City Education Construction Fund pays an average of \$325 per hour. Scott Christianson, *Cut-Rate Justice or High-Priced Fleecing*, ESRONLINE, May 1999, at 5, available at <http://www.empirestatereport.com/magazine/9905cutratejustice.html>. Many of the law firms are big contributors to Governor Pataki and the Republican Party. The New York City Education Fund work was done by Hawkins, Delafield & Wood, which donated more than \$36,000 to the Governor's campaign. *Id.* Even other professionals in the Family Court system receive greater pay than the attorneys. Court-appointed physicians are compensated at \$200 per hour; psychiatrists at \$125 per hour; certified psychologists at \$90 per hour; and social workers at \$45 per hour. Legal Aid and Legal Services attorneys receive salaries that increase with experience, receive benefits, and have no overhead costs. Schechter, *supra*, at 7.

462. Christianson, *supra* note 461. If the rates are increased to only \$45 per hour, the total increases to \$88.3 million, which includes both Criminal and Family Court. *Id.* These rates show the cost to the entire state. New York City's share would be approximately \$50 million. *Id.* Chief Judge Kaye suggested partially offsetting this cost through the "aggressive collection efforts" of the \$70 million annual criminal court fees, which would go to the general fund, and be targeted to pay 18-B wages. John Caher, *Chief Judge Calls For Raise in 18-B Fees*, N.Y. L.J., Jan. 11, 2000, at 1. Although Chief Judge Kaye's proposal suggests an equitable rate, many attorneys believe that it does not nearly provide adequate pay due to the high cost of living in New York. One practitioner notes that this will only create a short-term return of attorneys to the panels, but will not address future shortages. The NYSACDL proposed a single in- and out-of-court rate of \$100 per hour in 2000, increasing to \$125 per hour in 2001, and \$150 per hour in 2002. The New York State Bar Association proposed a four-tier schedule: \$75 per hour for Family Court, \$100 for capital offenses, \$75 for felonies, and \$50 for misdemeanors. This would fund the attorneys' much needed medical benefits, high commercial rents and advancing technological costs. Schechter, *supra* note 461.

463. *Financial Incentives*, NCCPR: ISSUE PAPER 11, <http://www.nccpr.org/newissues/11.htm> [hereinafter *Financial Incentives*].

464. *Id.*

465. *Infra* notes 473-475.

466. *Infra* note 492.

1. *The Cost of Foster Care*

In New York City, sixty-one nonprofit foster care agencies received more than \$616 million to care for the 40,000 children in 1998, in contrast to \$200 million just fifteen years ago.⁴⁶⁷ The rates are set by the ACS Commissioner,⁴⁶⁸ but rarely cover actual costs, which the agencies make up through endowments or investments.⁴⁶⁹ The amount of money an agency receives for each child depends on how much it spent the previous year, regardless of the source.⁴⁷⁰ The rates, which affect the quality of the services provided, ranged from \$11 per day to \$23 per day, until the ACS Commissioner set a minimum floor of \$17 in 1998.⁴⁷¹ The foster care system also must pay each foster parent,⁴⁷² kinship parent (relative), or family boarding home for children under age eighteen in their care,⁴⁷³ a cost that increases depending on specific medical, psychological, and educational needs, and even may continue after adoption. The cost per year to place a child with a foster care family is \$6,641 (\$18.74 per day) for a twelve-year-old child, and up to

467. *Recommendations & Solutions*, CHILD WELFARE WATCH, Summer 1999, http://www.nycfuture.org/child_welfare/cww_05.htm.

468. N.Y. SOC. SERV. LAW § 398-a (1999).

[The Commissioner has the power to set the rates for child services and regulations establishing standards of payment for care provided foster children when the care of such children is subject to public financial support when such care is provided by relatives, authorized agencies, family boarding homes, or state agencies. Such standards of payment shall include the care required to be provided for foster children and the cost of such care.

Id. § 398-a(2). For reimbursement regulations, see *id.* § 153-i.

469. *Contract Players*, CHILD WELFARE WATCH, Summer 1999, No. 5. The adoption rates differ according to age, location, and specialized circumstances. The rates per month include: age 0-5 (\$492/\$457) (New York City/Upstate NY), age 6-11 (\$537/\$494), age 12+ (\$639/\$600), with specialized rates at \$984, and exceptional rates at \$1455. For reimbursement after adoption, a child must be handicapped, or "hard to place," which refers to children in a group of two siblings with minority or older children, a group of three or more siblings, children over ten, or children who have lived for over eighteen months with a single foster family. New York State Citizen's Coalition for Children, Inc., <http://www.nysccc.org> [hereinafter Citizen's Coalition].

470. *Contract Players*, *supra* note 469.

471. *Id.*

472. Citizen's Coalition, *supra* note 469. Monthly/Per Diem Payments to Foster Parents from New York City Age 0-5: \$418/\$13.74; Age 6-11: \$493/\$16.21; Age twelve and over: \$570/\$18.74; special: \$917/\$30.14, exceptional: \$1,388/\$45.64. *Id.*

473. N.Y. SOC. SERV. LAW § 398-a (1999). The payments extend to age twenty-one if the child is attending school or training designed for gainful employment, or lacks the skills to live independently. *Id.* In an experimental project, the "homerebuilders demonstration project" has allocated federal payments for pre- and post-adoption services to establish capitated rates for innovative foster care funding that promotes permanency in placement. *Id.* § 398-a(4).

\$16,658 (\$45.64 per day) for a special needs youth.⁴⁷⁴ However, a standard preventive package including parenting classes, childcare, and minimal housing subsidies requires only \$2,627, or roughly one-third of the basic foster care cost.⁴⁷⁵ The average foster care placement is four years,⁴⁷⁶ which would equal twelve years of preventive care, or nearly the child's entire youth.

