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CARING FOR OUR KIDS: FEDERAL RESPONSES TO OVERMEDICATING CHILDREN IN FOSTER CARE?

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Introduction

The National Center for Youth Law (NCYL) is a non-profit organization based in Oakland, California. NCYL’s staff of attorneys and advocates works to ensure that public agencies created to protect and care for children do so effectively.

Several years ago, at the request of concerned foster parents and other child advocates, our office began investigating conditions in the Clark County (Las Vegas), Nevada foster care system. We discovered, among other problems, that foster children were often given psychotropic medications with little or no scrutiny of the drugs’ risks, benefits, or appropriateness. Foster parents provided us with examples of the adverse and, in at least one instance, almost fatal effects of this unfettered, unmonitored administration of antipsychotics, antidepressants, stimulants, and other medications upon children in their care. One young boy, who entered care in November 2005, was continuously on multiple psychotropic medications for more than three and a half years, including multiple antipsychotic drugs, until he was hospitalized with a life-threatening condition as a result of the drugs’ toxicity.

NCYL also works with public health nurses, psychiatrists, pharmacologists and others to reduce the inappropriate use of psychotropic medications among children in California’s foster care system. With support from Hedge Funds Care/Help for Children, we are studying state approaches to addressing the problems of “too much, too many, and too young” identified in the General Accounting Office’s 2011 Report. Since 2012, we have worked with California’s Departments of Social Services (CDSS) and Health Care Services (DHCS) trying to get these state agencies to cooperate in sharing data and to develop protocols for our children in care. The obstacles we encountered in that work exist in many other

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1 In 2011 the Nevada legislature enacted a major overhaul of the laws applicable to psychotropic medications administered to foster children. 2011 Nev. Stat. 2669 now codified at NRS §432B.4681 et seq.

2 General Accounting Office, Foster Children: HHS Guidance Could Help States Improve Oversight of Psychotropic Prescriptions, Report #GAO-12-270T (December 2011)
states. There are initiatives at the federal level that could be taken to address these obstacles and improve the safety and well-being of our children in foster care.

**Federal Leadership Lags, But it Can Catch Up**

In 2011 Congress enacted and President Obama signed the *Child and Family Services Improvement and Innovation Act* (P.L. 112-34) requiring states to develop and implement protocols for the appropriate use and monitoring of psychotropic drugs administered to foster children. A brief flurry of activity among federal agencies followed. In November 2011, the Administration for Children and Families (ACF), Centers for Medicare and Medicaid (CMS), and Substance Abuse and Mental Health Services Administration (SAMHSA) issued a joint letter promising collaboration among their agencies. In April 2012, the Children’s Bureau distributed a comprehensive *Information Memorandum* to state child welfare agencies in which it summarized some of the issues to be addressed and existing practice guidelines states could consult in devising protocols.  

In August 2012, HHS convened *Because Minds Matter*, a conference in Washington, D.C., bringing together representatives from state child welfare, health, and mental health agencies to hear from experts and begin a discussion about solutions.

The federal agencies, however, have not sustained the leadership promised by these initial responses. ACF’s attempts to monitor states’ progress in fulfilling the psychotropic medication mandates of the *Child and Family Services Improvement and Innovation Act* through its review of the Annual Progress and Services Reports (APSRs) is inadequate.  

ACF has signed off on California’s APSRs for the last two years despite little progress being demonstrated. There are few other federal efforts to curb the misuse of psychotropic drugs in foster care. Meanwhile, the promised improvements in the care and treatment of our nation’s foster children envisioned by the *Child and Family Services Improvement and Innovation Act* remain largely unfulfilled.

What is needed now are additional actions by Congress and the federal agencies. That action needs to be far more comprehensive in scale than has been attempted so far. There must be a greater sense of urgency driving responses to the concerns voiced about our foster children’s health and safety. The May 2014 Congressional hearing was the third such hearing since 2008. Since 2011, the General Accountability Office has issued several reports, each echoing many of the same concerns voiced at the Congressional hearing in 2008.

In March, 2015 the Office of the Inspector General raised the alarm anew in *Second Generation Antipsychotic Drug Use Among Medicaid-Enrolled Children: Quality of Care Concerns.* Among its findings, the OIG reported:

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3 Administration for Children & Families, U.S. Dep’t of Health and Human Services, Information Memorandum: Oversight of Psychotropic Medication for Children in Foster Care; Title IV-B Health Care Oversight & Coordination Plan,ACYF-CB-IM-12-03 (April 11, 2012).


• In only eight percent of cases were antipsychotics prescribed for medically accepted pediatric indications
• Monitoring of children taking the drugs was inadequate in 53% of cases
• In more than a third of the cases, children were taking the drugs too long, and
• In 37% of cases the child was being given too many drugs.

Evidence that a better job can be done at the federal level is apparent from the success in a parallel effort on behalf of another vulnerable segment of our population – elderly residents in nursing homes. Federal agencies should move swiftly to adopt this approach on behalf of foster children.

A Promising Model for Action: CMS’s Nursing Home Initiative

Dr. Phillip McGraw told a Congressional Committee in May 2104 “these [psychotropic] drugs are too often misused as ‘chemical straight jackets.’ This is a haphazard attempt to simply control and suppress undesirable behavior, rather than treat, nurture and develop these treasured young people.” Such rampant, unrestrained use of antipsychotics for these purposes was the subject of a recent article and editorial published in the *Journal of the American Medical Association: Psychiatry*.7

Recent data from a *Nine-State Summary* of Medicaid claims indicates an increase in the percentage of foster children/adolescents being administered antipsychotic drugs.8 A similar trend exists among the thousands of foster children in California being given one or more psychotropic medications.9 In stark contrast with the rate at which antipsychotics are administered to foster children, FDA approved uses for antipsychotics with children and adolescents are extremely limited.10 Antipsychotics use among foster children is largely “off-label” and used to control behaviors.

Our nation’s response to another at-risk and vulnerable group’s overmedication is in stark contrast with our failure to effectively address the same concerns about our foster children. This population - the elderly in nursing homes – is also dependent upon others for their care and safety and “chemical restraints” are a common “treatment” administered to them. Federal and state responses to concerns about the health and safety of these senior citizens far exceeds the scope of actions taken to address similar concerns for our nation’s foster children.

In 2011 HHS’ Office of the Inspector General (OIG) reported an alarmingly high use of psychotropic medications - atypical antipsychotics medications – among elderly nursing home residents. The OIG findings eerily mimic the findings of the 2011 GAO Report on foster children. One in four nursing home residents were receiving at least one antipsychotic medication. OIG also found that 83% of atypical antipsychotic drug claims were for elderly nursing home residents who had not been diagnosed with a condition for which antipsychotic medication was approved by the FDA. Many nursing home residents were receiving too high a dose and remained on the medications for too long.11

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7 Christoph U. Correll & Joseph C. Blader, *Antipsychotic Use in Youth Without Psychosis: A Double-Edged Sword*, *JAMA Psychiatry*, (published online July 1, 2015); Mark Olson, Marissa King & Mark Schoenbaum, *Treatment of Young People with Antipsychotic Medications in the United States*, *JAMA Psychiatry*, (published online July 1, 2015).
11 Karen Tritz, Director CMS Division of Nursing Homes, Michele Laughman, CMS Health Insurance Specialist, & Alice Bonner, Consultant, Northeastern University, *Report on the CMS Partnership to Improve Dementia Care in Nursing Homes: Q4 2011-Q1 2014* (April 1, 2014)
Many of the same reasons for the high use of antipsychotic medications to sedate nursing home residents likely explain the high use of similar psychotropic medications used to address the behaviors of foster children in group homes:

- Lack of staff training
- Low staff levels with high numbers of residents to professionally-trained staff
- Few relevant therapeutic interventions
- A culture of prescribing due to a perception that medications are effective in treating behaviors and that non-pharmacological interventions may be less effective or too time-consuming to be part of standard care.

In early 2012 CMS began a series of activities to address concerns from relatives and other advocates for the elderly and identified in the OIG Report. CMS established a National Partnership to Improve Dementia Care in Nursing Homes (Partnership). It established an initial goal of reducing antipsychotic medication use in nursing home residents by 15% by December 31, 2012. Nursing homes with high rates of antipsychotic use were identified and contacted by professional organizations. CMS began conducting regular (monthly) conference calls with states, regions and state coalitions. CMS publicly reported the incidence of antipsychotic medication use for each nursing home. CMS also contracted with university-based researchers to conduct a descriptive study to better understand the reasons for use of antipsychotic medications in nursing home residents. The initial focus of the Partnership on reducing the use of antipsychotic medications was expanded to include improving comprehensive approaches to the psychosocial and behavioral health needs of elderly persons in the nation’s nursing homes.

Our foster children are entitled to no less care and treatment than that afforded to our elderly. The urgency with which CMS approached the overmedication of nursing home residents, the scope of the actions taken on behalf of the elderly and the maintenance, evaluation, and adjustment of those efforts should be brought to bear with equal urgency and commitment to our children in foster care. HHS and CMS, taking the lessons learned from the Partnership, should move forward with similar actions on behalf of our foster children.

Data-Sharing: A Prerequisite to Development of Protocols for Psychotropic Medications

In the Child Welfare Services Improvement and Innovation Act of 2011 Congress assigned child welfare agencies the responsibility to create protocols for the appropriate use and monitoring of psychotropic medications administered to children and youth in foster care.

Although child welfare agencies are required to include information about the child’s medications as part of the child’s case plan, current law does not require states to aggregate the data or to make it available for analyses. In California, each foster child theoretically has a Health and Education Passport but for many children these Passports are incomplete and inaccurate and, even if they were reliable, there is no system for aggregating the Passport data. Consequently, our child welfare agency is dependent upon another agency for information about psychotropic medication prescriptions filled for children in foster care. This creates problems and those problems are not unique to California.

12 42 U.S.C. §675 (1). The term “case plan” means a written document which includes at least the following: ...(c) The health and education records of the child, including the most recent information available regarding ...(vi) the child’s medications...

13 California’s child welfare database does collect information on authorizations for psychotropic medications, but this data is limited to the date of the authorization, race, age, gender of the child and the county and type of placement in which the child is residing. Needell, B., Webster, D., Armijo, M., Lee, S., Dawson, W., Magruder, J., Exel, M., Cuccaro-Alamin, S., Putnam-Hornstein, E., Sandoval, A., Yee, H., Mason, F., Benton, C., Lou, C., Peng, c.
While child welfare agencies have responsibility for the psychotropic medication protocols, in many if not most states, it is the state’s Medicaid agency that has the data concerning prescription drugs, including psychotropic medications, is maintained by the state Medicaid agency. Additional data about mental health services may be housed in the Medicaid agency, some separate division, or an entirely different agency.

Although Title IV-B of the Social Security Act\(^\text{14}\) requires that child welfare agencies develop their Health Care Oversight Plan in coordination with the State Medicaid agency, there is no separate provision we are aware of that requires the State Medicaid agency to provide data or other assistance to the child welfare agency.\(^\text{15}\) In some states these two functions may be under the umbrella of one agency but in California, as is likely the scenario elsewhere, they are not.

The starting point for any state’s protocol should be the collection and analysis of relevant data. Information about foster children who are receiving psychotropic drugs and the drugs themselves is critical because

- Data can help separate what you think is happening from what is really happening
- Data will establish a baseline so you can measure improvement
- Data will help avoid putting solutions in place that will not solve the problem.

Despite the importance of data, in California we know very little about the psychotropic medications our foster children are being given. The GAO’s 2011 Report focused on, among other things, data about “too many” and “too much” - children on multiple psychotropic medications and dosages beyond the maximum for their age.\(^\text{16}\) In California we still do not know how many of our foster children are on multiple drugs of what classes and what doses. The little data available indicates a significant increase in the rate at which foster children are prescribed antipsychotics. This is particularly concerning given the very limited uses/diagnoses for which these drugs have FDA approval for use with children and the alarming risks and side effects associated with their use in children.\(^\text{17}\)

California has about fifteen percent of the nation’s children in foster care.\(^\text{18}\) During the last several years, our state’s foster care population has dropped sharply.\(^\text{19}\) But at the same time, there has not been an accompanying drop in the rate of authorizations for administering psychotropic medications to foster children and youth.\(^\text{20}\)

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14 42 U.S.C. 622 (b)(15)(A)

15 Congress clarified that by giving the state child welfare agency responsibility for the health care oversight and coordination plan it did not mean to reduce the State Medicaid agency’s duty to provide health care services to foster children, 42 U.S.C. 675 (b)(15)(B) (“subparagraph (A) shall not be construed to reduce or limit the responsibility of the State agency responsible for administering the State plan approved under title XIX [42 USCS §§ 1396 et seq.] to administer and provide care and services for children with respect to whom services are provided under the State plan developed pursuant to this subpart;"

16 General Accountability Office, Foster Children: HHS Guidance Could Help States Improve Oversight of Psychotropic Prescriptions, Report #GAO-12-270T (December 2011)


19 http://cssr.berkeley.edu/ucb_childwelfare/PIT.aspx (Between January 1, 2004 and January 1, 2013, California’s foster care population dropped from 83,000 to 56,000).

20 http://cssr.berkeley.edu/ucb%5Fchildwelfare/CDSS_5F.aspx
Several states have contracted with university-based researchers to pull together and analyze data to identify potentially inappropriate uses of psychotropic medications and to establish baseline measures. In 2009 the Kansas Department of Social & Rehabilitation Services published *Medicaid Children’s Focused Study: Prescribing Patterns of Psychotropic Drugs Among Child Medicaid Beneficiaries in the State of Kansas (Kansas Study).* More recently, Colorado’s Medicaid agency partnered with the Skaggs School of Pharmacy and Pharmaceutical Sciences to issue a report *Psychotropic Medication Use in Colorado Medicaid Children and Adolescents: A Focus on Foster Care Children.* Both studies illustrate the necessity of accessing Medicaid data to address concerns about psychotropic drugs.

Last year, Congress enacted the *Uninterrupted Scholars Act (USA Act)* (Public Law 112-278) and President Obama signed it into law on January 14, 2013. The USA Act amended the Family Educational Rights and Privacy Act (FERPA):

> to permit educational agencies and institutions to disclose a student’s education records, without parental consent, to a caseworker or other representative of a State or local child welfare agency or tribal organization authorized to access a student’s case plan “when such agency or organization is legally responsible, in accordance with State or tribal law, for the care and protection of the student.”

An amendment of Title XIX of the Social Security Act, similar to last year’s amendment to FERPA by the USA Act, one that explicitly allows or requires the state’s Medicaid agency to share pharmacy benefits claims data for children in foster care with the child welfare agency, would promote data sharing and contribute to the health and safety of our foster children.

Congress and HHS have set forth the types of data to be collected by state child welfare systems as a condition of receiving Title IV-B and IV-E funds.

The Foster Care Independence Act of 1999 (P. L. 106-169) provided States with flexible funding to carry out programs that assist youth in making the transition from foster care to self-sufficiency. The law and regulations promulgated under the Act also require States to collect information on each youth who receives independent living services and to collect demographic and outcome information on certain youth in foster care whom the State will follow over time. The information being collected about these youth includes limited questions about health insurance access and coverage.

*HHS should provide guidance and define the basic data elements that should be collected and provided to the child welfare agency as part of each state’s process for developing and implementing a plan for ongoing oversight and coordination of health care services for foster children required by Title IV-B, including data about the psychotropic medications.*

Based on the GAO study, analyses conducted by states, and the standards recommended earlier this year by the National Committee for Quality Assurance, we suggest the following data be included at minimum:

- Children and adolescents administered antipsychotic medications
- Children five years old and younger administered antipsychotic(s)

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21 Becci Akin, Stephanie Bryson, & Terry Moore, School of Social Welfare at the University of Kansas, Medicaid Children’s Focused Study: Prescribing Patterns of Psychotropic Drugs Among Child Medicaid Beneficiaries in the State of Kansas (August 2009) at https://keys.org/kureports/finalreportdrugs.pdf


23 42 U.S.C. §679; 45 CFR 1355, Appendix A
• Children and adolescents prescribed high dose of antipsychotics
• Children and adolescents prescribed two or more antipsychotics
• Children and adolescents prescribed three or more psychotropic drugs
• Children and adolescents with more than 20 day gap in prescription supply
• Children and adolescents for whom baseline metabolic tests are completed before administration of psychotropic medications
• Children and adolescents for whom metabolic tests are completed periodically while being administered psychotropic medications
• Length of time children are administered continuous psychotropic medications;
• Mental health diagnosis of children receiving psychotropic medication,
• Service utilization – i.e. average number of days between first prescription fill date and receipt of community-based services

Monitoring Guidelines

Monitoring of psychotropic medications for children in foster care includes two aspects. First, those states that have adopted standards or guidelines for the appropriate use of psychotropic medications identify children for whom the drug regimen appears to be outside those parameters. States have set up a variety of mechanisms to detect, monitor, and respond to those incidents. In some jurisdictions, a red flag triggers a prior authorization requirement. In others, it leads to a consultation with a psychiatric or pharmacology expert.

The second aspect of monitoring ensures that for those children who are administered one or more psychotropic medications, the safety and efficacy of the medications is periodically assessed through follow-up visits, measuring weight, body mass index, and lab work. We believe this type of monitoring has received less attention and consequently foster children are at risk for the adverse effects of drugs remaining undetected or timely addressed. A recent study completed by Dr. Julie Zito, who testified before Congress about these issues in 2008, confirms that children in foster care remain on psychotropic medications longer than other children.

New Jersey and Connecticut have adopted comprehensive protocols for the monitoring of children for whom psychotropic medications are prescribed. We recommend that HHS include these monitoring protocols as part of standards for minimally acceptable monitoring required under federal law.

Academic Detailing Demonstration Grants

During the 2014 Congressional hearing First Focus Vice-President Houshyar testified that “the pharmaceutical industry has skillfully marketed prescription medications to the Medicaid program.” Settlements and judgments in numerous lawsuits brought against pharmaceutical companies confirm the nature and extent of those marketing practices.

Academic detailing is a university or non-commercial-based educational outreach program. It seeks to improve the prescribing of targeted drugs or classes of drugs that is consistent with medical evidence

24 E.g., Arkansas Department of Human Services, Division of Medical Services, Pharmacy Unit, Memorandum to Arkansas Medicaid Prescribers (March 15, 2012) (requires signed informed consent form for any antipsychotic dispensed to all children under 18 years of age).
25 E.g., Washington’s Partnership Access Line (PAL) is a telephone based child mental health consultation system funded by the state legislature, at http://www.palforkids.org/.
from randomized controlled clinical trials. Persons involved in the provision of academic detailing do not have any financial links to the pharmaceutical industry.

In 2008 the Council of the District of Columbia enacted the SafeRX Amendment Act establishing “an evidence-based Pharmaceutical Education Program.” The Program was established to provide Medicaid prescribers with high-quality, evidence-based, cost-effective information regarding the effectiveness and safety of pharmaceutical products.”

We recommend that HHS support the development and implementation of models of academic detailing specific to the prescribing of psychotropic medications to children on Medicaid, including our children in foster care. If current law authorizing demonstration grants or other potential source within CMS or ACF does not permit such an allocation, we recommend that HHS seek the appropriate Congressional authorization.

Conclusion

In the absence of federal leadership to reduce the overmedication of foster children, some states are moving ahead; others are slow to institute reforms. A hodgepodge of varying quality and effectiveness has developed similar to the states’ responses to federal calls for public disclosure of information about child abuse fatalities. The enthusiasm and leadership that the Children’s Bureau and the Centers for Medicare and Medicaid put into reform early on needs to be rejuvinated. The recommendations made here will help to ensure that the promises made to our foster children as part of the Child and Family Services Improvement and Innovation Act will be kept.

27 Children’s Advocacy Institute, State Secrecy and Child Deaths in the United States (2012)
Many state courts do not address the reasonable efforts/no reasonable findings on a regular basis. Some state courts only discuss the reasonable efforts issue in termination of parental rights proceedings years after the child was removed from parental care. The reasons for this inattention include a number of policy and practice issues addressed in this section.

A. The Importance Of Attorneys

The quality of justice in the juvenile court is in large part dependent upon the quality of the attorneys who appear on behalf of the different parties before the court.1 Attorneys for children and parents provide critical support for their clients in child welfare cases. The complexity of these cases combined with the short time frame make their participation important for their clients and for the court. Judges do not work in a vacuum. The juvenile court bases its decisions on information it receives from the parties. If the only information the court reviews comes from the agency, it will be difficult for the judge to do anything but make orders based on the agency’s recommendations. Parents do not have the experience to address the legal issues that the court must decide. Only with well-prepared lawyers present will the court will receive information from multiple perspectives thus giving the judge alternative recommendations to consider.

The reasonable efforts requirement provides attorneys for both children and parents a powerful tool for enforcing their clients’ rights to services. By advocating for services that make removal unnecessary and reunification possible, attorneys can ensure that all reasonable steps have been taken by the agency to maintain family integrity.2 However, a number of barriers prevent many attorneys from fulfilling these goals.

B. Parents Are Unrepresented

The United States Supreme Court ruled that parents in child welfare proceedings do not have a constitutional right to counsel, even when termination of their parental rights is at stake.3 Thus, in some states parents are unrepresented by counsel in child protection proceedings, are appointed only in some cases, or are appointed only for certain hearings in the juvenile dependency process.4 In some states, the

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1 Advisory Committee Comment to Section 24 of the California Standards of Judicial Administration. (now Standard of Judicial Administration 5.40, California Rules of Court).
2 "Making Reasonable Efforts," op. cit., footnote 257 at p. 11.
3 Lassiter v State Department of Social Services, 452 U.S. 18 (1981). The majority opinion held that the Fourteenth Amendment does not require courts to appoint counsel for indigents in every parental status termination proceeding. The court noted that there was no loss of liberty at stake. In order for counsel to be appointed in a civil case the trial court must weigh several factors including the private interest at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions. The dissenting justices pointed out the seriousness of a termination of parental rights case and the necessity of counsel to “require that higher standards be adopted than those minimally tolerable under the Constitution.” The court stated that “[i]nformed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well.” (at pp. 33-34).
4 In Texas, for example, most parent attorneys are appointed after the critical Full Adversary Hearing. “Legal Representation Study: Assessment of Appointed Representation in Texas Child-Protection Proceedings,” Children’s Commission, Supreme Court of Texas, Permanent Judicial Commission For Children, Youth & Families, Austin, 2011, at pp 10-14.
court appoints attorneys for indigent parents only in termination of parental rights hearings. Unrepresented parents do not understand the legal system, and particularly complex issues such as whether the agency has provided adequate services to prevent removal from their care. The legal system anticipates that issues will be raised by counsel. If parents are unrepresented, it is likely that the issue will not be discussed.

In a national survey, professionals in each state were asked what the primary areas in need of improvement in their juvenile dependency courts. Twelve state court representatives indicated that representation (assuming appointment) is not adequate. A Texas study of legal representation concluded that in that state there were insufficient numbers of attorneys, insufficient training, parents’ attorneys were appointed late in the case, attorney compensation was inadequate, and the quality of representation was uneven. Most parent attorneys are appointed after the Full Adversary Hearing, thus making it difficult, if not impossible, for the reasonable efforts issue to be raised.

Most states appoint an attorney or guardian ad litem (GAL) for the child. This appointment is mandated by the Child Abuse and Prevention and Treatment Act (CAPTA) originally enacted in 1974. This legislation also requires states to have provisions that ensure that the GAL receives training appropriate to the role. CAPTA also provides federal funding to states in support of services for prevention, assessment, investigation, prosecution and treatment in child abuse cases. However, appellate case law indicates that attorneys and guardians ad litem for children rarely, if ever, appeal trial court decisions relating to reasonable efforts.

C. Attorneys Are Appointed Too Late And Are Not Prepared

Attorneys should be appointed for each parent and the child in every child welfare case. The court should appoint these attorneys as soon as possible, preferably simultaneously with the filing of a petition. Simultaneously with the appointment the agency should provide the attorneys with a copy of the petition and supporting documents. Attorneys have significant responsibilities in child welfare cases. They must interview the client (parent or child) and family members, interview the social worker, investigate the facts of the case, and review reports including the social worker’s file, all in an effort to

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7 Id., at p. 18.


9 Tex. Fam. Code section 262.201


12 P.L. 93-247 section 106(b)(2)(B)(xiii). CAPTA was amended several times, most recently in 2010 (P.L. 111-320).

13 Id.


15 Peters, J.K., J.P. Representing Children in Child Protection Proceedings: Ethical and Practical Dimensions, LexisNexis, 2d. edition, Mathew Bender, Newark, 2001, at p. 905; Edwards, L., “Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment,” Juvenile and Family Court Journal, Vol. 63, No. 2, Spring, 2012, at pp. 21-37; In re Hannah YY, (3 Dept. 2008) 50 A.D. 3d 1201, 854 N.Y.S.2d 797 – Mother’s fundamental rights were violated when she was not advised of her right to counsel until after the removal hearing was over, at which point the Public Defender’s office was assigned to represent her in subsequent proceedings.
determine whether the child can safely be returned to the family or relatives immediately. Additionally, the attorney must investigate whether the agency exercised reasonable efforts to prevent removal of the child.\textsuperscript{16}

Many states appoint attorneys for parents at the shelter care hearing.\textsuperscript{17} This is the first hearing after a child has been removed. At this hearing the juvenile court must make a finding whether the agency provided reasonable services to prevent removal of the child. If an attorney is appointed at that hearing, he or she will be ill-prepared to argue the reasonable services issue. Appellate court decisions reflect that the “reasonable efforts to prevent removal” issue rarely tried in the trial courts.

Attorneys should approach the presiding juvenile court judge concerning early appointment. If that is not possible, another strategy for the unprepared attorney is to request an adjournment.\textsuperscript{18}

\textbf{D. Attorneys Lack Training}

Attorneys working in juvenile dependency court are poorly paid and have low status in the legal system.\textsuperscript{19} A national study of parents’ attorneys and guardians \textit{ad litem} revealed that training was the area needing the most improvement.\textsuperscript{20} Often representing parents in juvenile dependency court is the first job for a new attorney. After a year or two many are eager to move on to another legal field where the pay is better and where they are not engaged in “social work.”\textsuperscript{21}

\begin{quote}
More interesting perhaps, is how very few state statutes articulate the training and qualifications required of attorneys as counsel in child abuse and neglect proceedings.\textsuperscript{22}
\end{quote}

Even if the parents are represented by counsel at the shelter care hearing, many attorneys lack training to alert them the needs of their client, community resources, and to the reasonable efforts issue.\textsuperscript{23} National experts state that before accepting representation in a juvenile dependency case attorneys should be familiar with the following:

- The causes and available treatment for child abuse and neglect.
- The local child welfare agency’s procedures for complying with reasonable efforts requirements.
- The child welfare and family preservation services available in the community and the problems they are designed to address.

\textsuperscript{16} There are still more responsibilities. These listed above are only a summary. See “Making Reasonable Efforts,” \textit{op.cit.}, footnote 257 at pp. 11-30.
\textsuperscript{19} “Attorneys representing all parties in juvenile court are hampered by high caseloads, low status and pay, lack of specific training and experience, and rapid turnover.” Hardin, M., “Responsibilities and Effectiveness of the Juvenile Court in Handling Dependency Cases,” \textit{The Future of Children: The Juvenile Court, Center for the Future of Children, The David and Lucile Packard Foundation}, Vol. 6, No.3, Winter, 1996, at pp. 111-125, 118; In Tennessee when the Supreme Court mandated that attorneys be appointed for indigent parents in dependency cases, the court simultaneously lowered the cap on attorneys fees from $1,000 to $500. See Brooks, S., \textit{op.cit.}, footnote 278 at p. 1039.
\textsuperscript{20} “The number one area identified as needing the most improvement with regard to representation was training of attorneys and guardians \textit{ad litem} (GAL’s).” \textit{Id.}, at p. 15.
\textsuperscript{22} Dobbin, et.al., \textit{op.cit.}, footnote 320 at p. 49.
\textsuperscript{23} “In the majority of states, attorneys for parents currently receive only some or no additional training.” \textit{Id.}, at p. 33.
(3) The structure and functioning of the child welfare agency and court systems, the services for which the agency will routinely pay, and the services for which the agency either refuses to pay or is prohibited by state law or regulation from paying.

(4) Local experts who can provide attorneys with consultation on the reasonableness and appropriateness of efforts made to maintain the child in the home.  

Early appointment, long-term assignments to juvenile dependency court, and adequate training are critical if attorneys are to have an impact on the court’s decisions.

E. Attorneys do not understand their role

An additional barrier to effective representation for parents is confusion about the role an attorney will play in the complex dependency system. Should attorneys raise the “no reasonable efforts” issue? Should the attorney be proactive and conduct research in order to understand the dynamics of a family? The same national study indicated that two-thirds of the experts contacted indicted that attorneys appointed for parents are only ‘somewhat’ or ‘not at all’ proactive in their representation of their clients.

F. Attorneys/Gal’s For Children Do Not Raise The Issue

Court decisions reflect that the attorneys and guardians ad litem for children rarely, if ever, raise the reasonable efforts issue. It is likely that appointed attorneys/GAL’s do not believe that their role encompasses the adequacy and timeliness of services to parents. Very likely they perceive these issues as between the parents and the children’s services agency.

Two experienced California attorneys who represent parents in juvenile dependency cases offer several reasons why the reasonable efforts issue is not raised by attorneys early in the case. They say that return of the child is not an option so that the reasonable efforts issue will not result in something their client will understand. Further they state that the issue can upset the judicial officer as the issue has little or nothing to do with the outcome of the hearing. They also fear that the jurisdiction will lose federal funding when the judge makes a “no reasonable efforts” finding. Finally, they state that since there is no definition of reasonable efforts, attorneys do not participate in trainings that educate them about how they should approach the issue. A full statement of their reasons is contained after the case law summary in Appendix A under California.

Hopefully, the materials in this booklet will encourage attorneys to take a more pro-active role in dependency cases and address the reasonable efforts issue early and often.

