



Legislative Memorandum

**Subject: Bill Establishing Independent Office of the Child Advocate
A3233-B/Clark; S6877/Parker**

Position: Support

In 2006, we published the report *Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls*.¹ We described the findings of an intensive, year-long investigation that we had undertaken, along with Human Rights Watch, of the treatment of girls by the New York State Office of Children and Family Services (OCFS). We discovered overwhelming evidence that, too often, girls incarcerated in New York are subjected to excessive physical force and other forms of abuse and neglect, and are denied the mental health, educational, and other rehabilitative services they need. As a result, girls are ill-equipped to meet life's challenges upon their release, and are in many cases destined to return to OCFS or enter adult prisons, rendering their future prospects grim and imposing enormous costs on this state.

The absence of meaningful oversight and accountability within OCFS is a key reason for this continuing abuse and neglect. Specifically, the internal grievance procedure provided to children is ineffective, with many complaints simply ignored. The agency's internal oversight mechanism, the Office of the Ombudsman, was for many years woefully understaffed and is in any event thoroughly lacking in the independence needed to rectify the serious failings within OCFS. In addition, the barriers to consistent monitoring by other state agencies or civil society organizations remains severe.

In accordance with these findings, we have for years urged the creation of an independent state Office of the Child Advocate (OCA). A robust and truly independent watchdog body is absolutely essential to protecting children in state custody, ensuring agency effectiveness, and minimizing the risk of legal liability. For this reason, we now urge the New York State Senate to adopt A3233-B/S6877, establishing an independent Office of the Child Advocate ("OCA bill"). This bill would create an OCA equipped with sufficient authority, independence, and flexibility to effectively carry out its duty to protect incarcerated children and maintain high standards within OCFS.

The Governor has introduced competing legislation, Program Bill 273, which would establish a Juvenile Justice Advocate ("JJA bill"). The JJA Bill is superior to the OCA bill in one respect: it permits courts to remand children to OCFS custody only when a child's delinquent offense, or his or her "record and background" indicate dangerousness to

¹ The report is available at: <http://www.aclu.org/womens-rights/custody-and-control-conditions-confinement-new-york's-juvenile-prisons-girls>.

**AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION**
WOMEN'S RIGHTS PROJECT
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2644
F/212.549.2580
WWW.ACLU.ORG

**OFFICERS AND
DIRECTORS**
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

the community. In cases where the remand determination is made on the basis of the child's record and background, the court must also determine that no less restrictive alternative to placement is available. This provision is exceedingly important because it would keep children out of prison-like environments except where it is actually necessary to keep the public safe. In addition, it would bring New York in line with the constitutional requirement that children in state custody be held in the least restrictive available setting.

Yet with respect to the creation of a watchdog agency, the JJA bill is in numerous ways inferior to the OCA bill, as detailed below. It is for this reason that the ACLU urges the Senate to adopt the OCA bill over the JJA bill, notwithstanding the lack of any language in the OCA bill that would restrict the incarceration of children. However, we strongly urge that over the course of the legislative process, the OCA bill be amended to incorporate such restrictions.

The OCA would have the mandate and independence necessary to carry out its duties:

A crucial distinction between the OCA bill and the JJA bill is that the OCA bill explicitly charges the advocate with protecting the legal rights of children. In contrast, the JJA bill limits the advocate's mandate to ensuring "quality of care," thereby duplicating existing quality control mechanisms and omitting a crucial purpose of the advocate's office, namely, ensuring that the fundamental rights of each incarcerated child, including the right against abuse and neglect, are respected. This is essential both to protecting children and reducing the potential legal liability of OCFS.

Another key feature of the OCA bill is that it empowers the advocate to craft solutions to deficiencies that he or she identifies. In contrast, the JJA bill explicitly reserves to OCFS the authority to determine necessary corrective action when violations are found. Under the Governor's bill, the advocate is empowered only to make broad "legislative, regulatory, public policy" recommendations, not to craft targeted solutions to specific problematic conditions. This would seriously hamper the advocate's effectiveness with respect to urgent problems in particular facilities and other institutional failings outside the enumerated categories. An advocate that can merely point at problems without shaping solutions is only doing half its job.

The JJA bill also undermines the advocate's independence by requiring him or her to report not only to the governor and the legislature, but also to OCFS. In essence, this provision holds the advocate accountable to the entity that it is to oversee. The OCA bill, in contrast, makes the advocate accountable to the legislature and the governor alone. Moreover, while the JJA bill permits the advocate to serve only at the pleasure of the governor, the OCA bill defines a renewable five year term of service to be cut short only for cause. It thereby enhances the advocate's independence by eliminating uncertainty regarding the advocate's term of service, thereby helping to ensure candid and dispassionate investigation and reporting.

**AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION**

WOMEN'S RIGHTS PROJECT
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2644
F/212.549.2580
WWW.ACLU.ORG

**OFFICERS AND
DIRECTORS**

SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

The OCA would have necessary access to information about OCFS operations:

Where institutional conditions are concerned, the two main sources of information concerning current and potential problems are the staff and the children who spend their days and nights in the institution. The OCA bill ensures that information can flow from these sources to the advocate by (1) providing whistleblower protection to staff who take the courageous step of reporting abuses; (2) requiring that information about the advocate be provided to institutionalized children who otherwise have no way of knowing that such an office exists; and (3) establishing a direct channel of communication between children and the advocate. The Governor's bill lacks all of these provisions, making it doubtful whether the advocate would even learn of many serious abuses. This is particularly true in the current era of severe budget constraints, when staffing limitations affecting the advocate's office are likely to cap the frequency of any in-person visits to far-flung OCFS facilities.

The Governor's bill also constrains the advocate's access to documentary sources of information regarding institutional conditions. The bill is ambiguous concerning access to records, and could well be read to permit only selective access to a small subset of OCFS records such as fatalities reports and the department's own internal investigations. No advocate could be expected to gain a meaningful knowledge of the agency's functioning from such a limited pool of records. Full access, provided in the OCA bill, is essential to the advocate's ability to do its job *before* child fatalities occur.

The OCA would provide more complete and timely reporting to the legislature:

The reporting provisions of the OCA are also more rigorous than those in the competing bill, ensuring that the legislature and governor would receive better and more timely information. The OCA bill requires the advocate to produce reports on at least a semiannual basis and in addition whenever needed. The JJA bill, in contrast, requires only annual reporting and provides the option of reporting when a systemic problem is identified. Surely, the legislature and the governor should be notified any time a system-wide failing is identified within OCFS, yet the JJA bill makes such a report optional rather than mandatory.

For the foregoing reasons, the ACLU urges the Senate to adopt A3233-B/S6877, creating an Independent Office of the Child Advocate. Doing so would advance good governance by increasing transparency and accountability. It would also go a long way toward protecting some of this state's neediest and most vulnerable children. We also urge that the provisions of the Governor's bill that would divert children with non-violent delinquent offenses from prison-like settings be incorporated into the final version of the OCA bill.

**AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION**

WOMEN'S RIGHTS PROJECT
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2644
F/212.549.2580
WWW.ACLU.ORG

**OFFICERS AND
DIRECTORS**

SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER