

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.

H.B.12-1139: PRETRIAL DETENTION OF CHILDREN TRIED AS ADULTS

# Holding Children in Adult Detention Facilities

By Hannah Doenges NACC Legal Fellow

Colorado county jails, like most jails throughout the nation, were not designed to house developing children. They do not have programs appropriate to advance the development of children. They were also not designed with children in mind. Federal Law requires physical separation of children from adults and jails are not designed to comply with this restriction.

The result is an improvised system where youth are isolated in pods or cells for up to 23 hours a day without access to basic amenities such as high school education and recreation. Adults are not available to appropriately supervise and socialize with the youth to promote emotional and social development.<sup>1</sup> In Colorado, county jail visits between parents and children only occur without contact over a video monitor.<sup>2</sup>

These environments are harmful to children in a variety of ways. Children detained in adult jails face a thirty-six percent increased risk of suicide compared to those housed in juvenile detention facilities. They also suffer from emotional disturbances from long periods of isolation.<sup>3</sup> Since 2008, two children in Colorado have committed suicide in adult jails.

Juvenile facilities are much more suitable for housing children because they have on-site educational services, provide recreational activities, have pro-social programs, and allow for contact visits with the youths' families. Although there is progress, implementation is slow. In 2010, for example, the state legislature passed S.B. 54, requiring children in adult jails to receive at least four hours of education a week. The following year saw only fifteen of forty-one children receiving any educational services.<sup>4</sup>

1. Colorado Counties, Inc., *Avoiding Unnecessary Jailing of Youth in Adult Facilities*, STEERING COMMITTEE ON GENERAL GOVERNMENT (2012).  
2. *Id.*

3. Neelum Arya, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, CAMPAIGN FOR YOUTH JUSTICE (2007), [http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing\\_Juveniles\\_Report\\_2007-11-15.pdf](http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf).  
4. Colorado Counties, Inc., *Avoiding Unnecessary Jailing of Youth in Adult Facilities*, STEERING COMMITTEE ON GENERAL GOVERNMENT (2012).

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# Cases

## IN THE MATTER OF K.B.

In March, the Court of Appeals of Oregon held that a father who had sexually abused children in the past and had failed to complete sex offender treatment did not endanger the welfare of his own children.<sup>1</sup>

In 1994, the father served a prison sentence for physically abusing two preschool-aged children while babysitting.<sup>2</sup> After his release in 1996, the father admitted to sexually abusing the three-year-old girl in 1994 as well as sexually abusing a four-year-old boy and a one-year-old girl when the father was fifteen. In 1998, the father was kicked out of sex offender treatment after viewing child pornography.<sup>3</sup> The father was caught viewing child pornography again five months later while receiving sex offender treatment from another provider.<sup>4</sup> The father discontinued treatment, created a child with the mother, and all three moved to Ohio, where three more children were born.<sup>5</sup> While in Ohio, DHS contacted the family, and an Ohio magistrate decided that the father was not required to complete sex offender treatment before being able to live with the mother and the four children.<sup>6</sup>

1. *In the Matter of K.B.*, 248 Or.App. 715 (2012).  
2. *Id.* at 719.  
3. *Id.* at 702.  
4. *Id.*  
5. *Id.* at 721.  
6. *Id.*

The family moved back to Oregon in 2010, and DHS promptly filed a petition claiming that the juvenile court had jurisdiction over three of the children because the father's presence in the home endangered their welfare since he had disclosed inappropriate sexual conduct with children in the past and failed to complete the recommended sex offender treatment.<sup>7</sup> The juvenile court held that DHS proved both of these allegations.<sup>8</sup> The Court of Appeals, however, stated that DHS had the burden of proving a *current* risk of harm.<sup>9</sup> Neither the father's inappropriate sexual conduct with children in 1994 and when he was a teenager, nor his viewing of child pornography when in sexual offender treatment satisfied this burden. The fact that the father had failed to complete the recommended treatment in itself was not enough to create a presumption that the father was a current risk to his children; rather, the Court focused on the fact that there were no allegations against the father to suggest that the children were endangered.<sup>10</sup> Furthermore, the Court of Appeals found that the juvenile court erred in finding evidence that supported the argument that the father was a current risk.<sup>11</sup> The father's actual sex offender treatment provider, who had purged the father's files and could not remember the specific details of his case, asserted that an individual who has sexually abused children does not necessarily need to complete sex offender treatment in order to discontinue sex offender behavior.<sup>12</sup>

Additionally, because DHS failed to show that the father created a risk to the children, the Court of Appeals also reversed the juvenile court's finding that the mother of the children exposed them to an "unsafe person."<sup>13</sup>

7. *Id.* at 722.  
8. *Id.*  
9. *Id.*  
10. *Id.* at 723-24.  
11. *Id.* at 724.  
12. *Id.*  
13. *Id.* at 729.

## » Detention from page 1

H.B. 12-1139<sup>5</sup> amends C.R.S. 19-2-508 and keeps direct-file children in juvenile detention facilities unless a hearing before a judge is conducted concerning the child's transfer. Under C.R.S. 19-2-508(3)(c), when a child is charged as an adult in district court, he or she can be transferred from a juvenile detention facility to an adult county jail. The law gives the prosecutor the authority to decide the child's place of pre-trial confinement without affording the child any option for judicial review.

H.B. 12-1139 prohibits a child who is to be tried as an adult from being held in an adult jail or pretrial facility without a hearing in the district court. H.B. 12-1139 provides a list of factors for the judge to consider: 1) the child's age; 2) their mental state; 3) the availability of juvenile and adult facilities and 4) the risk the child may pose to the juvenile population. The judge determines whether transferring the child to an adult facility is proper by considering the relevant evidence of their individual case. The bill provides that the juvenile detention facility may request emergency review if a child presents an imminent risk to other children in detention but favors children being placed with other children in youth facilities.

This law passed and took effect March 15, 2012. The NACC is pleased that Colorado has passed this new restriction on the placement of children in County jails and will support similar measures in other states to limit the detention of children in jails.

### » [Read entire bill](#)

5. Pretrial Detention Of Children Tried As Adults, H.B. 12-1139, 2012 Sess. (Colo. 2012), [http://www.leg.state.co.us/clics/clics2012a/csl.nsf/fsbill-cont3/ECE1A34EBB8CDF187257981007F1A26?open&file=1139\\_01.pdf](http://www.leg.state.co.us/clics/clics2012a/csl.nsf/fsbill-cont3/ECE1A34EBB8CDF187257981007F1A26?open&file=1139_01.pdf).

## SUPREME COURT OF PENNSYLVANIA HOLDS INCARCERATION OF PARENT MAY BE A DETERMINATIVE FACTOR IN TERMINATION OF PARENTAL RIGHTS

In a recent case, *In re Adoption of S.P.*, the Supreme Court of Pennsylvania was asked to determine whether the incarceration of a parent can be determinative of whether grounds for termination of parental rights due to incapacity exist.<sup>1</sup>

After Child's mother voluntarily forfeited her rights to Child, the trial court placed Child in the care of a great-aunt and uncle.<sup>2</sup> Testimony established that Child had developmental delays and that the Child was diagnosed with autism, requiring that the child attend medical appointments six days a week.<sup>3</sup> The trial court then terminated Child's incarcerated father's parental rights, on the grounds that although the father wanted to visit with Child, sent Child gifts and cards, attended anger management and vocational classes, the father was incarcerated when Child was born, the father did not have any relationship with Child, the father declined to support Child with his prison earnings, the date of the father's release from prison was unclear, the father did not own a residence or vehicle, and the father would have to move into a half-way house for some time after his release from prison.<sup>4</sup> In addition, the trial court noted that Child required a Caretaker who could provide almost constant, specialized attention to her needs, which the father could not provide.