G. Attorney Attitudes – “What Good Will It Do?”

Attorneys may recognize that the child welfare agency will lose federal dollars should the court either fail to make a reasonable efforts finding or make a “no reasonable efforts” finding. However, attorneys often do not see any benefit to their clients should the court make a “no reasonable efforts” finding. The state may lose money, but they believe the finding will not greatly benefit their client in the case before the court. They also believe that the judge will not be receptive to a finding that will reduce the money coming to the agency from the federal government.

These Attorneys are mistaken about the impact of a “no reasonable efforts” finding. Since the finding triggers a loss in federal funding, the agency takes these findings very seriously. If a judge determines

25 Id., at p. 39.
that parental visitation is inadequate and makes a “no reasonable efforts” finding, the agency will receive a clear message that visitation is important and will adjust agency policy and practice in the case before the court and in other cases they are managing. As a result the “no reasonable efforts” finding will have an impact on agency practice and will improve services for all families, not just the one before the court.

A well-prepared, trained attorney can make a significant difference in juvenile dependency proceedings. By insisting that the agency produce evidence of efforts to prevent removal and, if a child has been removed, to facilitate reunification the attorney will ensure that children are not unnecessarily removed from their families and that they are safely reunited, if possible.
CHARACTERISTICS OF ATTORNEYS REPRESENTING CHILDREN IN CHILD WELFARE CASES

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Introduction

Every day, in state and local courts throughout the United States, judges are called upon to decide who should have the responsibility for the immediate and long-term care of neglected and abused children. Federal recognition of the right to independent advocacy for the children subject to these proceedings originates with the 1974 Federal Child Abuse Prevention and Treatment Act (CAPTA). As a condition of receiving federal funds for child abuse prevention services through CAPTA, states must provide for the appointment of a guardian ad litem (GAL), who has received training appropriate to the role, for every child whose case results in a judicial proceeding.\(^1\)\(^,\)\(^2\)\(^,\)\(^3\) CAPTA permits the courts to appoint a guardian ad litem (GAL) who is an attorney or a lay advocate or both. CAPTA charges child representatives to obtain “first-hand a clear understanding of the situation and needs of the child; and to make recommendations to the court concerning the best interests of the child.”\(^4\) The CAPTA requirement reflects the view that children have interests that should be represented in these proceedings that may differ from the interests of their parents and the state (Pitchal, 2006; Taylor, 2009). The idea is that even though the state has brought the action to protect the child, the voice and needs of the child may get lost in the fray of the arguments and allegations between the state’s lawyers, parents, and other adults that are parties to the case. Furthermore, the child needs an advocate should the state fail to deliver on necessary services and actions due to fiscal constraints and organizational failures (Ventrell, 2010).

Since the passage of CAPTA, legal scholars have written extensively about how the voice and needs of children in dependency cases should be independently represented, most advocating for representation by attorneys (see for example, Heimov, Donnelly, & Ventrell, 2007; Pitchal, 2006; Smiles, 2003), and a few

ENDNOTES

\(^{1}\) 42 U.S.C. §5106(a)(2)(A)(xiii)

\(^{2}\) The National Quality Improvement Center on the Representation of Children in the Child Welfare System has compiled the state laws governing the child’s legal representative on its website. See www.ImproveChildRep.org

\(^{3}\) It should be noted that in most states, CAPTA comprises less than 5% of federal child welfare revenue provided to states, the majority flowing from Title IV-E and, to a lesser extent, IV-B of the Social Security Act. See http://www.childwelfarepolicy.org/maps/single?id=290

cautioning against the consequences of providing children attorneys (Guggenheim, 2003; Appel, 2008). Another field of debate has been the relative merits of client-directed versus substitute judgment role of representation. State laws vary in the definition of the role for the attorney, that is, whether client-directed or substitute judgment/best interests, and some states provide for both types of representation. (Appell, 1995; Duquette, 2000; Khoury, 2010; Taylor, 2009). Federal law is silent on the need for, or training requirements for, client-directed attorneys for children who are the subject of child welfare cases.

Also since the passage of CAPTA, professional associations have been debating, writing and promulgating standards for child representatives. In 2001, the American Bar Association established child representation as a distinct legal specialty with its own Board Certification (ABA Standing Committee on Specialization Approval of NACC Definition, 2001). Many law schools started child advocacy clinics (Ventrell, 2005). More recently, in 2011, the American Bar Association General Assembly approved a Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (American Bar Association, 2011). In October 2009, the federal Children’s Bureau included child representation in its National Quality Improvement Center initiative. After a national needs assessment of the field, the National Quality Improvement Center on the Representation of Children in the Child Welfare System (henceforth the QIC-ChildRep) developed a Best Practice Model to guide lawyers in representation of children. The 2012 article by Duquette & Darwall provides the most recent comprehensive review of the literature and professional activities on all of these issues (Duquette & Darwall, 2012).

While there has been considerable interest in defining and improving the legal representation that children in child welfare cases receive from their attorneys, there is only limited understanding of who these attorneys are and what they are actually doing to fulfill this role, either as a GAL, a client-directed attorney or both. Information about the practice context, range of income, practice experience, and training of child representatives has not been collected or published, either at the national or state level. Furthermore, no systematic surveys of these attorneys about their beliefs and attitudes about child representation work in the United States have been published to date.

This paper begins to fill the gap in knowledge about the attorneys who serve the child representation role in the legal-judicial system serving maltreated children. The paper examines the characteristics, experiences, and circumstances of attorneys representing children in dependency cases in the state of Washington and nineteen counties in Georgia using data collected during the experimental evaluation of the QIC-ChildRep Best Practices model for child representation. Understanding characteristics of lawyers who are currently representing children will guide legislators, courts and policy-makers seeking to provide and improve upon the delivery of legal services for maltreated children.

Methods

5 The majority of state laws (63%) mandate the appointment of an attorney to serve in the GAL role, but these mandates are not always followed in local courts (First Star & Children’s Advocacy Institute, 2012).
6 Other terms for client-directed attorneys are attorney at item, child’s counsel, counsel for the child, child’s attorney, or attorney for the child.
8 Ross, Nicola M., reports on a qualitative study of attorney beliefs and attitudes in New South Wales, Australia and found that “lawyers reported that they represented children in very different ways, reflecting ambiguity about how to interpret these roles and involve children as clients or the subject of best interests representation.” See Different Views? Children’s Lawyers And Children’s Participation In Protective Proceedings In New South Wales, Australia, International Journal of Law, Policy and the Family 27(3), (2013).
9 QIC-QIC-ChildRep is the National Quality Improvement Center on Child Representation in the Child Welfare System at the University of Michigan Law School, www.improveQIC-ChildRep.org. These data were collected by Chapin Hall at the University of Chicago, which serves as the evaluator of QIC-ChildRep Best Practices model implementation in Washington and several judicial districts in Georgia.
10 These data will be used to understand the implementation and impact of the QIC-ChildRep Best Practices model demonstration projects in Washington and selected jurisdictions in Georgia. Findings from this evaluation, forthcoming at the end of 2015, will develop many of the findings of this paper.
Sample
The sample was drawn from the group of attorneys recruited for the demonstration of the QIC-ChildRep Best Practices model. Most recruited attorneys completed the survey between April 2012 and April 2013.\(^{11}\) The QIC-ChildRep study sought to recruit all practicing attorneys representing children throughout Washington and in study counties in Georgia. The two largest Georgia counties (Dekalb and Fulton) were excluded from the project because attorneys in those two counties practiced primarily as staff attorneys in large legal offices, and random assignment of attorneys to treatment and control groups within the same organization would not have been feasible or reliable. In Washington, these attorneys were working in 25 different counties, including King (Seattle), Pierce (Tacoma), Clark (Vancouver), Spokane, and a number of medium and small size counties. Together, these 25 counties represented 89% of Washington’s child population.\(^ {12}\) In Georgia, 13 jurisdictions participated, covering 19 counties. These counties represented 26% of Georgia’s child population.\(^ {13}\)

The sample consists of 126 child representatives in Washington and 143 child representatives in Georgia (Table 1). In Georgia, the partner organization for the study, the Georgia Administrative Office of the Courts, sought and received agreement from presiding juvenile court judges in participating jurisdictions throughout the state to require all attorneys practicing in those jurisdictions to participate in the demonstration. As a result, all attorneys practicing at the start of the study or who began to represent children in one of the Georgia evaluation jurisdictions during the recruitment period were automatically enrolled in the study and received a survey. In Washington, participation was based on a statewide recruitment and consent process conducted by the Center for Children and Youth Justice and the Washington Office of Civil and Legal Aid, two of the QIC-ChildRep partner organizations in Washington. Staff from these partner organizations reported that, out of all the attorneys known to practice child welfare representation, fewer than 15 attorneys either did not respond or declined to participate.

Data
The data for this study were obtained via a web-based survey site developed for the QIC-ChildRep evaluation. In brief, attorneys were administered surveys at the inception of the evaluation (baseline survey), and then repeatedly over the course of the evaluation based on the number and status of the dependency cases each attorney represented. The data used for the current study, however, is limited to those collected via the baseline survey. The response rate for the baseline survey was high (WA: \(n=117, 93\%\); GA: \(n=123, 86\%\)).

The questions on the baseline survey cover a number of different domains, including attorney demographic characteristics, practice tenure, contract arrangements with counties, income, caseload size, and continuing legal education and experience in different areas of the law. The survey also contains several questions about attorneys’ opinions concerning the level of responsibility that child representatives should assume over various dependency case tasks and the importance of various tactics and objectives vis-à-vis dependency court outcomes. Finally, the survey contained a question about whether attorneys find child representation rewarding and a question about attorneys’ perception of impact as child representatives on child welfare outcomes. The question about impact on outcomes was kept general and did not parse out the different types of outcomes, such as due process outcomes, case disposition outcomes, and/or well-being outcomes. Rather, the question was intended to be a barometer of attorneys’ general sense of influence in the dependency court. In addition to survey data, information was also

\(^{11}\) The sample probably does not include attorneys who occasionally took one or two child representation cases over several years.

\(^{12}\) As of 2010 (U.S. Census)

\(^{13}\) Ibid.
collected from each jurisdiction on the mechanism for payment of child representatives and the circumstances under which children were provided child representation attorneys.

**Analysis Approach**

Our primary objective is to describe the characteristics, experiences, and circumstances of the sample as a whole. Nevertheless, to help inform our understanding of the degree to which the characteristics of our sample reflect those of the broader population of attorneys representing children, we compare the characteristics and circumstances of attorneys across the two samples. To the extent to which the characteristics and circumstances of attorneys in these two samples are found to be similar, we can make stronger claims about the representativeness of this combined sample to the population of child representatives in other jurisdictions. The statistical procedures used to conduct these comparisons varied depending on the nature of the variable under examination. Differences on interval-level and categorical variables are examined using a chi-square test of the equality of proportions, and differences on ordinal-level variables are examined using ordered logistic regression.

**Study Context**

The interpretation of the results is guided by three important features of the study context. First, the experimental evaluation of the QIC-ChildRep was focused explicitly on states where a large number of attorneys practiced either independently as solo practitioners or in small firms, or in small numbers (under 10 attorneys representing children) in non-profit legal aid organizations (Table 2).

Second, the state laws addressing the circumstances under which children were provided attorneys in dependency cases in Georgia were very different than they were in Washington at the time of the survey. Because of these differences in state law and local practice, Georgia attorneys were representing a group of children that was on average younger than the children being represented by Washington attorneys. In Washington at the time of the survey, the appointment of an attorney to fulfill the CAPTA requirement or to provide client-directed representation was not mandated at any point in the case for any child. State law provided that “if the child requests legal counsel and is age twelve or older, or if the guardian ad litem or the court determines that the child needs to be independently represented by counsel, the court may appoint an attorney to represent the child’s position.” Local court practice varied, but the majority of courts at least provided for the appointment of a client-directed attorney upon request for children entering or already in out-of-home care at the age of 12 or older. In Georgia at the time of the survey, state law mirrored CAPTA, allowing jurisdictions the discretion to assign either a CASA or an attorney to fulfill the GAL role. Participating jurisdictions in Georgia varied on whether attorneys were used to fulfill the GAL role. Half of the jurisdictions reported attorneys were assigned for children in all cases, and the remainder assigned an attorney upon request or only as required by state law. All children, regardless of age, were entitled to counsel (a client-directed attorney) in termination proceedings (Child Welfare Information Gateway, 2011).  

Third, the role of the attorney - whether the attorney was charged with a GAL or “substitute-judgment” role or with a role to represent the child’s “expressed wishes” – was different in the two states at the time of study. In Washington, when an attorney was assigned, the attorney’s role was almost always to represent the child’s expressed wishes. In Georgia, by contrast, even though the legal authority and practice was quite ambiguous and unsettled at the time of the survey, attorneys were commonly, although not always, appointed to serve both roles at once, or in a “dual role.” That is, the attorneys served in a substitute-judgment, GAL role unless there was a conflict between the attorney’s view of the child’s best

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14 [In this footnote, we will provide the best reference for GA and for WA that describes the changes in the law since the study.]
16 Georgia law governing child abuse and neglect at the time of the study has been superseded by a new code with new references. Language from Georgia law at the time of the study is available in this Children’s Bureau publication.
interests and the child’s wishes. If and when that occurred, the attorney was obligated to inform the court and an expressed wishes, counsel for the child would be appointed.18

Findings

In this section we describe the findings concerning the sample as a whole, as well as those concerning the differences across the two sampled states. Unless otherwise noted, the findings of cross-state comparisons are only described where these differences were found to be statistically significant. The findings are presented in Tables 3 through 11.

Child Representation Practice

All the attorneys in the sample had represented or were representing children during 2013, but there was a range in how much child representation each attorney was doing. For fifty-two percent of attorneys across both sites, child representation constituted 20% or less of their practice (Table 3). For twenty-four percent of attorneys, it constituted 21-40% of their practice. Child representation constituted at least 61% of attorney practice for only 15% of attorneys. Attorneys were also asked to report the number of cases represented in the last six months. Thirty-seven percent across both samples represented fewer than five cases in the last six months. Twenty-four percent had represented 6-10 cases, 19% had represented 11-21 cases and 20% had represented 22 or more cases. Thus, these “child representatives” were attorneys with a range of experience and specialization in this area of practice, with child representation constituting a minority of their practice for most child representatives.

The majority of attorneys representing children (56%) had been practicing child representation for at least five years. On the two ends of the distribution, 26% had been practicing for more than ten years and 29% had been practicing for two years or less.

Attorney Demographic Characteristics

Most attorneys who represent children were white (87%) (Table 4). Ten percent of attorneys in the Georgia jurisdictions were African American and four percent of attorneys in Washington were African American. Very few attorneys indicated Hispanic origin. Only 3% of attorneys were Asian or “Other” race/ethnicity. The difference between the percent of “Other” race/ethnicity was significant (p<.05) across the two sites, with 5% of Washington attorneys reporting “Other” versus 1% of Georgia jurisdiction attorneys.

Attorneys who represented children ranged in age. Over both sites, 5% of attorneys were under 30. Thirty-five percent were in their thirties. 26% were in their forties and 21% were in their fifties. Twelve percent were over 60 years old. The average number of years since admission to any state bar was 13.5 years. Most of these attorneys (84%) did not have other graduate degrees. With respect to other graduate degrees, attorneys practicing in the Georgia jurisdictions had significantly more degrees in psychology, counseling, or other human services field (6% vs. 1%, p<.05) compared to other fields and attorneys practicing in Washington had significantly more degrees in social work (3% vs. 0%, p<.05). One-third of attorneys indicated that they had worked with children in capacities other than as an attorney and 56% were a biological, foster or adoptive parent.

Areas of Law Practice

18 In 2012, the Georgia Supreme Court approved a formal advisory opinion of the State Bar, ruling that a dual role attorney, confronted with a conflict between the child’s expressed wishes and the attorney’s considered opinion of the child’s best interest, must withdraw as GAL, and seek appointment of a separate GAL without disclosing the reasons for her withdrawal. The attorney was permitted to continue as the child’s (client-directed) attorney, or to withdraw entirely if the conflict was severe. State Bar of Georgia (Formal Advisory Opinion 10-2, upheld Ga. S.Ct. Docket No. S11U0730.)
In addition to representing children, attorneys were practicing a variety of other types of law (Table 5). At least three-quarters (79% to 99%) of the Georgia jurisdiction attorneys were practicing some other type of child and family law (divorce or paternity, private adoption, truancy, and juvenile justice). The proportion of attorneys who practiced child and family-related law was significantly lower (p<.01) in Washington. The proportion of Washington attorneys with these types of practice was between 32% (private adoption) and 52% (juvenile justice). Significantly more (p<.05) Georgia jurisdiction attorneys than Washington attorneys were practicing trusts and estate (GA: 43%; WA: 31%), personal injury (GA: 32%; WA: 18%) and general business (GA: 34%; WA: 20%). \(^{19}\) Across both sites, 62% were representing adults in criminal cases, 26% were practicing landlord/tenant related law, 18% were involved in real-estate law and 9% were practicing bankruptcy.

**Financial Compensation**

Attorneys were asked about annual income from the practice of law and had the option to leave this question blank. Twenty-eight percent of Georgia jurisdiction attorneys and fourteen percent of Washington attorneys left the question blank (non-responses). The first set of percentages displayed on Table 6 includes non-responses and second set of percentages excludes the non-responses. The second set of percentages will only accurately capture the range of income among respondents if non-responding attorneys had the same distribution as responding attorneys. Among Georgia attorneys, with more than twice the percentage of attorneys declining to respond, this is less likely to be a valid assumption. Among Washington attorneys, excluding these non-responses, the results indicate that 10% of attorneys were earning under $40,000 per year practicing law. From the practice of law, twenty-one percent were earning $40,001 to $60,000; 26% were earning $60,001 to $80,000; 27% were earning $80,001 to $100,000; and 17% were earning more than $100,000. Among Georgia respondents, attorneys appeared to be earning less money from the practice of law, but this conclusion may not be valid in light of missing data. Nevertheless, the two results confirm that there was a range of income from the practice of law among lawyers who count child representation as a practice area.

Attorneys were also asked to estimate the percent of their income associated with child representation. For 68% of attorneys across both sites, child representation constituted 20% or less of their income. For thirteen percent, it constituted 21-40% of their income. Child representation constituted at least 61% of attorney income for a small proportion of attorneys. Comparing the ratio of the percent of practice that was child representation with the percent of income that was from child representation, 74% reported the same range for practice and income. Twenty-three percent of attorneys reported that the proportion of income they get from child representation is less than the proportion of time they spend within the ranges provided. This result was different in the two sites: 29% of Georgia jurisdiction attorneys reported the proportion of income was less vs. 18% of Washington attorneys (p<.05). Only 2% of attorneys reported a higher range of percent income than percent practice.

When asked, “how adequate do you think the level of the compensation you receive for deprivation cases is?” the majority of attorneys thought it was short of adequate, indicating either “very inadequate” (29%) or “somewhat inadequate” (38%). \(^{20}\) Twenty-nine percent of attorneys responded with “somewhat adequate “ and a small percent thought compensation was “more than adequate.”

**Compensation Arrangements** Across the sites, there were a few common compensation arrangements. Attorneys were paid an hourly rate, paid an hourly rate with limits per case, paid with a monthly or annual payment to handle some or all open cases or were working for a salary in a non-profit or government

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\(^{19}\) When only attorneys practicing in small firms or as solo practitioners are compared across the two sites (Georgia jurisdictions=123; Washington=82), the differences between these three practice types (trusts and estate, personal injury, general business) are no longer significant between the two states.

\(^{20}\) Note that as of January 1, 2014, the new Georgia Juvenile Code changed the name of these cases from “deprivation” cases to “dependency” cases.
organization (Table 6). In a few jurisdictions, more than one contract type was possible within the same jurisdiction. For example, one jurisdiction used the Office of the Public Defender (salaried attorney) but, if all public defender attorneys had conflicts, the jurisdiction used an outside “conflict attorney” paid by the hour based on a submitted voucher.

The most common compensation arrangement was a submission of a voucher with hours, where the attorney was paid an hourly rate without official limits on the number of hours. A few attorneys (10-12%) were paid an hourly rate with a jurisdiction-imposed maximum payment amount. It was more common for Washington attorneys to be paid a monthly amount negotiated as part of an annual contract for handling a certain number of open cases per month. And in Georgia jurisdictions, as discussed previously, there were no attorneys representing children who were staff attorneys either in a government or non-profit agency.

Organizational Supports
Legal research databases and individuals with whom to discuss cases were the most commonly available services, with 80% (19% + 58%) of attorneys indicating that legal research databases were either often or almost always available and 87% (35% + 48%) of attorneys indicating that individuals to discuss cases were either often or almost always available (Table 7). Legal research databases were more available to Washington attorneys (p<.05) and individuals with whom to discuss cases were more available to Washington attorneys (p<.01). Less commonly available were paralegals and administrative support, with 55% (18% + 37%) of attorneys indicating that paralegals and administrative support were either often or almost always available. Paralegals and administrative support were more available to Washington attorneys (p<.01). Only one quarter of attorneys indicated that psychologists or psychiatrists with whom to consult were available often (19%) or always (16%). Social workers and other helping professionals and investigative staff were the least likely to be available, though they were more available in Washington than in the Georgia jurisdictions. Social workers and other helping professionals were not at all available to 52% of attorneys in the Georgia jurisdictions and 33% of attorneys practicing in Washington (p<.01). Investigative staff was not at all available to 54% of attorneys in the Georgia jurisdictions and 35% of attorneys practicing in Washington (p<.01).

Continuing Legal Education
All but one attorney from the Georgia jurisdictions indicated having covered racial disproportionality in a CLE in the last two years compared to 18% of Washington attorneys (Table 8). Excluding racial disproportionality for both sites, 70% of attorneys had participated in at least one CLE that covered a topic within child welfare law and policy. Significant differences were revealed across the two sites, with Washington attorneys more likely to have covered state child welfare law, permanency planning, aging out of foster care, federal and state requirements for foster care cases and the Indian Child Welfare Act. Washington attorneys were also more likely to have participated in at least one CLE that covered a topic within child welfare law and policy (p<.05).

All but one attorney from the Georgia jurisdictions indicated having covered alternative dispute resolution in a CLE in the last two years compared to 25% of Washington attorneys. Excluding alternative dispute resolution for both sites, 75% of attorneys had participated in at least one CLE that covered a topic within child representation practice. Across the two sites, Washington attorneys more likely to have covered expert witness and interviewing and counseling the child (p<.01). Washington attorneys were also more likely to have participated in at least one CLE that covered a topic within child representation practice.

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21 When only attorneys practicing in small firms or as solo practitioners are compared across the two sites (Georgia jurisdictions=123; Washington=82), these Washington attorneys still have more access to investigative staff, paralegals, and psychologists or psychiatrists than Georgia jurisdiction attorneys but they rate the access to social workers and legal research databases equally.
(p<.05). More than half of the attorneys from either site had not received training on trial practice in maltreatment cases, expert witnesses or interviewing and counseling the child in the last two years.\textsuperscript{22}

Topics about child and family well-being were the least likely to have been covered in CLEs taken in the last two years, though these topics were clearly available to at least some attorneys in both sites. Differences between the Georgia jurisdictions and Washington were the most pronounced in these topic areas, with Washington attorneys selecting these as covered topics at least twice as much as attorneys practicing in the Georgia jurisdictions (p<.01). Nevertheless, more than 50% of Washington attorneys had not had CLEs on child development, child maltreatment, mental health treatment and family dynamics in the last two years. With respect to CLEs on domestic violence and substance abuse, Washington attorneys were more likely to have covered these topics in a CLE in the last two years than attorneys in the Georgia jurisdictions (p<.01).

**Responsibilities of Child Representatives**

Attorneys were asked to evaluate seven child representation tasks and indicate on a four-level scale the extent to which each task was “your responsibility as a child’s attorney in dependency cases.” Each statement and the response distribution are shown on Table 9.\textsuperscript{23} These questions were designed to get at how attorneys understood their responsibility to child clients relative to the duties of other parties with a stake in the case, including public child welfare agency workers, assistant attorneys general representing the state’s interests, CASAs, judges and parents.\textsuperscript{24} As shown on Table 6, the majority of attorneys considered attending case planning meetings (61%) and establishing the goals that parents need to meet in order to have their children returned to them (57%) a shared responsibility with other parties to the case. Forty-five percent of attorneys indicated that identifying caregivers to serve as foster parents was a shared responsibility with other parties to the case and 35% indicated that identifying potential adoptive homes was a shared responsibility. Almost half of the attorneys thought that advocating for services for parents and children was a shared responsibility. Thirty-two percent thought that advocating with respect to other legal matters was a shared responsibility.

For those attorneys who did not indicate a shared responsibility, did they select an option lower or higher on the scale provided? A response lower on the scale indicated less responsibility and a response higher on the scale indicated more responsibility. Across both sites, among attorneys who did not indicate a shared responsibility, more attorneys felt limited or little or no responsibility for the tasks listed, with the exception of attending case planning meetings and identifying adoptive homes. For those two tasks, responses were not significantly different on either side of “shared responsibility.” Comparing sites, attorneys from Washington were more likely to select options higher on the scale than attorneys from the Georgia sites for every task except establishing goals and advocating services for parents, where attorneys from Georgia were more likely to select options higher on the scale of responsibility.

**Importance of Child Representation Tasks**

Attorneys were asked to evaluate eleven child representation tasks and indicate on a four-level scale the extent to which each approach was important “for achieving positive and timely court outcomes for the children I represent.” Each statement and the response distribution are shown on Table 10.\textsuperscript{25} The distribution of response for the four highest ranked tasks was the same across both sites. The first

\textsuperscript{22} When only attorneys practicing in small firms or as solo practitioners are compared across the two sites (Georgia jurisdictions=123; Washington=82), the difference between the frequency of interviewing and counseling the child CLEs is no longer significant. All other contrasts in Table 8 remain significant.

\textsuperscript{23} These questions in the survey were designed to assess baseline attitudes about these approaches in advance of the evaluation of the QIC-ChildRep Best Practices model for child representation.

\textsuperscript{24} The list of tasks was not intended to be comprehensive, but rather to gauge attorney’s opinions of certain tasks associated with an active model of child representation in advance of the QIC-ChildRep Best Practices evaluation.

\textsuperscript{25} These questions in the survey were designed to assess baseline attitudes about these approaches in advance of the evaluation of the QIC-ChildRep Best Practices model for child representation.
statement related to how attorneys viewed the importance of communicating the child’s wishes. The second two had to do with communication capacities and interactions with child clients. And the fourth related to being culturally sensitive in interactions with the child client. Few attorneys indicated the tasks were less than important, and a comparable proportion (ranging from about 55% to 71%) indicating these tasks were very important.

The remaining seven statements related to possible approaches towards representing and interacting with child clients. Washington attorneys had stronger opinions than attorneys from the Georgia jurisdictions about the importance of all seven approaches that would be considered part of client-directed legal representation (p<.01). But it should be noted that very few attorneys in either site selected “not at all important” for any of the statements. The one exception was “allowing children to exercise control over legal objectives and tactics.” In this case, 25% of Georgia jurisdiction attorneys and 11% of Washington attorneys selected “not at all important.” And aside from that statement, the majority of attorneys selected “important” or “very important” for all of the statements. Thus, variation in responses within and across sites was between the top three levels of the scale and was concentrated at the top two levels.

**Job Satisfaction and Impact**

When asked to rate their impact and job satisfaction, 64% of attorneys “strongly agreed” with the statement, “I find my work as a legal representative for children in dependency cases to be rewarding.” Twenty-eight percent “somewhat agreed” and small percentage (8%) selected an option lower on the scale (Table 11). When asked to reflect on their impact, 34% of attorneys “strongly agreed” with the statement, “I have a significant impact on the outcomes of the children I represent in dependency cases.” Fifty-one percent “somewhat agreed” and the remaining 16% selected an option lower on the scale.

**Summary of Findings**

Based on survey responses, sampled attorneys were almost all white and had no graduate degrees besides a law degree. Attorneys were normally distributed by age, and the lawyers in both states were experienced, with an average of 13.5 years of practice. Just over half had experience as a biological, foster or adoptive parent and about a third reported they had worked with children in some other capacity. Almost two-thirds found their job as child representative rewarding and most thought they had a significant impact on outcomes. Child representation practice constituted under 20% of legal work and income and for most attorneys. Attorneys were practicing in a number of different fields of law, including divorce and paternity, private adoption, truancy, and juvenile justice. In the previous six months, one-third of attorneys had represented 5 or fewer cases. Most thought compensation was somewhat or very inadequate. Two-thirds of attorneys did not have psychologists or psychiatrists to consult.

Washington attorneys were more likely to have covered almost every child-welfare related CLE topic in previous two years. On responses to questions about attorney responsibility, Washington attorneys indicated a greater sense of responsibility for attending case planning meetings, identifying caregivers and advocating for services for children than Georgia jurisdiction attorneys. Georgia jurisdiction attorneys indicated greater responsibility for tasks related to parents – establishing goals and advocating for services for them than Washington attorneys. Washington attorneys had stronger opinions than attorneys from the Georgia jurisdictions about the importance of included child representation tasks for achieving good outcomes.

**Discussion**

26 This question blended of two concepts that are distinct in the law and may have made it difficult to answer for some attorneys. “Legal objectives” are something clients could have control over depending on whether the attorney was acting as a client directed (would have control) or substitute judgment/best interests attorney (would not have control). However, in any kind of representation, “tactics” are specifically reserved for the attorney.
Experience with Child Representation
Survey results showed that the professional practice of lawyers representing children includes a broad range of legal subjects. Indeed, for a majority of the lawyers, child representation constitutes less than 20% of their law practice and income. They are handling only a handful of dependency cases — one-third report handling fewer than five cases within six months. In discussing delivery of legal services to children, the national cognoscenti of child advocacy tend to focus on the specialty child welfare law office where children are represented by a dedicated group of lawyers who develop considerable experience and expertise. This sample shows that most children are not represented by such specialists, but rather by general practitioners handling a limited number of dependency cases. One possible explanation for the heterogeneity of attorneys’ practice portfolios is that in many jurisdictions, especially those in rural counties, there is not a sufficient number of dependency cases to support a full-time dependency law practice.