Often preventive service plans are less expensive than foster care placements, but due to federal reimbursements, foster care often proves cheaper to the state.⁴⁷⁷ The National Commission on Children discovered premature and unnecessary removal of children from their home, due to federal aid formulas providing a "strong financial incentive" to remove rather than seek preservation services.⁴⁷⁸ The policies continue under federal adoption laws, which provide up to \$6,000 per child placed in a final adoption, but none for a successful family reunification.⁴⁷⁹ A recent study of 3238 adoptions in New York City revealed that, although the children spent an average of 6.2 years in foster care before adoption, almost half eventually were adopted by their foster parents.⁴⁸⁰ In these cases, the state funded up to five years of unnecessary foster care.⁴⁸¹ Similarly, if a family is forced deeper into poverty under TANF restrictions, the parent may be denied public assistance for her biological children, but a placement in the foster care system assures a never ending stream of federal subsidy.⁴⁸²

In 1995, New York City Mayor Rudolph Giuliani slashed funding to preventive services, but substantially increased the city's funding of private foster care agencies.⁴⁸³ However, in an effort to create a greater number of neighborhood based, private sector foster homes, the quality of agencies' care was greatly diminished.⁴⁸⁴ The recent ratings of foster care agencies, compiled by ACS and

474. *Contract Players*, *supra* note 469.

475. Houppert, *supra* note 369, at 41.

476. SCOPETTA, *supra* note 269.

477. N.Y. SOC. SERV. LAW § 445 (1999) (authorizing states to apply for federal funding).

478. *Financial Incentives*, *supra* note 463 (citing NAT'L COMM'N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 290 (1991)).

479. *Id.*

480. Trudy Festinger, *New York City Adoptions 1996*, at 3, 7 (Sept. 1997) (unpublished manuscript on file with New York University School of Social Work).

481. *Id.*

482. *Id.*

483. *D-Graded*, CHILD WELFARE WATCH, Summer 1999, available at http://www.nycfuture.org/child_welfare/cww.05.htm.

484. *Id.*

reported by Child Welfare Watch, reveal that a significant percentage of those agencies that were given a poor or “needs improvement” rating received a renewal of a sizeable contract anyway.⁴⁸⁵ This obvious misallocation of funds leaves the child welfare system with poor service options.

2. *The Cost of Preventive Services*

The attorney for the parent may request additional preventive services and counseling,⁴⁸⁶ although the funding policies do not encourage these expenditures.⁴⁸⁷ The current legislative policy promotes the expansion of the foster care system at the expense of economic efficiency, and does not serve the statutory family reunification goals of the child welfare system.⁴⁸⁸ More than eighty percent of child protection cases involve neglect—cases in which parents are most likely to benefit from preventive social services. Therefore, expanded use of these services could result in significant savings to the state. However, judges typically do not inform the parent of this option.⁴⁸⁹ Only adequate, attentive counsel for the parents can guarantee access to these services.

If the state truly follows a family preservation policy, it should place its funding in preventive services and parental representation to ensure parental compliance with the ACS service plan during the allotted time under state and federal ASFA regulations. The cost of preventive service cannot be measured strictly by the numbers of children returned to the home, but also should be evaluated in terms of the decreased rates of recidivism in Family Court. The child welfare system must place greater emphasis on the needs of parents, which will, in turn promote the health and safety of the children.

485. *Id.*

486. *See infra* Part II.C.2.

487. N.Y. SOC. SERV. LAW § 409–a(i)(b) (McKinney 1999) (providing only six months of preventive services unless it is reasonable to believe that such services will result in the child remaining with or being returned to his family).

488. Sheryl Dicker, Permanent Judicial Comm’n on Justice for Children, *Update of Activities*, Oct. 1999, at 1 (describing a judicial reform agenda promoting relationships with “a strong social service system that provides effective preventive and family preservation services and good information to the court about children in care and in their families”).

489. Interview with Hon. Ruth Zuckerman, former Bronx Family Court Judge, at Fordham University School of Law, in New York, N.Y. (Jan. 17, 2000).

3. *The Current Crisis*

The current crisis in the 18-B system serves to exacerbate further the cost inefficiencies inherent in the New York City Family Court system. As more attorneys become unwilling or unable to accept new cases, judges and court staff must spend extra time securing attorneys to represent litigants. Judges often will assign counsel to a case and duplicate and forward materials to the attorney, only to have the attorney reject the assignment. Court staff must repeat the process again, usually leaving insufficient time for a new attorney to communicate with his client before a scheduled court appearance.⁴⁹⁰ Resulting adjournments and delays waste court time and resources as well as state money expended on children in foster care for unnecessary long periods of time.

Moreover, Harriet Wienberger, Director of the Second Department Law Guardian Plan, noted that the delay in raising rates actually would cause the state to spend even more money. Many parents and children will bring cases in the Appellate Division to contest the violation of their constitutional and statutory rights due to inadequate or untimely representation and the state will likely remand the cases for a new hearing in the lower court.⁴⁹¹ Thus, the state will have to pay for court proceedings in both the Appellate Division and the lower courts, whereas the state would only have had to pay for the trial court if the litigants had been accorded the proper protections.

Finally, failure of the state to address the needs of the 18-B attorneys may threaten to halt funding that New York receives from federal subsidies. If cases continue to be delayed due to lack of counsel for the parents, the courts will become increasingly unable to comply with the time limits imposed by ASFA. If determinations regarding permanency cannot be made within the required time period, the state could lose the millions of dollars provided by the federal government to states in compliance with the national child welfare policy.⁴⁹²

490. Anthony S. & Patricia K. v. Patricia S., Nos. X-8438-NA/NN-0182-98; X-8439-NA/NN-0181-98; Laniqua C. v. Lisa C., No. NN-00373-2000 (N.Y. Fam. Ct. Jan. 30, 2001).

491. Caher, *Commission Seeks Solutions*, *supra* note 28, at 1.

492. Sweat v. Skinner, No. B-1508-00 (N.Y. Fam. Ct. Jan. 12, 2001).

III. PROPOSED SOLUTIONS TO PROVIDE ADEQUATE PARENTAL REPRESENTATION

Now, more than ever before, parents need effective assistance of counsel to help them navigate through the inefficient, overburdened Family Court system and to aid them in obtaining the services to facilitate the return of their children. Despite the critically important role of the parent's lawyer,⁴⁹³ the systemic problems of the New York City Family Courts create obstacles for the assigned counsel.⁴⁹⁴ The following list summarizes the flaws in the system requiring both immediate and more complex long-term changes in order to provide adequate representation for the parent.