The trial court noted that Pennsylvania law states that parental rights may be terminated where it is demonstrated by clear and convincing evidence that "the repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child

to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent."<sup>5</sup> The trial court specifically observed that the father admitted that his incarceration resulted in Child's placement because he was unable to care for her while he was incarcerated.

Reversing the trial court's decision to terminate parental rights, the Superior Court cited a previous Supreme Court of Pennsylvania case, to support the Father's contention that incarceration alone cannot be the grounds for termination due to incapacity.<sup>6</sup>

Upon review, the Supreme Court, however, rejected the Superior Court's interpretation of prior cases.<sup>7</sup> In particular, the Supreme Court was concerned with the Superior Court's misinterpretation of the following passage:

A parent's absence and/or failure to support due to incarceration is not conclusive on the issue of abandonment. Nevertheless, we are not willing to completely toll a parent's responsibilities during his or her incarceration. Rather, we must inquire whether the parent has utilized those resources at his or her command while in prison in continuing a close relationship with the child. Where the parent does not exercise reasonable firmness in declining to yield to obstacles, his other rights may be forfeited.<sup>8</sup>

The Supreme Court made clear this does not stand for the proposition that incarceration could never be a factor considered in a termination proceeding.<sup>9</sup> Instead, this is intended to establish that an incarcerated parent has the duty to make use of avail-

able resources in order to continue a relationship with his or her child.<sup>10</sup> The Supreme Court held that incarceration is a factor, potentially determinative, that the court may consider when deciding whether grounds for termination exist.<sup>11</sup> The Court points out that this interpretation does not mean that all incarcerated parents forfeit their parental rights in a termination proceeding; rather, if the court finds grounds for termination, the court must assess the developmental, physical and emotional needs of the particular child in question and determine how the incarceration of the parent factors into a best interest analysis of the child.<sup>12</sup> The Supreme Court affirmed the trial court's decision to terminate the father's parental rights, pointing out that the trial court did not abuse its discretion by citing the father's complete absence from Child's life, the uncertainty of the father's parole date and the time he would need to spend in a half-way house, his need to obtain housing, transportation, and special training, and Child's close bond with her half-sister, with whom she now lived.<sup>13</sup>

» [View case details](#)

**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.

1. *In re Adoption of S.P.*, WL 1764190 (Pa. 2012).  
2. *Id.* at 1.  
3. *Id.*  
4. *Id.* at 2-3.

5. § 2511(a)(2).  
6. *In re Adoption of McCray*, 331 A.2d 652 (1975).  
7. *S.P.*, at 10-11.  
8. *Id.* at 655.  
9. *S.P.*, at 11.

10. *Id.*  
11. *Id.* at 12. The Court notes that the length of the incarceration may be an additional factor to consider.  
12. *Id.* at 11-12.  
13. *Id.* at 13



# Amicus

## In re E.T.

Recently, the NACC joined First Star and Voices for America's Children in filing an amicus curiae brief to reduce caseloads for court appointed attorneys. In the case of *E.T. v. Cantil-Sakauye*, the NACC filed a brief in support of Plaintiff-Appellant's petition for a writ of certiorari before the Supreme Court of the United States.

In this case, Sacramento County foster children filed a class action law suit in the District Court under 42 U.S.C. §1983, alleging that the excessive caseloads of the Sacramento County Dependency Court and its court-appointed attorneys violated federal and state statutory requirements of due process. Plaintiffs argued that the large number of cases interfered with the Court's ability to adequately hear dependency cases and impaired court-appointed attorneys' duty to provide effective counsel, resulting in harm to the Plaintiffs. Plaintiffs sought a declaratory judgment, injunctive relief, and an order that Defendants provide additional funding to improve the ability of the Dependency Court and court-appointed attorneys to help children in dependency cases.<sup>1</sup>

The District Court dismissed Plaintiff's claims under *O'Shea* and *Younger* on abstention grounds. Plaintiff's appealed the dismissal, and the Court of Appeals for the Ninth Circuit affirmed the District Court's dismissal. The Court of Appeals, echoing the District Court, cited *O'Shea* and *Younger*, which caution federal courts against issuing orders "that would entail heavy federal interference in such sen-

sitive state activities as administration of the judicial system."<sup>2</sup>

The Court of Appeals distinguished this case from *Los Angeles Cnty. Bar Ass'n*, in which the Court of Appeals did not abstain from deciding the constitutionality of a state statute establishing the number of judges in the county's superior court.<sup>3</sup> In that case, the Court of Appeals noted, the remedy would be "a simple increase in the number of judges."<sup>4</sup> In *E.T.*, however, the Court notes that the remedy "might involve examination of the administration of a substantial number of individual cases."<sup>5</sup> The Court of Appeals held that this considerable federal interference requires abstention under *O'Shea* and *Younger* and dismissed the case.

The NACC filed the amicus curiae brief in support of the plaintiff's appeal to the Supreme Court of the United States for a writ of certiorari. In the brief, Amici argue that the District Court failed to adequately take into account the unique nature of child protection dependency proceedings. Amici also claim that the District Court did not consider the injury suffered by foster care children from the inappropriate application of *O'Shea* and *Younger* to the case.

Inarguably, child protection dependency cases are dramatically different from other types of proceedings, such as those in *O'Shea* and *Younger*. In a child protection dependency case, the children appear as involuntary, victimized parties and the California dependency court system has the duty to protect their best interests. Similarly, child dependency attorneys have a "primary responsibility of any counsel appointed to represent a child

pursuant to this section shall be to advocate for the protection, safety, and physical and emotional well-being of the child."<sup>6</sup> Additionally, dependency proceedings have a statutorily mandated, specialized process with specific hearings at specific times for specific issues. The pendency of a child protection dependency case is often years, as the court addresses all of the significant issues with respect to the child as any placements or circumstances change throughout the minor's childhood.

Unlike many adults, children are unlikely to know or assert their rights in a dependency hearing. Without effective counsel, the children lose their voice in court.

Amici argue that the District Court's abstention leaves no appropriate venue for this issue since dependency courts are not equipped to handle the matter and state forums would not be able to meaningfully address the issue. Since dependency courts and dependency attorneys deal with every significant aspect of the children's lives, the overburdening of the courts and attorneys have an appalling impact on the children who require these services. Amici contend that the Courts had failed to properly consider this impact on the children when deciding to abstain from the case.

### > [View our brief](#)

The NACC Amicus Curiae Program promotes the legal interests of children and families through the filing of amicus curiae (friend of the court) briefs in state and federal appellate courts. The NACC files its own briefs and participates as co-amici in cases of particular importance to the development of child welfare and juvenile law. In recent years, the NACC has filed briefs in numerous state appellate courts, federal courts of appeal and The Supreme Court of the United States. To view briefs or submit a request for the NACC to participate as Amicus Curiae in a case, visit the Amicus Curiae page on our web site at [www.NACCchildlaw.org](http://www.NACCchildlaw.org).

6. CAL. WELF. & INST. CODE § 317(c)

1. *E.T. v. Cantil-Sakauye*, No. 10-15248, 1 <http://www.ca9.uscourts.gov/datastore/opinions/2012/03/12/10-15248.pdf>.

2. *Id.*  
3. *Id.* at 3.  
4. *Id.*  
5. *Id.*



# Policy & News

## National Study Cites Increased Off-Label Antipsychotic Drug Use Among Children

A national study conducted by researchers at The Children's Hospital of Philadelphia (CHOP) shows an increase in the number of Medicaid-enrolled children taking antipsychotics.

› [More information](#)

## From National Public Radio: Helping Foster Kids Even After Adoption

A news story from NPR about the challenges families and adopted children will face, even years after adoption.

