NACC
e-Guardian

August 2012 Vol 34 · No 07

NACC envisions a justice system wherein every child has his/her voice heard with the assistance of well-trained, well-resourced independent lawyers resulting in the child's rights being protected and needs being met.

Attorney Participation in Family Partnership Meetings[1]

By Sara R Brennan, NACC Legal Intern

A majority of states have systems in place for appointing lawyers for indigent parents who are involved in child welfare proceedings. However, very few states have provisions that provide parents with an attorney in the pre-petition stages of the case. As a result, parents are faced with many difficult initial decisions and often feel powerless against the team of CPS workers and investigators. Additionally, a majority of parents involved in child welfare proceedings cannot afford the cost of a lawyer. Without the assistance or guidance of an attorney, many parents volunteer information that can later be used against them, without a complete understanding of the consequences some of their statements can have. Parents may also agree to safety plans that can later be used against them in proceedings if they do not comply with every single provision of the plans. Furthermore, parents are sometimes forced to agree to out-of-home placements for their children, usually without a full understanding of their options.

Most states allow a court to appoint an attorney for a parent prior to the initial hearing; however, the chances that a parent will know to ask for an attorney, and that the court has time to appoint an attorney before the initial family partnership meeting are slim. Therefore, many child welfare lawyers are advocating for reform so that parents are provided with a court appointed attorney at the same time CPS begins its initial investigation. That way, the parent can be better informed about their options and the consequences of their decisions in the initial investigation period. This reform would help better protect parents' rights, as well as help prevent unnecessary foster care and out-of-home placements. With the assistance of a lawyer, parents can better communicate to CPS what their family's needs are without sacrificing any of their rights or jeopardizing their child's safety.

The following offices and individuals are presently providing pre-petition legal assistance to parents: The Detroit Center for Family Advocacy (DCFA); Mark Briggs, a solo practitioner in El Paso, Texas; Southwest Virginia Legal Aid Society (SVLAS); and

See Participation, page 2 »

1 A family partnership meeting is a pre-trial gathering of parents and state agents where discussions about goals and services for the child are held. In some jurisdictions, this may be called a case plan meeting, mediation, or a family conference.

In This Issue

Cases

Oman v. Portland Public Schools

NOMINAL DAMAGES UNDER INDIVIDUALS WITH DISABILITIES EDUCATION ACT

The Ninth Circuit Court of Appeals decided whether a parent may bring a claim for nominal damages under the Individuals with Disabilities Education Act (IDEA).[1]

The IDEA was enacted by Congress to "'ensure that all children with disabilities have available to them a free appropriate public education' (a FAPE)".[2] The act requires all states to provide appropriate public education.[3] This authorizes the states to create individualized education programs (IEP) for children. The IDEA also provides a procedure for parents to appeal if they are unhappy with their child's IEP.[4]

When C.O. was in second grade, with the help of his teacher and mother, C.O. was given an IEP.[5] Unfortunately, C.O.'s IEP was unsuccessful. By the eighth grade, he was still only reading at a third grade level.[6] Due to his low test scores, C.O. could not meet the minimum entrance requirements and was denied admission to the district's magnet high school.[7] Subsequently, his mother, Oman, requested all of C.O.'s school records and began a long battle back and forth with the district over the adequacy of C.O.'s IEP.[8] Once Oman had exhausted all her remedies through the IDEA appeals process, she chose to file a case, pro se, with the district court.[9] Her complaint alleged approximately twenty procedural and substantive violations of the IDEA.[10]

Initially, the lower court dismissed all of the claims Oman brought on behalf of C.O., concluding that, as a non-attorney, Oman could not represent the interests of another person in court.[11] The court also dismissed all of her claims under the Rehabilitation Act and Americans with Disabilities Act (ADA) because Oman herself did not have any disabilities.[12] Oman's request for prospective relief was dismissed because O.C. had already graduated from high school.[13] The court considered only those claims based upon allegedly retaliatory acts: (1) the district's in-house attorney's refusal to participate in informal discovery; (2) the district's in-house attorney's insistence that the mother seek permission to speak to the district employees about litigation matters; and (3) the Oregon Dept. of Education's delay in producing the administrative record during the federal litigation.[14] Oman