First, the cost of practicing as an 18-B attorney and the lack of adequate compensation force numerous attorneys to leave the field⁴⁹⁵ and discourage new attorneys from joining the panel.⁴⁹⁶ Additionally, the pay differential for in-court and out-of-court time forces the attorneys to prefer straightforward cases to those that require extensive investigation or counseling at an out-of-court rate.

Second, high caseloads prohibit attorneys from doing a complete and even ethically adequate job, because they cannot provide sufficient attention to any one client or follow up with clients between court appearances.

Third, the lack of adequate facilities in the courthouse prevents any confidential attorney-client conversation. There are no storage facilities for client files, no interview rooms, no copy services,⁴⁹⁷

493. Garcia & Batey, *supra* note 178, at 1082 ("It is difficult to conceive of a party in a court proceeding more in need of independent legal representation than a person charged with brutalizing his child.").

494. See *supra* Part II.B.1.

495. Anshen Interview, *supra* note 159. Before working for the past fourteen years on the Manhattan Family Court 18-B panel, Mr. Anshen spent the previous twelve years as an attorney for child protection agencies in New York City. *Id.* William Anshen told the authors that attorneys are no longer drawn to the 18-B panel as they once were from child protection agencies, Legal Aid, or criminal defense work. A lifestyle that promises low pay, a high workload, no fringe benefits, no paid vacation, and often-disagreeable work does not attract the experienced and dedicated lawyers the 18-B panel needs. *Id.*

496. Interview with Judge Zuckerman, *supra* note 489. Former Bronx Family Court Judge Zuckerman claimed that it is "a disgrace to ask someone to do a professional job for that amount of money." *Id.*

497. This the authors observed during a visit to Manhattan Family Court (Feb. 14, 2000). On one visit to the courthouse, an 18-B attorney offered to photocopy several newspaper articles. He led the authors through a maze of back doors several floors

and no offices in which the attorneys can complete work or meet with clients while waiting for court appearances.

Fourth, the lack of legal and referral resources forces attorneys to spend time out-of-court arranging these services. There are no social workers or investigators available to the attorneys at the court, and there is no resource library or any means to access legal information. The attorneys must limit their more highly-compensated in-court time to allow for out-of-court time to locate this information.

Fifth, the representation of accused parents always has carried a stigma. In the inherently adversarial structure of the tripartite Family Court system, parents are portrayed as defendants and their representatives as defense attorneys in a punitive action rather than as advocates in a remedial and rehabilitative proceeding.⁴⁹⁸ The inequity among the 18-Bs, law guardians, and ACS attorneys regarding the fees, services, and facilities provided further demonstrates that the system accords lesser respect to parents and their attorneys than to other parties involved in Family Court proceedings.

A. Analysis of Models of Change

Numerous legal service officers, judicial commissions, and public interest institutes recently submitted reports and proposals addressing the need for change in the 18-B system while supporting the role of their organizations in the courts.⁴⁹⁹ These proposals

down from the 18-B office, where they walked into an unoccupied office and photocopied the articles using a ten-year-old machine.

498. Boyer, *supra* note 171, at 1626 (citing Donald N. Duquette, *Liberty and Lawyers in Child Protection*, in *THE BATTERED CHILD* 401, 412-14 (Ray E. Helfer & Ruth S. Kempe eds., 4th ed. 1987) ("Once the lawyer assumes responsibility for advocating for the parent charged with mistreating the child, he or she must face not only the opposition of the parties responsible for prosecution of the case, but often the prejudice of the public, and indeed even the court as well.")). A vivid example is the public opinion of Hedda Nussbaum after the 1987 death of Lisa Steinberg:

Many saw her as a less-than-innocent victim, and still do [though she was brutally battered as well by Joel Steinberg]. Ms. Nussbaum had seen Lisa abused and failed to rescue her; she never left Steinberg and never summoned help, even when the girl lay dying in their Manhattan apartment.

A Public Figure Again, 10 Years After Steinberg Case, June 7, 1998, available at http://www.news-star.com/stories/060798/new_steinberg.html.

499. These organizations include: C-Plan: Green et al., *supra* note 1; the Vera Institute: Vitullo-Martin & Maxey, Vera Inst. of Justice, *New York Family Court: Court User Perspectives*, Jan. 2000; New York County Lawyers Association, *NYCLA Resolution* (adopted by NYCLA Board of Directors on January 19, 2000), <http://www.nycla.org/publications/18brates.htm>; the New York State Unified Court System, LIPPMAN & NEWTON, *supra* note 98; and the New York Appellate Division First Depart-

generally fall into three models, which allocate funding differently between numerous family welfare agencies.⁵⁰⁰

The first model would provide only an increase in pay, an elimination of the pay differential between in-court and out-of-court rates, and an increase or elimination of the compensation cap. This model assumes that the 18-B attorneys would not expand their capacity to represent the parent, and that the Legal Services organization would play an increasingly important role in the comprehensive needs of parental representation.⁵⁰¹ This model most closely resembles Judge Kaye's proposal.⁵⁰² The legislature would have to determine the amount of an increase necessary both to keep the 18-B panel in existence and to attract new attorneys.

The second model creates an "enhanced" system that provides the attorneys with necessary facilities to expand their role in the Family Court to better address the needs of parents. This system would include the general funding increase, as well as private in-court facilities and, potentially, a resource center. The legislature would need to determine which facilities and resources are necessary to improve representation by 18-B attorneys, and to develop a funding schedule for such improvements or allow each county to submit their own proposals for approval.

The third model replaces the autonomous 18-B system with an institutional model. This would allow office space within impoverished communities or near the courts with facilities and staff comparable to that provided for law guardians and ACS attorneys. Most 18-B attorneys do not favor losing their autonomy and ability

ment Panel, Daniel Wise, *Panel Announces Public Hearing on 18-B Options*, N.Y. L.J., May 31, 2000, at 1 [hereinafter Wise, *Panel Announces*].

The Appellate Division, First Department Committee on Representation of the Poor recently released a comprehensive report based on a sixteen month study. The report called for an overhaul of government funded legal representation. Michael A. Riccardi, *First Department Calls For Service to Parents*, N.Y. L.J., Mar. 27, 2001, at 1.

500. Interview with Nanette Schorr, Family Law Unit Director and Education Law Unit Director, Bronx Legal Services, Bronx, N.Y. (Jan. 23, 2001) [hereinafter Schorr Interview].

