New York State Bar Association

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NYSBA

Memorandum in Opposition to
Proposed Chapter Amendment

COMMITTEE ON CHILDREN AND THE LAW

Children #6

October 26, 2015

S. 5258-a

By: Senator Felder

A. 7679

By: M. of A. Lupardo

Senate Committee: Children and Families

Assembly Committee: Children and Families

Effective Date: Immediately

AN ACT to amend the family court act, in relation to permanency hearings for youth in foster care.

LAW AND SECTIONS REFERRED TO: Amends Family Court Act § 1089.

THE COMMITTEE ON CHILDREN AND THE LAW OPPOSES THIS LEGISLATION

Notwithstanding our strong desire to codify the child's right to participate in his or her permanency hearing, after intense and thoughtful reflection and discussion, it is the overwhelming consensus of the New York State Bar Association Committee on Children and the Law that the proposed chapter amendment to A.7679/S.5258-A actually "does harm" by undermining the very right the original bill seeks to codify. The purpose of this bill was to increase older youth participation in court proceedings, as recommended by the American Bar Association as well as research findings that there are clear benefits to youth participating in their permanency hearings. Unfortunately, rather than creating a framework for increasing youth participation in permanency hearings, the chapter amendments provide so many exceptions to the rule establishing a right to appear that they will lead to fewer youth appearing in court than do today.

The key areas of concern include the following:

- Providing only that the child is to receive "notice" (without specifying that the notice be written or in the same form as the notice provided to all other parties) will not ensure that proper notice is given to the child to increase and encourage participation- including notice of the right to appear and participate in the hearing - one of the specific goals of the of the original proposal.

- Allowing the Court to limit a child's participation when doing so is in the child's "best interests" is far too vague to be useful, and will simply provide an overly broad statutory exclusion of youth by judges and parties who are not comfortable with having children in the courtroom. Bifurcation of a permanency hearing can easily prevent the child from exposure to adverse information or persons while still permitting the child to attend. The American Bar Association recommends that the standard for determining when a child should not attend a court proceeding should be "compelling evidence that the youth's participation would be emotionally detrimental to the youth's well being"[i].

- Allowing the Court to consider "disruption of the child's school schedule" in a determination of whether participation would be in the child's best interests permits the Court to abridge the child's right to appear in virtually every hearing, since almost all hearings take place during the school day. Currently, courts either respect the child's wish to miss part of the school day to attend court or schedule the hearing so not as to conflict with the child's desire to appear. Children routinely miss school for medical appointments. The Committee believes that the permanency hearing where important decisions are made regarding the child's life is an equally important reason to miss school. If there is a particular conflict with a date, the child can alert his or her attorney to ask for a short adjournment rather than forgo the right to attend completely.

- The requirement that the attorney for the child must notify all parties ten days in advance if the child wants to participate is impractical given high caseloads and multiple litigants involved in permanency hearings. The result will be denial of a child's participation due to failure to provide notice despite the child's wish to appear. It should be noted that no other party to the proceeding must give advance notice of participation.

- Allowing the hearing to proceed when the attorney for the child has not met with his/her client, despite having made diligent efforts, creates a disincentive for foster parents and foster care agencies to produce the child for an interview with the attorney. As a matter of fairness and respect for the rights of all parties (including the child), courts today generally do not permit a hearing to proceed if the foster care agency or foster parent has not cooperated with the attorney's diligent efforts to meet with a child. Permitting a hearing to proceed in such circumstances certainly should not be permitted by statute.

- Allowing the child's attorney to make a motion for a finding that limiting the child's participation would be in the child's best interests suggests that the attorney for the child could make a motion to limit the child's participation against the child's wishes. A provision that authorizes the attorney to take such action would be in direct violation of 22 N.Y.C.R.R. 7.2, which clearly lays out the attorney's obligation to advocate for her client's stated position.

We are grateful for the Legislature's and Governor's effort to codify an older youth's right to appear in court. And, we are committed to seeing that New York joins all of the other states that have already enacted legislation recognizing the right of youth to participate in their permanency hearings. However, we hope that the serious concerns expressed in this memorandum will cause reconsideration of the proposed amendments, which drastically undermine any purported right.

We would greatly appreciate an opportunity to discuss our concerns at your earliest convenience.

Based on the forgoing, the New York State Bar Association's Committee on Children and the Law **OPPOSES** this legislation.

Betsy R. Ruslander, Chair   Kathleen DeCataldo, Chair
Committee on Children and the Law   Legislative Subcommittee

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[i] "Establishing Policies for Youth in Court—Overcoming Common Concerns." Washington, D.C.: American Bar Association Center on Children and the Law. Available at: http://www.isc.idaho.gov/cp/docs/Establishing%20Policies%20for%20Youth%20in%20Court-Common%20Concerns.pdf