1 Oman v. Portland Public Schools, No. 10-35402, 2012 U.S. App. LEXIS 9679 (9th Cir. May 14, 2012).
2 *Id.* at *2.
3 *Id.*
4 *Id.* at *3.
5 *Id.* at *3-4.
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.* at *5.
10 *Id.*
11 *Id.* at *6.
12 *Id.*
13 *Id.* at *7.
14 *Id.*

» Participation from page 1

the Vermont Parent Representation Center (VPRC). Their advice for other offices and individuals who have a desire to provide pre-petition legal assistance to parents is communication. During the Second National Parents' Attorney Conference, one group noted, "Targeted advertising and word–of-mouth can be excellent means of directing parents to solo practitioners engaged in pre-petition practice, as can community education about the importance of having legal counsel throughout the child protective services administrative process."[2]

If we can move toward all states providing pre-petition legal assistance to parents during the critical pre-petition stages of a case, parents will be able to make better, informed decisions for their children. This would result in making family partnership meetings much more effective, and, in most cases, preserve the family unit, and avoid unnecessary time in foster care or out-of-home placement.

2 Bech, Trine, Mark Briggs, Elizabeth Bruzzo, Tracy E. Green, and Christine Marra. Second National Parents' Attorney Conference, "The Importance of Early Attorney Involvement in Child Welfare Cases: Representation of Parents in Pre-Petition Proceedings." July 13-14, 2011. parentattorney.org/.../importance-of-early-attorney-involvement.doc

received $1 in nominal damages for the first two claims of retaliation.[15]

The school district and its in-house attorney appealed. Oman cross-appealed on a number of issues. The Ninth Circuit Court of Appeals overruled the district court's awarding of nominal damages.[16] It based its decision on the fact that the IDEA is a comprehensive enforcement scheme.[17] The Court of Appeals concluded that the language in the IDEA which grants courts the power to give all appropriate relief when an agency is in violation is merely a grant of jurisdiction rather than authority to award retrospective damages.[18]

The Court of Appeals denied Oman's claim of relief for statutory violation under 42 U.S.C. 1983.[19] Whether a claim under this statute can be upheld depends on whether IDEA applies instead; it if does, Oman can seek relief only under IDEA.[20] The new approach to determining what constitutes a claim for relief under IDEA starts by determining if the claim falls within one of the following three categories: (1) monetary relief as the functional equivalent of a remedy available under the IDEA; (2) prospective injunctive relief to alter an IEP or the educational placement of a disabled student or (3) to enforce rights that arise as a results of a denial of a FAPE.[21] Oman's claim that she was denied sufficient access to discovery during the administrative proceedings is essentially the equivalent of a claim of procedural defect under that statute.[22]

On her cross-appeal, Oman asserted the district court erred in dismissing her claims for monetary relief under the Rehabilitation Act and ADA, based on the admissions policy of the district's magnet high school.[23] The Court of Appeals upheld this ruling, deciding that Congress has not expressed an intent to create a cause of action for monetary damages based on such a claim.[24]

Finally, the Court of Appeals addressed the issue of whether a party may bring a damages action based upon the admissions policies of a magnet school. The Court of Appeals ultimately decided in the negative after looking at the requirements of the Rehabilitation Act itself and congressional intent.[25] Section 504 of the Rehabilitation Act prohibits educational institutions from excluding a person due to a disability and who is otherwise qualified.[26] It does not require the educational institution to make substantive modifications in their program to allow disabled persons to participate.[27] Previous courts have read that to mean educational institutions require judicial deference in their academic decisions in ADA and Rehabilitation Act cases.[28] Additionally, Congress did not intend to create a private cause of action for monetary damages for claims involving school's admission policies.[29] The Court of Appeals concluded in the event the schools fail to comply with the law, the appropriate action is to discontinue federal funding.[30]

› ***View full opinion***

15 *Id.*
16 *Id.* at *7-8.
17 *Id.* at *8.
18 *Id.* at *10.
19 *Id.* at *10-11.
20 *Id.* at *11.
21 *Id.* at *11-12.
22 *Id.* at *12.
23 *Id.* at *13.
24 *Id.*
25 *Id.* at *15-16.
26 *Id.*
27 *Id.* at *16.
28 *Id.*
29 *Id.*
30 See *id.* at *17.

In re C.M.