The State of Training
Washington attorneys had taken more courses, and more courses with a detailed focus on topics important to active child representation than Georgia jurisdiction attorneys. Differences in what and how many continuing professional education programs (CLEs) were taken in the last two years may have been the result of different statutory training requirements. In Georgia, the minimum requirement to be appointed as a GAL was to take an in-person or on-line 7 CLE-credit course approved by the Georgia Office of the Child Advocate. This CLE course did include a child development and a child well-being segment. However, attorneys who had practiced as GALs in juvenile court deprivation proceedings for three or more years and had demonstrated a proficiency in child representation were exempt (Child Welfare Information Gateway, 2011). In Washington, statute directs the Administrator of the Courts to develop a curriculum for GALs with specific topic areas addressed: child development, child sexual abuse, child physical abuse, child neglect, domestic violence, clinical and forensic investigative and interviewing techniques, family reconciliation and mediation services.

27 National Association of Counsel for Children, CHILD WELFARE LAW OFFICE GUIDEBOOK: BEST PRACTICE GUIDELINES FOR ORGANIZATIONAL LEGAL REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT AND DEPENDENCY CASES. (2006)
28 The Supreme Court of Georgia Committee on Justice for Children/Georgia Administrative Office of the Courts administered this training and it was provided through the Institute of Continuing Legal Education in Georgia. Other child welfare related trainings were offered in the two years prior to the survey, but none were required in order to serve as a child representative.
29 See http://www.iclega.org/programs/webcast/8620.html
30 This exemption has been deleted in the new Georgia Juvenile Code, as of January 1, 2014.
31 WA § 2.56.030(15)

Compensation and Supports
One of the concerns voiced by legal advocates is that the financial compensation received by child representatives is low, leading to a high level of attrition and diminution in practice quality (D’Andrea, 2012). However, the findings here paint a somewhat more complicated picture. Although it is true that a majority of attorneys in both states report that the level of financial compensation is either somewhat or very inadequate, it is also true that most report that their work as child representatives is both rewarding and impactful. Moreover, based on their average tenure as child representatives, it appears that the level of attrition among these groups of child representatives may be low. Taken together, the attorneys' views that the work is personally rewarding and but the financial compensation inadequate suggests that there may be other, non-financial factors at play. For example, child representatives may be motivated by altruistic reasons that transcend financial concerns. The personal rewards these attorneys derive from including child representation as part of their practice may serve to counteract the influence of inadequate compensation.

Information about the availability of supports to attorneys is important because these supports are often thought to contribute to the quality of representation (National Association of Counsel for Children, 2006). Several supports, including legal research databases and individuals with whom attorneys can discuss cases, appeared to be widely available. In contrast, however, several other types of supports, including investigative staff and social workers appeared to be available to only a minority of attorneys. The reasons why the latter class of services were less readily available may reflect a combination of the relative costs of these different types of supports and counties' willingness to pay for them.

When it comes to resources and supports available to attorneys in different states, attorneys from the Georgia jurisdictions appear to have had fewer supports and services available. These attorneys indicated that they had significantly less access to legal research databases, people with whom to discuss cases, paralegals and administrative support, consulting psychologists or psychiatrists, social workers or investigative staff.

These differences could be a reflection of two different phenomena. First, the organizational context and contract arrangements under which Washington State attorneys worked may have made it easier for these attorneys to fund these types of supports than it was for Georgia jurisdiction attorneys. For example, the percentage of attorneys in Washington State who worked in private law firms or private nonprofit organizations (46%) was more than twice the percentage of attorneys in Georgia (22%). Also, Washington state attorneys were much more likely to work under contract with courts, either as an individual or as part of a larger agency-level contract, than were attorneys in Georgia. Together, these differences in organizational context and contract arrangements may be associated with differences in billing arrangements with counties, or access to alternative funding sources, which then result in differences in the level of financial resources to pay for these supports.

A second alternative is that there were differences across states in the policies and practices governing the use of these supports. For example, there may be differences across states with respect to attitudes between the funding authority (typically the county government), and the courts about the utility of child representation. As a result, policies concerning billing may be more restrictive, on average, in the Georgia jurisdictions than they were in Washington.

**Views of Task Responsibilities**
A majority of attorneys in both states reported that child representatives have shared, primary, or exclusive responsibility over many dependency case tasks. As might be expected, attorneys acknowledged greater responsibility for tasks that pertain specifically to a child or child's dependency case (e.g., advocating for services for children) than they did for tasks pertaining to other parties or matters that were not central to children's dependency cases (e.g., advocate with respect to other collateral legal matters).

Although many attorneys in both states claimed at least a shared responsibility for these tasks, there were a number of interesting differences across states. For example, save for the two tasks that pertain specifically to parents, Georgia attorneys reported assuming a lower share of responsibility than Washington attorneys for various tasks. These differences may reflect the influence of the models of representation used in these respective states. That is, the GAL model used in Georgia may be associated with a narrower, less assertive, purview than that associated with the client-directed model used in Washington State. Interestingly, Georgia jurisdiction attorneys were more likely (but not strongly so) to establish goals and advocate for services for parents, perhaps because in Georgia no preference for assigning attorneys at a certain age existed. The group of children represented probably had more children assigned counsel at the beginning of their dependency case when reunification was the primary focus and services to parents were especially important. A safe and prompt reunification is a logical “best interests of the child” goal.

**Views of Task Importance**
Attorneys' responses to questions about the importance of different tasks suggest that attorneys in both states put a premium on actively engaging child clients. For instance, super-majorities in both states reported that it was important, or very important, to make sure that children have a well-informed understanding of their dependency cases. Similarly, large majorities in both states reported that it was important that child representatives understand children's developmental capacities, including those pertaining to children's ability to communicate and process information.

Reported differences across states appear to be limited to two general types of tasks: eliciting children's input on case decisions and attorneys' efforts to communicate with child clients. For both types of tasks, higher percentages of attorneys in Washington State report that the tasks are very important. As is the case for the questions concerning attorney responsibilities, these differences might reflect differences between the models of representation used in each. For example, Washington attorneys, who operate under an client-directed model, are required to afford children greater authority over case decisions than are attorneys in Georgia, who operate primarily under a GAL model. Moreover, the client-directed model may also necessitate a more concerted effort to help children understand the exigencies of their court cases in order to ensure that children's expressed interests are well informed.

Alternatively, the differences across states in attorneys' assessments of the importance of these tasks could be a reflection of differences in the average age of children represented. At the time that the survey was administered, attorneys in Washington primarily represented adolescents, whereas attorneys in Georgia represented children of all ages. Thus, the greater importance attributed by Washington attorneys to some of these tasks may simply be a reflection of an older, more capable pool of child clients.

**Implications**
This study has implications for efforts to hire, train, support and retain a cadre of high quality child representatives. A weakness of this point-in-time profile of attorneys already engaged in this work is that it cannot speak to the characteristics of attorneys just as they are recruited and enter the field. But it has
advantages in that any effort to change the qualifications, training or organization of attorneys will encounter a similar eclectic group of attorneys with a mix of training, experience and attitudes.

The survey data show that these child attorneys are not fresh out of law school. Most had practiced law for many years (mean of 13.5 years) and 56% had had represented children for 5 or more years. The implications for training and recruitment may be that good child attorneys could be recruited at various stages of a legal career and that training opportunities should be available to prepare not only the beginning lawyer but also the more experienced lawyer looking to add the personally rewarding child representation to an existing practice. A downside could be that attorneys who are already accustomed to representing children in a certain way may be less flexible and reluctant to change and accept practice innovations.

Child representation constituted a minority portion of the law practice for most attorneys. For 52% of the attorneys, child representation constituted less than 20% of their practice. The practice portfolio of the attorneys was very broad and very heterogeneous. This heterogeneity of practice areas may be a function of the relatively low numbers of dependency cases in many jurisdictions or the varied legal needs of children and families involved in dependency cases. But regardless of the underlying reasons, this practice heterogeneity presents a challenge for training. This lack of specialization may make attorneys less willing to invest in the unique skills required for child representation. In recognition of the limited amount of time and resources that attorneys can devote to dependency law training, educators should carefully identify those aspects of dependency law practice that are most critical for achieving positive outcomes for children and families. Distance learning and on-line adult-education oriented courses that attorneys could take on their own schedules should be encouraged.

Attorneys were asked to identify which tasks were their responsibility and which the responsibility of other participants in the dependency process. Variances in attorney opinions reflect differences in the state practice models and the client populations. In Georgia the ages of child clients range from birth to adulthood with an expectation (at the time of the survey) of GAL best interests representation. In contrast, in Washington State, the clients were typically over age 12 and the practice model was clearly client-directed. Yet despite the fact that there were significantly different approaches to the child between these two states, attorneys from both states show a consistency of opinion that favors thoughtful, active, meaningful representation that involves a relationship with the child. In both states, a majority of attorneys viewed tasks that would be necessary to stay informed about their child’s case as at least a shared responsibility with other parties to the case.

On the other hand, notable proportions of attorneys saw themselves having limited or no responsibilities for surveyed tasks. There was no consensus in either of these jurisdictions as to the proper elements of child representation. This great variation in what attorneys consider their responsibility is consistent with Ross’ qualitative study of lawyer’s views of the tasks of child representation. She found that “lawyers reported that they represented children in very different ways, reflecting ambiguity about how to interpret these roles and involve children as clients or the subject of best interests representation.” (Ross, 2013) Any efforts to establish standards of practice and systematically train child attorneys must address and harmonize differing views on the actual tasks a child representative should undertake.

The findings of the current study suggest that most child representatives consider themselves poorly compensated. Happily, despite the compensation level, many attorneys find the work rewarding and have made it part of their law career for more than just a few years. But compensation levels may impose a barrier to improving practice standards going forward. Raising the expectations of attorneys is likely to require additional hours per case. How will this be paid? Even without the additional work suggested by more active standards, two thirds of attorneys reported that compensation was short of adequate. Reform efforts must take into account the current inadequate compensation.
Can multidisciplinary approaches help improve child representation? This survey provides information as to what services and supports are available to attorneys that may help us understand whether the lack of these resources is one cause of poor practice quality and effectiveness. Psychologists or psychiatrists with whom attorneys could consult were often or always available only for 1/3 of attorneys. Social workers were not at all available to the majority of attorneys in Georgia and only 1/3 of attorneys in Washington. Investigative staff were the least available service in both states, but more available in Washington than in Georgia. Does the lack of access to investigative services compromise attorneys' ability to collect relevant information? Similarly, does a lack of available social workers or other helping professionals compromise attorneys' ability to advocate for children's non-legal needs? Without access to practice supports, attorneys may not be able to implement new expectations, ideas and techniques. Perhaps these complementary multidisciplinary services, as an adjunct to child representation, would enhance child outcomes and be a more efficient use of funds than expecting attorneys to handle issues beyond the scope of lawyer expertise.

An encouraging finding from our surveys is the commitment to the importance of the work and the willingness to assist others in doing it. Despite the fact that most attorneys were solo practitioners, more than 80% said that individuals were often or almost always available to discuss cases with them. These results suggest a willingness to collaborate, share information and form learning communities. The ongoing QIC-ChildRep study involved a program of coaching and small group meetings and evaluation results will speak to this possibility.
Table 1. Sample by State and Survey Response Rates

<table>
<thead>
<tr>
<th></th>
<th>All</th>
<th>Georgia Juris</th>
<th>Washington</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Sample</td>
<td>269</td>
<td>143</td>
<td>126</td>
</tr>
<tr>
<td>Complete Survey Responses</td>
<td>240</td>
<td>123</td>
<td>117</td>
</tr>
<tr>
<td>Partial Survey Responses</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Response Rate (Complete Only)</td>
<td>89%</td>
<td>86%</td>
<td>93%</td>
</tr>
</tbody>
</table>

Table 2. Number of and Percent of Responding Attorneys by State and Employment Setting

<table>
<thead>
<tr>
<th>Employment Setting</th>
<th>Georgia Juris (N = 123)</th>
<th>Washington (N = 117)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Solo practitioner</td>
<td>95</td>
<td>77%</td>
</tr>
<tr>
<td>Employed by a private law firm</td>
<td>27</td>
<td>22%</td>
</tr>
<tr>
<td>Employed by private, non-profit organization</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Employed by county office</td>
<td>1</td>
<td>1%</td>
</tr>
</tbody>
</table>
Table 3. Child Representation Practice

<table>
<thead>
<tr>
<th>% of Practice that is Child Representation</th>
<th>All</th>
<th>Georgia Juris</th>
<th>Wash.</th>
</tr>
</thead>
<tbody>
<tr>
<td>0% to 20%</td>
<td>52%</td>
<td>48%</td>
<td>56%</td>
</tr>
<tr>
<td>21% to 40%</td>
<td>24%</td>
<td>23%</td>
<td>25%</td>
</tr>
<tr>
<td>41% to 60%</td>
<td>8%</td>
<td>9%</td>
<td>8%</td>
</tr>
<tr>
<td>61% to 80%</td>
<td>5%</td>
<td>9%</td>
<td>2%</td>
</tr>
<tr>
<td>81% to 100%</td>
<td>10%</td>
<td>11%</td>
<td>9%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Number of Cases Represented in Past Six Months</th>
<th>All</th>
<th>Georgia Juris</th>
<th>Wash.</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 - 5 cases</td>
<td>37%</td>
<td>38%</td>
<td>36%</td>
</tr>
<tr>
<td>6 - 10 cases</td>
<td>24%</td>
<td>20%</td>
<td>29%</td>
</tr>
<tr>
<td>11 - 21 cases</td>
<td>19%</td>
<td>19%</td>
<td>19%</td>
</tr>
<tr>
<td>22 or more cases</td>
<td>20%</td>
<td>23%</td>
<td>16%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Years Practicing as Child Representative</th>
<th>All</th>
<th>Georgia Juris</th>
<th>Wash.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 1 year</td>
<td>13%</td>
<td>10%</td>
<td>17%</td>
</tr>
<tr>
<td>1 or 2 years</td>
<td>16%</td>
<td>13%</td>
<td>19%</td>
</tr>
<tr>
<td>3 or 4 years</td>
<td>15%</td>
<td>20%</td>
<td>10%</td>
</tr>
<tr>
<td>5 or 6 years</td>
<td>16%</td>
<td>17%</td>
<td>14%</td>
</tr>
<tr>
<td>7 or 8 years</td>
<td>8%</td>
<td>6%</td>
<td>9%</td>
</tr>
<tr>
<td>9 or 10 years</td>
<td>6%</td>
<td>5%</td>
<td>8%</td>
</tr>
<tr>
<td>More than 10 years</td>
<td>26%</td>
<td>30%</td>
<td>22%</td>
</tr>
</tbody>
</table>
### Table 4. Attorney Demographic Characteristics

<table>
<thead>
<tr>
<th>Race/Ethnicity</th>
<th>All</th>
<th>Georgia Juris</th>
<th>Wash.</th>
<th>Contrast</th>
</tr>
</thead>
<tbody>
<tr>
<td>Afric. Amer.</td>
<td>7%</td>
<td>10%</td>
<td>4%</td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>87%</td>
<td>87%</td>
<td>87%</td>
<td></td>
</tr>
<tr>
<td>Asian</td>
<td>3%</td>
<td>2%</td>
<td>3%</td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td>3%</td>
<td>1%</td>
<td>5%</td>
<td>p&lt;.05</td>
</tr>
<tr>
<td>Hispanic</td>
<td>2%</td>
<td>1%</td>
<td>3%</td>
<td></td>
</tr>
</tbody>
</table>

### Age

<table>
<thead>
<tr>
<th>Age</th>
<th>All</th>
<th>Georgia Juris</th>
<th>Wash.</th>
<th>Contrast</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 30</td>
<td>5%</td>
<td>7%</td>
<td>3%</td>
<td></td>
</tr>
<tr>
<td>30 to 39</td>
<td>35%</td>
<td>36%</td>
<td>35%</td>
<td></td>
</tr>
<tr>
<td>40 to 49</td>
<td>26%</td>
<td>26%</td>
<td>25%</td>
<td></td>
</tr>
<tr>
<td>50 to 59</td>
<td>21%</td>
<td>21%</td>
<td>22%</td>
<td></td>
</tr>
<tr>
<td>60 and over</td>
<td>12%</td>
<td>10%</td>
<td>14%</td>
<td></td>
</tr>
</tbody>
</table>

### Tenure

<table>
<thead>
<tr>
<th>Years Since First Bar Admission</th>
<th>All</th>
<th>Georgia Juris</th>
<th>Wash.</th>
<th>Contrast</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>13.5</td>
<td>13</td>
<td>15</td>
<td></td>
</tr>
</tbody>
</table>

### Other Graduate Degrees

<table>
<thead>
<tr>
<th>Other Graduate Degrees</th>
<th>All</th>
<th>Georgia Juris</th>
<th>Wash.</th>
<th>Contrast</th>
</tr>
</thead>
<tbody>
<tr>
<td>Business Administration</td>
<td>5%</td>
<td>5%</td>
<td>4%</td>
<td></td>
</tr>
<tr>
<td>Psychology, counseling, or other human services field</td>
<td>3%</td>
<td>6%</td>
<td>1%</td>
<td>p&lt;.05</td>
</tr>
<tr>
<td>Social work</td>
<td>2%</td>
<td>0%</td>
<td>3%</td>
<td>p&lt;.05</td>
</tr>
<tr>
<td>Public policy</td>
<td>1%</td>
<td>1%</td>
<td>1%</td>
<td></td>
</tr>
<tr>
<td>None of the above</td>
<td>84%</td>
<td>86%</td>
<td>81%</td>
<td></td>
</tr>
</tbody>
</table>

### Worked with children in other capacities (e.g., social worker, counselor, teacher)?

<table>
<thead>
<tr>
<th>Yes</th>
<th>All</th>
<th>Georgia Juris</th>
<th>Wash.</th>
<th>Contrast</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>33%</td>
<td>30%</td>
<td>37%</td>
<td></td>
</tr>
</tbody>
</table>

### Biological, foster or adoptive parent?

<table>
<thead>
<tr>
<th>Yes</th>
<th>All</th>
<th>Georgia Juris</th>
<th>Wash.</th>
<th>Contrast</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>56%</td>
<td>57%</td>
<td>55%</td>
<td></td>
</tr>
</tbody>
</table>

### Table 5. Areas of Law Practice in Addition to Child Representation

<table>
<thead>
<tr>
<th>Area of Law Practice</th>
<th>All</th>
<th>Georgia Juris</th>
<th>Wash.</th>
<th>Contrast</th>
</tr>
</thead>
<tbody>
<tr>
<td>Divorce or paternity</td>
<td>69%</td>
<td>86%</td>
<td>51%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Private adoption</td>
<td>67%</td>
<td>99%</td>
<td>32%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Truancy cases</td>
<td>73%</td>
<td>99%</td>
<td>44%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Juvenile justice cases</td>
<td>66%</td>
<td>79%</td>
<td>52%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Adults in criminal cases</td>
<td>62%</td>
<td>67%</td>
<td>57%</td>
<td></td>
</tr>
<tr>
<td>Trusts &amp; estate</td>
<td>37%</td>
<td>43%</td>
<td>31%</td>
<td>p&lt;.05</td>
</tr>
<tr>
<td>Tenant / landlord</td>
<td>26%</td>
<td>26%</td>
<td>26%</td>
<td></td>
</tr>
<tr>
<td>Real estate</td>
<td>18%</td>
<td>19%</td>
<td>16%</td>
<td></td>
</tr>
<tr>
<td>Personal injury</td>
<td>25%</td>
<td>32%</td>
<td>18%</td>
<td>p&lt;.05</td>
</tr>
<tr>
<td>General business</td>
<td>27%</td>
<td>34%</td>
<td>20%</td>
<td>p&lt;.05</td>
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<tr>
<td>Bankruptcy</td>
<td>9%</td>
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<td>7%</td>
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</table>
### Table 6. Financial Compensation

<table>
<thead>
<tr>
<th>Income from the Practice of Law</th>
<th>All</th>
<th>Georgia Juris</th>
<th>Wash.</th>
<th>Contrast</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Entire Sample</strong></td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Left blank</td>
<td>21%</td>
<td>28%</td>
<td>14%</td>
<td></td>
</tr>
<tr>
<td>&lt;= $40,000</td>
<td>13%</td>
<td>17%</td>
<td>8%</td>
<td></td>
</tr>
<tr>
<td>$40,001 to $60,000</td>
<td>21%</td>
<td>25%</td>
<td>18%</td>
<td></td>
</tr>
<tr>
<td>$60,001 to $80,000</td>
<td>16%</td>
<td>11%</td>
<td>22%</td>
<td></td>
</tr>
<tr>
<td>$80,001 to $100,000</td>
<td>16%</td>
<td>10%</td>
<td>23%</td>
<td></td>
</tr>
<tr>
<td>More than $100,000</td>
<td>12%</td>
<td>9%</td>
<td>14%</td>
<td></td>
</tr>
<tr>
<td><strong>Respondents</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&lt;= $40,000</td>
<td>16%</td>
<td>23%</td>
<td>10%</td>
<td></td>
</tr>
<tr>
<td>$40,001 to $60,000</td>
<td>27%</td>
<td>34%</td>
<td>21%</td>
<td></td>
</tr>
<tr>
<td>$60,001 to $80,000</td>
<td>21%</td>
<td>16%</td>
<td>26%</td>
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</tr>
<tr>
<td>$80,001 to $100,000</td>
<td>21%</td>
<td>14%</td>
<td>27%</td>
<td></td>
</tr>
<tr>
<td>More than $100,000</td>
<td>15%</td>
<td>12%</td>
<td>17%</td>
<td></td>
</tr>
<tr>
<td><strong>% of Income from Child Rep</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0% to 20%</td>
<td>68%</td>
<td>67%</td>
<td>69%</td>
<td></td>
</tr>
<tr>
<td>21% to 40%</td>
<td>13%</td>
<td>10%</td>
<td>15%</td>
<td></td>
</tr>
<tr>
<td>41% to 60%</td>
<td>7%</td>
<td>8%</td>
<td>5%</td>
<td></td>
</tr>
<tr>
<td>61% to 80%</td>
<td>5%</td>
<td>7%</td>
<td>2%</td>
<td></td>
</tr>
<tr>
<td>81% to 100%</td>
<td>8%</td>
<td>7%</td>
<td>9%</td>
<td></td>
</tr>
<tr>
<td><strong>Ratio of Child Rep Practice % (Table 3) to Income %</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Respondent Reported Same Range for Practice and Income</td>
<td>74%</td>
<td>69%</td>
<td>80%</td>
<td></td>
</tr>
<tr>
<td>Respondent Reported Higher % Practice than % Income</td>
<td>23%</td>
<td>29%</td>
<td>18%</td>
<td>p&lt;.05</td>
</tr>
<tr>
<td>Respondent Reported Higher % Income than % Practice</td>
<td>2%</td>
<td>2%</td>
<td>3%</td>
<td></td>
</tr>
<tr>
<td><strong>Adequacy of Compensation</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Very inadequate</td>
<td>29%</td>
<td>30%</td>
<td>28%</td>
<td></td>
</tr>
<tr>
<td>Somewhat inadequate</td>
<td>38%</td>
<td>41%</td>
<td>36%</td>
<td></td>
</tr>
<tr>
<td>Somewhat adequate</td>
<td>29%</td>
<td>28%</td>
<td>30%</td>
<td></td>
</tr>
<tr>
<td>More than adequate</td>
<td>4%</td>
<td>2%</td>
<td>6%</td>
<td></td>
</tr>
<tr>
<td><strong>Compensation Arrangement</strong></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Hourly rate based on voucher</td>
<td>65%</td>
<td>86%</td>
<td>42%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Hourly rate based on voucher with limits</td>
<td>11%</td>
<td>12%</td>
<td>10%</td>
<td></td>
</tr>
<tr>
<td>Contract for a monthly or annual payment</td>
<td>8%</td>
<td>2%</td>
<td>14%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Salaried in non-profit or government organization</td>
<td>16%</td>
<td>0%</td>
<td>33%</td>
<td>p&lt;.01</td>
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</tbody>
</table>
Table 7. Organizational Supports (bolded distribution indicates direction of statistical significance)

<table>
<thead>
<tr>
<th></th>
<th>All</th>
<th>Georgia Juris</th>
<th>Wash.</th>
<th>Contrast</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legal research databases</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not at all available</td>
<td>8%</td>
<td>9%</td>
<td>8%</td>
<td></td>
</tr>
<tr>
<td>Sometimes available</td>
<td>12%</td>
<td>15%</td>
<td>9%</td>
<td></td>
</tr>
<tr>
<td>Often available</td>
<td>14%</td>
<td>19%</td>
<td>9%</td>
<td></td>
</tr>
<tr>
<td>Almost always available</td>
<td>66%</td>
<td>58%</td>
<td>74%</td>
<td>p&lt;.05</td>
</tr>
<tr>
<td><strong>Individuals with whom to discuss cases</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not at all available</td>
<td>1%</td>
<td>1%</td>
<td>2%</td>
<td></td>
</tr>
<tr>
<td>Sometimes available</td>
<td>12%</td>
<td>16%</td>
<td>8%</td>
<td></td>
</tr>
<tr>
<td>Often available</td>
<td>31%</td>
<td>35%</td>
<td>26%</td>
<td></td>
</tr>
<tr>
<td>Almost always available</td>
<td>56%</td>
<td>48%</td>
<td>64%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td><strong>Paralegals and administrative support</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not at all available</td>
<td>26%</td>
<td>33%</td>
<td>18%</td>
<td></td>
</tr>
<tr>
<td>Sometimes available</td>
<td>20%</td>
<td>22%</td>
<td>18%</td>
<td></td>
</tr>
<tr>
<td>Often available</td>
<td>18%</td>
<td>15%</td>
<td>21%</td>
<td></td>
</tr>
<tr>
<td>Almost always available</td>
<td>37%</td>
<td>30%</td>
<td>44%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td><strong>Psychologists or psychiatrists with whom you can consult</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not at all available</td>
<td>25%</td>
<td>22%</td>
<td>29%</td>
<td></td>
</tr>
<tr>
<td>Sometimes available</td>
<td>40%</td>
<td>41%</td>
<td>38%</td>
<td></td>
</tr>
<tr>
<td>Often available</td>
<td>19%</td>
<td>21%</td>
<td>17%</td>
<td></td>
</tr>
<tr>
<td>Almost always available</td>
<td>16%</td>
<td>16%</td>
<td>15%</td>
<td></td>
</tr>
<tr>
<td><strong>Social workers and other helping professionals</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not at all available</td>
<td>43%</td>
<td>52%</td>
<td>33%</td>
<td></td>
</tr>
<tr>
<td>Sometimes available</td>
<td>32%</td>
<td>33%</td>
<td>31%</td>
<td></td>
</tr>
<tr>
<td>Often available</td>
<td>12%</td>
<td>11%</td>
<td>12%</td>
<td></td>
</tr>
<tr>
<td>Almost always available</td>
<td>14%</td>
<td>4%</td>
<td>24%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td><strong>Investigative staff</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not at all available</td>
<td>45%</td>
<td>54%</td>
<td>35%</td>
<td></td>
</tr>
<tr>
<td>Sometimes available</td>
<td>36%</td>
<td>36%</td>
<td>36%</td>
<td></td>
</tr>
<tr>
<td>Often available</td>
<td>7%</td>
<td>6%</td>
<td>9%</td>
<td></td>
</tr>
<tr>
<td>Almost always available</td>
<td>12%</td>
<td>4%</td>
<td>21%</td>
<td>p&lt;.01</td>
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</table>
### Table 8. Continuing Legal Education in Prior 2 Years

<table>
<thead>
<tr>
<th>Category</th>
<th>All</th>
<th>Georgia Juris</th>
<th>Wash.</th>
<th>Contrast</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Child welfare law and policy</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Racial disproportionality</td>
<td>60%</td>
<td>99%</td>
<td>18%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>State child welfare (i.e., deprivation) law</td>
<td>53%</td>
<td>46%</td>
<td>60%</td>
<td>p&lt;.05</td>
</tr>
<tr>
<td>State case law updates affecting child welfare</td>
<td>51%</td>
<td>47%</td>
<td>55%</td>
<td></td>
</tr>
<tr>
<td>Permanency planning</td>
<td>33%</td>
<td>18%</td>
<td>49%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Aging out of foster care</td>
<td>23%</td>
<td>14%</td>
<td>32%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Federal &amp; state requirements for foster care cases</td>
<td>19%</td>
<td>10%</td>
<td>27%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Indian Child Welfare Act</td>
<td>18%</td>
<td>9%</td>
<td>27%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td><strong>Any of the above (excluding racial dispro.)</strong></td>
<td>70%</td>
<td>64%</td>
<td>76%</td>
<td>p&lt;.05</td>
</tr>
<tr>
<td><strong>Child representation practice</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alternative dispute resolution (ADR)</td>
<td>63%</td>
<td>99%</td>
<td>25%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Child representation practice</td>
<td>59%</td>
<td>63%</td>
<td>54%</td>
<td></td>
</tr>
<tr>
<td>Trial practice in child abuse and neglect cases</td>
<td>34%</td>
<td>30%</td>
<td>38%</td>
<td></td>
</tr>
<tr>
<td>Expert witnesses</td>
<td>28%</td>
<td>15%</td>
<td>42%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Interviewing and counseling the child</td>
<td>22%</td>
<td>17%</td>
<td>28%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td><strong>Any of the above (excluding ADR)</strong></td>
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<td>71%</td>
<td>80%</td>
<td>p&lt;.01</td>
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<tr>
<td><strong>Child and family well-being</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Child development</td>
<td>33%</td>
<td>18%</td>
<td>49%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Child maltreatment</td>
<td>33%</td>
<td>22%</td>
<td>44%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Mental health treatment for children and families</td>
<td>27%</td>
<td>18%</td>
<td>37%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Family dynamics in child maltreatment</td>
<td>22%</td>
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<td>31%</td>
<td>p&lt;.01</td>
</tr>
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<td>67%</td>
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<tr>
<td><strong>Other issues</strong></td>
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<tr>
<td>Domestic violence</td>
<td>43%</td>
<td>33%</td>
<td>53%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Substance abuse</td>
<td>37%</td>
<td>24%</td>
<td>50%</td>
<td>p&lt;.01</td>
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<tr>
<td>Educational rights of children</td>
<td>16%</td>
<td>15%</td>
<td>17%</td>
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</tbody>
</table>
Table 9. Opinions about Responsibilities of Child Representatives (bolded distribution indicates direction of statistical significance)