› [Listen to the story](#)

## From the State Policy Advocacy and Reform Center (SPARC): "Privatization of Child Welfare Services: A Guide for State Advocates"

SPARC, a project coordinated by First Focus designed to help state child welfare advocates, has issued a policy brief and accompanying webinar concerning the privatization of child welfare services. The brief offers tips to advocates for how to

get in on the conversation in your state and make sure that any privatization is done thoughtfully and carefully.

› [View policy brief](#)

› [View webinar](#) (follow along with the recorded webinar via the audio player below the presentation)

## 2012 Sexting Legislation

The National Conference of State Legislatures is an organization that serves the legislators and staffs of the nation's 50 states, its commonwealths and territories. They provide research and information to legislators on pressing issues.

› [View state-specific sexting bills](#)

## TRAINING CALENDAR

December 3, 2012 · Indianapolis, IN

### › [Researching the Referral Stage of Youth Mentoring in Six Juvenile Justice Settings](#)

This training will examine best practices for referring youth to mentoring from six juvenile justice settings: detention, corrections, probation, delinquency court, teen court/youth court and dependency court.

January 24, 2013 · Washington, DC

### › [Positive Outcomes for At-Risk Children and Youth: Improving Lives Through Practice and System Reform](#)

This symposium will focus on promoting effective solutions to the problems facing vulnerable young people.

February 24–27, 2013 · San Antonio, TX

### › [Judicial Institute: Family Law](#)

This conference will provide the most current information and tools to family and domestic relations judges to improve case processing and outcomes for children, youth, families, victims.

April 14–17, 2013 · Washington, DC

### › [Making Children and Families a Priority: Raising the Bar](#)

The theme for the conference is based on the CWLA Standards of Excellence National Blueprint.

September 15–18, 2013 · Dublin, Ireland

### › [Thirteenth European Regional Conference on Child Abuse & Neglect](#)

The goal of this conference is to support individuals and organizations working to protect children from abuse and neglect worldwide.

# Child Welfare Law Certification



If you represent children, parents, or the state child welfare agency you may be eligible to become certified in child welfare law. The NACC certification program is accredited by the ABA and has been endorsed by the National Council of Juvenile and Family Court Judges, the Conference of Chief Justices, and the Conference of State Court Administrators.

Certification gives you the recognition as an expert and will help you negotiate better pay for your services.

NACC Child Welfare Law Certification is available to attorneys who serve in the role of Child's Attorney (including Guardian ad Litem, Law Guardian, Attorney ad Litem), Parent's Attorney, and Agency / Department / Government Attorney. The specialization area as approved by the ABA is defined as "the practice of law representing children, parents or the government in all custody, adjudication, disposition, foster care, permanency planning, termination, guardianship, and adoption. Child Welfare Law does not include representation in private child custody and adoption disputes where the state is not a party."

## Certification Preparation

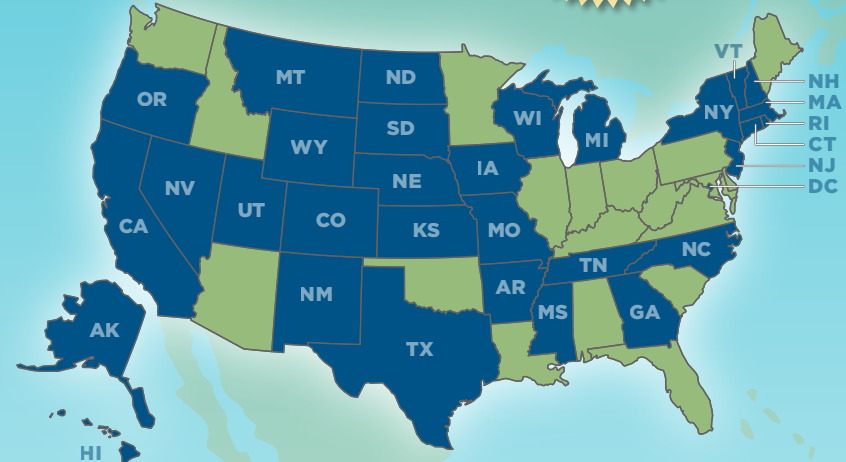
Your legal education, practice experience, and continuing legal education in child welfare, delinquency, family law, and related areas all help prepare you for the certification exam. Upon submitting a Certification Application, you will also receive a copy of the *Child Welfare Law and Practice* (Red Book).