501. Beth Harrow, Brooklyn Legal Services Corp. A, *Funding in Neighborhood-Based Legal Services Office to Represent Parents in Family Court Proceedings. Why it Makes Sense.*, Jan. 26, 1999, at 5. Particular cases that would have previously been referred to assigned counsel, are now handled by various legal service agencies, such as Victim Services, Sanctuary for Families, Network for Women's Services and LSNY family law units. Green et al., *supra* note 1, at 39 n.150.

502. Chief Judge Judith S. Kaye, State of the Judiciary Address (Jan. 10, 2000), <http://courts.state.ny.us/soj2000.html>.

to maintain a private practice on the side;⁵⁰³ however, this solution could create a system that addresses most of their current complaints concerning inequality in representation. Moreover, an 18-B panel would have to be maintained in some capacity to take on cases which institutional organizations cannot take if conflicts of interest arise, such as both parents needing separate representation.⁵⁰⁴

1. *Model One*

There is almost universal support by judges and attorneys to increase the pay of assigned counsel.⁵⁰⁵ Given that the cost of living in New York City has increased by more than fifty percent since the last pay raise in 1986,⁵⁰⁶ and that salaries in all state agencies, including the minimum wage rate have been raised,⁵⁰⁷ the stagnant pay rates for 18-B attorneys are disastrous to the future of the panel and its clients.

Child advocates suggest that “[a]t the bare minimum, the state needs to provide parents’ attorneys with substantial per-hour pay increases.”⁵⁰⁸ Only then might more attorneys be attracted to the 18-B panel to ameliorate the current situation in which there is “a dramatically smaller number of attorneys—who are often far less experienced—to handle a significantly larger number of cases.”⁵⁰⁹ The number of active cases a lawyer carries at any time can be so overwhelming that one attorney claimed he only assisted the clients who returned his calls.⁵¹⁰ He felt that using this “triage”

503. See Survey of Manhattan 18-B Attorneys (on file at the Fordham Urban Law Journal).

504. Green et al., *supra* note 1, at 44. This report suggests creating a legal organization to represent parents in child protective proceedings, and utilizing the assigned counsel panel for conflicts of interest and high caseloads. *Id.*

505. *Id.* at 34 n.140 (listing numerous calls for support, and noting “over the last three years, key Judiciary and Executive Branch officials have expressed their concerns that the reimbursement rates fixed by law creates a risk of inadequate representation”).

506. Riccardi, *Assigned Counsel Face the Cold*, *supra* note 162, at 1.

507. Anthony S. & Patricia K. v. Patricia S., Nos. X-8438-NA/NN-0182-98; X-8439-NA/NN-0181-98 (N.Y. Fam. Ct. Jan. 30, 2001).

508. *Recommendations & Solutions Proposed by Child Welfare Watch and the Child Welfare Watch Advisory Board*, CHILD WELFARE WATCH, Winter 1999, at 4 [hereinafter *Recommendations & Solutions*].

509. LIPPMAN & NEWTON, *supra* note 98, at 13. Despite a thirty-three percent increase in the number of cases filed in the past ten years in Family Court, there has been a fifteen percent decrease in the number of attorneys representing parents in child welfare proceedings. Green et al., *supra* note 1, at iv.

510. See Survey of Manhattan 18-B Attorneys (on file at the Fordham Urban Law Journal).

method, which probably eliminated those who most needed his aid, was the only way to assist adequately at least some of his clients.⁵¹¹ An increase in the number of 18-B attorneys, and corresponding decrease in caseloads, would allow him and other similarly situated 18-B attorneys to devote more time to each client.

Time spent on each client's case also could be more meaningful and provide longer lasting results with the removal of the present pay differential.⁵¹² With the current wage scale, the attorneys are less inclined to take on the more complicated cases, such as terminations of parental rights. Although competent legal representation demands that attorneys commit sufficient time to out-of-court tasks such as drafting, filing motions, and doing research,⁵¹³ compensating such preparation at a lower rate than in-court work discourages all but the most cursory out-of-court work.⁵¹⁴ Absent the present financial disincentive to take on complicated cases, the 18-B attorney would accept more freely a variety of cases.⁵¹⁵ Some attorneys might even prefer the very cases that require more out-of-court work, because they provide more flexibility regarding location and time than in-court appearances. Moreover, situations that might be better resolved outside the courtroom could more likely remain there, thus relieving some of the pressure on the court docket.

The \$800 fee cap discourages any additional work beyond strict in-court representation. The cap has forced many attorneys to per-

511. *Id.* A small survey recently found that 56% of parents reported that the attorneys did not return their phone calls, 57% stated that they were not told their legal rights and options, and 70% felt the attorneys did not adequately represent their views in court. Green et al., *supra* note 1, at vi.

512. LIPPMAN & NEWTON, *supra* note 98, at 18-19. Green et al., *supra* note 1, at iv ("The dual rate system . . . has created a strong disincentive for assigned counsel to perform the out-of-court work which is critical to any lawyer's effective representation of his or her client.").

513. Although there is no precise definition of "competence" in the *Model Rules*, commentary on the rules explain some of the qualities thereof:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

MODEL RULES OF PROF'L CONDUCT R.1.1, cmt 5 (1983).

514. LIPPMAN & NEWTON, *supra* note 98, at 18-19.

515. For a discussion on the overhead costs of private attorneys in New York City that would cause an 18-B attorney actually to lose money on out-of-court work with the current pay scale, see *supra* Part II.E.

form legal services without knowing if the judge will approve the voucher to compensate them completely. It also dissuades the attorneys from taking on difficult cases that probably would require services exceeding the cap rate. The 18-B attorneys consistently raise this issue as a hindrance to competent representation.⁵¹⁶ This model also may incorporate limits on attorney caseloads, in order to ensure more thorough representation to the parents.⁵¹⁷

2. *Model Two*

Although most of the 18-B attorneys' efforts over the past several months have focused on a pay raise, many agencies and bar associations have compiled a long list of additional services and benefits that are critical to the adequate representation of parents in New York City Family Court.⁵¹⁸ The 18-B panel may survive with the increase in wages, but the 18-B attorneys' capacity for representation still would be severely limited.⁵¹⁹ The following necessities would relieve the 18-B attorney's burden of enduring these working conditions, and create practical remedies to the parent's lack of access to services.

