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HATS OFF TO CLAIRE FLOM: EDUCATION AND THE IMPORTANCE OF BEING INVOLVED

*Judith S. Kaye**

I begin the Claire Flom Memorial Lecture with an expression of regret that I did not have the privilege of working alongside our honoree, whose vision and energy continue to this day to inspire us. When choosing a title I knew immediately that “Hats Off to Claire Flom” would be part of it, capturing both her love of hats and the honor we pay her.

Where should I begin among the many causes she supported—cancer research at the New York University Medical Center; health law policy, biotechnology, and bioethics at Harvard; the Food Allergy Initiative; the Innocence Project; City College; the extraordinary Feerick Center for Social Justice at Fordham University School of Law—indeed Fordham University itself, which she proudly served as a Trustee.

Each is enormously important, but for me the choice of topic easily is her deep commitment to educational equity for all schoolchildren. I think most especially of the Gateway School, dedicated to students with learning differences, and pause to mention my own former Law Clerk, Audra Zuckerman, who left a brilliant career in the law to co-found the Ideal School of Manhattan, dedicated to integrating children with special needs into an inclusive environment.¹ Both of these extraordinary women underscore my message tonight, which is that caring, concerned individuals undeniably can make a vital difference for our nation’s children. My fellow Barnard alum Margaret Mead said it best: “Never doubt that a small group of thoughtful, committed, citizens can change the world. Indeed, it is the only thing that ever has.”

Throughout her life, Claire Flom brought her wisdom and drive to public schools and education, ultimately founding and presiding over the New York Alliance for Public Schools, a comprehensive public-private network

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1. See THE IDEAL SCHOOL, www.theidealschool.org/inclusion (last visited Oct. 6, 2010).

of educators and other professionals dedicated to everything from research, to mentor programs, to career-related courses, to the improvement of our public school system. Whether paving the way for children with learning differences, or otherwise helping to assure a first-rate New York City public school system, Claire Flom lived and breathed the truth that education is a fundamental right that enables people to participate in our democracy. To my mind that was never more true than today, given our Internetted, highly technological world. We simply cannot afford to squander our nation's most precious resource: our children.

This lecture deservedly honors Claire Flom, and of course Joe and Judi Flom, and the entire Flom family. Thank you for the innumerable ongoing projects you nurture that enable people of all ages to realize their dreams—students in our schools and colleges; Skadden Fellows² and Skadden Scholars;³ as well as other young lawyers advancing the public interest around the globe; even this older lawyer proud and delighted to be at one of the world's pre-eminent law firms, Skadden, Arps, Slate, Meagher & Flom—and that give true meaning every single day to our professional values, including the importance of pro bono service.

Two invariable truths are immediately established beyond all doubt: that education matters, or put another way, that kids—particularly at-risk kids—lacking or denied an education have a distinctly diminished chance of making it in today's world; and that every single one of us can and must help to make a difference for them.

In preparing this lecture, I ran across the following *New York Times* quote from a great educator and administrator, John Brademas: “Claire Flom and people like her will determine the future of New York's schools.

2. The Skadden Fellowships, established in 1988, are awarded each year to approximately two dozen law graduates, selected from hundreds of applicants, who—through public interest organizations—render legal services to those in need. The Fellowship provides salary, benefits and law school tuition debt service for one year, with the expectation of renewal for a second year. As of today, there are 591 Skadden Fellows, many working long after their Fellowships to advance civil rights, including legal services for needy children. See SKADDEN FELLOWSHIP FOUNDATION, www.skaddenfellowships.org/sitecontent.cfm?page=about (last visited Oct. 6, 2010).

3. The Skadden, Arps, Slate, Meagher & Flom Honors Program in Legal Studies at The City College of New York (“Skadden, Arps Honors Program” or “Skadden Scholars”), initiated by the firm in 2008, begins with two-year assistance to City College juniors—again, approximately twenty-four individuals each year, selected from a large pool of applicants—who are interested in becoming lawyers. By focusing on law school preparation, the Skadden Scholars program is aimed at fostering broad diversity in the legal profession. See Press Release, Skadden, Arps, Slate, Meagher & Flom, Skadden, Arps and City College of New York Launch Landmark Program to Promote Diversity in the Legal Profession (Apr. 17, 2008) (on file with author).