NO RIGHT TO COUNSEL FOR IMPOVERISHED PARENTS; DISCRETION TO APPOINT COUNSEL STAYS WITH TRIAL COURT

On June 29, the New Hampshire Supreme Court decided that indigent parents do not have the right to counsel during the dependency phase of abuse and neglect proceedings.[1] From the dissent's opinion, it seems that New Hampshire has for several decades recognized a statutory right to counsel for parents.[2] The Court considered whether the Constitution requires appointment of counsel during the dependency proceeding.[3] The legislature had abolished the right in July of 2011.[4] The New Hampshire Supreme Court followed the precedent of the U.S. Supreme Court in *Mathews v. Eldridge* by balancing the private interest affected by the official action, the risk of erroneous deprivation of such an interest through the procedures used and the probable value of additional or substitute procedures, and the government's interest in keeping administrative and fiscal demands within reason.[5]

The Court determined that the private interest at issue was the parent-child relationship.[6] It followed this determination by evaluating the nature of dependency proceedings.[7] It decided that the relaxed evidentiary rules and the absence of a jury actually decrease the risk of erroneous deprivation.[8] In addition, the State is required to offer assistance to parents to help them overcome whatever difficulties

1 In re C.M., No. 2011-647 (N.H. June 29, 2012).
2 *Id.* at 12 (Conroy, J., dissenting).
3 *Id.* at 17 (Conroy, J., dissenting).
4 *Id.* at 3.
5 *Id.*
6 *Id.* at 4-5.
7 *Id.* at 5-7.
8 *Id.* at 7.

have kept them from providing and appropriately caring for their child.[9] The Court concluded that the State shares the parents' interest in maintaining the parent-child relationship as dictated by statute.[10] For these reasons, the Court ultimately could not justify allocating limited funds and resources to always appointing counsel for the poor.

The Court held that the trial judge has discretion in determining whether to appoint counsel to indigent parents during dependency proceedings but that no statutory right exists.[11] The Court rested its analysis on the belief that the dependency proceeding remains separate from a termination of parental rights.[12] Only when sophisticated legal issues are involved, expert testimony is required during the dependency proceeding, or the trial judge suspects that a termination hearing will likely result will the New Hampshire judiciary countenance appointing counsel.[13]

The dissent countered by reiterating what almost everyone already knows. The dependency and termination proceedings are linked because any errors during the dependency phase establish the factual basis upon which subsequent proceedings operate.[14] The accuracy of the dependency proceeding directly affects the outcome of the termination hearing.[15] It is a continuous process where the absolute loss of parental rights remains in jeopardy.[16] At every phase, parents should have the right to counsel especially because even a temporary loss of parental rights can increase the risk that the family will never again have the opportunity for reunification.[17] Practically speaking, judicial economy should be allowed to counterbalance the economic expense initially incurred.[18]

› ***View full opinion***

NOTICE TO READERS : Decisions reported herein may not be final. Case history should always be checked before relying on a case. Cases and other material reported are intended for educational purposes and should not be considered legal advice. Featured cases are identified by NACC staff and our members. We encourage all readers to submit cases. If you are unable to obtain the full text of a case, please contact the NACC and we will be happy to furnish NACC members with a copy at no charge.

9 *Id.* at 6.
10 *Id.* at 8.
11 *Id.* at 8.
12 *Id.* at 6.
13 *Id.* at 8.
14 *Id.* at 16-18 (Conroy, J., dissenting).
15 *Id.* at 18 (Conroy, J., dissenting).
16 *Id.* (Conroy, J., dissenting).
17 *Id.* (Conroy, J., dissenting).
18 *Id.* at 20 (Conroy, J., dissenting).

Connecticut Supreme Court Rules ICPC Does Not Apply to Parents

On July 19, 2012, the Connecticut Supreme Court issued a victory for families in its ruling in *In re Emoni W.* The Court held that the Interstate Compact on the Placement of Children (ICPC) does not apply to out-of-state noncustodial parents. After two children were removed from their mother's home, a Connecticut trial court refused to grant the out-of-state noncustodial father's petition for custody, ruling that ICPC procedures had to be followed before the father could obtain custody. Despite the absence of allegations against the father's fitness, Emoni and Marlon had to wait in foster care for several months while case workers evaluated their father and his home. The trial court's improper application of the ICPC resulted in an entirely unnecessary separation for this family, violating the father's substantive and procedural due process rights.