<table>
<thead>
<tr>
<th>Attending case planning meetings</th>
<th>Little or none</th>
<th>Limited</th>
<th>Shared</th>
<th>Primary</th>
<th>Exclusive</th>
<th>p&lt;.01</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>6%</td>
<td>11%</td>
<td>1%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>16%</td>
<td>24%</td>
<td>7%</td>
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<tr>
<td></td>
<td>61%</td>
<td>59%</td>
<td>62%</td>
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<tr>
<td></td>
<td>11%</td>
<td>4%</td>
<td>19%</td>
<td></td>
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<td></td>
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<tr>
<td></td>
<td>6%</td>
<td>2%</td>
<td>11%</td>
<td></td>
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<td></td>
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</tbody>
</table>

Establish the goals that parents need to meet in order to have their children returned to them

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<th>8%</th>
<th>7%</th>
<th>9%</th>
</tr>
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<tbody>
<tr>
<td>Limited</td>
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<td>20%</td>
<td>32%</td>
</tr>
<tr>
<td>Shared</td>
<td>57%</td>
<td>62%</td>
<td>52%</td>
</tr>
<tr>
<td>Primary</td>
<td>7%</td>
<td>10%</td>
<td>3%</td>
</tr>
<tr>
<td>Exclusive</td>
<td>3%</td>
<td>2%</td>
<td>4%</td>
</tr>
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</table>

Identifying caregivers who can serve as foster parents for

<table>
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<tr>
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<th>17%</th>
<th>24%</th>
<th>10%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limited</td>
<td>30%</td>
<td>31%</td>
<td>28%</td>
</tr>
<tr>
<td>Shared</td>
<td>45%</td>
<td>41%</td>
<td>50%</td>
</tr>
<tr>
<td>Primary</td>
<td>7%</td>
<td>5%</td>
<td>9%</td>
</tr>
<tr>
<td>Exclusive</td>
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<td>0%</td>
<td>2%</td>
</tr>
</tbody>
</table>

Identifying potential adoptive homes

<table>
<thead>
<tr>
<th>Little or none</th>
<th>32%</th>
<th>37%</th>
<th>26%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limited</td>
<td>35%</td>
<td>32%</td>
<td>38%</td>
</tr>
<tr>
<td>Shared</td>
<td>29%</td>
<td>28%</td>
<td>30%</td>
</tr>
<tr>
<td>Primary</td>
<td>4%</td>
<td>3%</td>
<td>4%</td>
</tr>
<tr>
<td>Exclusive</td>
<td>0%</td>
<td>0%</td>
<td>1%</td>
</tr>
</tbody>
</table>

Advocating for services for parents

<table>
<thead>
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<th>15%</th>
<th>11%</th>
<th>19%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limited</td>
<td>29%</td>
<td>25%</td>
<td>32%</td>
</tr>
<tr>
<td>Shared</td>
<td>45%</td>
<td>49%</td>
<td>41%</td>
</tr>
<tr>
<td>Primary</td>
<td>9%</td>
<td>13%</td>
<td>4%</td>
</tr>
<tr>
<td>Exclusive</td>
<td>3%</td>
<td>2%</td>
<td>3%</td>
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</tbody>
</table>

Advocating for services for children

<table>
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<th>0%</th>
<th>0%</th>
<th>0%</th>
</tr>
</thead>
<tbody>
<tr>
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<td>3%</td>
<td>0%</td>
</tr>
<tr>
<td>Shared</td>
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<td>28%</td>
</tr>
<tr>
<td>Primary</td>
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<td>50%</td>
<td>43%</td>
</tr>
<tr>
<td>Exclusive</td>
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<td>9%</td>
<td>29%</td>
</tr>
</tbody>
</table>

Advocating with respect to other legal matters (e.g., education, custody, SSI) for the children you represent in dependency cases

<table>
<thead>
<tr>
<th>Little or none</th>
<th>7%</th>
<th>7%</th>
<th>8%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limited</td>
<td>13%</td>
<td>15%</td>
<td>11%</td>
</tr>
<tr>
<td>Shared</td>
<td>33%</td>
<td>36%</td>
<td>31%</td>
</tr>
<tr>
<td>Primary</td>
<td>32%</td>
<td>32%</td>
<td>32%</td>
</tr>
<tr>
<td>Exclusive</td>
<td>15%</td>
<td>11%</td>
<td>19%</td>
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</tbody>
</table>
Table 10. Opinions about Importance of Child Representation Tasks
(bolded distribution indicates direction of statistical significance)

<table>
<thead>
<tr>
<th>Importance For Achieving Positive And Timely Court Outcomes for Children</th>
<th>All</th>
<th>Georgia Juris</th>
<th>Wash.</th>
<th>Contrast</th>
</tr>
</thead>
<tbody>
<tr>
<td>Communicating children’s wishes and needs to others involved in the case</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not at all important</td>
<td>0%</td>
<td>0%</td>
<td>1%</td>
<td></td>
</tr>
<tr>
<td>Somewhat important</td>
<td>3%</td>
<td>5%</td>
<td>1%</td>
<td></td>
</tr>
<tr>
<td>Important</td>
<td>25%</td>
<td>28%</td>
<td>23%</td>
<td></td>
</tr>
<tr>
<td>Very Important</td>
<td>71%</td>
<td>67%</td>
<td>75%</td>
<td></td>
</tr>
<tr>
<td>Understanding the impact of maltreatment and trauma on children's mental and behavioral well-being.</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Not at all important</td>
<td>0%</td>
<td>0%</td>
<td>1%</td>
<td></td>
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<tr>
<td>Somewhat important</td>
<td>4%</td>
<td>3%</td>
<td>5%</td>
<td></td>
</tr>
<tr>
<td>Important</td>
<td>30%</td>
<td>29%</td>
<td>32%</td>
<td></td>
</tr>
<tr>
<td>Very Important</td>
<td>65%</td>
<td>67%</td>
<td>62%</td>
<td></td>
</tr>
<tr>
<td>Understanding the cognitive and communication capacities of individual children.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not at all important</td>
<td>0%</td>
<td>0%</td>
<td>1%</td>
<td></td>
</tr>
<tr>
<td>Somewhat important</td>
<td>9%</td>
<td>11%</td>
<td>7%</td>
<td></td>
</tr>
<tr>
<td>Important</td>
<td>37%</td>
<td>36%</td>
<td>38%</td>
<td></td>
</tr>
<tr>
<td>Very Important</td>
<td>54%</td>
<td>53%</td>
<td>55%</td>
<td></td>
</tr>
<tr>
<td>Being culturally sensitive in your interactions with child clients</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not at all important</td>
<td>1%</td>
<td>0%</td>
<td>2%</td>
<td></td>
</tr>
<tr>
<td>Somewhat important</td>
<td>8%</td>
<td>11%</td>
<td>5%</td>
<td></td>
</tr>
<tr>
<td>Important</td>
<td>35%</td>
<td>38%</td>
<td>31%</td>
<td></td>
</tr>
<tr>
<td>Very Important</td>
<td>56%</td>
<td>50%</td>
<td>62%</td>
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</tr>
</tbody>
</table>

Continued on next page.
Table 10, continued.
(bolded distribution indicates direction of statistical significance)

<table>
<thead>
<tr>
<th>Importance For Achieving Positive And Timely Court Outcomes for Children</th>
<th>All</th>
<th>Georgia Juris</th>
<th>Wash.</th>
<th>Contrast</th>
</tr>
</thead>
<tbody>
<tr>
<td>Establishing and maintaining a relationship with the children you represent</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not at all important</td>
<td>1%</td>
<td>1%</td>
<td>1%</td>
<td></td>
</tr>
<tr>
<td>Somewhat important</td>
<td>7%</td>
<td>8%</td>
<td>5%</td>
<td></td>
</tr>
<tr>
<td>Important</td>
<td>31%</td>
<td>38%</td>
<td>24%</td>
<td></td>
</tr>
<tr>
<td>Very Important</td>
<td>61%</td>
<td>53%</td>
<td>70%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Giving children the opportunity to express their wishes regarding legal Objectives</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not at all important</td>
<td>1%</td>
<td>1%</td>
<td>1%</td>
<td></td>
</tr>
<tr>
<td>Somewhat important</td>
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<td>3%</td>
<td></td>
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<tr>
<td>Important</td>
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<td>46%</td>
<td>20%</td>
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<tr>
<td>Very Important</td>
<td>58%</td>
<td>41%</td>
<td>76%</td>
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<tr>
<td>Allowing children to exercise control over legal objectives and tactics</td>
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<tr>
<td>Important</td>
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<td>24%</td>
<td>29%</td>
<td></td>
</tr>
<tr>
<td>Very Important</td>
<td>19%</td>
<td>7%</td>
<td>31%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Informing children of positions you have taken or will take as their legal Representative</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Not at all important</td>
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<td>1%</td>
<td></td>
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<tr>
<td>Somewhat important</td>
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<td>25%</td>
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<td>21%</td>
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<td>Very Important</td>
<td>54%</td>
<td>36%</td>
<td>74%</td>
<td>p&lt;.01</td>
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<tr>
<td>Explaining to children the meaning of attorney-client privilege</td>
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<tr>
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<td>1%</td>
<td>1%</td>
<td></td>
</tr>
<tr>
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<td>24%</td>
<td></td>
</tr>
<tr>
<td>Very Important</td>
<td>59%</td>
<td>49%</td>
<td>70%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Keeping children informed of the progress and status of their dependency Case</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not at all important</td>
<td>1%</td>
<td>1%</td>
<td>1%</td>
<td></td>
</tr>
<tr>
<td>Somewhat important</td>
<td>12%</td>
<td>19%</td>
<td>4%</td>
<td></td>
</tr>
<tr>
<td>Important</td>
<td>36%</td>
<td>42%</td>
<td>30%</td>
<td></td>
</tr>
<tr>
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<td>51%</td>
<td>38%</td>
<td>65%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td>Making sure that children understand the legal options available to them</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not at all important</td>
<td>2%</td>
<td>2%</td>
<td>1%</td>
<td></td>
</tr>
<tr>
<td>Somewhat important</td>
<td>6%</td>
<td>10%</td>
<td>2%</td>
<td></td>
</tr>
<tr>
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<td>31%</td>
<td>45%</td>
<td>17%</td>
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</tr>
<tr>
<td>Very Important</td>
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<td>43%</td>
<td>80%</td>
<td>p&lt;.01</td>
</tr>
<tr>
<td></td>
<td>All</td>
<td>Georgia Juris</td>
<td>Wash.</td>
<td>Contrast</td>
</tr>
<tr>
<td>------------------------------------------------------------------------------------</td>
<td>-----</td>
<td>---------------</td>
<td>-------</td>
<td>----------</td>
</tr>
<tr>
<td>I find my work as a legal representative for children in dependency cases to be rewarding</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Strongly disagree</td>
<td>0%</td>
<td>1%</td>
<td>0%</td>
<td></td>
</tr>
<tr>
<td>Somewhat disagree</td>
<td>2%</td>
<td>1%</td>
<td>3%</td>
<td></td>
</tr>
<tr>
<td>Neither agree nor disagree</td>
<td>6%</td>
<td>7%</td>
<td>6%</td>
<td></td>
</tr>
<tr>
<td>Somewhat agree</td>
<td>28%</td>
<td>23%</td>
<td>32%</td>
<td></td>
</tr>
<tr>
<td>Strongly agree</td>
<td>64%</td>
<td>69%</td>
<td>59%</td>
<td></td>
</tr>
<tr>
<td>I have a significant impact on the outcomes of the children I represent in dependency cases</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Strongly disagree</td>
<td>0%</td>
<td>0%</td>
<td>1%</td>
<td></td>
</tr>
<tr>
<td>Somewhat disagree</td>
<td>3%</td>
<td>1%</td>
<td>4%</td>
<td></td>
</tr>
<tr>
<td>Neither agree nor disagree</td>
<td>13%</td>
<td>11%</td>
<td>14%</td>
<td></td>
</tr>
<tr>
<td>Somewhat agree</td>
<td>51%</td>
<td>50%</td>
<td>52%</td>
<td></td>
</tr>
<tr>
<td>Strongly agree</td>
<td>34%</td>
<td>38%</td>
<td>29%</td>
<td></td>
</tr>
</tbody>
</table>
CHILD ALIENATION: AN OVERVIEW

H. D. Kirkpatrick, Ph.D.
John Parker, J.D.

Alienation – You know it when you hear it:
    “I won’t go!”
    “I hate her”
    “I wanna talk to the judge”
    “Mom and I got our lawyer”
    “I wish she were dead”

An unholy alliance – Alienating Parent & Child

<table>
<thead>
<tr>
<th>Risk factors that my potentiate alienation (Kelly &amp; Johnston, 2001):</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Triangulation of the child in intense marital conflict</td>
</tr>
<tr>
<td>a. The child develops an unbalanced view of reality.</td>
</tr>
<tr>
<td>2. Child experiences separation as deeply humiliating</td>
</tr>
<tr>
<td>3. High conflict divorce &amp; litigation</td>
</tr>
<tr>
<td>4. Tribal warfare</td>
</tr>
<tr>
<td>a. New partners</td>
</tr>
<tr>
<td>b. Kin</td>
</tr>
<tr>
<td>c. Professionals</td>
</tr>
</tbody>
</table>

Children can be groomed to be alienated.

Alienation is a complex variable ranging in several dimensions:
    1. Mild to severe                                          |
    2. Situational and temporary                               |
    3. On-going pattern                                        |
    4. Sometimes obvious; sometimes not                        |

The alienated child feels insecure about BOTH parents and must resolve this insecurity.

The Alienated child (Kelly & Johnston 2001):
    “one who expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection, fear) toward a parent that is significantly disproportionate to the child’s actual experience with that parent”

“The estrangement or transfer of feelings away from one person and often unto another . . . alienation refers to a concerted attempt, conscious or not, to disrupt a child’s affectionate relationship with the other parent and coopt all the child’s loyalty onto oneself” (Gunsberg & Hymowitz, 2005)

“revenge on the partner through robbing him or her of the pleasure of the child” (Reich, 1949)
TIME is the alienating parent’s best ally.

Systemic Processes that POTENTIATE Child Alienation
1. A history of intense marital conflict
2. A humiliating separation
3. Subsequent divorce conflict fueled by professionals and extended family
4. Personality dispositions of each parent
5. Child-related factors: age, cognitive capacity, temperament

Wallerstein & Kelly (1980):
A child’s irrational rejection of a parent and resistance or refusal to visit

A pathological alignment between an angry parent and an older child or adolescent

Some parents in conflicted divorce engage in a process in which they intentionally and negatively influence the child’s perception of the other parent (Gould & Martindale, 2013)

A Continuum of Child-Parent Relationships after Separation & Divorce
(Kelly & Johnston, 2001)

<table>
<thead>
<tr>
<th>Positive relationship to both parents</th>
<th>Affinity with one parent (closer to one)</th>
<th>Allied Children (preference for one)</th>
<th>Estranged Children (historical reason, e.g., DV, abuse, neglect)</th>
<th>The Alienated Child (reasonable distance)</th>
</tr>
</thead>
</table>

The alienated child comes to believe that the target parent is untrustworthy, unsafe and unavailable.

The alienated child comes to view the target parent with hatred and fear.

Alienated children, over time, re-write their personal histories and develop a distorted reality.

You, child, will lose me if you pursue an attachment with the target parent.

“Children who refuse visitation” (Johnston & Campbell, 1988)

The alienating parent becomes a restrictive gatekeeper, limiting contact between child and other parent – thus limiting the target parent’s function as an attachment figure.

Brainwashing is a part of alienation.

Alienation emanates from Gatekeeping.

The effective alienating parents encourage the child to believe the target parent is not physically or emotionally available.
The child’s view of the family becomes polarized.

Target Parent (Garrity & Baris, 1994)

One must differentiate among domestic violence, estrangement & alienation to understand and explain the distance between a child and a parent. (Olesen & Drozd, 2008; Fidler & Bala, 2010)

A situation in which the child rejects a parent for trivial or false reasons, not consistent with his or her own experience of that parent. (Olesen & Drozd, 2008)

Parents who engage in alienating behaviors have the potential to adversely affect child’s psychological best interests. (Baker, 2005)

Alienating strategies – effective tools for interfering with the developing or existing attachment relationship between the child and the target parent. (Gould & Martindale, 2013)

“Virtual Allegations” (Cartwright, 1993)

“You'll be safe at your mom’s but I’ve put DSS # in your phone if you get scared.”

Alienation is seen when the child persistently refuses to spend time with one parent because of unreasonable ideas and negative feelings about that parent. (Rohrbaugh, 2008)

Parental Alienation Syndrome (PAS) (Gardner, 1980’s)

False allegations of abuse often used to create alienation
Campaign of denigration
Inconsistent, illogical, weak or absurd rationalizations
Use of inappropriate phrases and terms
Lack of ambivalence – one parent is all bad, the other all good
Rejecting the target parent is the child’s decision
Unquestioned support from the alienating parent
No guilt or remorse
Everyone on the target parent’s side is bad

- Campaign of rejection or denigration
- Unjustified rejection
- Alienation process is partial result of alienating parent’s influence
- (Warshak, 2003)

Visitation is not a right of the child but a duty of the parent.

To explain and amplify what we mean regarding our own findings, we offer the following definitions of alienation and estrangement: Alienation may be thought of as a creation of a false reality. It “involves the estrangement or transfer of feelings away from one person and often onto another…alienation refers to a concerted attempt, conscious or not, to disrupt a child’s affectionate relationship with the other parent and coopt [sic] all of the child’s loyalty onto oneself” (Gunsberg & Hymowitz (2005, pp. 109-110).
Alienation is not “Parental Alienation Syndrome” as defined by Gardner (1992). In 1988, Johnston and Campbell referred to the problem of “children who refuse visitation.” These same authors referred to the existence of “an unholy alliance” between the child and one parent against the other.

Alienation is different from “estrangement,” which is a situation where there is understandable distance between a child and a parent when there has been a conflict-ridden or abusive relationship between the child and the parent.

Kelly and Johnston (2001) “propose the concept of the alienated child as a more useful conceptualization of alienation dynamics at work in high-conflict families. They define an alienated child as ‘one who expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection and/or fear) toward a parent that significantly is disproportionate to the child’s actual experience with that parent.”

Alienated children “tend to express their rejection of [a] parent (a) stridently, (b) without apparent guilt or ambivalence, and (c) by strongly resisting or completely refusing any contact with that rejected parent” (Gould, 2006, p. 223).

Alienation, as distinguished from estrangement, can be seen when the child persistently refuses to spend time with one parent because of unreasonable ideas and negative feelings about that parent (Rohrbaugh, 2008, p. 404).

Some of the early researchers about alienation (Clawar & Rivlin, 1991) pointed out that certain cases of alienation have elements that suggest “brainwashing,” illustrated by certain things the child says or does (the following are a small set of examples): the child presents as having permission to love only one parent; having inappropriate information (oftentimes legalistic); appearing to be quoting the “brainwashing” parent, taking a one-sided alliance; making age-inappropriate comments; fearing contact with the target parent.

The reader should understand that this case has not been analyzed through the theoretical model of the “Parental Alienation Syndrome” (Gardner 1992). There are many reasons for this that we will not go into here. Suffice it to say, there is not sufficient support for “PAS” in the social science literature, and such syndromal evidence will not withstand either a Frye or Daubert challenge.

We have utilized a way of assessing this case and analyzing the factors identified in the Court Order through the lens of the decision tree model described by Drozd & Olesen (2004). This model suggests language to help evaluators differentiate between cases in which the term alienation is appropriate, as in non-abuse cases, and when it is advisable to use other language such as estrangement, sabotaging, and counter-productive protective parenting in cases where there is abuse.

“Alienation is not a dichotomous variable to be noted as present or absent. It is a complex variable that ranges in several dimensions: from mild to severe, from situational and temporary, to part of an ongoing pattern. In some situations, it is more obvious than others; in some cases, parents are aware of the alienating they are doing and other cases, they are not” (Drozd & Olesen, 2004, p. 77).

According to Drozd & Olesen (2004), an evaluator must determine (differentiate) if the child’s rejection of the parent is alienation, estrangement, due to sabotaging, and/or the result of counter-productive protective parenting. The model also points out that developmental factors may contribute to a child’s rejection of a parent.
Drozd and Olesen recommend not using the terms *alienation* and *estrangement* in cases where there has been abuse.

In examining possible answers to the question “why?” this condition of alleged emotional distance and extreme hostility between the son and his father has developed, we have explored several hypotheses (following the Drozd & Olesen model (2004)). We have analyzed the “alienation” in this case to determine if it might be explained by a consideration of four factors or hypotheses:

1. Has there been abuse?
2. Is the obvious estrangement a result of poor parenting?
3. Is there alienation?
4. Is this a normal developmental variation?

In a meta-study of empirical studies of alienation (Saini, Johnston, Fidler, and Bala in Kuehnle & Drozd (Eds.) *Parenting Plan Evaluations* (2012), they found:

- The majority of academic literature documenting the presence and sources of alienation remains based on clinical illustrations and expert opinions
- There remains a great debate whether the current research is robust enough to accurately make assertions about etiology, prevalence, and consequences of alienation for children and families
- Further research is needed to distinguish alienation from other types of strained parent-child relationships
- The Saini et al. findings are based on studies identified in the fall of 2010
- 29 published papers and 10 doctoral dissertations were included
- This meta-study assessed the quality of the research of these 39 studies, using the GRADE system developed by Atkins, et al., (2004)
- None of the studies were given a high quality score
- 7 (18%) were scored as “moderate,” meaning “further research is likely to have an important impact on confidence in the estimate of effect and may change the estimate”
- These 7 studies were Gordon, Stoffey, and Bottinelli (2008); Johnston (2003); Johnston, Walters, and Olesen (2005a); Johnston, Walters and Olesen (2005b); Johnston, Walters, and Olesen (2005c); Laughrea (2005); and Stoner-Moskowitz (1998).
- There is general agreement that alienation may occur regardless of gender of parent or child
- The phenomenon occurs more frequently in disrupted families and litigating cases, suggesting parental conflict is a formative factor
- Fathers are more likely to be the rejected parent
- The problem of alienation has been raised increasingly in custody litigation matters during the past decade

No consensus about its definition, e.g., parental alienation, child alienation, parental alienation syndrome, etc.

There is agreement about the kinds of behavioral strategies that parents can use to manipulate a child in ways that interfere with that child’s relationship with the other parent

There is also agreement about the cluster of symptoms or behaviors that indicate the presence of alienation in the child.

No defensible evidence of the prevalence or incidence
However alienation occurs more frequently in disrupted families and litigating families

Parental conflict is suggested as a formative factor

- Alienated child: “freely and persistently expresses unreasonable negative feelings and beliefs (such as anger, hatred, rejection and/or fear) toward a parent that are disproportionate to their actual experience of parent”

- Most children of separation want to see both parents, long for them

- Retrospective Studies: most adults wished they had had more time with access parent (Father)
  - attributed blame to mothers
  - those who claim hate, were refusing/reticent to see Dad, secretly wished he’d know they were not telling the truth, that he had been more persistent, wished the brainwashing to stop was stopped by someone

- 11 – 15% in community samples of separating couples

- 20 - 40% in high conflict samples (Johnston et al.; Baker)
  - direct/indirect
  - mild to severe
  - intentional/unintentional

- Direct alienation – directly undermining relationship with other parent
  - actively denigrating, blaming, badmouthing
  - encouraging child to express negative sentiments to an assessor, the court, child’s lawyer, other parent

- Indirect alienation – undermining relationship without taking direct action
  - Tacit approval of child’s expression of negative feelings; failure to help child resolve matters
  - Failure to facilitate contact, correct, encourage
  - Arranging activities that compete with access

- Children can reject/resist one parent for many reasons

- Relationships exist on a continuum:
  - Affinity (preference, but not rejecting)
  - Alignments (consciously taking sides to avoid loyalty conflict)
  - Estrangement (can be realistic)
Alienation (unjustified)

- Need to differentiate:
  - actual refusal (alienation) from lesser forms of resistance/reluctance (affinity, alignment, etc.), THEN
  - pathological alienation VS realistic estrangement (Warshak)

- Realistic Estrangement—a justified and often times healthy reaction to trauma—realistic fears and/or anxiety caused by violence/abuse/inept parenting of rejected parent

- May be different interventions/remedies depending on the causes and responses, degrees/levels of alienation

- Better NOT to view visitation as “right of child” as this may encourage manipulation, rather it is “duty of the parent” to support relationship to other parent

- “A parent does have a duty to not turn a child away from the other parent by ‘poisoning the well.’ Notwithstanding the perceived imperfections in the other parent, a custodial parent should, in the best interests of the children, nurture the children's relationship with the noncustodial parent.”
  - Johnson v Schlotman, 502 N.W.2d 831 (1993, ND)

- Though evaluators, advocates and courts often give significant weight to wishes of child, not always appropriate
  - Child may not want to visit due to pressure, threats, emotional blackmail etc. from a parent (“alienation”)
  - Child may ally with 1 parent to end the tension, or from anger at end of marriage (“aligned”) – understandable response to tension
  - OR child’s desire not to visit may reflect genuine fear, even if no recent abuse (“estranged”)

- Visits with unwilling child may emotionally harm child

- Unless rejected parent has good skills & patience, visits with unwilling child may be unpleasant and further undermine relationship

- Early definition: “parental alienation occurs when a parent pursues a consistent course of action calculated to prevent any close relationship existing between the child and other parent, causing the child’s mind to become ‘poisoned and prejudiced’ against the other parent.”
  - Ludlow v Ludlow, 201 P 2d 579 (Cal Dist Ct App, 1949)

- Late 1980’s & 1990’s acceptance of “parental alienation syndrome” in many decisions

- Since 2000, extensive acceptance of “parental alienation,” but now reluctance to use “syndrome”
  - See e.g. In re McCord, 2003 WL 23219961 (Iowa App.)

- Generally requires evidence from evaluator or other expert

- R.B. v. S.B. (N.Y.L.J., Mar. 31, 1999, at 29, col 5) the court determined that the wife had “so vilified” her husband to their son, causing the boy to refuse to see his father for almost four years, that a reduction in spousal support was justified.

- Protracted litigation without remedial efforts will almost certainly lead to continued alienation

- Long “cooling-off” periods usually don’t work

- If alienation found to exist, ordering evaluation/assessment, therapy, counselling takes many months and may be too late to yield a positive outcome

- Possibility of emotional abuse leading to CPS involvement and child welfare proceeding

- Judges’ decisions need to address not just immediate problem before the court, but also long-term interests of the children

- Children have a right to have a healthy relationship with both parents

- Need for specialized training about alienation for judges and lawyers


CHILD LABOR TRAFFICKING IS A CHILD WELFARE ISSUE

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Abstract

This article will examine the recent mobilization of the child welfare system to better protect child sex trafficking victims and argue that this same attention would benefit child labor trafficking victims. It will also discuss the recently passed Preventing Sex Trafficking and Strengthening Families Act (P.L. 113-183) and discuss how the new federal framework could have benefited child labor trafficking victims as well as child sex victims.

I. Introduction

Recent reports and media coverage from across the country have highlighted the connection of child sex trafficking or commercially sexually exploited children (CSEC) to the child welfare system across the United States. In fact, reports have estimated that as many as 50-80% of child sex trafficking victims have had contact with the child welfare system.\(^1\) In Los Angeles, 59% of the 174 juveniles arrested on prostitution-related charges in 2010 were in the foster care system, some of whom were recruited into prostitution from group homes.\(^2\) A report published by the California Child Welfare Council found that anywhere from 50%-80% of victims of commercial sexual exploitation are currently or were formerly involved with the child welfare system.\(^3\) In Connecticut, the Department of Children and Families reported that 86 out of 88 children identified as sex trafficking victims had been involved with child welfare services.\(^4\)

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\(^4\) ACYF Guidance at 3, see supra note 1.
In comparison to child sex trafficking, the issue of child labor trafficking in the United States is less researched and less frequently highlighted by the media. However, the limited evidence available demonstrates the need for the child welfare system to pay equal attention to this issue. For example, in Florida, twenty-four children were involved in a child labor trafficking scheme where they were forced to sell items door to door until they were identified by an off-duty Florida Department of Child and Families worker.\(^5\) A similar scheme was identified in Colorado, where an anti-trafficking organization has helped children who were trapped in magazine sales crews.\(^6\) Child labor trafficking victims have been identified in a diverse array of industries, including agricultural work, restaurant service, hair braiding, domestic work, forced peddling, and a range of illegal work activities\(^7\) For example, in California, a newspaper reported the horrific tale of a girl who ran away from foster placement and was then kidnapped, confined in a metal box, sexually assaulted, and only allowed outside to cultivate marijuana for her captors.\(^8\) Child labor trafficking victims will be identified if an effort is made to look for them. They will continue to be exploited and abused if people continue to ignore this issue or believe this does not occur in the United States.