. . . She embodies the spirit of private citizens who care deeply about the city's public schools."⁴

And are we not—every single one of us—those private citizens who care deeply about New York City's public schools? For every child, for every one of our City's more than 1.1 million schoolchildren,⁵ we care because it's their future. But we care as well because we know that their future is our future too. It's the future of our City, our nation, our world.

Recognizing that my subject is vast, I would like to offer as a guidepost the concept of early intervention. As with so many things in life, a little attention to a problem at the outset can avoid incalculable cost later on. This is nowhere more true than with respect to children.

I happen to have spent my own "growing up" lawyer years in an entirely different universe, as a commercial litigator, determined to penetrate the white-shoe law firm universe, which seemed most unattainable for women back in the early 1960s. I thoroughly enjoyed two great decades in that universe, leading in 1983 to my appointment to the Court of Appeals, New York State's high court, where I served for the next twenty-five-plus years, until reaching mandatory retirement on December 31, 2008.

Given my commercial litigation background, you can understand that, in 1990, when then-Chief Judge Sol Wachtler invited me to chair his newly formed Permanent Judicial Commission on Justice for Children, I thought it was a preposterous idea—too zany to be taken seriously. And I told him precisely that. But the Chief Judge persisted (as Chief Judges are wont to do), and ultimately I caved. To this day, twenty-one years later, I continue to chair the Permanent Judicial Commission on Justice for Children. It was a transformative event in my life.

I only wish I had been sensitive to children's issues far earlier. What held me back may be true for a lot of us: how to advance, let alone secure, justice for children was a complete mystery to me. The subject was hardly a focus of law school attention, law firm attention, or public attention back in the 1960s, 1970s, 1980s, or even today. Kids, after all, don't vote and they don't have political clout. Individually and systemically, they depend on caring parents and families. And many, many of them—especially children who lack caring parents and families—depend on us.

4. David W. Dunlap & Susan Heller Anderson, *Stargazers*, N.Y. TIMES, Apr. 26, 1987, available at http://www.nytimes.com/1987/04/26/magazine/stargazers.html?page_wanted=3.

5. N.Y. CITY DEP'T OF EDUC., <http://schools.nyc.gov/AboutUs/default.htm> (last visited Oct. 6, 2010).

As a society we sadly stumble from scandal to scandal—from Lisa Steinberg in 1987,⁶ to Elisa Izquierdo in 1995,⁷ to Nixzmary Brown in 2006,⁸ to a beaten thirteen-week-old infant in 2010⁹—clamoring for blame and retribution, with relatively little interest in effecting significant sustained reform. The scandal of the day involves children in juvenile detention facilities, where excessive force and inadequate services have seized headlines,¹⁰ and suddenly we focus in on it like laser beams. Hopefully, there will be genuine reform. But the challenge plainly goes beyond the youth in juvenile detention facilities—important as they are. Our laser beam focus must also include early intervention, meaning preventive measures that in the first instance reduce the flow of children into courts and detention facilities. What opportunities we miss in the years between each front-page scandal!

In truth, my Permanent Judicial Commission co-chair Ellen Schall and I back in 1990 found ourselves at sea as to where to begin the pursuit of justice for children, so we conducted a small survey, and decided to center on the zero-to-three population. Believe me, there is no wrong place to intervene. Only not intervening, not stepping up, is wrong.

The Commission's own earliest interventions were truly that: to secure amendment of a statute that required all applications for publicly funded Early Intervention health services to be channeled through the vastly under-resourced Family Court. Imagine that: as if it were not hard enough to recognize and deal with a child's developmental delays and disabilities, parents and caregivers additionally had to find lawyers to petition Family Court for the health services to which the law entitled them.¹¹

6. Laura Mansnerus, *The Steinberg Case and Trends in Abuse; Sometimes the Law Is Helpless as a Child*, N.Y. TIMES, Dec. 11, 1988, available at <http://www.nytimes.com/1988/12/11/weekinreview/region-steinberg-case-trends-abuse-sometimes-law-helpless-child.html>.