First, non-monetary benefits such as health insurance, better office space, and modern technical resources would improve both the 18-B's quality of life and the caliber of representation. These logical amenities would include larger offices, several private conference rooms, additional phones, computers, photocopiers, and access to research tools such as a library, Westlaw, or Lexis.⁵²⁰ These benefits would relieve the stagnating burden of overhead

516. LIPPMAN & NEWTON, *supra* note 98, at 10 (suggesting raising the cap to \$5,000, but allowing judicial approval through a voucher procedure).

517. Wise, *Panel Announces Public Hearing*, *supra* note 499, at 1 (noting that the First Department proposal suggests "the promulgation of caseload limits by the courts along with the courts taking a more active role in the oversight of legal services programs").

518. *Supra* note 499.

519. Kathryn M. Kase, *Statement In Response To Chief Judge Judith S. Kaye's State of the Judiciary Address Regarding Increases in Assigned Counsel Rates*, NYSACDL, Dec. 10, 2000, <http://www.nysacdl.org/html/hotnews/kase-response-kaye-assn-cnsl.htm> (stating that the proposed rate increase is not high enough, and that lawyers "cannot rent space, pay a secretary and pay for all those other things that prosecutors do not have to pay for out of their salaries, for \$75 per hour").

520. Green et al., *supra* note 1, at 3 (noting that ACS and Legal Aid "work for organizations with imperfect but extensive resources—offices, support staff, supervision, investigators and paralegals. However limited, these provide the necessary components of a properly functioning law practice. Assigned counsel for parents, by contrast, have only the barest of such help."). *Id.* at iv.

costs, and diminish the effect of minimal monetary compensation.⁵²¹

Additionally, greater and easier access to the other professionals in the New York City Family Court would directly benefit the parent. The current process to retain expert testimony,⁵²² psychologists, or drug counselors is convoluted and time-consuming.⁵²³ If the 18-B attorney had an in-court resource center to expedite the procedure, it would reduce the necessity for court appearances to obtain judicial approvals and orders.⁵²⁴

Similarly, requiring the assignment of a social worker to every case could avoid the complicated process of applying for and awaiting social services. In other jurisdictions, interdisciplinary training of certified social workers and attorneys working within the same system has improved the relationship between the attorneys and social workers, and increased the efficiency of the system.⁵²⁵ Some members of the 18-B panel do not regard having a social worker as necessary,⁵²⁶ a view that partially results from present reliance on the ACS caseworker or voluntary agency worker. Currently, assigned counsel does not continue to represent the parent after disposition. A social worker's continuous presence and expertise would aid the parents in performing required services, providing and advocating for the parent during service reviews with ACS, and protecting the parents from inevitable bureaucratic indifference.⁵²⁷

521. LIPPMAN & NEWTON, *supra* note 98, at 7.

522. *Recommendations & Solutions*, *supra* note 508 (calling the resources to obtain expert testimony a necessary "bare minimum" change).

523. See discussion *supra* Part II.A.3.

524. Wise, *Panel Announces Public Hearing*, *supra* note 499, at 1 (discussing a proposal by the First Department calling for the creation of a resource center staffed with investigators, social workers and other experts available to provide services currently appointed by judges on a case-by-case basis).

525. See generally Paul Johnson & Katharine Cahn, *Improving the Child Welfare Practice Through Improvements in Attorney-Social Worker Relationships*, 54 U. PITT. L. REV. 229 (1992) (detailing the "Children Can't Wait" project, in which attorneys and social workers received extensive training on each other roles, and with them working together in the system, the results included decrease in delays).

526. E.g., Carlin Interview, *supra* note 183. Although social workers, who work under the auspices of a legal entity, usually follow the ethical guidelines of that entity, in cases of child abuse, the social worker is required to report. N.Y. FAM. CT. ACT § 1046(a)(vii) (McKinney 1998) ("The social worker-client privilege . . . shall be a ground for excluding evidence which otherwise would be admissible.").

527. Green et al., *supra* note 1, at 36 (stating that "assigned counsel, even if better paid, cannot both provide legal representation to their clients and act as social workers").

Alternatively, the extension of the scope of 18-B representation after a neglect or abuse determination would provide the necessary legal knowledge to facilitate the return of the child, or an extension of placement.⁵²⁸ In the post-dispositional phase of a case, the parent must demonstrate her efforts to comply with the social service plan to get her children back, and the ability to protect her legal rights is crucial. Many attorneys consider continuous representation through the entire child protection process mandatory for providing an ethically adequate level of representation.⁵²⁹

Were the legislature to grant approval and funding, the 18-B attorney's scope of representation could be extended outside the Family Court system to encompass cases related to Family Court proceedings. Recent proposals to create a statewide unified court system⁵³⁰ suggest placing Family Court proceedings with domestic violence and criminal cases under the jurisdiction of the New York Supreme Court. This broad jurisdiction would permit an 18-B attorney to provide an integrated approach to interrelated problems in the same family.⁵³¹

An expansion of the role of the 18-B attorney to address the extensive and complex needs of parents is imperative to proper representation and protection of client's rights. The present system for parental representation does not address the assigned counsel's unwieldy caseloads, insufficient workspace, and lack of access to other courts. For the panel to survive and offer adequate and

528. *See id.* at v-vi (noting that the parents do not have access to counsel between hearings to notify the court that the city has failed to file a petition to either terminate or extend the placement of the child in foster care).

529. Nat'l Council of Juvenile & Family Court Judges, *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, Jan. 1995, at 22 (stating that continuity of representation through every critical stage of the proceedings is imperative for effective representation); Nicholas Scoppetta, New York City Administration for Children's Services, *Protecting the Children of New York: A Plan of Action for the Administration for Children's Services*, Dec. 19, 1996 (stating that Commissioner Scoppetta requires ACS attorneys to follow a case from intake to termination of parental rights or reunification of the family), available at <http://www.ci.nyc.ny.us/html/acs/home.html>. National standards for assigned counsel, as well as recommendations by the U.S. Department of Health and Human Services, recommend that "the same legal representatives for the child, parent and State remain throughout the case." Donald N. Duquette et al., U.S. Dept. of Health and Human Servs., *Adoption 2002: The President's Initiative on Adoption and Foster Care*, June 1999, at IV-VII.