In light of the pervasive commercial exploitation of children in America for labor and sexual services, this paper will discuss (1) the intersection of child sex trafficking victims and the child welfare system; (2) the similar intersection of child labor trafficking victims and the child welfare system; (3) protections provided for trafficking victims in the child welfare system in the Preventing Sex Trafficking and Strengthening Families Act and (4) recommendations for State Child Welfare Systems implementing this new law to protect all child trafficking victims, including those who are exploited for forced labor.

II. Child Sex Trafficking and The Child Welfare System

Media sources and recent reports have documented increasing identification of U.S. citizen youth who are being trafficked in the sex industry.\(^9\) Federal law is clear that any person under the age of eighteen engaging in commercial sex is a victim of human trafficking.\(^10\) However, many state laws contradict federal law and continue to permit the arrest of children for prostitution. For example, under current California state law, a child engaging in prostitution has committed a criminal act, even though the child cannot legally consent to sex and the adult who has hired the child has committed statutory rape.\(^11\) Only eighteen states have addressed this issue by enacting so-called “safe harbor laws,” which attempt to protect prostituted minors from the criminal and juvenile justice system.\(^12\) These laws operate in highly varied ways from state to state, as some

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\(^{10}\) 18 U.S.C. § 1591(a).

\(^{11}\) CAL. PENAL CODE § 261.5; § 269; § 647(b). California’s prostitution law is not limited in its application to adults and does not decriminalize prostitution for a minor offender, nor does it create a presumption that a minor engaged in prostitution is a victim of trafficking.

decriminalize prostitution for minor offenders, some automatically divert minors engaged in prostitution to service programs, and others merely create an affirmative defense for a minor charged with prostitution.\textsuperscript{13}

In 2014, the National Human Trafficking Resource Center hotline, operated by Polaris, received reports of 5,042 human trafficking cases inside the United States.\textsuperscript{14} Of these cases, 3,770 (75\%) involved sexual exploitation, while 1,581 (31.4\%) involved minor victims.\textsuperscript{15} In 2014, the National Center for Missing & Exploited Children estimated that one in six endangered runaways reported to them were likely sex trafficking victims.\textsuperscript{16} 68\% of these likely sex trafficking victims were in the care of social services or foster care when they ran away.\textsuperscript{17} Clearly, more efforts are needed to protect child trafficking victims from commercial sexual exploitation in the United States. One of the key targets for early identification and prevention must be the child welfare system, considering the astonishing statistic that as many as 50-80\% of child sex trafficking victims have had contact with this system.\textsuperscript{18}

Statistics from the past few years highlight the striking intersection between the child welfare system and child sex trafficking. In a 2013 nationwide FBI raid to recover child sex trafficking victims, the FBI reported that up to 60\% of the recovered victims had some involvement with group homes or the foster care system.\textsuperscript{19} In 2007, the New York Office of Children and Family Services identified 2,652, child trafficking victims statewide, finding that 85\% of these children had contact with the child welfare system, primarily in the form of abuse and neglect proceedings.\textsuperscript{20} This report also found that 75\% of the child trafficking victims in New York City had been in foster care at some point in their lives.\textsuperscript{21} In 2010, an FBI agent estimated that 70\% of children identified as sex trafficking victims in the state of Florida were foster youth.\textsuperscript{22}

Los Angeles County, California presents a particularly vivid portrait of the interconnected nature of child sex trafficking and the child welfare system. Of the 174 juveniles arrested on prostitution-related charges in 2010 in Los Angeles County, 59\% were in the foster care system.\textsuperscript{23} In 2012, 72 commercially sexually exploited children were processed through Los Angeles County’s Succeed Through Achievement and Resilience (STAR) Court Program, 56 of them

\textsuperscript{11} See, e.g., 725 ILL. COMP. STAT. § 5/11-14(d) (individuals under eighteen immune to prosecution for prostitution); MICH. COMP. LAWS § 750.448 (prostitution statute only applicable to those sixteen or older); WASH. REV. CODE § 13.40.070 (requiring a prosecutor to divert a prostitution case where the defendant is a juvenile and has no prior offenses); N.J. STAT. § 2C:34-1(e) (creating an affirmative defense to a prostitution charge if the accused was being trafficked); WIS. STAT. § 939.46(1m) (creating affirmative defense excusing any offense committed as a direct result of being trafficked).


\textsuperscript{15} Id.


\textsuperscript{17} Id.

\textsuperscript{18}ACYF Guidance at 3; see supra notes 1-3 and accompanying text.


\textsuperscript{21} Id.


(78%) were involved with the child welfare system. In 2013, nearly 150 youth were arrested for prostitution in Los Angeles County and 89% of those arrested had some contact with the foster care system.

III. Child Labor Trafficking and the Child Welfare System

Far too often, the dialogue around human trafficking is centered on child sex trafficking or CSEC. When looking at the issue of commercial exploitation of American youth, it is important to recognize and discuss all forms of human trafficking, including both sex and labor trafficking. Sexual exploitation and forced labor are both included in the federal definition of human trafficking. The Trafficking Victims Protection Act (TVPA) of 2000, Section 103(9) defines “severe forms of trafficking in persons” as:

A. sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
B. the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Although data on sex and labor trafficking in the United States is currently incomplete, what is known is that human trafficking of children spans across diverse industries nationwide, such as agriculture, restaurant work, hair and nail salons, peddling rings, domestic work, commercial sex, forced begging, and drug smuggling or cultivation. Since 2007, the National Human Trafficking Resources Center (NHTRC) has identified 3,829 potential cases of labor trafficking in the United States, from which 489 cases (13%) were minor victims. Since 2012, the labor trafficking cases tracked by the NHTRC included victims engaged in sales crews/peddling rings (382 cases); domestic work (490 cases); food service work (228 cases); agriculture (152 cases); health and beauty services (112 cases); and small business, retail, and other industries (81 cases).

Some specific case examples of labor trafficked children identified in the United States include:

- **Mary**, a young Mexican girl, was forced to peddle tamales on the street and was sexually assaulted in her family’s home. While she was peddling on the street, a woman noticed bruises on her body and called the police. Police dropped Mary off at the local homeless shelter where she waited for help for over two months before being identified as a child trafficking victim by a staff member.

- **Jessica** was 17 when she was recruited to sell magazines in the southern United States. She was forcibly transported and made to work in various locations in the United States and finally escaped when she was 18. She went to a police department for help.

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26 22 U.S.C. § 7102(9).
29 Hotline Statistics, see supra at note 14.
30 Individual stories from Coalition to Abolish Slavery and Trafficking (CAST) caseload (2014).
police department considered her homeless and did not identify this as a labor trafficking case.31

- **Liz and Marty**, two American youth were homeless after their families kicked them out of their homes and answered a website ad for au pair services. Once they were flown to the host family’s home, they were forced to work every day and sexually assaulted by the father of the household, who used drugs to sedate them.32

- **Marco**, 16, was forced to smuggle drugs into the United States. He was violently beaten and watched as a friend was killed in front of him. Marco was arrested for selling drugs and sentenced to time in juvenile hall instead of being identified as a victim of human trafficking.33

- In Ashland, Ohio, a federal jury convicted three individuals of engaging in a labor trafficking conspiracy after the group held a cognitively disabled woman and her child against their will and forced them to perform manual labor.34 In addition to beatings and threats with vicious animals, the traffickers also threatened the mother with the possibility that authorities might take her child away.35 The traffickers forced the mother to hit her child while they recorded video, so that they could threaten to show the video to authorities in order to have the child removed.36

These examples demonstrate that child victims of labor trafficking are clearly victims of abuse and neglect in similar ways to sex trafficked children. Because of the nature of this crime, many child sex and labor trafficking victims will not self-identify as victims, since they often experience intense shame and distrust of authority figures.37 Self-identification is also difficult for all child trafficking victims because many victims feel emotionally bonded or physically dependent on their traffickers.38 Similarly, both labor and sex trafficked children are often arrested for the crimes their traffickers force them to commit.39 These similar dynamics suggest that increasing the capacity of child welfare agencies to identify all types of trafficking victims could simultaneously increase the number of children who receive appropriate specialized services and assistance after being commercially exploited.

Organizations that serve homeless and exploited youth have demonstrated successful models for screening and identifying labor trafficked children. The Alliance to End Slavery and Trafficking
(ATEST) recently conducted a survey of 42 runaway and homeless youth organizations. One organization had identified as many as 150 labor trafficked youth in the last three years, while another had identified 122 labor trafficked youth during this same time period. These survey responses indicate that these organizations were able to identify potential child labor trafficking cases by simply asking intake questions about child labor trafficking.

Covenant House, a non-profit organization which serves homeless, abandoned, abused, trafficked, and exploited youth, released a study in May 2013 entitled Homelessness, Survival Sex and Human Trafficking: As Experienced by the Youth of Covenant House New York, which identified both sex and labor trafficked youth among the youth it serves. This study interviewed 174 youth receiving services from Covenant House and found that 12% of these youth had experienced sex trafficking and 2.9% had experienced labor trafficking. Notably, the study demonstrates that identification of sex and labor trafficking cases can occur using a single questionnaire and appropriate training. The study found that labor trafficked children, similarly to sex trafficked children, are often recruited by family members or close family friends at an early age (e.g., two of the children identified were recruited at the age of 11 and 14) and that trafficking is employed as a tactic to further illegal activities such as drug sales. The report concluded that “[t]he dynamics of labor trafficking appeared very similar to those of sex trafficking, with traffickers exploiting vulnerable people’s desperation and isolation.”

All commercially exploited children are in need of specialized, comprehensive services and protections. Sex and labor trafficked children need immediate access to shelter, medical care, and therapy, through a child welfare system uniquely designed to protect abused children. All trafficked children have safety concerns and complex legal rights and many require criminal justice advocacy, especially when their traffickers are connected to organized criminal networks and gangs.

Our child welfare system has failed to appropriately identify and serve all child trafficking victims. As we explore the role of child protective agencies in responding to trafficking, it must include both sex and labor trafficking in order to protect all children from exploitation, abuse, and neglect.

IV. Federal Framework for Protection Under the Preventing Sex Trafficking and Strengthening Families Act of 2014

A. Background

Five different bills were introduced in the United States House and Senate in 2013-2014 that dealt with child trafficking and the child welfare system. The primary focus of all of the proposed legislation was data collection, training centered on best practices, and reporting child welfare efforts involving child trafficking to Congress. The bill which had the most co-sponsors, the Strengthening the Child Welfare Response to Trafficking Act of 2013, included provisions regarding data collection, training, and federal reporting

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41 Id.
43 Id. at 5, 9.
44 Id. at 17-18.
45 Id.
46 Id. at 13.
requirements which applied comprehensively to both sex and labor trafficked children. None of the remaining proposed bills used the full federal definition of trafficking in persons, which includes labor trafficking.

Rather, the majority of the proposed bills focused exclusively on child sex trafficking in the child welfare system. Each of these bills could have been easily modified to include child labor trafficking. Out of all of the proposed legislation around these issues in 2013-2014, only the Preventing Sex Trafficking and Strengthening Families Act, which excludes labor trafficking victims from its provisions, was ultimately passed into law.

By excluding child labor from data collection and reporting, these bills fail to meet the goal of providing more competent, targeted services to potentially exploited youth in the child welfare system. In addition to the moral imperative to protect vulnerable children, a more expansive definition of child trafficking would also provide long-term fiscal benefits for the government. A more comprehensive collection of data would lead to more efficient provision of government-funded services, which ultimately leads to greater cost savings for taxpayers.

B. Provisions in the Preventing Sex Trafficking and Strengthening Families Act of 2014 that are directly relevant to human trafficking

The Preventing Sex Trafficking and Strengthening Families Act [“the Act”] became law on September 29, 2014. The Act is aimed at preventing youth in the foster care system from becoming victims of sex trafficking. First, the bill adds many substantive requirements for the state plans for foster care. Under the Act, the state plan must demonstrate that the state agency has developed policies and procedures for identifying, documenting, and determining appropriate services for any youth for whom the state agency has responsibility for placement, care, or supervision who the state has reasonable cause to believe is, or is at risk of being, a victim of sex trafficking or a severe form of trafficking in persons. This reference to “a severe form of trafficking in persons” is the only possible reference to labor trafficking victims in the Act, but it is used in the context of defining the term “sex trafficking victim.” The Act also authorizes a state to develop these same policies and procedures for any individual under the age of 26, regardless of whether the individual was ever in the foster care system.

New protections are provided under the Act for missing and runaway youth, who are particularly vulnerable to trafficking. A new state plan requirement directs states to implement protocols for locating and responding to children who have run away from foster care, including screening a missing child upon her return to determine if the child is a possible sex trafficking victim. This requirement also directs state agencies to immediately report information on missing or abducted youth to law enforcement.

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50 Id.
52 Id.; the Act at § 101, see supra note 49; 42 U.S.C. § 671(a)(9).
53 42 U.S.C. § 675(9); the Act at § 101, see supra note 49.
54 42 U.S.C. § 671(a)(9); the Act at § 101, see supra note 49.
56 42 U.S.C. § 671(a)(35); the Act at § 104, see supra note 49.
authorities for entry into the National Crime Information Center database of the Federal Bureau of Investigation and to the National Center for Missing and Exploited Children.\textsuperscript{57}

The remaining provisions of the Act focus on reporting and future research regarding youth sex trafficking. A new state plan requirement mandates the reporting of instances of sex trafficking to law enforcement authorities within 24 hours of identifying a victim.\textsuperscript{58} The Act also requires data regarding the annual number of children who are identified as sex trafficking victims before entering foster care or while in foster care to be reported in the Adoption and Foster Care Analysis and Reporting System (AFCARS).\textsuperscript{59} On a national level, the Act directs the Secretary of Health and Human Services to report to Congress on: (1) children who run away from foster care and their risk of becoming sex trafficking victims, including characteristics of those children, factors associated with children running away, the experiences of children while absent from care, and trends in the number of runaway children; (2) state efforts to provide specialized services, foster homes, child care institutions, or other placements for child sex trafficking victims; and (3) state efforts to ensure that children in foster care form and maintain long-lasting connections to caring adults.\textsuperscript{60} Finally, the Act establishes the National Advisory Committee on the Sex Trafficking of Children and Youth in the United States, which will advise the Secretary of Health and Human Services, the Attorney General, the Committee on Finance of the Senate, and the Committee on Ways and Means of the House of Representatives on policies concerning the nation’s response to the sex trafficking of minors in the United States.\textsuperscript{61}

V. Why Child Labor Trafficking Victims Could Have Equally Benefited From These Protections

The role of child welfare in prevention and intervention of human trafficking extends beyond the protection of sex trafficked children. The Preventing Sex Trafficking and Strengthening Families Act was an important step forward in assisting victims through the child welfare system, but it only requires that data be collected about child victims of sex trafficking. While collecting this information is crucial to combating human trafficking, these data collection requirements focusing on sex trafficking are insufficient to assess the scope of the problem or to be used as a basis for the adoption of effective solutions to combat human trafficking. It is also important to identify, document, protect, and serve the child victims of labor trafficking who come into contact with the child welfare system. Child welfare agencies are in a highly strategic position to prevent all forms of human trafficking. The protections established by the Preventing Sex Trafficking and Strengthening Families Act for child sex trafficking victims could be highly applicable to child victims of labor trafficking for the following reasons:

- Like child sex trafficking victims, child labor trafficking victims are abused, neglected, and often sexually assaulted children.
  - A recent report examining both the common circumstances among sex and labor trafficked children concluded that “[t]he dynamics of labor trafficking appeared very similar to those of sex trafficking, with traffickers exploiting vulnerable people’s desperation and isolation.”\textsuperscript{62}

\textsuperscript{57} Id.
\textsuperscript{58} 42 U.S.C. § 671(a)(9); the Act at § 102, see supra note 49.
\textsuperscript{59} 42 U.S.C. § 679(c)(3); the Act at § 103, see supra note 49.
\textsuperscript{60} The Act at § 105, see supra note 49.
\textsuperscript{61} 42 U.S.C. § 1314b; the Act at § 121, see supra note 49.
\textsuperscript{62} Covenant House Report 13, see supra note 42.
• Child labor trafficking impacts not only foreign national children, but also U.S. citizen children.
  o In the period from Dec. 7, 2007 through May 31, 2014, the Human Trafficking Resource Center reported 619 cases of labor trafficked minors, as well as another 124 cases of minors trafficked for both sex and labor. Collectively, these cases comprised 16.53% of the 4,496 total minor cases reported to the National Human Trafficking Resource Center during this time period. From the total number of minor trafficking cases reported during this period, 2,143 (47.66%) were U.S. citizens or legal permanent residents.63
  o In the year 2014 alone, the National Human Trafficking Resource Center hotline received reports of 5,042 potential human trafficking cases in the United States and 1,581 of these cases involved minor victims. Of these cases involving minors, 143 (9%) were trafficked for labor, while 49 (3.1%) were trafficked for sex and labor. Out of those labor trafficking cases, 31 (22%) involved U.S. citizen or legal permanent resident victims. Similarly, there were 1,322 (83.6%) sex trafficking cases involving minors, out of which 558 (42.2%) involved U.S. citizens.64
  o Perhaps most compelling is a human rights lawyer, originally from Nevada, testifying to Congress in 2014 about his own experience being forced to provide domestic labor while being sexually abused as a young teenager and questioning why both labor and sex trafficking victims were not protected under the Act.65

• Better data collection is needed for all forms of child trafficking. If data is only collected by child welfare systems about child sex trafficking and not about child labor trafficking, the child welfare system will never be able to appropriately address this issue.
  o A May 2013 study entitled Homelessness, Survival Sex and Human Trafficking: As Experienced by the Youth of Covenant House New York identified both sex and labor trafficked youth among the individuals served by a large non-profit organization. The study demonstrates that identification of sex and labor trafficking cases can occur using a single questionnaire and appropriate training.66

• It is far more cost effective to include all child trafficking victims, both sex and labor, in any reforms made to the child welfare system to deal with child commercial exploitation issues.
  o Many of the changes needed in the child welfare system start with data collection and training. Development of these materials and resources is a one-time cost and including all forms of child trafficking will not add to the initial expense. However, it will be more costly if all forms of trafficking are not included up front and these materials need to be developed again in the future.
  o Child sex and labor trafficking victims need very similar specialized services that are tailored to the unique dynamics of human trafficking—including access to shelter, basic necessities, mental health and medical care, case management, and legal services.

• Child trafficking at its core is about child exploitation for commercial purposes. The dynamics of why and how children are recruited into sex or labor trafficking is therefore strikingly similar, as are bonds that many children experience with their traffickers.
  o Many children in both sex and labor trafficking experience “traumatic bonding” by becoming emotionally and physically dependent on their traffickers, which

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66 Covenant House Report 17-18, see supra note 42.
can make it difficult to identify potential trafficking victims.67

- Similarly to victims of sex trafficking, child victims of labor trafficking are often economically vulnerable to exploitation due to their need to provide financially for themselves or their families.68

VI. Model Human Trafficking Guidelines for Child Protection Agencies69

In order to effectively fight child labor trafficking, federal and state legislation regarding the role of child protection agencies must focus on training, prevention, identification, serving potential victims, and data collection. This multi-faceted strategy will preemptively protect children who are vulnerable to trafficking while also identifying and serving children who have been victimized in the past by labor trafficking. Many of the following suggested guidelines are already established for potential sex trafficking victims and can be easily expanded to include victims of labor trafficking as well.

1. Training:

All human trafficking trainings for child protection agencies should cover sex and labor trafficking of foreign national and U.S. citizen children. Child protection agencies should involve specialized service providers and human trafficking survivors in both the development and the delivery of trainings, provided that survivors should receive compensation and support for such work. Providers can include runaway homeless youth services, LGBT youth organizations, anti-trafficking and victim services agencies in the development and implementation of the trainings. All staff should be required to attend an introductory human trafficking training and should attend a continuing education training no less than once a year. These trainings must cover both labor and sex trafficking of girls, boys, and transgender youth. Advanced human trafficking training should be available, and ideally required, for those likely to interface with potential trafficked youth. A formal protocol should be implemented in order to ensure that basic human trafficking training is mandatory and regularly available for target staff. Child protection agencies should also reach out to emergency response partners, including police and emergency medical staff, to partner on basic trainings where possible.

Basic human trafficking training should include types of human trafficking, identification of trafficked youth, dynamics of exploited youth, the importance of early assessment of the therapeutic needs of trafficked youth, and understanding how child protection settings, group homes, foster homes, and emergency shelters are targets for trafficking. Advanced training topics around trafficked youth could include building trust, interview methods, safety issues, engaging parental or support systems, applying client centered practice methods, available legal and financial benefits, managing criminal victim witness issues, understanding risk factors for recruitment, understanding forms of legal redress, understanding the intersection between domestic and intimate partner violence with trafficking of minors, identifying marginalized youth populations at risk for less visible trafficking, trafficked youth with developmental delays, undocumented trafficked youth, and working with migrant farm worker youth.

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67 Child Labor Trafficking in the United States, see supra note 33; Meeting the Legal Needs of Child Trafficking Victims, see supra note 37; Stockholm Syndrome in the Pimp-Victim Relationship, see supra note 38.


69 Recommendations drafted by Keeli Sorensen, Director of Government Relations and Public Policy, Polaris and Stephanie Richard, Policy and Legal Services Director, Coalition to Abolish Slavery and Trafficking (CAST). Adopted from recommendations presented to the Department of Health and Human Services by the Alliance to End Slavery & Trafficking (ATEST) available at: https://endslaveryandtrafficking.org/human-trafficking-guidelines-for-child-protection-agencies/.
2. Prevention:
Training programs should explore early identification of youth at risk of trafficking for all front-line staff and implement a formal protocol for identifying at-risk youth. Specialized programming or therapy for youth at risk for trafficking should be developed. Additionally, organizations and speakers who can educate staff about youth at-risk to trafficking should be utilized as valuable resources. Links to external programs for at-risk youth should be identified and cultivated. Child protection agencies should consider partnering with schools to do outreach and training, as schools are critical locations for prevention efforts.

3. Identification:
Child protection agencies should implement a formal protocol for identifying trafficked youth. While understanding that there are no magic-button intake questions, child protection intakes should be updated to include several key questions about human trafficking. If the child answers “yes” to any of these, then they should be referred to a human trafficking case management specialist for a more comprehensive screening. However, the term “human trafficking” should not be used with youth, as this is often a misunderstood or unclear term. Instead, screening questions should utilize youth-friendly terminology and focus on survival activities to identify potentially trafficked youth. Intake questions may include, but are not limited to:
- Do you have access to your identification documents, or is someone else holding them?
- Have you worked for anyone without being paid or without being paid what you were promised?
- Have you had to miss school because you had to work?
- Have you ever done something sexual for money or food or a place to stay?
- Have you been involved sexually with people on the Internet like sending photos or videos to someone?
- Has an older person outside of your family ever asked you to leave home with them?
- Have you ever been arrested or committed a crime that you felt someone else forced you to do?
- Have you ever done something like holding or selling drugs or other things that may have gotten you in trouble, for someone else?

4. Serving and Engaging Potential Victims:
Trainings should be provided to help key front-line child protection staff engage with youth who may be victims of trafficking. Outreach workers, truancy officers, age-out planners, and other key stakeholders should receive training to help them engage vulnerable youth, including homeless youth communities, youth with mental illness, and youth with developmental delays.

Child protection agencies should make every effort to designate specialist caseworkers to specifically focus on working with youth identified as trafficked or strongly suspected as trafficked. Knowing that it often takes time for youth to disclose they have been trafficked, workers should be given extended time on these cases. Identified trafficked youth should be referred to therapists who have received advanced human trafficking training. Agencies should also share information about enrollment in VOCA (Victims of Crime Act) compensation or other state benefits programs, as well as providing referrals.
to attorneys with expertise in criminal victim witness advocacy or with immigration expertise when needed.

Finding safe housing for trafficked youth can be challenging. Available options will be dependent on a variety of factors including gender, sexual preference, and safety. Because this population often lacks stability, it is extremely important that children who leave placement should be able to return to the same placement if they choose to do so. It could take months or longer for youth to self-identify, so services should not be contingent on positive identification. Housing options should include placement with family or former guardian(s) with specialized support for family reunification, placement in specialized foster care with additional support, or referential residential care facilities. Secure placement should be considered as a last resort, and when used it should be modeled after the strict requirements in place for children designated as a harm to themselves or others.

5. **Data Collection:**
A formal protocol for standardized data collection and regular reporting regarding all at-risk trafficked youth should be implemented. Standardized data collection on all trafficked youth should include separate categories for sex and labor, indication of whether labor trafficked youth also experienced sexual violence, gender/gender identity, race/ethnicity, sex, whether the child was trafficked by a family member or exploited by a third party, age at recruitment, and number of traffickers.

**VII. Conclusion**

The collective experiences of anti-trafficking organizations and youth services organizations working throughout the United States demonstrate the urgent need for child welfare agencies to identify and protect child victims of labor trafficking. In order to address the problem of child trafficking comprehensively, states must make a greater effort to collect data on the impact and scope of child labor trafficking within their borders. The child welfare system is a crucial place for this data collection effort to start. As states work to update their polices and procedures to comply with the *Preventing Sex Trafficking and Strengthening Families Act of 2014*, they should consider updating these procedures to identify and protect all forms of child trafficking. In the future, legislation at the state and federal level should prioritize protecting child labor trafficking victims, along with child sex trafficking victims. At the federal level, this could be achieved through simply amending the *Preventing Sex Trafficking and Strengthening Families Act* to cover children trafficked for labor under its provisions. Together, federal and state government can combat the problem of child labor trafficking on the front lines by requiring child welfare agencies to report more wide-ranging data, offer specialized trainings, and provide competent services which mindfully identify and protect vulnerable youth.
COLLABORATING ACROSS SYSTEMS TO IMPROVE EDUCATIONAL OUTCOMES OF YOUTH IN FOSTER CARE

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Introduction

Families involved in the child welfare system are often served by many other systems as well. One study found that “1 in every 15 Illinois families (6.9%) is a multi-system family.” (Goerge et.al., 2010, p.3). Child welfare involved youth also access multiple systems including the education system, legal system, mental health system, and social services system. Unfortunately these systems often operate in isolation creating both redundancy and gaps in areas of service delivery and policy development. Woodruff et.al. (1999) opined that “school officials who are mandated to serve all students are frequently wary of interagency collaboration because they fear additional responsibilities, accountability, and costs, and they frequently perceive other members of the system of care as calling for services without offering the resources to implement them.” (p.26). This reticence is not only felt on the part of school officials; many administrators share these concerns making efforts at better communication an important element of cross-systems collaboration.

Fiscal limitations and increasing responsibilities for everyone involved are valid and must be considered. There are creative solutions available however, that lead us towards working together rather than keeping us apart. Despite the hesitation and concerns of many about cross-systems collaboration there are many states who are engaging in this process and achieving successful outcomes as a result. (National Resource Center for Permanency and Family Connections, 2010). For example, the National Working Group on Foster Care and Education, comprised of multiple agencies, strives to improve educational outcomes of youth in foster care by identifying adult relationships important to youth, developing network opportunities for youth, increasing school stability and sharing data. (Pawlowski, 2014). The ability to coordinate services and work together to identify the needs of the whole youth allows us to serve the whole youth and is invaluable in creating a path to success. Federal legislation such as the Fostering Connections to Success and Increasing Adoptions Act (2008) and the Uninterrupted Scholars Act (2013) also encourages cross-systems collaboration to support improved educational outcomes for youth in foster care.

When professionals work together across systems they can coordinate efforts and, in some cases, pool resources to become more efficient. “Ultimately, sharing information, resources, and personnel may lead to not only more efficient and effective intervention and prevention for youth and families, but also greater fiscal accountability through the elimination of redundant efforts.” (Gonsoulin, S., & Read, N.W., 2011, p.5). This increased efficiency leads to maximized resources for the service group as well as improved outcomes for the youth those systems serve. “Over the last decade, child welfare agencies and advocates have begun to recognize that the students they serve need access to greater educational opportunities, and that education is critically important to child wellbeing, permanency planning and a successful transition to adulthood.” (Advocates for Children of New York, 2012, p.9).
A key component to working across systems is to identify who the stakeholders are in the community serving the youth and understanding their roles. Each stakeholder has an affirmative set of responsibilities towards the youth and each has limitations that their professional obligations and ethics do not allow them to cross. Understanding and respecting these roles and boundaries is imperative to successful cross-systems collaboration efforts. Altshuler (2003) found that a “lack of understanding regarding confidentiality constraints” was a barrier to successful collaboration. (p.55). The same study also found that there was a mutual lack of trust between educators and caseworkers. (Altshuler, 2003). The Vera Institute for Justice (2004) also found that “in many instances there is a fundamental lack of understanding of how the system works” between caseworkers and educators. (p.5). Establishing a protocol that resolves these barriers is an important step in successful cross-system collaboration efforts.

**Cross-Systems Collaboration**
For purposes of this article we will focus on three categories of stakeholders: Education System, Court System, and Social Service System. We recognize that there are many other key groups that serve youth involved in the child welfare system and encourage the expansion of the principles discussed to these other categories as well. The overarching theme in cross-systems collaboration is that the youth is a part of and voice in each of the systems they access.

**Education System**
The stakeholder category labeled “Education System” may include State and local administrators, district representatives, education liaisons, program directors, principals, counselors, teachers, and others directly involved in delivering educational and supportive services to youth involved in the child welfare system. The focus and responsibility of this group is to address the immediate and on-going educational needs of the youth and to guide the youth to future academic success in a trauma informed manner. This is a struggle with youth in the child welfare system because they are a very transient population with most of them experiencing frequent placement and school changes. In addition, public education has not historically looked at issues such as trauma as a way to inform their pedagogy. This difficulty is exasperated when communication channels with social services personnel are non-existent or under-utilized because the schools do not have the information they need to serve the youth in the most effective way.