7. Marc Parent, *For Elisa, More Than the System Failed*, N.Y. TIMES, Nov. 28, 1995, available at <http://www.nytimes.com/1995/11/28/opinion/for-elisa-more-than-the-system-failed.html>.

8. Andy Newman & Annie Correal, *Stepfather Is Convicted of Manslaughter in Beating Death of 7-Year Old Girl*, N.Y. TIMES, March 19, 2008, available at <http://www.nytimes.com/2008/03/19/nyregion/19nixzmary.html>.

9. Sarah Wheaton & Colin Moynihan, *Queens Man Charged With Assaulting 13-Week-Old*, N.Y. TIMES, Mar. 6, 2010, available at <http://www.nytimes.com/2010/03/07/nyregion/07baby.html>.

10. Nicholas Confessore, *New York Finds Extreme Crisis in Prisons*, N.Y. TIMES, Dec. 13, 2009, available at <http://www.nytimes.com/2009/12/14/nyregion/14juvenile.html?scp=1&sq=juvenile%20detention%20new%20york%20city%20abuse&st=cse>.

11. As for the early work of the Commission, see SHERYL DICKER, REVERSING THE ODDS: IMPROVING OUTCOMES FOR BABIES IN THE CHILD WELFARE SYSTEM (2009). Ms. Dicker is the Commission's former Executive Director. Kathleen DeCataldo is the current

Talk about life-transformative. I learned the importance of dedication to a principle and dogged perseverance in the face of inevitable pushback. And—wonder of wonders—we did indeed secure a change in the law so that these services are now accessed directly, and more expeditiously, through the Health Department. One can only hope that we could be as successful today with the Commission's legislative proposals. There is no success quite as sweet as improving the lives of children in need.

I would like to apply my themes—the importance both of early intervention, and of getting involved—first to children with special education needs and then to adolescents, kids at the brink of adulthood. You don't have to be a genius to know that intervening early is key to both populations. Neglected learning difficulties only worsen with the passage of time.

CHILDREN WITH SPECIAL EDUCATION NEEDS

Roughly fifteen percent of the 1.1 million New York City public school children have special education needs—that's about 160,000 children,¹² though there are estimates even up to 180,000,¹³ with fewer than one in four actually graduating from high school.¹⁴ For students in self-contained, special education school settings the prospects are even grimmer,¹⁵ with vastly higher rates of school dropout, unemployment, homelessness, premature parenthood, and incarceration.¹⁶ The statistics are voluminous and the conclusion is unanimous: we have a problem that cries out for early intervention.

Executive Director. See PERMANENT JUDICIAL COMMISSION ON JUSTICE FOR CHILDREN, <http://www.nycourts.gov/ip/justiceforchildren/members.shtml> (last visited Oct. 6, 2010).

12. Lindsay Whitton Christ, *Abysmal Graduation Rate for Students in Self-Contained Classes*, INSIDE SCHOOLS (Apr. 23, 2009, 8:50 PM), <http://insideschools.org/blog/?url=http://insideschools.org/blog/2009/04/23/abysmal-grad-rate-for-students-in-self-contained-classes/>.

13. See Press Release, Advocates for Children, New Coalition Comes Together to Promote Special Education Reform in New York City's Schools (Aug. 7, 2008), available at http://www.advocatesforchildren.org/Press_Release_8_7_08.pdf; see also Jennifer Medina, *City Pushes Shift for Special Education*, N.Y. TIMES, Apr. 29, 2010, available at <http://www.nytimes.com/2010/04/29/education/29schools.html?sq> (fixing the number at 177,000 students, or more than seventeen percent of the system, up from roughly thirteen percent in 2003).