## Apply to be certified for free!

On October 1, 2012, NACC received funding from the U.S. Department of Health and Human Services to pay the application fee for up to 200 applicants for certification. This funding comes through HHS' Children's Bureau. We are now open in 33 jurisdictions and have more than 470 Child Welfare Law Specialists (CWLS). The waivers are available on a first-come, first-serve basis through September 30, 2013. Applying takes about 20 minutes and applicants then have two years to complete all components including the exam.

## Eligibility at a Glance

- 3+ years practicing law
- 30% or more of the last 3 years involved in child welfare law
- 36 hours CLE/3 years (45 hours/3 years CA only) in courses relevant to child welfare law
- A writing sample demonstrating legal analysis in the field of child welfare law drafted in the last 3 years (court memo, motion, brief, article, etc.)
- Substantial Involvement Waivers are available for judicial officers, professors, and policy/supervising attorneys

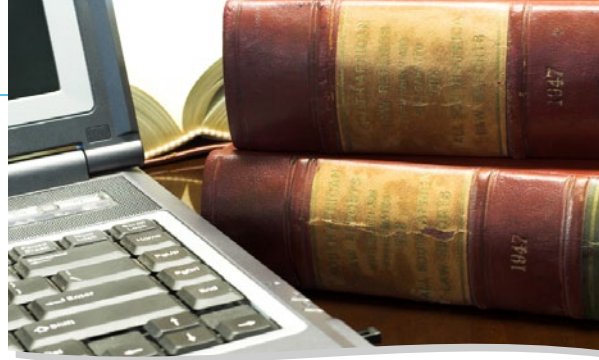


**If you meet these basic requirements, we would love to have you apply while we have funding from Children's Bureau to pay for your \$300 application fee!**

To apply or for more information, please visit our Certification page at

[www.naccchildlaw.org](http://www.naccchildlaw.org)

or contact Daniel Trujillo, 303-864-5359, or [Daniel.Trujillo@childrenscolorado.org](mailto:Daniel.Trujillo@childrenscolorado.org)



# Professional Resources

## PUBLICATIONS

You now have the opportunity to purchase publications from the NACC Official Bookseller: [Bookworks](#). Available publications include:



### [Confessions of a Prairie Bitch: How I Survived Nellie Oleson and Learned to Love Being Hated](#)

By Alison Arngrim

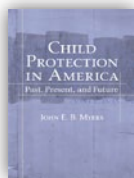
**Paperback \$14.99**

ISBN-13: 9780061962158

**Availability:** In Stock at Warehouse; Usually Ships in 1–5 Days

**Published:** It Books, 06/2011

Other editions of this title



### [Child Protection in America: Past, Present, and Future](#)

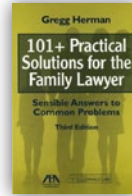
By John E. B. Myers

**Google EBook \$39.95**

ISBN-13: 9780195169355

**Availability:** In Stock at Warehouse; Usually Ships in 1–5 Days

**Published:** Oxford University Press, 07/2006



### [101+ Practical Solutions for the Family Lawyer: Sensible Answers to Common Problems](#)

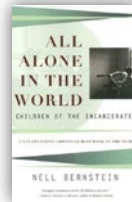
By Gregg Herman

**Paperback \$139.95 (includes CD-ROM)**

ISBN-13: 9781604425079

**Availability:** Special Order; Price and Availability May Change

**Published:** American Bar Association, 05/2011



### [All Alone in the World: Children of the Incarcerated](#)

By Nell Bernstein

**Paperback \$16.95**

ISBN-13: 9781595581853

**Availability:** In Stock at Warehouse; Usually Ships in 1–5 Days

**Published:** New Press, 08/2007



### [The APSAC Handbook on Child Maltreatment](#)

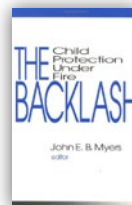
By John E. B. Myers, John E. B. Myers, APSAC (American Professional Society on the Abuse of Children)