**Court System**
The “court system” category includes judges, attorneys (and their management team if they are an employee of an organization), guardian ad litems (GAL), education rights holders¹, and court improvement program (CIP) administrators. The legal professionals serving child welfare involved youth have different duties and responsibilities. The judges presiding over their cases are making decisions that they believe are in the youth’s best interest based on the evidence, facts, and applicable law in the jurisdiction. Attorneys for the youth are advocating for the position of their client, and the GAL is advocating for what they believe is in the youth’s best interest based

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¹ Education Rights Holders are included in the court system category rather than the education system category because, with the exception of parents, the right is conferred upon them by court order.
upon their understanding of the facts and evidence. In jurisdictions where attorneys have a hybrid role (serving as both the GAL and attorney) they perform both functions. In most jurisdictions parents have their own attorneys who must advocate for the position of the parent. CIP administrators also play a key role in the court system by setting policy, establishing expectations, and managing case data. The youth’s attorney, GAL, and the judge all have a responsibility to address the educational needs of the youth. If the education rights holder is not well-informed or does not share pertinent information with the court stakeholders, then determining the educational needs of the youth with specificity is very difficult and becomes nearly impossible if the education system stakeholders are not communicating with the court system or social service system stakeholders. The role of the court system is not to replace the social service system or education system but to work with these other systems to serve the whole youth.

Social Service System
The stakeholders included in the “social service system” category include social workers, supervisors, agency directors, and policy administrators. The role of the social service system is often to work with the entire family, at least in the early stages of child welfare cases. The social service system has a responsibility to ensure the safety and well-being of the family and the safety concerns often take priority in decision making. Services are provided to parents to remediate their perceived deficiencies as well as services provided to the youth to assist them in addressing the trauma that they have experienced. The social service system stakeholders have access to information that should inform both the court system and the education system. A clear understanding of what information the social services system may share is critical to developing a positive working relationship that respects their professional limitations.

Successful Collaboration Projects
The issue of poor educational outcomes for youth involved in the child welfare system is not new. From 1999-2002 a demonstration project was implemented in five Bronx County middle schools in New York. (Vera Institute of Justice, 2004). The method used to create cross-systems collaboration was to co-locate child welfare workers in schools. The program recognized that “if the systems responsible for the well-being of foster children – child welfare, education, and the courts – do not place a strong emphasis on the education of foster children and work together to promote success in school, education will fall through the cracks.” (p.3). They found that “the first challenge is to pay attention.” (p.2). The program was successful in improving academic performance and attendance; they also made modest gains in creating systemic change at the senior levels of management within the social services system. (Vera Institute of Justice, 2004).

In 2012 the Children’s Commission Education Committee in Texas published a report on their efforts to improve education outcomes for youth involved in the child welfare system titled: The Texas Blueprint: Transforming Education Outcomes for Children & Youth in Foster Care, the Final Report of the Education Committee. In recognition that “children and youth who are of school-age and in foster care may also find themselves lost in-between child welfare and education – two systems with overlap, but inadequate ongoing and effective communication” (Children’s Commission, 2012, p.15), the Education Committee “created a collaborative initiative” made up of “over 100 court, education and child welfare stakeholders coming together over an 18-month period to listen and learn from each other, discuss and debate about the issues, and ultimately develop recommendations to improve educational outcomes of children and youth in foster care.” (Children’s Commission, 2012, p.16). Similar to the New York project the Texas group also found that the three systems lacked sufficient knowledge of each other.

There are exceptional circumstances where parents are not offered services based on specific facts that are beyond the scope of this article.
In San Diego, California currently there is a collaborative advisory group, Foster Youth Services Advisory Committee (FYSAC) that is made up of members from the education, court and social service systems. The presiding judge of the juvenile court and representatives from the office of education, child welfare agency, the non-profit attorney organization representing families in the child welfare legal system, the local Court Appointed Special Advocates (CASA) organization, and various other stakeholders collaborate to address the successes and challenges related to education of youth in foster care. Examples of the collaborative work of this group include an interagency agreement signed onto by all stakeholders, including 42 school districts. FYSAC, like the Texas Children’s Commission, has found that the participation of the local bench is critical because “no child enters or leaves foster care without a court order…courts have the power to effect systemic change by creating awareness about the importance of education in the life of a child in care.” (Children’s Commission, 2012, p.27). Judges can also establish expectations in their courtrooms for attorneys and social service agencies about the importance the bench places on educational issues for youth in the cases on their dockets.

FYSAC members co-train stakeholders in all three systems. The result has been an increased understanding by all systems of their abilities, limitations, roles and responsibilities. Members raise issues at FYSAC meetings and the group is able to develop and implement creative solutions. The regular and ongoing communication allows for relationship building and the ability to proactively anticipate needs of youth in care rather than being in crisis management mode perpetually.

Conclusion
In the United States, where education is compulsory, there is no other system that has more contact, or arguably more influence, with youth than the education system. The research is clear that outcomes for child welfare involved youth are far below youth not in the child welfare system. Less than 70% of youth in care graduate high school; youth in care experience multiple placements and school changes which results in poor academic performance; and only approximately 3% of youth in foster care graduate from post-secondary education (National Working Group on Foster Care and Education Brochure, n.d.). The Invisible Achievement Gap, Parts 1 and 2, documented the disparate educational outcomes for students in foster care in California. The study which analyzed disaggregated data on all students’ enrolled in public schools found multiple areas where students in foster care were falling significantly behind their peers, even when compared with children in poverty and those with disabilities (Wiegmann et. al., 2014). The contact these youth have with social service and court systems are not improving their academic trajectories. The statistics are negative and disheartening but as the youth will be quick to tell you, they are more than just statistics on a spreadsheet.

The research on cross-systems collaboration is also clear that the outcomes can be improved and systemic change can be achieved. The success of pilot programs around the country is encouraging. While another monthly meeting may not be met with much enthusiasm, if that meeting actually resulted in solutions that removed items from your ‘to do’ list, wouldn’t it be worth your time? The dedication and commitment on the part of the stakeholders is important to the success of any program and cross-systems collaborative efforts are no exception. The first step is introducing the stakeholders in each system to the others and teaching them the roles, responsibilities, and limitations of each. Only by moving past the distrust between the systems discussed by Altshuler (2003) can the educational outcomes for youth in child welfare be improved.
8. Legal Center for Foster Care and Education: http://www.fostercareandeducation.org
In many ways, cross-examination of a social worker is no different than cross-examination of any other witness.

Leading questions may be asked on cross-examination. At times, cross-examination is used to question the social worker’s memory of events or to impeach the credibility of the social worker by showing lapses in memory or showing a bias on the part of the social worker. This is especially true if you believe the social worker does not like your client.

Generally, in cross-examining a social worker, you want to keep your tone of voice friendly and pleasant. Most judges do not like to see social worker’s bullied by a cross-examiner.

Many social workers become defensive when testifying. If this happens, your tone should become even nicer and more pleasant. Defensiveness harms the witness’s credibility.

There are several areas on which social workers may be cross-examined. Not all areas will be present in every case.

A social worker’s education, training and experience is the first area that should be explored to determine if the worker should be cross-examined in these areas. For instance, is the social worker a new social worker? If the case is a domestic violence case, how much training has the worker had specifically in domestic violence and its effect on children.

The second area that is ripe for cross-examination is what guidelines or protocol they used in arriving at their conclusions about the family. This includes whether or not they interviewed everyone they should have interviewed. For example, if an incident that led to a referral occurred in the home, were there non-family members present who witnessed the event.

If the social worker interviewed children, particularly young children, did they use age appropriate questions? How many times was the child interviewed? Did the social worker do other investigation to determine if what the child was saying was true? Are there other events going on in the child’s life that would lead to less than accurate statements by a child. For example, the parents may be engaged in a custody battle in family court. The child may not have been interviewed away from their family and/or other witnesses. The social worker should have looked at school records if it is believed the abuse or neglect has been ongoing, rather than a one-time incident. Teacher can be interviewed. They should be asked if risk assessment is an exact science. (It is not) If a social worker believes risk assessment is an exact science, they are not as credible as a witness. Ask them where that exact science can be found.

If the social worker acknowledges risk assessment and social work is not an exact science, then cross-examination should include questions about whether conclusions different than the conclusions reached by the social worker, are also reasonable. If they acknowledge there is more than one interpretation, ask why they interpreted the evidence the way they did. If you are aware of facts that the social worker does not know, ask if knowing those facts changes their opinion.

Another area of cross-examination is whether the social worker has discussed the case with anyone else. If the case has been discussed with the supervisor or supervisors, it is possible the social worker came to
one conclusion but was told to assert another by a supervisor. Discovery of social worker’s notes and other written materials should be obtained as that is where one often finds supervisor intervention.

While often a third party’s statement is admissible as the basis for the social worker’s opinion (this gets around the hearsay exception) the worker must be cross-examined as to what questions the worker asked of the third party to determine if reliance on the statement was reasonable. For example, if a social worker concluded that a parent will not reunify and in coming to this conclusion has relied on the statements of the parent’s therapist, have they discussed treatment goals and progress with the therapist or have they merely asked the therapist if it is likely the client will reunify. If they have not asked details with a witness, create questions including details and ask if knowing those details would have changed their opinion.

If it becomes apparent the social worker has not prepared the case properly then questions about what they did is an effective form of cross-examination. For example, if the issue is termination of parental rights and the social worker has not observed the children and parents together at any visit, it is appropriate to ask why they did not do this. Social workers are overworked. While we may all be sympathetic to this, it also means they have not been able to prepare a case as thoroughly as they could have. Cross-examination can elicit admissions that a social worker could not investigate everything or do everything on a case if the manner of questioning is pleasant and sympathetic.

A social worker who has not properly worked a case often relies on general answers to questions. On cross-examination counsel must pin down the worker. This can be done by asking specific questions. Such as where did you interview a witness? Where was the visit observed? Who was present? The more a witness cannot remember specifics, the less credible the witness is.

In summary, counsel must be familiar with the facts of the case. Discovery should have been done and reviewed. Counsel must have a general idea of the facts needed to prove or disprove the party’s contentions. Only then can appropriate cross-examination questions be formulated to get the statements needed to help the case. Generally, the case regarding the family is only as reliable as the social worker.

Cross-examination provides the opportunity to put forth your theory of the case, often without having to call a single witness on direct.
Today, it is clear (and increasingly legally accepted)\(^1\) that children are less developed intellectually, more likely to take unnecessary risks and have more difficulty seeing the ramifications of their actions than adults.\(^2\) This is not new information, just newly and better understood. In the past, the youthful practices of passing hand-written notes in class and calling classmates on your one house landline were much less worrisome. In today’s world, however, the availability, ease, and affordability of modern communications devices and the internet mean that a youthful indiscretion can end up being broadcast to millions of unknown people on a webpage that can be used to humiliate, blackmail, or harass a child and will exist forever. Accordingly, parents, administrators, and law enforcement need to be better educated and prepared to deal with these indiscretions in a way that takes into account the need for consequences with the need for fairness towards a child’s development (or lack thereof).

Two of the most difficult examples of this precarious balancing act concern cyberbullying and sexting. Cyberbullying has been defined as “the electronic posting of mean-spirited messages about a person (as a student) often done anonymously”\(^3\) or “bullying that takes place using electronic technology.”\(^4\) Sexting has been defined as the “sending of sexually explicit messages or images by cell phone.”\(^5\) To summarize these two acts: minors using electronic communications to titillate or threaten with little regard for the permanence, scope or breadth of consequences.

Cyberbullying is simply old-fashioned bullying but in a more modern, more dangerous form. Cyberbullying gains its power in part from the anonymity available from modern communications. It also owes some of its power to the greater distancing involved — no longer does a bully have to see you, or even be in the same geographic area for that person to target you. “Believing you are anonymous and untrackable gives us courage”\(^6\) and this “courage” is very dangerous in the possession of someone focused on making your life miserable. These two factors have made cyberbullying incredibly threatening and frightening, even deadly.\(^7\)

Like cyberbullying, sexting has gotten a lot of press in the past few years. Unlike cyberbullying, however, the interest in this activity has taken off in part due to its confusing nature. If you are an adult, sexting is portrayed as innocent, fun, risqué, and naughty. People read articles on how to “max out your sext appeal”\(^8\) and what celebrities are sexting others.\(^9\) For minor-aged children, however, sexting is far less accepted and viewed as far more dangerous. Part of the notoriety of sexting for minors in the past few

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\(^1\) See Roper v. Simmons, 543 U.S. 551, 569 (2005) (finding juveniles less criminally culpable than adults due to their immaturity, transitory identity, and susceptibility to peer and environmental influences).


\(^7\) See The Tragic Megan Meier Story, NoBullying.com (last modified May 28, 2015), http://nobullying.com/the-megan-meier-story/ (discussing the notorious cyberbullying case that ended in the death of a teenager, Megan Meier).

\(^8\) Drew Grant, 4 Tricks for Your Steamiest Sexts Yet, Cosmopolitan (May 26, 2104), http://www.cosmopolitan.com/sex-love/advice/a6941/sex-techniques-whisperer/.

years is due to a few notable (and terrible) incidents involving juveniles. While the tragic stories of Jessica Logan\textsuperscript{10}, Tyler Clementi\textsuperscript{11}, and Hope Witsell\textsuperscript{12} involve sexting, they also involve cyberbullying to a deadly degree.

Technological innovations show no hint of slowing down and more children than ever have access to a mobile device\textsuperscript{13}. These realities require that we become more vigilant, better prepared and more thoughtful about how to approach these issues. Unfortunately, the technological basis of these two problems also seems to make these more difficult to address and leads to overreaction and hurried results.

The State response to cyberbullying has been fairly swift. As of January 2015, 49 states had enacted bullying prevention laws.\textsuperscript{14} All of these laws require schools to deal with bullying and almost all of them refer specifically to electronic harassment (or cyberbullying). But there are a wide variety of acts mandated as consequences, from civil fines to criminal sentences. As the concept of bullying has become better known and discussed at schools, legislation and protection against cyberbullying was a fairly direct and predictable result.

Sexting legislation and enforcement is much more controversial. The debate over sexting laws is just as difficult to understand as the understanding of sexting itself. Some states have made clear distinctions and enacted criminal consequences. As of January 2015, 20 states have enacted some form of law involving sexting regulation\textsuperscript{15}, arguing that new criminal legislation is the only way to adequately deal with this new problem. Many states have yet to make sexting-specific crimes, opting to continue to study the issue and rely on already existing pornography statutes, if needed.

Regardless of the type of law used, however, larger concerns about the enforcement against minors’ sexting behaviors need to be addressed. For example, many new state statutes seem to target ALL participants, including the subjects of any images, even if they did not give permission for the picture(s) to be distributed and could reasonably be deemed victims.\textsuperscript{16} Additionally, there does not seem to be enough protection for minors who are in a relationship and who voluntarily send an image – treating this act the same as the transmission of an illegal image to the public.\textsuperscript{17} There is also the obvious concern of utilizing felony child pornography statutes against minors – the originally protected class under the law – which include disproportionately harsh consequences (such as sex offender registration).\textsuperscript{18}

On the local level, however, both cyberbullying and sexting pose different problems. As minors spend most of their day in school, the responsibility and reactions of school systems are as important as those of parents. Both struggle to identify their role in dealing with these issues.

\textsuperscript{11}See Ian Parker, The Story of a Suicide: Two college roommates, a webcam and a tragedy, The New Yorker (Feb. 6, 2012), http://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide.
\textsuperscript{12}See Bullying and the Ramifications for Hope Witsell, NoBullying.com (modified Mar. 16, 2015), http://nobullying.com/hope-witsell/.

\textsuperscript{13}Amanda Lenhart, Teens, Social Media & Technology, Pew Research Center (2015), http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/ (explaining that nearly 75% of teens 13 to 17 have/have access to a smartphone, 30% have a basic phone, and just 12% of teens have no cell phone of any type).


\textsuperscript{16}Arguably the most famous occurrence of this issue arose in Pennsylvania in 2008-09 when three female minors filed suit and obtained a temporary restraining order enjoining the District Attorney from pressing criminal charges against them for possessing photos the girls took of themselves in sports bras. See Miller v. Skumanick, 605 F.Supp. 2d 634 (M.D.Pa. 2009). For a good analysis of the incident and aftermath, see Dionne Searcy, A Lawyer, Some Teens and a Fight Over ‘Sexting’, Wall St. J. (updated Apr. 21, 2009), http://www.wsj.com/articles/SB124026115528336397.

\textsuperscript{17}For a greater discussion of the pros and cons of sexting legislation, see John Kip Cornwell, Sexting: 21st-Century Statutory Rape, 66 SMU L. Rev. 111 (Winter 2013).

While criticism of parents often focuses on their ignorance of the situation or their naiveté, schools face more complex issues, ranging from the location of any occurrence (Did it occur on- or off-campus? If off-campus, was the issue accessed or carried over on-campus?), to the breadth of any effect (Was there a substantial interference or clear disruption with the school environment?), to the overall duty of the school once it is agreed that a violation of school policy did take place (To educate? To press criminal charges?).

Unfortunately, sexting and cyberbullying are not issues that are going away any time soon. At least 20% of students report having experienced cyberbullying or having been involved in sexting. Thus, it is imperative for parents, educators and legislators alike to inform themselves about these issues so that they may then educate and protect minors. Blindly passing laws or overzealously prosecuting children will do far more harm than good. Both sexting and cyberbullying can be combated with education, clear policies, and firm – but reasonable – consequences.

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DOES POVERTY CAUSE CHILD ABUSE?

Dawn Post

Cornell University released a large study last month positing that poverty causes higher instances of child abuse and neglect. Considering the advance publicity, it seemed to me that the average reader might overlook the crucial role that socioeconomic and racial biases play in determining which families come under the scrutiny of the child welfare system to begin with.

While poverty is widely recognized as a risk factor in abuse and neglect cases, it is by no means a cause of abuse and neglect. Children are just as likely to be abused or neglected in wealthy homes as in poor ones. However, wealthier white families are simply not under the same scrutiny that brings families of color of low socioeconomic status to the attention of child welfare authorities.

Is this increased scrutiny due to societal or systemic factors that make living conditions worse for minority families? Or is it due to implicit biases? Disproportionate minority representation of children of color in foster care is a complex one with many contributing factors. But as much as people may want to deny it, this is due in part to implicit bias and choices that are made by decision-makers who encounter these families. Consider the brief released in June 2011 by University of Chicago research institute Chapin Hall, which argued that that foster care placement is needed to protect black children from the "self-destructive behavior" that occurs in "racially segregated impoverished enclaves."

Racial prejudices, biases and assumptions contribute to the fact that 97 percent of children in New York City foster care are children of color. According to a leading researcher in the field, Dorothy Roberts, author of "Shattered Bonds," "[t]he fact that the system supposedly designed to protect the children remains one of the most segregated institutions in the country should arouse suspicion." This is most clearly demonstrated by the documented decisions that medical professionals make when they encounter abuse and neglect in families of color. The data in the books "To the End of June: The Intimate Life of American Foster Care" (Cris Beam) and Roberts's "Shattered Bonds" illustrates this point:

- Black women have been reported to health authorities at delivery 10 times more often than white women, even though studies show that drug use is relatively equal, for instance, between blacks and whites (9.5 percent and 8.2 percent respectively), and that more pregnant white women use drugs than pregnant black women (113,000 versus 75,000).
- Doctors failed to detect abusive head trauma twice as often in white as compared to minority children.
- Even reviewing neutral e-rays for fractures, hospitalized minority toddlers were five times more likely to be evaluated for child abuse, and three times more likely to be reported for child abuse, than white children.

Any child protective attorney can attest to the truth of this statement. New York City Family Courts, which handle child protective cases, are courts of the poor where white families are a significant minority. White families are given the benefit of the doubt when allegations of abuse and neglect arise, and, as noted in the statistics, they simply do not suffer the same scrutiny by mandated reporters. In addition, they have less contact with the mandated reporters at schools, mental health facilities, welfare offices and hospitals, resulting in fewer calls to the Administration for Children’s Services. Factors such as homelessness, unemployment and
welfare enrollment bring poor families into greater contact with more bureaucracies and caseworkers. In addition, living in a poor neighborhood with drug use and street crime where there is greater police presence increases a family’s visibility to police scrutiny.

One of the only cases in which I represented a young white child of white parents involved a mother from England who was addicted to heroin. I came to call it my "heroin chic" case. Three times, the mother was found with the young child on a street in the classic "heroin high" pose—a blissful and euphoric state in which she was nodding out while standing up, slowly falling forward and displaying seemingly amazing acts of balance before slowly standing straight up again, her child by her side.

Was this mother immediately arrested and the child removed from her care by the Administration for Children’s Services? No, not the first two times. Emergency personnel who responded escorted the mother home and ACS offered the mother drug-rehabilitation services, with which she refused to cooperate. It wasn’t until the third time when the mother passed out on the street and the child was injured that a case was finally filed against the mother in family court. Had this been a child of color, it is much more likely that the child would have been immediately removed from the mother’s care when she was first found nodding out in the street.

I had this case during a time where there were hundreds of neglect cases being filed in family court involving allegations of marijuana use under the theory that marijuana was the gateway to hard drugs. Frequently, neglect charges were brought solely based upon recreational use and then other allegations were added later to bolster the neglect claims. And a small portion of these marijuana cases involved children being placed into foster care. Needless to say, these cases all involved families of color.

The racial and socio-economic prejudices, biases and assumptions that result in a disproportionate amount of children of color being placed into foster care in New York City are systemic and institutional issues, and they are larger issues than those of us in the family court who work on child protective cases can address. This bias that exists goes beyond foster care and implicates society as a whole.

Certainly, as the Cornell study shows, poverty is a strong risk factor in abuse and neglect cases. But it should never be assumed that abuse and neglect predominately occurs in poor homes or that children will be better off in foster care than in so called “impoverished enclaves” where they may live.

With contributions by Sarah McCarthy, a Kirkland and Ellis Fellow at the Children’s Law Center of New York. The views expressed are of those of the author and not of the organization.
EVERY TIME FOSTER KIDS MOVE, THEY LOSE MONTHS OF ACADEMIC PROGRESS HOW INSTABILITY WREAKS HAVOC ON THESE CHILDREN’S SCHOOL LIVES—AND WHAT CAN BE DONE TO FIX IT

Jessica Lahey

*Article originally appeared in The Atlantic – with express permission to republish*

Matt Slocum/AP Photo

When 12-year-old Jimmy Wayne’s parents dropped him off at a motel and drove away, he became the newest member of the North Carolina Foster Care system. Over the next two years in the foster care system, he attended 12 different schools.

“I don’t even remember what I learned—no, let me rephrase that—I don’t remember what they tried to teach me—after fifth grade,” he told me recently. “It wasn’t until I had a stable home and was taken in by a loving family in tenth grade that I was able to hear anything, to learn anything. Before that, I wasn’t thinking about science, I was thinking about what I was going to eat that day or where I could get clothes. When I was finally in one place for a while, going to the same school, everything changed. Even my handwriting improved. I could focus. I was finally able to learn.”
Only 50 percent of the 400,000 foster care children in the United States complete high school by age 18.

Wayne got lucky. He was taken in at 16 by an older couple who saw how desperate he was for a stable home and an education. He lived with them for the next six years, and they gave him the stability he needed in order to finish high school and college and launch a successful country music career. He’s become a national spokesperson for Court Appointed Special Advocates, a network of volunteers who work to make sure that abused and neglected children don’t get lost in the legal and administrative red tape of the foster care system.

Students in foster care move schools at least once or twice a year, and by the time they age out of the system, over one third will have experienced five or more school moves. Children are estimated to lose four to six months of academic progress per move, which puts most foster care children years behind their peers. Falling behind isn’t the only problem with frequent school moves: School transfers also decrease the chances a foster care student will ever graduate from high school. A national study of 1,087 foster care alumni found that “youth who had even one fewer change in living arrangement per year were almost twice as likely to graduate from high school before leaving foster care.” Right now, the United States’ more than 400,000 foster care children complete high school at much lower rates than their non-foster peers; decreasing the number of school moves for foster care students could translate to substantially more high school diplomas.

Several pieces of legislation have tried to tackle the problem of school transfers from different angles. The Fostering Connections to Success and Increasing Adoptions Act of 2008 require child welfare agencies to have a plan in place for ensuring “educational stability of the child while in foster care.” The Elementary and Secondary Education Act and No Child Left Behind require schools to close the achievement gap between high- and low-performing students, which led education agencies to identify high-risk students, like foster children, and work to address their specific educational needs. The Uninterrupted Scholars Act, passed in January 2014, grants childcare welfare agencies access to education records that were previously rendered private under the Family Educational Rights and Privacy Act. This allows agencies to retain up-to-date copies of school records, which expedites foster children’s transfers and academic placement. These laws are important first steps towards getting more foster care children to graduate: Enrollment delays, frustration over the inability to transfer credits, and the unnecessary repetition of partially completed courses are all factors that increase the chances that students will drop out of school before completing their education.

Schools must ensure school stability for children in foster care by requiring schools to be flexible around residency requirements in order to allow children to remain in the same school or district, and provide the supports to make that stability happen, such as reliable transportation and dedicated adult liaisons who can provide academic support.

Promote greater collaboration between child welfare agencies and schools in order to ensure that foster children’s particular educational needs are being met. Collect tracking data on educational progress and outcomes, including attendance, school moves, enrollment delays and academic outcomes in order to reveal where policies and practices could be improved.

When I asked Wayne what he would change about the foster care system, he reminded me of the 50 percent of children who don’t—or can’t—finish high school by the time they age out of the foster care system. “If it were up to me, every state in the nation would extend foster care services through age 21 so foster kids can have the time they need to finish their education and graduate.”
FETAL ALCOHOL SPECTRUM DISORDERS: BEHAVIOR BELONGS IN THE BRAIN
Ira J. Chasnoff, M.D.

Over the last several decades, progress has been slow in determining how many children in this country are affected by prenatal exposure to alcohol. A combination of legal, social, and attitudinal barriers has restrained communication on every level, starting with the health care provider and patient. Physicians rarely ask a pregnant woman about her alcohol intake, and fetal alcohol syndrome (FAS) remains the most common cause of preventable intellectual disabilities in the United States as well as one of the leading causes of behavioral problems in children.

The prevalence of FAS is estimated to range from 0.2 to 2 cases per 1,000 live births, depending on ethnic, cultural, and regional factor. Given the approximately 4 million births per year in the United States, there are up to 6,000 children born in this country each year with FAS. But the problem is even worse than these statistics suggest.

A recent study of 100,653 pregnant women in six states documented that 31% of the women had a positive screen for substance use: 23.4% were using alcohol and 8.9% were using illicit drugs, including marijuana, narcotics, cocaine, and methamphetamine. These data are similar to results from the 2008–2009 National Survey on Drug Use and Health. This survey, based on a national sample of women, revealed that in the first trimester 8.5% of pregnant women use illicit drugs, 20.4% drink alcohol, and 22.4% smoke cigarettes. Thus, around 800,000 children across the United States may be exposed prenatally to alcohol each year. These children can suffer from a broad range of difficulties that, while often quite subtle, can compromise the children’s long-term health, behavior, development, and academic achievement.

Criteria for Diagnosis

Fetal alcohol syndrome is the original name given to a cluster of physical and mental defects present from birth that are the direct result of a woman’s drinking alcoholic beverages while pregnant. Infants with FAS have signs in three categories: (1) growth deficiencies, (2) central nervous system impairment, and (3) facial dysmorphism.

The mother’s confirmed use of alcohol is not necessary to make a diagnosis of FAS if the child meets criteria in all three categories. However, to ensure accuracy and completeness in the child’s medical

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records, physicians should note when the diagnosis is based solely on these physical and developmental parameters and without confirmation of the mother’s drinking.

The impact of prenatal alcohol exposure is not determined only by the cumulative “dose” of alcohol to which the child was exposed. Many reports demonstrate that the mother’s binge drinking, with high peak blood alcohol levels, is actually more dangerous than chronic drinking. Recent studies regarding adolescents have noted that even “light drinking” during pregnancy has a significant detrimental impact on the adolescent’s neurodevelopmental status.10

Growth Deficiencies
In the United States, the average birth weight of babies born at term (38 to 42 weeks gestation) is 7 pounds 8 ounces, with a normal range down to 5 pounds 8 ounces. Babies born to mothers who use alcohol have an average birth weight of around 6 pounds and are more likely than babies born to mothers who abstained to weigh less than 5 pounds 8 ounces.11 As children with fetal alcohol syndrome grow older, they tend to continue to be small for their age—that is, short and underweight. To meet the FAS diagnostic guidelines set for growth criteria, a child must have either reduced weight or height (at or below 10th percentile on standard growth charts) at birth or at any point in time after birth.12

Changes in Facial Features
Facial features associated with prenatal alcohol exposure are consistent with mid-face hypoplasia, an overall undergrowth with resultant flattening of the middle portion of the face. Thus, children with FAS exhibit:

- Epicanthal folds (extra skin folds coming down around the inner angle of the eye)
- Short palpebral fissures (small eye openings)
- A flattened elongated philtrum (no groove or crease running from the bottom of the nose to the top of the lip)
- Thin upper lip
- Small mouth with high arched palate (roof of the mouth)
- Small teeth with poor enamel coating
- Low set ears.

These changes can vary in severity, but usually persist over the life of the child. Most people will not recognize any differences when they see the child, but physicians and other practitioners with experience in working with children prenatally exposed to alcohol will be able to detect the changes.

A problem arises when clinicians rely too heavily on changes in facial structure to recognize the child affected by prenatal alcohol exposure. In animal studies, pregnant rats given alcohol on days 7 or 8 after conception had newborns with facial features typical of FAS. However, giving the pregnant rats alcohol on days 1 through 6, or on day 9 or any time beyond did not affect the facial features in any way. Thus, there appears to be a very narrow window of alcohol exposure that can affect children’s facial features.13

Central Nervous System Impairment
Problems in the central nervous system can become manifest through structural, neurological, or functional changes.14 Structurally, a small head circumference (at or below 10th percentile) at birth or at any time thereafter indicates poor brain growth. For example, the average head

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size of term infants at birth is 35 centimeters, while the head size of a baby with FAS often is less than 33 centimeters. Neurological damage can be manifest as seizures, problems in coordination, difficulty with motor control, or a number of “soft” neurological deficits. Functionally, the average IQ in children with FAS is in the 70s, as compared to the general population in which the average IQ is 100. Alcohol-exposed children, with or without the characteristic facial features or growth retardation, have consistently lower IQ scores than non-exposed children. Importantly, even alcohol-exposed children with a “normal IQ” demonstrate difficulty with behavioral regulation, impulsivity, social deficits, and poor judgment, causing problems in day-to-day management in the classroom and home.