530. *See* Barbara A. Babb, *Where We Stand: An Analysis of America's Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Courts*, 32 FAM. L.Q. 31, 34 (1998).

531. Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 33 REV. JUR. U.P.R. 311, 320 (1999).

meaningful representation, the legislature must provide these necessities.

3. *Model Three*

Some practitioners believe the only way to ameliorate the failing system of representation for indigent parents in Family Court is to create a full institutional provider comparable to the Legal Services or Legal Aid Society models.⁵³² Testifying at a hearing before the First Department's Committee on the Representation of the Poor, a member of the Indigent Defense Organization Oversight Committee argued that even if 18-Bs were given additional resources, "the heart of the problem is that many assigned counsel do not know when to use investigators and social workers."⁵³³ Andrew Scherer, the Director of the Legal Support Unit of Legal Services for New York noted at the hearing that parents are the only party not represented by an institutional provider. He argued that only an institutional provider such as Legal Services or the Legal Aid Society could provide the array of legal services necessary for families in trouble, including assistance with housing, custody, domestic violence, and public benefits problems.⁵³⁴ Furthermore, the director for the Center for Appellate Litigation testified that when clients need appellate court representation, institutional providers, which have specific appellate training, would provide advocacy superior to 18-B representation.⁵³⁵

However, some practitioners remain opposed to the idea of one organization taking over cases from the 18-B attorneys. A private practitioner who has been representing the poor for thirty years noted that institutions "'have a tendency to develop institutional personalities' that create 'the urge to perpetuate personal power within the organization, and institutional power outside the organization.'"⁵³⁶ Another private family law practitioner argued that preserving and strengthening the 18-B system would result in less bureaucracy, and a wider array of attorneys would be drawn to represent poor clients.⁵³⁷

Reformatting the 18-B system based on the Legal Services or the Legal Aid model would be a long-term solution that likely would

532. Rivkin, *Exodus in System for Assigning Counsel*, *supra* note 181, at 1.

533. *Id.*

534. *Id.*

535. *Id.*

536. *Id.*

537. *Id.*

have the greatest impact on the representation provided for parents in Family Court. At the outset, the cost of such reforms may seem prohibitively expensive. However, comprehensive legal representation for parents would result in efficiency in court proceedings and a reduction in the amount of time children spend in foster care, thus reducing wasteful expenditures in the current system.⁵³⁸

a. Legal Services Model

Currently, there are seven Legal Services offices in New York with salaried attorneys funded by state and federal grants.⁵³⁹ Each office is community based and provides a range of services to assist low income individuals with legal issues regarding Family Court matters, domestic violence, education, housing, government benefits, health, and public utilities.⁵⁴⁰ Legal Services attorneys are not mandated to take cases, but rather select clients through a referral and screening process. Therefore, the attorneys who represent parents in abuse and neglect proceedings can be more selective and choose cases in which their resources will have the most impact and in which the comprehensive legal representation they can provide will lead to reunification.⁵⁴¹

Unlike under the 18-B system, Legal Services attorneys represent parents throughout their entire Family Court case, both in- and out-of-court, even if it takes years.⁵⁴² This allows trust to develop between the lawyer and client, and allows the lawyer to understand the parent's social and legal issues more fully.⁵⁴³ The Legal Services attorneys believe it is crucial that parents have ac-

538. *Separation Anxiety: Parent Lawyers at a Loss*, CHILD WELFARE WATCH, Winter 1999, at 13 (noting the most cost-effective preventive service the state could provide would be good attorneys for parents), available at <http://www.nycfuture.org/4/index.htm>.

539. Schorr Interview, *supra* note 500.

540. Harrow, *supra* note 501, at 4.

541. Telephone Interview with Beth Harrow, Family Law Unit Coordinator, Brooklyn Legal Services Corporation A (Jan. 23, 2001) [hereinafter Harrow Interview].

542. Telephone Interview with Nanette Schorr, Family Law Unit Director and Education Law Unit Director, Bronx Legal Services (Apr. 18, 2000).

543. Ingrid V. Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433 (1998). *Contra* Michelle S. Jacobs, *Pro Bono Work and Access to Justice for the Poor: Real Change or Imagined Change?*, 48 FLA. L. REV. 509, 518 (1996) (commenting how "the leadership of legal services organizations have not had sufficient appreciation for the complexities of the lives of poor people"); Anthony V. Alfieri, Book Review, *Practicing Community*, 107 HARV. L. REV. 1747 (1994). In his review of Gerald Lopez's book, *Rebellious Lawyering*, Mr. Alfieri discusses some experiences he had as an "outsider" legal services attorney in New England and New York. "Notwithstanding Lopez's aspirational vision, I harbor

cess to comprehensive legal assistance, especially after a dispositional proceeding that places or extends a child's placement in foster care.⁵⁴⁴ During this period of time, attorney assistance can be critical to a parent's ability to work toward reunification with her children. Attorneys can assist parents in developing realistic service plans by participating in service plan reviews so that the parent does not have to face the caseworker and law guardian alone.⁵⁴⁵ Moreover, Legal Services offices have ties to social service organizations, such as drug treatment facilities and domestic violence programs, within their communities, allowing them to obtain more readily the services necessary for reunification.⁵⁴⁶ Where caseworkers pay little attention to the needs of parents,⁵⁴⁷ having an advocate to rely upon when parents run into problems with their service plans is vitally important to their efforts to remain on a tight timeline toward reunification.⁵⁴⁸ Furthermore, attorneys can seek court orders to insure that the state is providing parents with services and visitation in a timely manner. If the state has not been fulfilling its obligation, attorneys can seek to insure that the parents are given the appropriate amount of additional time to comply with court orders.⁵⁴⁹

In addition to connections with social service organizations, Legal Services representation offers holistic legal assistance, recognizing that parents may have several other legal problems impacting their ability to provide appropriate care for their children. For example, in many cases parents must secure adequate housing or income or get out of a domestic violence situation to be deemed fit to be reunified with their children. When parents have difficulty securing housing or public assistance, for example, the Legal Services attorney representing the parent in the Family Court matter can refer the parent to another attorney within the same office for assistance.⁵⁵⁰ Even if another attorney does not take on the client's

little faith in the ability of progressive lawyers to redeem community in their individual and collective meetings with subordinated clients." *Id.* at 1750.