**Paperback \$120.90**

ISBN-13: 9781412966818

**Availability:** In Stock at Warehouse; Usually Ships in 1–5 Days

**Published:** Sage Publications (CA), 06/2010



### [The Backlash: Child Protection Under Fire](#)

By John E. B. Myers

**Paperback \$65.00**

ISBN-13: 9780803954045

**Availability:** In Stock at Warehouse; Usually Ships in 1–5 Days

**Published:** Sage Publications (CA), 07/1994



### [Child Maltreatment: A Collection of Readings](#)

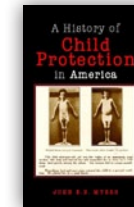
By John E. B. Myers

**Paperback \$46.80**

ISBN-13: 9781412995061

**Availability:** Special Order; Price and Availability May Change

**Published:** Sage Publications (CA), 05/2011



### [A History of Child Protection in America](#)

By John E. B. Myers

**Paperback \$24.99**

ISBN-13: 9781413423013

**Availability:** In Stock at Warehouse; Usually Ships in 1–5 Days

**Published:** Xlibris Corporation, 05/2004



### [Legal Issues in Child Abuse and Neglect Practice](#)

By John E. B. Myers

**Paperback \$128.75**

ISBN-13: 9780761916666

**Availability:** In Stock at Warehouse; Usually Ships in 1–5 Days

**Published:** Sage Publications (CA), 07/1998

Other Editions of this title

And, available from Bradford Publishing



### [Child Welfare Law and Practice, 2nd Edition](#)

Donald N. Duquette and Ann M. Haralambie, General Editors

**Item No:** BK1070-2

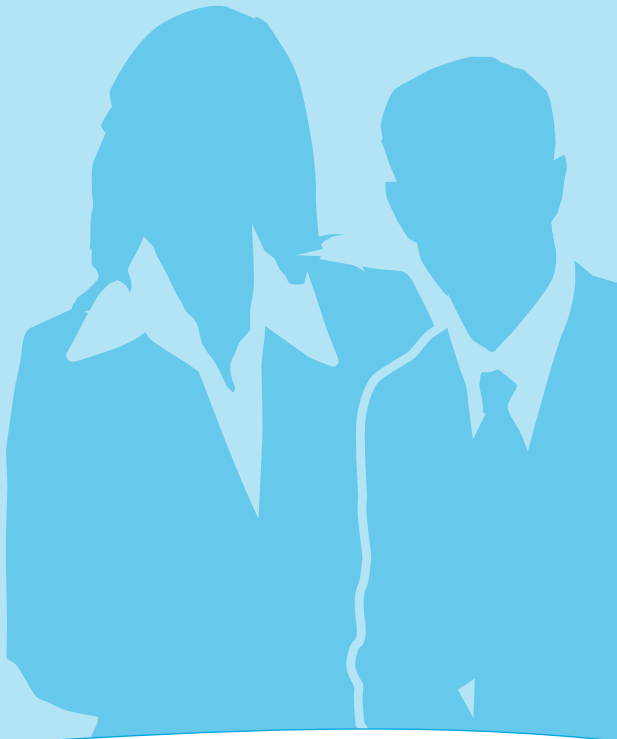
**Price:** \$89.00

# e-Guardian Member Feature

NACC is looking for nominations of outstanding advocates, so we can highlight them in our *eGuardian*.

**Do you know someone who does an outstanding job and deserves to be recognized?**

Send an email with their basic information and why you're nominating them to Taylor Stockdell at [taylor.stockdell@childrenscolorado.org](mailto:taylor.stockdell@childrenscolorado.org).



## 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](#)



## 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