Children affected by prenatal alcohol exposure exhibit a wide range of functional difficulties much more commonly than global intellectual impairment; these difficulties include learning disabilities, poor school performance, diminished executive functioning (e.g., organization of tasks, understanding cause and effect, following several steps of directions), clumsiness, poor balance, and problems with writing or drawing. Behaviorally, many of the children have a short attention span, and often are described as impulsive and hyperactive.  

From a brain structure perspective, prenatal alcohol exposure not only can cause the child to have a small brain overall but also can stunt the growth of individual parts of the brain. This damaged growth may be present regardless of the child’s facial features. Problems with the formation and development of different parts of the brain can result in a wide range of behavioral and learning deficits. Many children and adolescents with prenatal alcohol exposure have trouble moving information between different brain regions; they cannot effectively use information to self-direct their behavior or to think in the abstract. They may have trouble learning new information and recording it in the brain—and then have even more difficulty retrieving the information they’ve already learned. A child may learn his multiplication tables one day, but forget them the next.

Other parts of the brain also can be affected, impairing the child’s ability to coordinate planned motor movements and resulting in impulsive movement and clumsiness. Reduction in the size of the cerebellum in the back part of the brain, for example, produces difficulties with balance and arousal and may be a source of sleep problems. Again, it is important to remember that such problems occur not only in children with the abnormal facial features associated with full expression of FAS, but also in alcohol-exposed children who “look normal.”

Brain Structure and Function: Deficits in Information Processing

The behavioral, emotional, and learning difficulties of children with prenatal alcohol exposure can be best understood as a deficit in processing information. More specifically, children have difficulty recording information (bringing it into the brain); interpreting information; storing information in memory for later use; and using information to guide actions, behavior, emotions, language, and movement.

Damage from drinking in the first trimester—that is, the first three months of pregnancy—mainly occurs in the midline structures of the brain, where the limbic system is located. The limbic system guides information processing: the way we bring information into the brain and use it to manage our behaviors,

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emotions, and thoughts. Data retrieved from our senses enter the brain through different pathways. Visual information enters through the back portion of the brain, a region known as the occipital lobe. Touch, taste, and smell enter through the parietal lobe, located in the upper, posterior half of the brain. Auditory information enters through the ear, and the eighth cranial nerve carries the information from the ear to the inner midline section of the brain.

A primary job of the brain is to bring these disparate bits of sensory input together and conduct the information to the prefrontal cortex in the front of the brain. There, dopamine, a key neurotransmitter, is fired off at intervals to guide the individual in using and responding appropriately to the information via motor activity, behavior, emotion, speech and language. In other words, by regulating the amount and frequency of dopamine release, the individual is able to use information from the environment to manage a response to the environment.

Alcohol’s damage to the limbic system is what produces many of the functional difficulties we see in children exposed prenatally to alcohol. For example, the hippocampus, situated in the posterior aspect of the limbic system, plays a role in consolidating new memories and applying information in novel situations. If the hippocampus is damaged, the child has difficulty transferring neurologically generated maps of information and experience to long-term memory storehouses in the temporal lobes. The child may know, cognitively, not to run out into a particular street in front of his house, but cannot retrieve that knowledge when approaching a different street. As a result, he runs out into the street, appearing to be “impulsive” or “hyperactive.”

Other alcohol-induced structural changes in the brain can occur in the corpus callosum, resulting in “thinning” along different aspects of this midline structure. This structural thinning effect disrupts communication within the brain so that certain types of information can never reach consciousness. For example, an alcohol-exposed child may be able to recite the rules for good behavior in the school lunchroom, but be unable to regulate his behavior in accordance with those rules. As a result, he is described as disobedient or labeled with a diagnosis of oppositional defiant disorder (ODD): “He knows what he’s supposed to do,” exclaims his teacher. “He just won’t do it!” Although a child with FAS may meet diagnostic criteria for oppositional defiant disorder, diagnostic and therapeutic approaches must consider the nature of the structural brain defects that are producing the behavior before such a determination is made. We are asking clinicians and parents to look beyond the behavior they see to identify the root cause of that behavior.

As another example, the thalamus (also part of the limbic system) receives input from all over the body and sends it to the cerebral cortex, the area of the brain responsible for cognition and learning. The thalamus also helps organize behavior related to survival: fighting, feeding, and fleeing. That is why children whose thalamus is affected by prenatal alcohol exposure often get a panicked look in their eyes when faced with a sudden change or threat, or overloaded with information. When parents describe the children as being “stubborn,” they are recognizing, perhaps, that the child diagnosed with FAS does not learn from experience in the same way other children do. This is not willful behavior on the part of the child; rather, the connections between past instructions or experience and current behavior just don’t exist.

Alcohol use in the third trimester—the final three months of pregnancy—causes damage to the cerebral cortex, the outer shell of the brain. When a woman uses alcohol during the third trimester brain cell migration is disrupted, interfering with the development of the gyri and sulci in the cortex of the brain and significantly reducing brain surface area. The resulting brain is small, there are very few folds in the cortex of the brain, and the surface of the brain is quite flat (known as lissencephaly). These changes may be among the major factors producing the global intellectual disability seen in many children with FAS.
In the initial conceptualization of damage caused by prenatal alcohol exposure, if a woman drank alcohol during pregnancy and gave birth to a child who showed partial or no apparent expression of physical features characteristic of alcohol exposure, her child was said to have fetal alcohol effects (FAE). These children may have had minimal to moderate facial changes or no changes at all, but usually they had some problems with intellectual, behavioral, or emotional development. These difficulties were known to have an impact on learning and long-term development, though just how extensively FAE affected the child was less clear.

More recently, research has demonstrated that children with FAE may have significant structural and functional changes in the brain, even though they lack overt physical manifestation of the alcohol exposure. Guidelines published by the Institute of Medicine (IOM)\textsuperscript{19} and the Centers for Disease Control and Prevention (CDC)\textsuperscript{20,21} have attempted to lay out diagnostic criteria that can be applied to the varied pictures with which children prenatally exposed to alcohol can present. Based upon a comprehensive evaluation by a multidisciplinary team, children can be assigned an alcohol exposure-related diagnosis based on the following criteria:

- Growth retardation: current or past weight and/or height less than 10\textsuperscript{th} percentile adjusted for age and gender.
- Facial dysmorphology: abnormal measurements of the upper lip (rank 4 or 5) and/or the philtrum (rank 4 or 5) and shortened palpebral fissures, according to analysis of facial features utilizing the Lip-Philtrum Guide and digital facial photograph based on the criteria of Astley and Clarren.\textsuperscript{20,21}
- Central nervous system abnormalities: demonstration of structural, neurological, or functional CNS deficits as documented by the presence of microcephaly (current head circumference below 10\textsuperscript{th} percentile for age and gender) and/or functional deficits demonstrated as global cognitive delays with performance below the 3\textsuperscript{rd} percentile on standardized testing or three or more domains of neurodevelopmental functioning more than 2 standard deviations below the normed mean on standardized measures of neurocognitive, self-regulatory, or adaptive functioning.

Following these criteria, individuals who meet all physical criteria for growth impairment and facial dysmorphology as well as neurodevelopmental deficits receive a diagnosis of fetal alcohol syndrome (FAS). Individuals with confirmed prenatal alcohol exposure, facial dysmorphology, and neurodevelopmental deficits but with normal growth (height and weight) patterns, are diagnosed as partial FAS (pFAS). Individuals who have confirmed exposure and meet criteria for neurodevelopmental deficits but do not meet criteria for facial dysmorphology are classified as alcohol related neurodevelopmental disorder (ARND), and individuals with confirmed prenatal exposure and with malformations, including dysmorphic facial changes, but normal growth and normal neurodevelopment fall into the category of alcohol related birth defects (ARBD).

In April 2004, a group of federal agencies developed a consensus definition of fetal alcohol spectrum disorders (FASDs):

…an umbrella term describing the range of effects that can occur in an individual whose mother drank during pregnancy. These effects may include physical, mental, behavioral,

\textsuperscript{21} Astley SJ, Clarren SK. Diagnosing the full spectrum of fetal alcohol-exposed individuals: introducing the 4-digit diagnostic code. Alcohol & Alcoholism. 2000;35:400-412.
and/or learning disabilities with possible lifelong implications.\textsuperscript{22}

FASDs is not meant to serve as a diagnostic term, but rather a unifying one to help us appreciate the many ways in which prenatal alcohol exposure can become manifest in the affected individual. For our purposes, we will use the term “FASDs” throughout this book when the information applies to all alcohol-exposed children, including those with a diagnosis of FAS, pFAS, or ARND. When the information specifically refers to children with a specific diagnosis, such as FAS or ARND, we will use those terms. It is important to stress that FASDs is not a diagnostic term; it indicates only children affected by prenatal alcohol exposure and not a specific condition. This approach is consistent with the newly published \textit{DSM 5 mental health criteria for Neurodevelopmental Disorder with Prenatal Alcohol Exposure (ND-PAE)}.\textsuperscript{23}

\textit{FASD as a Mitigating Factor in Litigation and Sentencing}

On October 26, 2010, the State of Arizona executed Jeffrey Landrigan. This was after the United States Supreme Court lifted a lower court’s stay of execution.\textsuperscript{24} Among the issues the Court considered in that case was whether Landrigan was entitled to a new sentencing hearing because his attorney failed to present any evidence in mitigation, despite the young man’s diagnosis of Fetal Alcohol Syndrome. Justice Clarence Thomas, who wrote the majority opinion, stated that the mitigating evidence Landrigan sought to introduce, \textit{i.e.} evidence of serious organic brain damage associated with Fetal Alcohol Syndrome, “would not have changed the result.”\textsuperscript{25} This was in spite of the fact that Cheryl Hendrix, the Arizona judge who presided over Landrigan’s trial, submitted a declaration on the defendant’s behalf stating that “Mr. Landrigan would not have been sentenced to death,”\textsuperscript{26} if she had been given the medical evidence of the defendant’s brain damage and other factors.

In spite of the fact that 60\% of youth with FASD end up incarcerated,\textsuperscript{27} very few lawyers and judges have any knowledge of FASD. The American Bar Association recognized this difficulty and in August 2012 passed a resolution that “…urge(d) attorneys and judges, state, local, and specialty bar associations, and law school clinical programs to help identify and respond effectively to Fetal Alcohol Spectrum Disorders (FASD) in children and adults, through training to enhance awareness of FASD and its impact on individuals in the child welfare, juvenile justice, and adult criminal justice systems and the value of collaboration with medical, mental health, and disability experts.”\textsuperscript{28}

There are several arguments that can be made supporting the idea that FASD is a potential mitigating factor in adjudication and sentencing: 1) It is brain-based; 2) It arises from circumstances entirely beyond


\textsuperscript{26} Ibid.

\textsuperscript{27} Streissguth, A. P., Barr, H.M., Kogan, J., & Bookstein, F.L. Understanding the occurrence of secondary disabilities in clients with fetal alcohol syndrome (FAS) and fetal alcohol effects (FAE): Final report to the Centers for Disease Control and Prevention on Grant No. RO4/CCR008515 (Tech Report No. 96-06). Seattle: University of Washington, Fetal Alcohol and Drug Unit, 1996.

\textsuperscript{28} Resolution approved by the ABA House of Delegates: August 7, 2012. \url{http://www.abanow.org/2012/06/2012am112b/}. Accessed June 22, 2015.
the individual’s control; and 3) It affects the defendant’s ability to understand society’s norms and/or to conduct his behavior within those norms. With these issues in mind, the courts must begin to address the issue of FASD as it places individuals at risk for involvement in the criminal court system.
FORMER FOSTER YOUTH AS SUCCESSFUL ADVOCATES FOR TRANSITIONING YOUTH: A PERSONALIZED EXPERIENCE

Brenda Dabney, J.D., CWLS
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Sabine Chery

Advocates for foster youth across the country grapple with the same dilemma day in and day out, regardless of geography or jurisdiction: youth “aging out” of foster care without the appropriate skills and resources. Not surprisingly, these youth face an exceptionally high risk of unemployment, homelessness, dependency on public welfare, and incarceration. In response to this ongoing challenge, two advocacy organizations on opposite ends of the country have developed innovative programs that can serve as a model for other states in meeting the needs of this population.

The Children’s Law Center of California, which represents foster youth in Los Angeles and Sacramento Counties, has created a program of peer-to-peer education and assistance to arm youth with the relationships, knowledge and tools they need to become healthy and productive adults. CLC’s ‘Peer Advocate Program’ was first created in 2011 to assist with the implementation of the California Fostering Connections to Success Act (AB 12). This important law implemented the federal ‘Fostering Connections’ legislation in California, allowing for the extension of foster care up to age 21, and also created a mechanism for eligible youth to re-enter foster care after their cases have closed.

In the initial stages of the program, CLC’s peer advocates traveled around the state training youth and youth agencies about the benefits of this new law, and created youth friendly and accessible materials to ensure that all foster youth remain informed of their rights and options.

Today, this successful model of two peer advocates (all former foster youth) to one supervising attorney allows one-on-one directed advocacy with teenage clients both in and outside of the courtroom. Prior to engaging with clients, each peer advocate undergoes a rigorous training course on all topics relevant to transition age youth, including available services and resources, housing options, applicable legislation, local and state policy, and the court process. With this knowledge and skill set, the advocates are able to empower transition age youth to fight for their future. Indeed, the Peer Advocates offer guidance in all areas of self-sufficiency, self-advocacy and preparation for adulthood. As they become more experienced they are assigned to work with some of the most high-needs clients including those involved in commercial sexual exploitation, teen pregnancy & early parenthood, involvement with the criminal justice system, low educational attainment, lack of employment opportunity, and lack of family support. They are also part of a grant-funded, local, targeted effort to help youth access the benefits of the newly formed “Los Angeles Opportunity Youth Collaborative.” The advocates play a critical role in the Collaborative’s success in creating policies and breaking down ‘siloes’ systems to ensure that our transitioning age youth obtain high school graduation or GED; achieve post secondary enrollment and credential completion; and ultimately attain gainful employment though work-based learning and training. These Peer Advocates provide one-on-one assistance to clients to cement their relationship and attachment to workforce centers - and/or secondary educations supportive programs - by providing personalized follow up with these youth. Their role is not only to guide youth through the process, but also to act as a liaison between youth, project partners and the court system.

CLC’s Sacramento-based Peer Advocates are AmeriCorps members and have undergone extensive training in child welfare policies and practices in order to provide specially-tailored support to the youth they serve in the Sacramento area. They also go through training on local and statewide services available to current and former foster youth and conduct the Casey-Ansell Life Skills Assessment on each
youth they serve in an effort to accurately evaluate a youth’s strengths and needs to reach self-sufficiency. With this training as a foundation in addition to the national network that AmeriCorps provides, these Peer Advocates are able to draw from a wealth of available resources and supports to assist the youth who are in most need of assistance as they transition into adulthood.

New York City’s Administration for Children’s Services focuses on the special needs of expectant and parenting teen in foster care in its youth program. The Teen Specialist Unit (TSU) partners with external experts, professionals and internal cross-divisional partners to promote services that will develop and enhance parenting capacity for expectant and parenting teens involved in our child welfare system as well as the well-being of their children. The goal of the unit is to reduce subsequent teen pregnancy rates and decrease reports of child abuse and neglect allegations when there are no clear safety concerns. TSU staff provides support to expectant and parenting teens at Family Team Conferences, works to build providers’ expertise in youth and family engagement; as well as providing useful toolkits, workbooks, training materials and linkages to community-based services. Additionally, NYC’s ACS consults with several former foster youth parents to assist in the development and planning of policies and practices to better serve the system’s young parents. In this way, New York’s model draws on a very specific area of expertise of their Advocates to improve parenting outcomes for foster youth and to work to incorporate fathers into the lives of their children. ACS uses these young parents to work one-on-one with expectant and parenting foster youth to help them appreciate and understand the unique opportunity they have to secure services from the agency in order to build stronger, more resilient young families. These Advocates conduct outreach in local neighborhoods, give talks to young people about parenting, and work to educate young people on family planning, educational achievement and career options.

The tremendous impact of these models of Youth Advocates cannot be overstated. Judicial officers, attorneys, community agencies and social workers can all rely upon an effective Youth Advocate to reach the “hard to reach” youth – those who are at the greatest risk of face and who face the most challenges or who have lost all faith and trust in the system. Having experienced and successfully navigated the foster care system, these former foster youth are uniquely situated to communicate and form relationships with this vulnerable population.

With scarce child welfare resources across the county, many jurisdictions are becoming creative in utilizing the skills and experience of former foster youth to assist the delivery of services to those who need them the most. While social workers and lawyers have extensive responsibilities to their clients, developing an effective program to utilize the experience and skills of these young people can help spread these resources farther and benefit a greater number of clients in the long run. These Peer and Youth Advocate models are just two of the many ways an organization can learn from and help serve families. Through innovation and creativity former foster youth can be relied on in many ways to help reach some of the most vulnerable children and families in our foster care systems.
FRAMING THE DISCUSSION: UNDERSTANDING COGNITIVE IMPAIRMENT AND POTENTIAL IMPACTS ON DEPENDENCY CASE PLANNING

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Introduction

This paper, a companion to our presentation “Providing Services to Families Impacted by Intellectual Disability and Other Mental Health Conditions that Impair Cognition: Overcoming Unique Obstacles” serves as a primer to cognition and conditions that can impair cognition. Here we invite the reader to begin to think about how cognitive impairment can impact engagement in case plan services in dependency cases. We presume that parents will be receiving reunification services, though we recognize that not all parents do. Additionally, even with thoughtfully designed case plans, not all parents will engage or be able to overcome the barriers to success within the proscribed timelines. It is also worth noting that there may be co-occurring issues, such as substance abuse, which can impact engagement and progress in case plan services. Starting from an informed place allows us as advocates for children to more meaningfully assess the needs of our clients’ families and advocate appropriately.

Understanding Cognition

Oftentimes, cognition is associated solely with intelligence. However, in order to address the needs of parents that have cognitive impairments and are involved in the child welfare system, it is important to have a broader understanding of what cognition is. Essentially, cognition is how a person’s mind organizes and makes meaning of experiences (Thomson Wadsworth, 2006). Cognitive functioning seamlessly manifests itself in a person’s day to day life, ranging from their use of basic reasoning skills to abstract, hypothetical thinking. Some aspects of cognition to consider when assessing risk and appropriate service delivery for parents include how the parent processes and retains information, their ability to focus, plan and problem solve, and their use of judgment and reasoning to make decisions. For example, a parent with auditory processing issues may be ill suited to a classroom parenting class and not be able to retain information provided through the class. Additionally, a parent may struggle with executive function processes, making it difficult for them to consider the future and plan accordingly, resulting in an inability to meet service requirements. Often times, these scenarios are either misattributed to a parent’s resistance to change or considered irreparable. It is the opinion of the authors of this paper, that this not always the case. By understanding cognitive impairments and their broad impact on a person’s functioning, social workers are more likely to arrange services that consider a parent’s cognitive needs and better support them in parenting safely.

Intellectual Disability

In this section, we will discuss intellectual and developmental disabilities. Intellectual developmental disabilities are marked by deficits in both intellectual and adaptive functioning that are present prior to 18 years of age. This means that not only do people with intellectual disabilities experience cognitive impairments, as described in the previous section, but they also experience difficulties in meeting other developmental standards that create obstacles for living and functioning independently. (American Psychiatric Association, 2013)
Symptoms of intellectual disability range in severity. Symptoms can include impaired short term memory, difficulty acquiring new skills without long periods of education, and a lack of abstract thinking abilities. While parents with mild symptoms of intellectual disability are able to manage daily living functions, personal care, and vocational work, they tend to require guidance in more complex tasks and decision making. More severe symptoms of intellectual disability may require people to live in supportive living environments where others can provide ongoing support on a daily basis. (American Psychiatric Association, 2013)

Some common causes of intellectual disability include Down syndrome, cerebral palsy, in-vitro toxic exposure, and traumatic brain injury (TBI). As these conditions result in a range of cognitive impairments that have the potential to impact independent living skills, it is crucial that social workers create service and treatment plans that include the development of support systems that will provide ongoing support past the parent’s involvement within the child welfare system.

Other Mental Health Conditions That Impair Cognition

While it is common to think that only the class of intellectual and developmental disabilities has a negative impairment on cognition functioning, it is also true that other mental health conditions also impair cognition in significant ways. This is important to keep in mind for both children and adults and should significantly influence the way in which children’s legal services think about case planning and risk assessment in a variety of types of cases. In this section we will talk about some of the major mental health conditions that have significant effects on cognition, including schizophrenia, major depressive disorder, and posttraumatic stress disorder.

Schizophrenia
When most people think about people with schizophrenia, they associate the disorder primarily with psychosis such as hallucinations and delusions; this is accurate, but schizophrenia is also a constellation of other symptoms. It is enough to say that even just the psychotic aspects of the disorder, sensory stimulation from things that aren’t there, would prevent a parent or child in our cases from attending a parenting class, participating fully in a therapy session, or otherwise attending to their child during visitation. But also consider that there are a host of other symptoms that exist as part of this disorder which include disorganized thinking (speech), grossly disorganized or abnormal motor behavior (including catatonia), and negative symptoms (American Psychiatric Association, 2013). Disorganized thinking impacts children and adults with schizophrenia because it impairs the thought processes, limiting the amount of information that can be taken in and subsequently stored. Negative symptoms of schizophrenia, much like depression which we will talk about next, impair motor abilities of the person, which could affect their ability to even get out of bed or leave the house to do their case plan. As Tandon et al. (2013, p. 4) note, “cognitive deficits are a prominent aspect of the psychopathology of schizophrenia and research over the past two decades has substantially elucidated the nature and significant relevance of cognitive impairments in schizophrenia.” This is true so much so that in the most recent iteration of the Diagnostic and Statistical Manual (DSM) of the American Psychiatric Association considered calling these cognitive deficits out separately but ultimately decided to hold off on doing so.

Major Depressive Disorder
Major Depressive Disorder, or as its more colloquially known, “depression” has a profound impact on cognition and the effects of the disorder should be considered a major barrier for any client in engaging fully in services. Most widely depression is known to be a disorder that causes an increased sadness in those who suffer from its effects, but there are also other elements to the diagnostic criteria which impact cognition. For instance, one of the components of the disorder is a diminished ability to think or concentrate, certainly a barrier for anyone who has to sustain attention for long periods of time in order to
complete a case plan (American Psychiatric Association, 2013). Decreased sleep is another component of the disorder which causes impairment in the areas of attention, memory, and learning (Harvard Medical School Division of Sleep Medicine, 2007; American Psychiatric Association, 2013). Certainly these additional components make it hard for clients to fully participate in their services.

**Posttraumatic Stress Disorder**

Posttraumatic stress disorder (PTSD) is commonly characterized by intrusive symptoms, such as flashbacks, which activate the person’s primitive fight, flight or freeze reactions to stimuli that might not even be threatening or related to them. And certainly this hyperarousal and sensitivity to stimuli that may look like the trauma they once experienced is enough to impair a parent or child in our cases from fully realizing their treatment goals. But, like we discussed in depression above Criterion D of the disorder includes trouble concentration and decrease need for sleep, components we’ve discussed above as having a profound impairment on cognition. In addition, the disorder often involves efforts by the person to avoid thinking about or talking about things that remind them of the trauma that they suffered. Certainly, many cases that children’s legal services providers encounter involve treatment or case plans that involve talking about or thinking about major life traumas for children and adults, and it may be difficult for the client to rally the resources or be motivated enough to do so.

**Conclusion**

As explored above, there is broad spectrum of conditions which impair cognition and which can impact both the types of services needed to help and parent safely care for a child as well as the parent’s ability to engage in these services. In dependency, in order to serve our clients, we should not focus solely on whether a parent should receive reunification services or whether those services have effectively addressed the issues which brought the family before the court. We should also be able to assess and advocate what services should be part of a case plan in the first place, and advocate for case plans that are crafted meaningfully for individual families.

IS THE PRIVACY OF THERAPY A SECRET TO FOSTER CHILDREN?

Robert L. Waring

Abstract

This article examines the standard of care owed to foster children as to the privacy of their therapy. In many U.S. jurisdictions, the presumption is that such therapy information is not private. This article explores countervailing privacy arguments and asserts that it is the legal duty of the child’s counsel not just to avoid unnecessary disclosure of a child’s confidential communications to her therapist, as some have suggested, but also to vigorously protect the privacy of those conversations. In many states, statutes and long standing practices do not afford foster children the privacy they need and deserve, and protection is overdue. Suggestions for changes to statutes and practices conclude the discussion.

I. Introduction

This article will examine the standard of care owed to foster children as to the privacy of their therapy. In many U.S. jurisdictions, the presumption is that such therapy information is not private. Of the reasons offered for this presumption, paramount is that the mission of dependency courts is to serve the best interests of the child. In order to determine that interest, the court and social workers need as much information as possible about a child’s emotional state—especially how the child perceives past, present and potential caregivers. According to this argument, what services abused and neglected children need and with whom they should live are of such fundamental importance that there should be no barriers to obtaining information that would assist those trying to help these children.

This article explores countervailing privacy arguments and asserts that it is the legal duty of the child’s counsel not just to avoid unnecessary disclosure of a child’s confidential communications to her therapist, as some have suggested, but also to vigorously protect the privacy of those conversations. In a few states, statutes and case law align to support privacy. In other states, statutes and long standing practices do not afford foster children the privacy they need and deserve, and protection is overdue. California law and practices will serve as a basis for this discussion. Statutes more than a decade old require vigorous protection of such privacy, but case law has helped maintain some of the old practices.

For readers less familiar with legal process in the foster care system, here is a short primer. Children in the system are known by different names in different states: juvenile dependents, CHINS (children in need of services), CHIPS (children in need of protection), among others. Courts having jurisdiction over these children may be called juvenile dependency courts, child protection courts, family courts, etc. The legal structure of the modern foster care evolved in part from the federal Adoption Assistance and Child Protection Act of 1980, and the Adoption and Safe Family Act of 1997. Many states have an integrated agency that administers the system for the entire state. In the remainder, including California, each county has its own agency operating under state laws and regulations, but subject to local policies.

In most states’ systems, the Child Welfare Agency, the Department of Children and Family Services, or some other agency charged with this function (hereinafter “the Agency”) evaluates the circumstances of children whose abuse or neglect comes to its attention. In a small percentage of these cases, the Agency files a court petition seeking court jurisdiction over the child. In most of those cases, the children are removed from the home. At the first hearing, the dependency court appoints counsel for the children and for each of the parents. After two or more hearings, the court usually takes jurisdiction over the case and approves case plans for the Agency and family to follow. These case plans may include family and
individual mental health therapy. Subsequent review hearings track the progress of the Agency and the family. Sometime later, the court terminates jurisdiction, either because the children have been returned to their parents and are safe, have been adopted or placed in a guardianship, or have aged out of the system. All states are supposed to follow federal and state laws requiring that various steps in the process occur within particular timeframes, both to protect due process rights and to ensure that children will be in permanent homes in due course.

At all of the various points in the process, in order to guide actions or make recommendations to the court, the child welfare worker may seek mental health information about the child that is subject to some degree of confidentiality. The extent of this confidentiality and the protections that it should be afforded are key subjects of this article. Also, at various hearings along the way, the Agency or another party may attempt to introduce evidence containing confidential mental health information that could be protected by evidentiary privilege.

The first discussion in this article is a general review of what level of care society owes foster children. Any compromises concerning that care should be informed by commonly agreed upon standards. Otherwise, application of the laws governing these children will be neither consistent nor fair. Flowing from these principles, what is the purpose of therapy? Specifically, how much does information gathering intrude on the process, and do the benefits of that intrusion outweigh any harm it causes? Second is a discussion of the law in California concerning out of court disclosures of therapy information to persons such as social workers, parents and caregivers. Third is a review of the history of the exclusion of confidential psychotherapist-patient communications as evidence in court. This includes an informal survey of some states’ protection of the privacy of the mental health information of foster children. Then there is a detailed examination of what the law in California says about the presentation of such mental health information to the court, and thus to other parties in the case. While California and some other states have adequate or nearly adequate statutory protection of the privacy of foster children’s therapy, the key to actual protection is the willingness of minor’s counsel to assert statutory authority and the court’s commitment to support this effort. But convenience is a form of inertia and old habits die hard.

Fourth is a set of recommendations. Minor’s counsel should actively protect their clients’ stated desire for privacy, and explain children’s privacy rights to them in an age appropriate manner. Using the protocol provided may help those possessing confidential mental health information about foster children better protect privacy. Those states without protections against disclosure of confidential mental health information at least as strong as those in California should strengthen their laws. States with exceptions for psychotherapist-patient privilege in dependency cases should eliminate this lapse in protection. Foster children should not give up their fundamental privacy rights by virtue of their parents’ misdeeds.

In California, some legislative clean-up would go further to protect the privacy of foster children’s therapy. Case law has misinterpreted the intentions of the Legislature, and legislative clarification is long overdue. There are also some minor fixes that would eliminate what appear to be unintentional conflicts in the law. A substantial suggested change would deny parents access to the confidential mental health information of their children that have been removed from their physical custody.