544. Harrow, *supra* note 501, at 4.

545. *Id.* at 4.

546. *Id.*

547. *Id.*

548. An attorney from Bronx Legal Services noted that ideally a social worker would attend service plan reviews with the parents. However, due to lack of funding, many Legal Services offices can no longer afford a full time social worker. Currently, sometimes paralegals or interns will go to service plan meetings with the parent, but often the attorneys themselves will attend. Schorr Interview, *supra* note 500.

549. Harrow Interview, *supra* note 540.

550. Schorr Interview, *supra* note 500.

case, she can advise the Family Law Unit attorney how to assist the parent with the other legal issues.⁵⁵¹

Believing that the Legal Services model can provide the most comprehensive legal representation and most efficiently and effectively meet the needs of parents in Family Court, Legal Services attorneys have suggested that the city direct more funding toward their organizations. A 1999 Legal Services proposal suggested expanding a pilot project in which three attorneys, a social worker, and a paralegal were responsible for reuniting fifty-eight children with their families.⁵⁵² The proposal set out an ideal form of representation for parents in Family Court. Under the system envisioned, a social worker and attorney would work with the client to identify obstacles to safe family reunification.⁵⁵³ The attorney would provide legal representation in Family Court and make referrals to other appropriate units within the office.⁵⁵⁴ The social worker would provide case management support by coordinating and monitoring services to the client and her family and the attorney and social worker would ensure that the state is complying with mandates to provide parents with appropriate services.⁵⁵⁵ The social workers also would assist the clients in negotiating the social services system and in establishing a relationship with the agencies and caseworkers involved in their cases, and would attend service plan review meetings to provide support for the parent and advocate for necessary services.⁵⁵⁶ Additionally, the social workers would observe visits between the parents and children and describe to the attorney and the court the family interaction so that the court would hear more than the city caseworker perspective.⁵⁵⁷ Finally, the social workers would work with the attorneys in developing a strategy for court and in providing case records and expert testimony.⁵⁵⁸

In 1995, Congress cut funding to the Legal Services Corporation by thirty percent⁵⁵⁹ and placed restrictions on the clients Legal Ser-

551. *Id.*

552. *See generally* Harrow, *supra* note 501.

553. *Id.*

554. *Id.*

555. *Id.*

556. *Id.*

557. Harrow, *supra* note 501, at 5-6.

558. *Id.*

559. Elizabeth C. Kehoe, *Community Legal Education by Michigan Legal Aid Programs*, 77 MICH. B.J. 785 (1998).

vices can represent.⁵⁶⁰ The Legal Services offices can no longer support in-house social workers, so the attorneys must attempt to fulfill many tasks that would be carried out much more effectively and efficiently if left in the hands of a social worker.⁵⁶¹ For all parents to receive the comprehensive legal representation envisioned by the Legal Services model, support for Legal Services organizations must be increased drastically or the 18-B system must be restructured based on this model.

b. Legal Aid Society Model

Another alternative is an institutionalized system of parental representation within the Family Court, analogous to the Juvenile Rights Division of the Legal Aid Society. Although this model would not provide parents with the comprehensive legal assistance they can receive at Legal Services offices, the Legal Aid model would provide offices in or near courthouses, staffed with paralegals, social workers, and investigators.⁵⁶² The entire process would be more efficient, from the beginning of representation through the disposition: offices, files, and phones would be situated in or near the courthouse and easily accessible to lawyers and their clients; attorneys could share information about developments in child welfare laws and possibly work in teams; a common database would give quick information on a present or past proceeding.⁵⁶³ In addition, there would be an internal supervisory system to enable attorneys to cover for one another and better handle complicated issues.⁵⁶⁴

Legal Aid already represents children in child protective proceedings, so the organization would be ethically disqualified from representing parents as well. Therefore, parental representation could be organized and institutionalized in the New York City Family Court system under the separate auspices of a Parent Defender's Office.⁵⁶⁵

The most important task the court can undertake immediately is to assure all parents facing the loss of their children receive adequate legal representation and access to legally-mandated ser-

560. Schorr Interview, *supra* note 500. For example, Legal Services attorneys cannot represent illegal aliens or parents with incomes over a certain level. *Id.*

561. *Id.*

562. See Gershman Interview, *supra* note 281.

563. *Id.*

564. *Id.*

565. See, e.g., Inga L. Parsons, "Making It a Federal Case": A Model For Indigent Representation, 1997 ANN. SURV. AM. L. 837 (1997).

vices and support. Toward that end, we urge the creation of a government-funded organization analogous to Legal Aid's Juvenile Rights Division (JRD), to provide an institutional legal base for the defense of poor parents.⁵⁶⁶

Such a program would provide indigent parents with access to meaningful representation in child protective proceedings.

A lawyer working at the Parent Defender's Office would be able to work more efficiently for his clients, because the office would be located in or near the Family Court. Less time would be spent outside a courtroom waiting to be called, because the lawyer could return to his office and attend to other matters. If a lawyer and client wanted to meet, they would not have to find a makeshift meeting space in the crowded waiting rooms; rather they could meet in an office, thus providing parents the respect and confidentiality they deserve.⁵⁶⁷

Such an institutionalized system would grant attorneys more stability and status within the Family Court, changes that are strongly desired by the members of the 18-B panel. Accordingly, there would be greater equality between the lawyers for the three parties in any Family Court proceeding, which would, in turn, provide for a fair process and a just result for all the parties involved.

B. Appeal to the New York State Legislature

To ameliorate the failing assigned counsel system with the speed required, the state must supplement county funding to make necessary reforms. Although the state may be hesitant to take on a role requiring state legislators to oversee the assigned counsel panels, such oversight is only logical given the current structure of Family Court and child welfare systems throughout New York. The state regulates and oversees the attorneys in each county who prosecute the parents and represent the children in Family Court. The state also extensively regulates the agencies responsible for providing services to both parents and children involved in the court system. Furthermore, the state enforces the federal requirements imposed by ASFA, and the availability of adequate representation by parents' attorneys is, in many cases, crucial for courts to comply with the regulations. Moreover, the state legislature granted Family Court litigants the right to an attorney. Inherent in that right is the right to effective assistance of counsel and zealous advocacy. By

566. *Recommendations & Solutions*, *supra* note 467.