The father appealed to the Connecticut Supreme Court which reversed the trial court's interpretation to apply the ICPC. The Court found that that the plain language of § 17a-175 art. III (a), which states that the ICPC applies in proceedings involving "placement in foster care or as a preliminary to a possible adoption," renders the Compact inapplicable to parents. The Court also explained that the Connecticut child protection agency and the trial court had mechanisms to quickly evaluate the father's fitness and to temporarily supervise the children to ensure their safety with their father.

› ***View full opinion***

Amicus

Miller v. Alabama* and *Jackson v. Hobbs

CHILDREN SENTENCED TO LIFE WITHOUT PAROLE (LWOP); LWOP SENTENCING STILL ALIVE BUT PROCEDURE MODIFIED

Background

Since the eruption of teen violence in the '80s and the harsher penalties instituted as part of the '90s criminal justice reforms, judges presiding over children charged in adult court have had the option of sentencing children to life without parole. Sometimes, however, with mandatory sentencing statutes, it becomes a misguided but inevitable reality of the '90s response to delinquency which undermines the rationale behind the juvenile justice system in toto.

Aside from the obvious differences between children, particularly adolescents, and adults regarding the perpetration of crimes, juveniles suffer from a life without parole sentence to an unjustifiable degree.[1] Human Rights Watch points out that the cumulative effect of a LWOP sentence for juveniles amounts to degrading and inhumane treatment.[2] In the United States, few laws require that prisons provide child offenders with programs for their mental and emotional development.[3] A few states require youth offenders to take the GED exam; some offer it only as an option.[4] Child offenders enter the system unprepared for life as adults even on the outside. They face significant obstacles in accessing programs for the mental and emotional development necessary to cope with the reality of their sentence.[5] A sentence otherwise harsh becomes akin to torture in every imaginable way.

While the arguments that they will spend more of their life in prison than an adult similarly sentenced and that their vulnerability makes them targets for sexual and physical assault are counterbalanced by the harsh but fair assessment that "they should not have done it," we cannot justify denying them the right to evolve as human beings. The reality of security levels dictating housing placement and, by default, the programs available to lifers may not support banning life without parole for juveniles, but surely this sentence should not be imposed mandatorily.[6]

Miller v. Alabama and *Jackson v. Hobbs*

On June 26, 2012, the Supreme Court issued an opinion for two cases in tandem dealing with the imposition of life without parole for juveniles.[7] The Court held that LWOP could not be imposed mandatorily. Individualized consideration of both the offense and the child offender must precede any LWOP sentence.[8] The Court used recent precedent involving youth sentenced to harsh adult penalties, *Graham* and *Roper*, to bolster its argument that the significant differences between adults and children regarding their rehabilitative potential merits overruling the courts below.[9] It stressed the opinion in *Graham* which related a life without parole sentence to the death penalty in order to move the argument from a proportionality analysis to a procedural analysis and back again.[10]

Two statutory provisions made it possible to impose this sentence on a juvenile: one would land the child in adult court either by transfer or by direct filing for specified crimes and another sets out sentencing schemes for all individuals who find themselves in adult court.[11] The two as they interact with each other lead to LWOP sentences for juveniles irrespective of any mitigating factors.[12]

The Court focused on the process by which a child could be transferred to adult court to untangle the consequences of the interaction between these two provisions.[13] Sometimes juveniles charged with specific crimes are automatically transferred.[14] Other times prosecutors have discretion to file directly in adult court.[15] A third possible circumstance allows a juvenile court judge discretion but at the transfer stage he would likely have only partial information about the child and the alleged crime.[16] After transfer, the mandatory nature of LWOP sentences for certain offenses makes any testimony regarding mitigating circumstances essentially moot.[17]

The Court's opinion mentions also that only 29 states permit this type of sentencing, remarking that the Court cannot determine whether state legislatures or Congress knew of this interaction

1 See **Human Rights Watch**, *Against All Odds: Prison Conditions for Youth Offenders Serving Life without Parole Sentences in the United States* (2012).
2 *Id.* at 2, 10, 25, 45.
3 *Id.* at 26.
4 *Id.* at 31.
5 *Id.* at 26-36.
6 *Id.* at 27-32.
7 *Miller*, 2012 WL 2368659.
8 *Id.* at *17.
9 *Id.* at *11.
10 *Id.* at *8-9.
11 *Id.* at *3.
12 *Id.* at *10-11.
13 *Id.* at *15-16.
14 *Id.* at *16.
15 *Id.*
16 *Id.*
17 *Id.*

between these two provisions; one pertaining to juveniles specifically and the other to adults.[18] The Court reiterated that it could say at best that such provisions had inadvertent effects but could not confirm that state legislatures and Congress approved mandatory LWOP sentences.[19]