14. Medina, *supra* note 13.

15. Michelle Diament, *Poor Graduation Rates, Racial Disparities Persist in NYC Special Education, Report Says*, DISABILITY SCOOP, Apr. 23, 2009, available at <http://www.disabilityscoop.com/2009/04/23/nyc-report/2993/>.

16. ALLIANCE FOR EXCELLENT EDUC., THE HIGH COST OF HIGH SCHOOL DROPOUTS: WHAT THE NATION PAYS FOR INADEQUATE HIGH SCHOOLS (2007), available at <http://www.all4ed.org/files/archive/publications/HighCost.pdf>.

Where do the solutions lie? What would best serve these public school children? First and foremost, of course, is reaching children with special education needs early, tailoring programs to their particular learning needs, and integrating them—to the greatest extent possible—into inclusive classrooms.¹⁷ Children with special needs benefit through positive behavioral support from mainstream students, but it’s a two-way street in terms of learning the value of diversity and working with others.¹⁸

That was the conclusion reached about a year ago by a group of parents, educators, advocates, and service providers—including many great friends at Advocates for Children—who joined to form the ARISE Coalition.¹⁹ Their report is filled with moving stories underscoring the need for reform.

And wouldn’t you know, on February 1, 2010, Chancellor Klein and the New York City Department of Education issued their “Implementation Plan for the Reform of Special Education,” to be phased in over a two-year period.²⁰ Among its foundation principles are the requirements that, to the extent possible, every school educate and embrace the overwhelming majority of students with disabilities, and that every school have greater curricular, instructional, and scheduling flexibility to design new student programs to meet the diverse needs of students with special needs. Flexibility, skill, staffing, resources—obviously these will be the keys to making a promising promise happen.

Most exciting to me is the Plan’s explicit direction that all schools not simply educate but actually embrace students with disabilities.²¹ In this respect, the Implementation Plan identifies a critical, yet elusive, element of successfully educating children—particularly children with special needs—and that is embracing these children and their families, making them feel welcomed, genuinely included, and accepted for who they are.

And here I am reminded of the words of Albert Schweitzer: “Success is not the key to happiness. Happiness is the key to success.” We know that students with a sense of their own self-worth, self-respect, and personal

17. MARGARET C. WANG, OFFICE OF EDUC. RESEARCH & IMPROVEMENT, SERVING STUDENTS WITH SPECIAL NEEDS THROUGH INCLUSION EDUCATION APPROACHES, Pub. Series No. 11 (1997), available at <http://www.eric.ed.gov/PDFS/ED419076.pdf>; Jennifer Katz & Pat Miranda, *Including Students With Developmental Disabilities in General Education Classrooms: Educational Benefits*, 17(2) INT’L J. SPECIAL EDUC. 14 (2002).

18. KIDS TOGETHER, INC., BENEFITS OF INCLUSIVE EDUCATION, available at <http://www.kidstogether.org/inclusion/benefitsofinclusion.htm>.

19. ARISE COALITION, www.arisecoalition.org (last visited Oct. 9, 2010).

20. N.Y.C. DEP’T OF EDUC., IMPLEMENTATION PLAN FOR THE REFORM OF SPECIAL EDUCATION (2010), available at http://schools.nyc.gov/NR/rdonlyres/C2D033F2-14F1-4D6B-9950-70ACAD7E2768/77537/SpecialEd2YearPlan_Winter2010.pdf

21. *Id.* at 4.

dignity are more likely to succeed academically. Maybe it's not echoes of Schweitzer I am hearing but visions of the Gateway School and the Ideal School that I am seeing, nurturing environments where the uniqueness of each child is celebrated.

Easier said than done, I know. Issuing a plan is one thing, accomplishing it is another. But with an actual public promise now in hand, undeniably we are at a new juncture.

I don't know whether you believe in coincidences, but here are a few recent coincidences in my own life that underscore my passion, and my optimism.

The first is that the Claire Flom Memorial Lecture was scheduled at a time when the ink was barely dry on the Chancellor's "Implementation Plan for the Reform of Special Education."²² We can only wonder what she would have had to say about the Plan. Of one thing we can be certain: plenty. Hopefully, there are many other "watchdogs" today who will stand in her place.