567. For discussion of practical problems for 18-B attorneys, see *supra* Part I.B.1.

allowing the parental representation system to falter, the state is ignoring its self-imposed obligation and, consequently, repeatedly violating the rights of indigent parents. To provide the representation to which parents are entitled, and which, in the long run, would benefit whole families and the Family Court system in general, the state immediately must take a series of steps culminating in extensive reform.

Increasing the hourly pay for 18-B attorneys to at least \$75 per hour for in-court and out-of-court time, and either substantially raising or eliminating the compensation cap may prevent a further exodus of attorneys from the 18-B panel. Compensation more comparable to market rates finally will accord assigned counsel the respect they deserve and may boost morale among the panel members. Ideally, the higher rate will attract more attorneys to the panel and, consequently, decrease caseloads. With fewer cases and fewer court appearances, the attorneys would have more time to devote to each client and, with the assurance of the same higher rate of pay for out-of-court time as in-court time, they may be more inclined to continue to represent their clients beyond disposition. The attorneys could attend service plan reviews and make efforts to ensure that their clients are being provided with the appropriate services without fear of losing money on out-of-court work. If such services are not being provided, the attorneys who remain involved with their clients would be aware more quickly of the lapse and could fulfill their duties as zealous advocates by taking legal action to ensure that court orders for services are enforced.

In the long run, however, a pay raise alone would not ensure that 18-B attorneys have all the resources necessary to provide their clients with adequate representation. To draw more attorneys already experienced in family law, and to retain seasoned 18-Bs, the state also should provide a benefits program and malpractice insurance. Assigned counsel must be given private interview rooms in the courthouse so that they can make their clients comfortable and ensure the confidentiality of conversations. Whereas today clients normally are dealt with in hurried conversation in hallways, a place to meet privately with their attorneys may provide them with at least a minimal level of respect and allow them to start the legal process on a level playing field rather than with a feeling that no one is on their side. Moreover, they may gain a sense of confidence or at least comfort knowing that someone will assist them through this desperate time. Additionally, if the attorneys can

properly understand the client's situation at the outset of a case, they may be able to prevent removal or at least enable cases to move through the system more efficiently.

If, after the evidentiary hearing, the court places the children in foster care, assigned counsel members, unless the family objects, should be mandated to continue representing their clients, until the family is reunified or the children are placed permanently out of the client's care.⁵⁶⁸ The state should provide a resource center in every courthouse where attorneys could obtain immediate on-site referrals to social workers and psychologists or psychiatrists. The attorneys should be able to work with these other professionals whenever they believe it is necessary. A social worker would be able to assist in identifying the services the parent needs, to help the parent secure such services, and to work in conjunction with the attorney so that the attorney remains informed about the client's progress and any obstacles the client has faced. This would alleviate the pressure on the ACS caseworker to have to provide services for both the children and the parent and allow the parent to rely on someone solely on her side to assist her in obtaining the services she needs. Additionally, at extension of placement or permanency hearings, the court could assess the progress of the parent based on more than just the word of the caseworker against the word of the parent.

Moreover, a social worker and attorney together could better identify other underlying legal problems clients may have that might be preventing them from being reunified with their children. The social worker and attorney could instruct the parent how to obtain an order of protection if, for example, the client were a victim of domestic violence, or what to do when welfare benefits are cut off, or how to obtain housing assistance. The attorney could then bring to the Family Court's attention the parent's efforts to ensure her children return to a safe and stable environment and keep the court apprised of any delays in such efforts.

To facilitate the provision of comprehensive representation, an in-court resource center should provide basic amenities the attorneys need to conduct out-of-court work efficiently between court

568. Katherine Law, Administrator of the Appellate Division, First Department Law Guardian Plan, noted that if the attorneys currently were mandated to provide continued representation, many would be carrying more than 800 cases. Law Interview, *supra* note 118. Therefore, the 18-B panels must be able to attract new attorneys as soon as possible to reduce caseloads and provide parents with representation beyond disposition.

appearances. Attorneys should have access to a library and on-line research services, desks and chairs, photocopiers, fax machines, several telephone extensions, computers, and a common database to track cases and share pertinent information.

Without adequate compensation, appropriate facilities, and social service resources, 18-B attorneys cannot fulfill their obligations to provide effective assistance of counsel and zealous advocacy for their clients. The State of New York guaranteed all parents in Family Court the right to representation and created an assigned counsel system to carry out that guarantee. However, by failing to support that system, the state is repeatedly violating the rights of parents in the Family Court and consequently harming their children. The state must act immediately to ameliorate the deteriorating system of representation by providing the attorneys with the resources outlined above.

CONCLUSION

If the agreement by Governor Pataki to support legislation raising the assigned counsel rates produces a law during this legislative session, the rate increase will not be effective until the 2002-2003 fiscal year.⁵⁶⁹ By that time, many assigned counsel members will have abandoned the panel out of practical necessity, and thousands of families will not have received constitutionally mandated representation, resulting in irreversible family separation.⁵⁷⁰ The legislature should create a three-tiered resolution: an emergency provision to disperse funds this year; a short-term solution to increase facilities and determine an assigned counsel rate schedule; and a long-term proposal that examines overhauling the Family Court system to consider the family as a whole rather than as separate parties, and create a panel to oversee continuing improvements.

Many judges, attorneys, and legal scholars pledge support for both an assigned council pay raise, and a Family Court system overhaul to uphold the constitutional right to equal and adequate representation for the most vulnerable in our society. In the words of Dean John Feerick:

Remedial action by government is desperately needed if we are to remain faithful to the moral and legal imperative of protect-

569. Evan A. Davis, *Athena Isn't Smiling Yet*, 44TH STREET NOTES, Mar. 2001, at 1 (stating that "[s]ince we face an immediate crisis, delay in taking corrective action harms the poor in all parts of the State, with severe impact in New York City").

570. *Id.*

ing children and families in need. If the Legislature and Executive fail to redress this injustice, our courts may once again have to be the ultimate decision maker.⁵⁷¹

Only immediate, precise, and extensive reforms can reinstate the family preservationist goals in the New York Family Court system.

571. Feerick, *supra* note 17, at 2.