In sum, the Court determined by borrowing the logic of precedent and accounting for specific procedural issues that the provisions in question could not withstand constitutional scrutiny.[20] This opinion makes clear that the law today in America prohibits the mandatory imposition of LWOP for juveniles. It requires that an individual assessment of the child offender and the crime occur sometime after pretrial transfer hearings and before sentencing. And while human rights scholars and activists might wonder why the Court neglected a cruelty analysis focusing instead on a merger between death penalty proportionality and procedural insufficiency, we are somewhat further from a categorical ban than the dissents believe and somewhat closer to a very narrow, but skillfully tread, middle ground.

The National Association of Counsel for Children as Amicus Curiae

The amicus brief submitted by the NACC focused primarily on the idea that mandatory life without parole as applied to children does not comport with the underlying theories of our criminal justice system or constitutional mandates.[21] While the Supreme Court focused primarily on the procedures by which the sentence is imposed, the Court did reiterate some of the major premises of the NACC's argument.[22] A child's conviction for felony murder or murder when coupled with a mandatory sentencing scheme in adult court undermines legal precedent.[23] This precedent requires judges and juries to give due consideration to the unique characteristics of the offender and the circumstances of the offense when the harshest of sentences may be imposed.[24]

The basic limitations of the adolescent mental process do not allow for a child to fully grasp the risk of imprisonment or the risk of another's death being a direct consequence of his actions.[25] A retribution justification for life without parole disintegrates once the trier of fact considers the limited capacity of children to assess risk.[26] If the child did not intend to kill, did not know another might be killed, or foresee any such risk, taking the child's life along with his potential cannot rest on the premise of just deserts.[27] If the child does not perceive any risk at all by virtue of his being an adolescent, the specific and general deterrence that the harsh punishment of life without parole should inspire ceases to exist.[28] If the child perceives some risk and acts in spite of it, incapacitation in a juvenile facility at most may be justified. Additionally, that a child's conviction for felony murder or murder can lead to an LWOP sentence undermines the rehabilitation theory altogether.[29] Throwing out the possibility of reform based on the dictates of a mandatory sentencing scheme does honor only to illogic and barbarism. Both the unique characteristics of adolescents and the sentence itself contradict what precedent and science say children are capable of and their potential for reform.[30]

› ***View full opinion***

To view briefs or submit a request for the NACC to participate as Amicus Curiae in a case, visit www.NACCchildlaw.org.

18 *Id.* at *14-15.
19 *Id.*
20 *Id.* at *14.
21 Brief for National Association of Counsel for Children as Amicus Curiae Supporting Petitioners at 3, Miller v. Alabama, Nos. 10-9646 & 10-9647, 2012 WL 2368659 (U.S. June 26, 2012).
22 Miller v. Alabama, Nos. 10-9646, 10-9647, 2012 WL 2368659 (U.S. June 26, 2012).
23 Brief for National Association of Counsel for Children, *supra* note 7, at 15-17.
24 *Id.*
25 *Id.* at 26-28.
26 *Id.* at 29-30.
27 *Id.* at 24.
28 *Id.* at 31.
29 *Id.* at 32.
30 *Id.*

Policy & News

Bill Would Curb Foster Care Entries Linked to Immigration, Deportation

A bill was introduced in the U.S. House of Representatives that aims to curb the number of children placed in foster care because of immigration enforcement, and end the termination of parental rights brought on because of deportation proceedings.

› ***Learn more***

Reforming Our Child Welfare System

The recently-appointed Nebraska Children's Commission met last month to begin reviewing potential improvements to the system. They will meet monthly to discuss child welfare issues.

› ***Learn more***

D.C. Child Welfare Law Change Leaves Some Behind

A change in the District's child welfare laws designed to help adopted children and those with legal guardians has left some without financial support.

› ***Learn more***

Eliminating Barriers to Interstate Adoptions

Why is it easier for an American family to adopt a child from across the world than adopt a foster child across a state line? State Department data show that in fiscal 2010, Americans adopted 11,058 children from other countries. By contrast, according to data from the National Data Archive on Child Abuse and Neglect, Americans adopted just 527 children from foster care across state lines that same year.