A second fortuity is that not long ago, I attended a Lincoln Center Institute benefit that featured Richie Havens and Arlo Guthrie, two old favorites of mine. It took me back to my hippie law school days in Greenwich Village back in the early 1960s.

The Lincoln Center Institute is dedicated to teaching imagination learning—sharpening student skills of observation, imagination, and creativity through the visual and performing arts.²³ In the program booklet for the evening, one public school teacher trained in the Institute's Imagination Curriculum expressed her gratitude for the "toolkit" (her word) to create lessons that make the students blossom like flowers.

Developing a "toolkit," by coincidence, is also central to the City's new Implementation Plan. The Plan explicitly mandates that the Department of Education develop "toolkits" that can then be adapted by teachers to meet the particular challenges they face in the classroom.²⁴

And with Arlo Guthrie's tender voice in the background, I began thinking of our wonderful Lincoln Center Institute as a natural partner in the City's plan for developing toolkits for special education. That thought led me straight to Claire Flom's New York Alliance for Public Schools, a public-private partnership of prominent educators in the business community and others, and how important and valuable it could be in

22. *Supra* note 20.

23. See ERIC LIN & SCOTT NOPPE-BRANDON, IMAGINATION FIRST: UNLOCKING THE POWER OF POSSIBILITY (2009).

24. *Supra* note 20, at 3.

actually implementing the Plan to draw on diverse, outside resources, as I hope the New York City implementers will do.

As Arlo Guthrie concluded the program with a rousing “This Land is Your Land, This Land is My Land,” his father’s words took on new meaning for me, directly relevant to the education of children with special needs. Indeed, this land is our land, and their land too. Let’s assure that this new initiative is more than a paper promise. Let’s see that it becomes a reality.²⁵

AT-RISK ADOLESCENTS

Much of what I have been saying about the reform of the special education system is also directly pertinent to the population of at-risk adolescents, who stand at the brink of adulthood. Indeed, many of them are the very same special-needs children we failed earlier. It’s their land too. They need, and deserve, an opportunity for an education that will enable them to participate in today’s world.

Again the statistics are voluminous and the conclusions unanimous. The rate of incarceration in the United States is four to seven times higher than other western nations,²⁶ heavily concentrated on twenty-to-thirty year old male minorities.²⁷ The average annual cost to incarcerate a person is about three times what we spend educating a child.²⁸ About sixty-eight percent of state prisoners throughout the nation are high-school dropouts;²⁹ approximately 1.2 million inmates have minor children.³⁰ That’s a lot of

25. In the words of Kim Sweet, Executive Director of Advocates for Children of New York, “[t]his could easily fall flat if not done right.” See Medina, *supra* note 13.

26. CHRISTOPHER HARTNEY, NAT’L COUNCIL ON CRIME AND DELINQUENCY, U.S. RATES OF INCARCERATION: A GLOBAL PERSPECTIVE 2 (2006), available at http://www.nccd-crc.org/nccd/pubs/2006nov_factsheet_incarceration.pdf.

27. See THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 3, 5-7 (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>; Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, available at <http://www.nytimes.com/2008/04/23/us/23prison.html?pagewanted=all>.

28. THE PEW CHARITABLE TRUSTS, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA’S PRISON POPULATION 2007-2011, at 19, 33 (2007), available at <http://pewcenteronthestates.org/uploadedFiles/Public%20Safety%20Spending.pdf>.

29. CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), available at http://www.policyalmanac.org/crime/archive/education_prisons.pdf.

30. THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 1, 19 fig.9 (2007), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/Kids_are_Waiting_TimeforReform0307.pdf.

broken families. The *New York Times* has referred to them as “the incarceration generation.”³¹

Once a leader in juvenile justice, today the United States is almost Third World in its punitive approach to youth crime. Shame on us.