› ***Learn more***

Certification Update

Become a Child Welfare Law Specialist

The NACC is pleased to announce several new changes to make the Certification Application and Exam process more convenient for you.

- **The Certification Application is now available in electronic form.** Request an application via our web site.
- **NACC has launched a computer-based Certification Exam offered at ACT Centers nationwide.** With locations in every state the ACT Center network delivers computer-based testing at hundreds of sites across the country. Approximately 85% of the U.S. population lives less than an hour from an ACT Center.

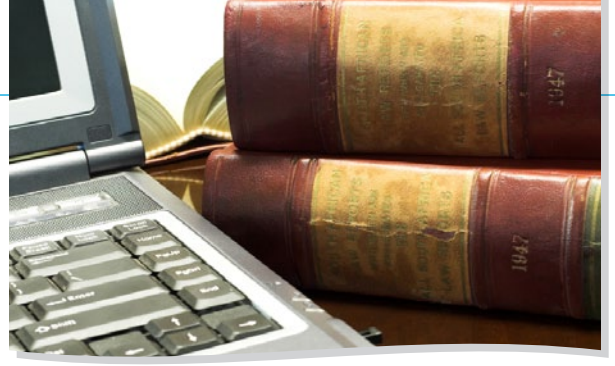
These changes will permit the NACC to accept applications year-round. Once your application is approved, you will be able to schedule your own exam at a local ACT testing center.

QIC Application Fee Waivers — 2012

We are pleased to announce that the QIC Child-Rep from Children's Bureau is funding an additional 200 certification applications in 2012. Applications are being accepted now.

2013 Target States

The NACC is applying to open certification in Alabama, Arizona, and Minnesota. We anticipate accepting applications as early as January 2013.



Professional Resources

PUBLICATIONS

Re-Visioning Case Management: Partnering with Families and Communities to Create Meaningful Change

Produced by Strategies: Strengthening Organizations to Support Families & Communities

This work provides guidance to staff and organizations in assessing, discussing, and modifying their approach to case management.

› ***View at no charge***

Foster Care Statistics 2010

Produced by the Child Welfare Information Gateway

› ***View at no charge***

Child Maltreatment 2010

Produced by the Child Welfare Information Gateway

› ***View at no charge***

The Revolving Door of Family Court: Confronting Broken Adoptions

This article, written by Brian Zimmerman and Dawn Post, explores the large number of children who are returned to the system through the revolving doors of family court. The article is published through the Capital University Law Review. It is available at 40 Cap. U.L. Rev. 437 (2012).

TRAINING CALENDAR

Tuesday, August 28, 2012

› ***13th National Conference on Child Sexual Abuse and Exploitation Prevention***

New Orleans, LA

Wednesday, September 19, 2012

› ***National Center for Victims of Crime 2012 National Conference***

New Orleans, LA

Congratulations

to our newly certified* Child Welfare Law Specialists!

Sandy Barnhart y Chavez	NM	Michael Chad Kotwal	TX
Alison Dean Casias	CO	Melanie A. Merritt	CO
Evan Ray Clift	TX	Amy Eliza Mitchell	UT
Susan Rose Deski	TX	Andrea D. Nguyen	CA
David Nichols Foley	NH	Kathryn Aring Piper	VT
Michael Lane Forsberg	UT	Gabriela Naomi Sandoval	CO
Charles David Halvorsen	NY	Stacey M. Snyder	UT
Julie Ann Ketterman-Amann	TX	Stephany Lynn Zaic	GA

*as of July 17

And a big thank you to Southwest, the preferred airline of NACC!

Through the generosity of Southwest Airlines, NACC has been able to develop a Member Emergency Assistance Program (MEAP). A limited number of travel vouchers are available to current NACC members for work-related travel.

› ***Learn more about this exciting member benefit***

SOUTHWEST℠

NACC Mission

As a multidisciplinary membership organization, we work to strengthen legal advocacy for children and families by:

- Ensuring that children and families are provided with well resourced, high quality legal advocates when their rights are at stake
- Implementing best practices by providing certification, training, education, and technical assistance to promote specialized high quality legal advocacy
- Advancing systemic improvement in child-serving agencies, institutions and court systems
- Promoting a safe and nurturing childhood through legal and policy advocacy for the rights and interests of children and families