So how do we interrupt the deadly “Cradle to Prison Pipeline?”³² How do we stop the downward spiral that begins with children dropping out of school? How do we build offramps for troubled youths to get their lives back on track?

Here, too, there is no simple solution. Together, we need to create a host of meaningful interventions that will hold young people accountable for their behavior while simultaneously offering them the structure and support they need.

I referred earlier to the recent reports on the ineffectiveness—and worse—of New York policies and practices regarding the confinement of juveniles, and my concern is that we not, once again, simply stumble from the current scandal to the next one. Rather, we need to seize the moment for a broader effort to keep kids from entering the juvenile justice system in the first place. Courts are just not a good place for people to grow up in—neither are prisons.

For me, the answer lies in finding more ways to keep kids from dropping out of school. I know that the Chancellor’s new “Implementation Plan for the Reform of Special Education” will itself help to reduce the population of endangered adolescents. Clearly, we also need an “Implementation Plan for Keeping Kids in School and out of Courts.” We need to reduce “zero tolerance” school discipline policies. We need strong school-justice partnerships. There are just too many kids being raised in the courts.

I wish I could offer a list of comprehensive steps that would go into such a plan—if I had one I would not have waited to reveal it. My list would include serious efforts to deal with truancy and other issues before they reach school suspension, expulsion, and court referral—again, early intervention.

My own thoughts just now center on school-based youth courts, where peers in schools instead of judges in courts can intervene early with kids who write on desks, or get into scuffles and scrapes, or talk back, or commit offenses such as vandalism, graffiti, and petty larceny, as kids sometimes do. Youth courts train teenagers to serve as judges, jurors, and

31. Erik Eckholm, *In Prisoners’ Wake, a Tide of Troubled Kids*, N.Y. TIMES, July 4, 2009, available at <http://www.nytimes.com/2009/07/05/us/05prison.html>.

32. See *Cradle to Prison Pipeline Campaign*, CHILDREN’S DEFENSE FUND, <http://www.childrensdefense.org/programs-campaigns/cradle-to-prison-pipeline/> (last visited Oct. 8, 2010).

attorneys, handling real-life cases involving their schoolmates, helping them get onto the right track.

I was pleased to discover that we actually have about eighty youth courts, or teen courts, scattered throughout the State of New York, some run by schools, some by courts, and some even by the police and probation.³³ We need to strengthen and support these efforts.

A second item topping my list is the concept of education mentors, educational advocates for individual schoolchildren. Imagine if schoolchildren each had someone who believed in them, who thought their lives and futures had value, who could monitor their school progress, guide them in their career development, and be attentive to simmering problems before they boil over. I know that there are many wonderful mentoring programs. Plainly there can never be enough.

By coincidence (my last), I recently had dinner with a prominent judge, a product of the New York City public school system, and we naturally got onto the subject of juveniles, one of my favorite subjects. He commented with surprise that he had never once been called on to do anything with respect to the New York City public school system, though other institutions he attended never hesitated to seek him out. Why is that, I wondered. Aren't there a lot of alumni who might willingly lend a hand to furnish exactly the personal school connection so many of our young people are lacking? And what about the thousands of so-called senior lawyers—now stepping down from law firms as early as age fifty-five but wanting to remain useful? I know we should not wait for a call, we should volunteer. But shouldn't there *also* be a call from public school programs we can meaningfully be part of? I am reminded of a line from the film *Field of Dreams*: "If you build it, [they] will come."³⁴

And in the end, isn't it dreams that we are talking about—the dreams of our nation and the dreams of our youth, in whose hands our future rests. It is in our hands—all of us—to take a part in making those dreams come true. It's their future to be sure, but ours, too. So I conclude where I began, with hats off to Claire Flom. Indeed, hats off to every single person who helps turn this crisis into opportunity for our nation's children.

33. See ASSOC. OF N.Y. STATE YOUTH COURTS, *available at* <http://www.nysyouthcourts.org>. (last visited Oct. 6, 2010).

34. FIELD OF DREAMS (Universal Pictures 1989) ("If you build it, he will come.").