Like many states, unfortunately, California has a confusing dual role for dependency counsel. Well established case law instructs all lawyers to maintain an absolute duty of loyalty to the client.4 Section 317(e) of the California Welfare and Institutions Code obligates the child’s counsel to tell the court the child’s stated interests, but at the same time requires counsel to advocate for the client’s “interests” and not to advocate for return at the risk of safety.5 A recent Court of Appeal opinion holds that minor’s counsel has a “‘paramount duty to serve the minor’s best interests’” in lieu of stated interests.6 Although it does not appear that many minors’ counsel are so limiting their advocacy for their older clients, confusion regarding the role of counsel continues to plague many client relationships. Another significant
recommended change would set twelve or over as the presumptive age at which counsel should represent a dependent minor’s stated interests, rather than being under an obligation to advocate for what in counsel’s opinion was best interests even if contrary to the client’s wishes. As described below, this change would end the conflict caused by these dual mandates, as well as the fear some foster youth have that in revealing confidences to their therapists their own counsel could discover those confidences and use them to advocate against the youth’s stated desires.7

So as to set proper expectations for the reader, this article does not explore whether court ordered psychological evaluations should be confidential. Across all U.S. jurisdictions, such evaluations are rarely excluded on the basis of evidentiary privilege.8 In large part, this is because it is assumed that the person being evaluated is not receiving treatment and has no expectation that his communications with the evaluator will be confidential. Also, this article does not address the privacy rights of minors that have been conserved - that is placed in locked psychiatric facilities by order of the court because they are a danger to themselves or others.

II. What Standard Of Care Do We Owe Foster Children - Where Is The Balancing Point?

An appropriate starting point in any analysis that compares competing interests is to examine the ethical values that underpin the placement of the balancing point between them. Many legal writers visualize balancing tests as weights on the scales of justice. But a more realistic analysis recognizes that the outcome of balancing tests sometimes is determined before relative weights are assigned to the two interests, because the arms of the scale may not be of equal length. By looking at the pivot point on the scale, this alternative approach gives new meaning to the expression “the long arm of the law.” If two interests are of equal weight, the interest at the end of the long arm likely will tip the scale. An important factor that often lengthens an arm is cost. If an interest costs less, it may be placed at a greater distance from the pivot point despite its being less fair, efficacious or just.

Determining how much care we owe foster children is not an academic question. In fact, courts and social workers make thousands of such choices in individual children’s cases every day, influenced by the recommendations of various professionals using their own scales-some with unequal arms that only reflect present and not future societal costs. A key question is the extent to which the lengths of the arms of the balancing scale should reflect long term social values and the costs of realizing the goal that foster children become fully functional and responsible adults.

The foundation of one model of care is rooted in Section 364(c) of the California Welfare and Institutions Code, which says that the standard for dismissal of the foster care case of a child living at home is met when the circumstances of that child would not justify court supervision if jurisdiction were ended.9 Essentially, this means that if there is no current risk of physical or emotional harm to the child caused by the custodial parent or legal guardian,10 the court must dismiss the case. By this threshold, the standard of care owed to foster children is only what is needed to keep a child’s well-being above the level that mandates removal. Stated another way, although the circumstances of many children are less than ideal, it is not the government’s job to be the perfect parent.11 The foster care system is only intended to address parent’s failures, and to solve children’s mental health problems only to the extent to which parents are unable or unwilling. Public resources are limited, and any particular proposed use must be balanced against other competing social needs and in consideration of ebbs and flows in state revenues.

An alternative model assumes a greater social responsibility toward child victims of abuse or neglect, providing them whatever services are needed to mitigate the harm suffered. The first basis for this responsibility is pragmatic. For example, the national push to extend foster care to age twenty-one reflects the recognition that providing more resources to foster youth reduces the likelihood of their incurring
societal costs as adults, such as from welfare, incarceration, or rehabilitation, and also improves their lives as adults and their contributions to society as taxpayers. Estimates of the return on this societal investment on each dollar invested in foster youth range from $1.35 in direct savings to government, to as high as $5.16 in overall benefit to society based partly on the higher lifetime earnings of youth receiving extended foster care. This alternative model also relies on the notion of special duty - that in many cases the state may have a heightened responsibility to a child because its previous actions or inactions increased the harm suffered by that abused or neglected child. The vast majority of foster care cases involve families that have come to the attention of the Agency more than once before the events that caused the court to take jurisdiction. Missed warning signs could have prevented injury to the child and remedial actions based on those signs might have precluded the need for removal. Courts recognize a special duty to protect children that have been removed from the home, sometimes even when the child is returned to or placed with a parent despite the limitations on damage suits against state actors created by the U.S. Supreme Court in *DeShaney v. Winnebago County Department of Social Services*. Using a scale informed by one of these models improves the chances that in weighing risks to the therapy patient, the balance that is reached reflects the society’s values. Two areas of privacy concerns illustrate relevant competing interests: effective treatment versus disclosure that could be helpful in case management decisions, and sharing information between individual and conjoint therapy.

A. Therapy In Foster Care: Treatment Versus Disclosure

Extending the care versus cost analysis, what should be the balance between privacy and informational access to a child’s therapy? The access side of the scale includes the fact that the resources of foster care are limited. For example, one way of preserving the privacy of therapy is to gather information about a child’s emotional well-being using an evaluator independent of the child’s therapist. As discussed below, there are therapeutic advantages to such an approach that flow from respecting privacy, but an independent evaluation adds to short term costs. Also, from a therapeutic standpoint, subjecting abused children to questioning by too many professionals could increase their trauma. This suggests limiting the number of different mental health professionals evaluating foster youth. Finally, allowing the therapist to freely communicate with social workers, foster parents, teachers and the courts could lead to better decision making about issues such as placement and visitation. For high needs children, more communication could facilitate anticipating mental health crises.

The privacy side of the scale asserts that each child deserves the best treatment. A system that sends children the message that their healing does not come first may reinforce feelings set by their abusive or neglectful parents that these kids’ well being is not valued. They may see therapy less as a friendly place for healing and more as a place for spying on their personal thoughts and emotions. There are extra costs incurred if the therapeutic relationship is destroyed by a breach of trust and therapy must be restarted with another therapist, as discussed below. Worse still, if the child refuses further therapy, downstream societal costs from a failed launch into adulthood can run to seven figures.

In many states, including California, parents whose children have been removed can still access their children’s mental health information, subject to some discretion by the therapist. Such parents may not act in their children’s best interests regarding use of mental health treatment, and may use confidential information from that treatment to frame a litigation strategy hostile to their children’s stated wishes or best interests - even if that information may not be directly admissible in court.
B. What Are The Risks Of Disclosure?

A 2009 article by Law Professor Deborah Paruch reviewed a number of published studies that examined whether lack of confidentiality in psychotherapist-patient communications inhibited the process and reduced patients’ forthrightness and disclosure of symptoms. She concluded that there was ample evidence of a detrimental effect. The American Psychological Association (APA) asserts that confidentiality is meaningful to the patient only if it can be guaranteed against intrusion by persons or institutions outside the sessions. According to the APA, psychotherapist-patient privilege has “little value if it could be abrogated whenever information from therapy sessions might have a significant impact on the outcome of the case.”

Law Professor David Katner’s 2004 article, Confidentiality and Juvenile Mental Health Records in Dependency Proceedings, asserts that children who experience disclosure of their confidences may be unwilling to trust future therapists, social workers or counsel. This is because treatment of a child who has been abused often requires helping the child create a sense of trust, autonomy and personal boundaries. Where trust of adults is absent it has to be created and nurtured, thus enabling the child to reveal past events and present emotions to a “safe” adult without fearing adverse consequences. Treatment may not be effective where trust is violated, and the child is unable to experience autonomy and feel in control of personal boundaries. Writing about the therapy confidentiality of a foster child, the California Court of Appeal in In re Kristine W. observed that Kristine probably felt “betrayed and powerless, and it would be regrettable if the entities trying to help her were inadvertently to reinforce those feelings by allowing her innermost thoughts to be disclosed by and to those she distrusts.” It may be impossible to even start a therapeutic conversation with an older victim unless confidentiality is assured.

As Professor Katner points out, there is also a considerable stigma surrounding mental health treatment, which is increased with disclosure of the details of the symptoms, diagnosis and nature of treatment. Willingness to engage in treatment often is reduced if there is an expectation or fear of such disclosure.

The consequences of lack of privacy in therapy are analogous to the old adage about the work ethic in the old Soviet Union. “We pretend to work, and they pretend to pay us.” In other words, without candor the patient pretends to engage in therapy and the therapist pretends to be engaged in healing, but both know they are engaged in a form of charade.

Expressed another way, lack of confidentiality creates what can be described as the quantum physics observer effect, whereby the act of measuring a phenomenon changes it. Children who know their thoughts ultimately may be revealed to their parents may tell their therapists what they think their parent(s) want them to say - either out of fear or loyalty - thus profoundly changing the therapists’ conclusions. Alternatively, children may decide to say nothing at all about what is at issue in the dependency case. These patients get no help, and the social workers and the court get no information in a sort of pact of mutual assured destruction - this kind of scorched earth standoff was known by the acronym MAD in the nuclear standoff between the superpowers during the Cold War.

These risks are even greater for sexual abuse victims. In a common pattern, a child abuser, who is a parent or relative, intimidates the victim into keeping the abuse secret. When the child eventually reveals the secret, it results in the child’s removal from the home. Because the child is punished twice - first for keeping a secret and then for revealing it - secrets become very stressful for that child. The created secret maintains the abuse, but disclosure of the secret destroys the family. As abuse expert Tilman Furniss has described it, child sexual abuse is a “syndrome of secrecy for the child.”

Therefore, sexual abuse presents enormous challenges for the therapist. As a patient, the victim often is reluctant to reveal private information, fearful of the consequences in doing so. This creates a classic
chicken and egg situation. A sexual abuse victim may never develop a healthy ability to trust adults without therapy, yet cannot meaningfully engage in therapy because of an inability to develop the trust needed to reveal private information. If those interactions appear to the child to be exploitive, have a hidden agenda or be subject to disclosure, a therapeutic level of trust may never be achieved. As Furniss observed, whether sexually abused children “are motivated to trust is the result not of an internal state but of an interactional process between professionals and the child.”

As will be discussed in Part V.B., there are some ways to mitigate the potential damage from disclosure, the foremost being discussing the need for disclosure with the patient so that the patient - with the advice of counsel - may have the option to permit the disclosure. This is the reverse of the adage sometimes followed in business and law: it is better to beg for forgiveness than to ask for permission. In building and preserving trust, an ounce of permission is better than a pound of apology.

C. Balancing Privacy In Conjoint Therapy

Although conjoint therapy is a subject that would merit comprehensive discussion in a separate article, it deserves at least a brief mention as a privacy issue here. One of the most challenging privacy issues occurs in conjoint therapy where the same therapist does individual therapy for a client, and then family therapy between that client and other family members. When the reason for treatment is limited to the clients’ difficulty in understanding and communicating with each other, this arrangement may allow the therapist to more efficiently get to the root of the problem and guide its resolution. Some clients prefer to deal with only one therapist instead of having one for individual therapy and another for family therapy.

Alternatively, having a separate therapist for individual therapy and another for conjoint sessions can improve the therapeutic benefits by greatly reducing the risk of an inadvertent damaging disclosure, thus increasing the client’s trust in the therapist and privacy of their communications in individual sessions. The importance of privacy generally is greater in situations where there is a high degree of conflict within the family.

The therapeutic dangers of using the same therapist for both individual and family therapy have been well known for decades. From a highly respected clinical text:

‘‘Colleagues and patients alike have inquired about the advisability of the individual therapist’s working with both one individual in the family and the family as a whole in ongoing treatment. It has been our experience that this does not work out well. Being the therapist to the whole family interferes greatly with the work of individual therapy. Issues of confidentiality, the specialness of the support and rapport between the therapist and patient, and the unique “acceptance” of the patient’s perspective would all be significantly compromised by an extended combination of individual and family therapy with the same therapist.

Similarly, family therapy will be untenable if one family member has a “‘special” relationship with the therapist. Not only may the others feel there is bias in the therapist’s judgments, but one individual’s talking to the therapist between family sessions may undermine the powerful pressures to change the family system that family therapy attempts to generate. For these reasons, we advise even those individual therapists who are comfortable with and experienced in family therapy to refer the family to a colleague if ongoing family work seems an appropriate treatment modality.’’

Other highly respected texts criticize using the same therapist for both individual and family therapy, saying that in such a situation, “The patient in individual therapy feels that what he or she reveals in the
one-to-one situation may in some way (either overtly or covertly) be communicated to the family by the therapist.” While certainly a foster youth who has legal control over the disclosure of his confidential psychotherapist-patient communications should have the right to decide whether to share the same therapist in individual and conjoint therapy, any patient in individual therapy in this situation also should be afforded this decisional autonomy in order to ensure the best outcome. Special care should be taken regarding conjoint therapy when a child is near the age of having legal control over disclosure - discussed in the next Part. If that child subsequently objects to disclosure it might then be necessary to bring in a new therapist, thus delaying treatment.

In weighing the proper balance between effective treatment and the competing interests aided by disclosure, the harmful effects of disclosure on the treatment should affect the scale so that disclosure is reduced.

III. Out Of Court Disclosures Of Confidential Psychotherapist-Patient Communications And Therapy Records

The laws regarding disclosure of therapy records and confidential psychotherapist-patient communications are divided into two areas: confidentiality and privilege. It is important to distinguish between the two. Confidentiality laws govern the conduct of healthcare providers and restrict the circumstances in which a provider may disclose mental health information about a patient to a third party, including the Child Welfare Agency. Privilege laws, discussed at length in the next Part, govern the submission of mental health information to the court and parties in the case.

A social worker, relative caregiver (if granted the authority by the court), or parent (if his authority has not been removed by the court), can sign an authorization for a California foster child to receive mental health treatment. However, that person’s ability to authorize mental health treatment does not by itself confer a right to access or control access to information about that treatment. One key concept is that if a minor in the foster care system legally can consent to treatment in therapy, that minor controls access to her confidential therapy records and communications, except in exigent circumstances or pursuant to a court order or subpoena. If the minor is not lawfully able to consent to treatment, the court may limit the parents’ authority regarding the child’s mental health information, and the therapist also may limit their access based on detriment to the child. A recently enacted statute addressed the ability of social workers to access the therapy records and confidential communications of minors not lawfully able to consent to treatment.

Thus, consent to treatment is key to understanding the statutory framework in California. Section 6924(b) of the California Family Code specifies that a minor twelve years of age or older may consent to therapy if the minor “is mature enough to participate intelligently,” and is either in “danger of serious physical or mental harm to self or to others” without therapy, or “is the alleged victim of incest or child abuse.” For patients receiving care via private insurance, the dangerousness and abuse victim requirements were dropped in 2011. (The Legislature feared empowering poor children to seek counseling would add additional costs to Medi-Cal, the state’s public insurance program.) There is nothing in the legislative history of Section 6924 of the Family Code to suggest that the legislature intended to treat child victims of abuse and neglect differently regarding consent, so for this purpose it is reasonable to assume that all children in foster care are victims of child abuse. Here the analysis diverges slightly as to access versus the ability to authorize the therapist to disclose confidential information to others.

A. Access
Minors have a right to confidentiality in their therapy. Licensed therapists, psychologists and their
supervisees are prohibited from disclosing “any individually identifiable information” without a court order or authorization, except to, among others, “the patient or the patient’s representative.” A patient’s representative is a “parent or guardian of a minor who is a patient.” These statutes do not grant social workers a right to this confidential information. There is no legal authority under which a social worker is a “guardian” in this context, or any other context in health care or juvenile law.

The right of the parent or guardian to access minors’ therapy records and confidential psychotherapist-patient communications is limited by Section 123115 of the California Health and Safety Code, which reads:

(a) The representative of a minor shall not be entitled to inspect or obtain copies of the minor’s patient records in either of the following circumstances:
(1) With respect to which the minor has a right of inspection under Section 123110.
(2) Where the health care provider determines that access to the patient records requested by the representative would have a detrimental effect on the provider’s professional relationship with the minor patient or the minor’s physical safety or psychological well-being.

Under Section 123110(a) of the Health and Safety Code, minors have the right of inspection to records concerning any treatment for which they are “authorized by law to consent.” Thus, Section 123115 means that a parent cannot access a minor’s therapy records or confidential psychotherapist-patient communications if the minor is age twelve or over, of sufficient maturity and a victim of child abuse. There is no distinction in these statutes between what dependency law considers an offending parent and a nonoffending parent.

The only exception that explicitly addresses social worker access is Section 56.103(e)(1) of the California Civil Code, effective in 2008. The statute also applies to caretakers and custodial parents. This exception for limited disclosure was negotiated with interested stakeholders and passed both chambers of the Legislature by nearly unanimous votes. This statute states that:

if a provider of health care determines that the disclosure of medical information concerning the diagnosis and treatment of a mental health condition of a minor is reasonably necessary for the purpose of assisting in coordinating the treatment and care of the minor, that information may be disclosed to a county social worker, probation officer, or any other person who is legally authorized to have custody or care of the minor.

Under this change in the law, the decision to exercise the exception is squarely in the hands of the mental health provider, not the social worker. However, the statute states that it does not abrogate other privacy protections. Thus, disclosure of mental health information about foster children age twelve or over still requires the patient’s release. In addition, disclosure of “psychotherapy notes” is barred by Section 56.103(e)(2) of the Civil Code.

Section 56.103(e)(1) of the Civil Code goes on to put a duty of confidentiality on the social worker or caretaker who receives the information the therapist chooses to disclose: “The information shall not be further disclosed by the recipient unless the disclosure is for the purpose of coordinating mental health services and treatment of the minor and the disclosure is authorized by law.” This means that the information disclosed under Section 56.103(e)(1) cannot only be passed on by the recipient for any other purpose other than for coordinating treatment and mental health services - a narrower definition than the one that initially enabled the disclosure, “coordinating treatment and care” - and then only if there is also some other legal basis to do so. Also, in creating this new law, the Legislature did not modify the law concerning psychotherapist-patient evidentiary privilege. Thus, information obtained via Section 56.103(e)(1) cannot be used as evidence, such as in court reports or testimony, unless there is some
independent basis for its admission. This issue is discussed in more detail in Part IV.B.4.

Section 56.103 of the Civil Code does not affect the obligation of therapists as mandated child abuse reporters to report newly discovered instances of child abuse. § 59 Nor does it mitigate the ability to warn persons at risk of serious harm by the patient, or to warn authorities who could prevent the patient from harming herself if at such risk. § 60 Outside of these situations and in the absence of a valid release or court order, it is absolutely clear in the legislative history of the enabling legislation for Section 56.103 of the Civil Code, AB 1687, that this new law is the only state statutory non-exigent basis for therapists to provide confidential mental health information about foster children under the age of twelve to social workers or foster parents. The author of the bill stated that because of misunderstandings about Federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) regulations, “Social workers for the Department of Children and Family Services, probation officers and other custodial caregivers are being denied critical medical and psychological information absolutely necessary to the safety and well-being of their charges.” § 61 If social workers or foster parents could simply sign a valid waiver, there would have been no need for the legislation.

Minor’s counsel has the right to inspect the records of any licensed medical or mental health provider that has treated the child. § 62 Most interpret this right to include obligating such providers to speak to the child’s counsel.

B. Disclosure By Release

Section 56.11(c) of the California Civil Code states that an authorization for release of any medical information (which includes mental health information) is only valid if signed by the patient or patient’s “legal representative.” § 63 Paralleling the scheme for access in sections of the California Health and Safety Code described above, Section 56.11(c)(2) states that the representative may not authorize disclosure of information concerning “services to which a minor patient could lawfully have consented.” § 64 However, “legal representative” is not defined by statute or case law. The legislative history Section 56.103 of the Civil Code described above, and the passage of SB 2160 in 2000, described below in Part IV.B.2.b., make clear that social workers are not the legal representative of the child for this purpose.

Whether minor’s counsel should be the “legal representative” is an open question, with attorneys in some California counties taking on that responsibility, and in others refusing. The attorney performing the role of legal representative may increase the efficiency of information exchange decisions. But it also has the potential for conflicts caused by the attorney knowing confidential information that he may use in best interests advocacy against the wishes of the client, causing the client and the therapist to become reluctant to share information. These conflicts are explored more fully below in Part V.C.

IV. Psychotherapist-Patient Privilege

A. History

Professor Paruch’s article described in Part II traced how the concept of evidentiary privilege arose out of “the need to protect the privacy of certain relationships” in order to foster candid communications within them, § 65 and became “an essential ingredient of a democratic society.” § 66 It first arose for attorney-client and priest-penitent communications, and then was expanded to doctor-patient communications as a necessary extension of the Hippocratic Oath. The emergence of psychotherapy in the twentieth century led to expansion of the privilege to include it. § 67

The first U.S. Court to recognize psychotherapist-patient privilege was probably in Cook County, Illinois in 1952. § 68 Hospital authorities and the treating psychiatrist, subpoenaed to testify, refused, citing
privilege. The court agreed with their assertion that the success and advancement of psychiatric treatment depends on greater protection of the confidentiality of psychiatrist-patient communications than of those between physician and patient in the treatment of physical ailments. The court used a four part test for privilege found in John Henry Wigmore’s seminal treatise on evidence:

1. The communications must originate in a confidence that they will not be disclosed;
2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. The relation must be one which in the opinion of the community ought to be sedulously fostered; and
4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

The court was especially concerned that violation of psychotherapeutic confidences in one case would adversely affect the treatment of other patients by putting them in fear that their own confidences could be violated, and “thereby run the risk of such a disservice to society as may rob it of a healing process affecting thousands and perhaps millions of our inhabitants.” Paruch and other commentators characterize this as a utilitarian approach, whereby an individual litigant’s right to the truth is outweighed by a greater harm to society created by the particular truth finding process at issue.

After several states enacted psychotherapist-patient privilege statutes in the 1960’s, the U.S. Supreme Court submitted a proposal to Congress for a federal privilege statute. However, Congress enacted only a general statute referring to common law privilege. The Court finally ruled on psychotherapist-patient privilege in Jaffee v. Redmond.

The Court found that successful psychotherapy requires “an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.” Even the “mere possibility” of a breach of that confidentiality could preclude successful treatment. The Court found that “[m]aking the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.” Embracing the utilitarian approach attaching weight to public interests - or moving the balancing point on the scale - the Court held that, “The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.” Continuing its analysis, the Court weighed the public and private interests served by the privilege against the value of the evidence expected to be produced in the absence of a privilege.

The Court suggested that little valuable evidence would be produced in the absence of a privilege because patients would be hesitant to disclose confidential information. Embracing a mutual assured destruction analysis, the Court observed that:

If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access - for example, admissions against interest by a party - is unlikely to come into being. This unspoken “evidence” will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

No fan of new age sensibilities, Justice Scalia’s dissent scoffed at the supposed value of psychotherapy:
When is it, one must wonder, that the psychotherapist came to play such an indispensable role in the maintenance of the citizenry’s mental health? For most of history, men and women have worked out their difficulties by talking to, inter alios, parents, siblings, best friends, and bartenders - none of whom was awarded a privilege against testifying in court. Paruch noted that, unlike bartenders, mental health professionals are bound by codes of ethics that impose a duty to maintain patients’ confidential communications. “Sanctions for violation of these ethical duties include censure, expulsion from professional organizations, and the potential for suspension or loss of one’s professional license. These ethical rules are enforced independently of the evidentiary rules of privilege and, in some ways, may provide more protection than legal privileges.” But, the statutory privilege is needed because nearly all ethical obligations to maintain confidentiality are abrogated by any action of law, such as a court order to submit a report or testify.

Although all fifty states guarantee psychotherapist-patient privilege in adult courts, Paruch asserts that the privilege “is routinely abrogated” in child protection hearings. She described in detail several cases in her home state of Michigan where juvenile courts relied on therapists’ testimony to rule against parents, even though the critical information was available from other sources. She observed that the Ohio Supreme Court took a stand in favor of the privilege in child dependency cases in 2000, and seven months later the State Legislature created an exception in such cases. New York does not recognize the privilege in dependency cases, while Missouri and Wisconsin do not recognize it in hearings to terminate parental rights. An outlier, Florida does provide the privilege in dependency proceedings.

How low a priority such protection remains is partly illustrated by the fact that there does not appear to be any entity tracking the confidentiality of mental health information across the various states. The author was able to gather a small set of data from internet searches, academic journals, and an email survey. In the District of Columbia, Section 4-1321.05 of the D.C. Code provides that the judge in a dependency proceeding can deny psychotherapist-patient privilege “in the interest of justice.” Case law has held that this court power even applies to professional evaluations conducted prior to court involvement. In Louisiana, under Article 663 D of the Children’s Code, “Testimony or other evidence relevant to the abuse or neglect of a child or the cause of such condition may not be excluded on any ground of privilege ....” None of the exceptions to this exclusion include psychotherapist-patient communications.

The law governing release of mental health records for minors in Pennsylvania has been meticulously documented by the Juvenile Law Center in Philadelphia. A minor age fourteen or over in treatment generally controls access to his or her mental health information, except that parents can learn of diagnosis and treatment to be provided if they, rather than the minor, consented to the treatment. In the case of a child under the age of fourteen, the parent controls access, but release is barred if it would be detrimental to treatment, would reveal the identity of a confidential reporter of child abuse, or is without the minor’s consent if privileged; a court order overrides these protections. Assertion of psychotherapist-patient privilege bars even court intrusion into therapy, but that is only effective to stop a court order if asserted by the child or her counsel. A large child advocacy office in Pittsburgh reported that minor’s counsel there never attempt to block court access of clients’ mental health information.

An email survey of children’s law offices in nearly two dozen states produced complete responses from just three: Minnesota, Missouri, and Illinois. The results can be summarized by observing that there are some limitations on the child welfare agencies’ access to dependent minors’ confidential mental health information, but virtually none on the court’s access to what it regards as relevant to the case at hand. Of course, whatever the court admits into evidence is seen by all parties, including the child’s parents. It was clear in communications with attorneys in a few states that did not submit survey answers that they did not regard mental health privacy as being within the responsibility of minor’s counsel. For example, a children’s attorney in Indiana referred the author to the State child welfare agency for answers to questions.
about privilege.104

B. Application In Dependency Courts In California
In the time scale of dependency law, the privilege has long applied to the confidential communications between a dependent minor and her therapist.105 Under Section 1012 of the California Evidence Code:

[C]onfidential communication between patient and psychotherapist” means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.106

Information described by Section 1012 is privileged, and may not be admitted into evidence unless the privilege is waived by the holder of privilege or is subject to an exception. “[T]he purpose of the privilege is to protect the privacy of a patient’s confidential communications to his psychotherapist.”107 It is noteworthy that the privilege standard for disclosure to persons other than the patient or “representative” is looser than that under HIPAA and California Law, which generally bar release of “any individually identifiable information,” absent a valid release or court order.108

Court ordered psychological evaluations are exempt from privilege, but in dependency cases In re Eduardo A. makes it very clear that a referral to a mental health professional for therapy is not “the equivalent of a court-ordered examination of a patient by a psychotherapist within the meaning of Evidence Code Section 1017, subdivision (a),” and thus not subject to that exemption from psychotherapist-patient privilege.109

Another exemption applies under Section 1024 of the Evidence Code, “if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.”110 This exception to psychotherapist-patient privilege “is narrow in the sense it only permits disclosure of those communications which triggered the psychotherapist’s conclusion that disclosure of a communication was needed to prevent harm.”111 A patient’s privacy must still be preserved as far as confidential communications that do not trigger the warning.112

There are some mechanics of the privilege particular to dependency. If a minor is not mature enough to exercise the privilege, the attorney is the holder. If the child is found by the court to be mature enough, she may invoke the privilege, or she may allow her attorney to invoke it.113 Maturity “shall be presumed, subject to rebuttal by clear and convincing evidence, if the child is over 12 years of age ....”114 “If the child invokes the privilege, counsel may not waive it, but if counsel invokes the privilege, the child may waive it.”115 This means that when the child is twelve years of age or older, the child presumptively is the holder of the privilege and her attorney may invoke the privilege on her behalf with her consent. These provisions were enacted in 2000 as part of Senate Bill 2160, discussed below in Part IV.B.2.c.

I. Case Law Recognizes The Sanctity Of The Psychotherapist-Patient Privilege.
The court in Eduardo A. was adamant that the privilege is essential to the success of therapy:

Crucial to psychotherapeutic treatment is a patient’s readiness to reveal his thoughts, dreams,
fantasies, sins and shame. It would be unreasonable to expect a patient to freely participate in such treatment if he knew that what he said and what the therapist learned from what he said could all be revealed in court. A patient in therapy has and needs a justifiable expectation of confidentiality as to his psychotherapeutic treatment. ¹¹⁶

The court pointed out that the key to providing information to the juvenile court for its use in making decisions about the child is good social work. ¹¹⁷ If there is good social work, it should not be necessary to intrude into therapy. The court’s response to the argument that the psychotherapist-patient privilege “would obstruct the court’s ability to evaluate, at a dependency status review hearing, whether [to] return of a child to his or her parents” was that the social worker is supposed to make this report and recommendation. ¹¹⁸

Implicit in these requirements for preparation and consideration of a “‘progress report’ is the Legislature’s recognition of a social worker’s expertise in evaluating a parent’s cooperation, development and growth as these matters relate to the parent’s ability to provide a safe, well-supervised home for the child. Such information can be developed from a variety of sources including the social worker’s personal observations as well as his or her interviews with the parent, neighbors, teachers, relatives, physicians, and even the children themselves; it need not depend on revelations by the treating psychotherapist. ¹¹⁹


In re Mark L. ¹²⁰ and In re Kristine W. ¹²¹ (hereinafter collectively “the companion cases”), two Fourth District Court of Appeal opinions issued within a day of each other by the same panel of three justices in Division One, and originating from the same juvenile court referee in San Diego County, are the only dependency cases ever to result in children being treated differently than adults with respect to psychotherapist-patient privilege. Neither case requested review by the California Supreme Court, so the high court has never had the opportunity to review the reasoning and holdings of these cases. ¹²² Two later dependency cases, both from a single San Diego County judge and also reviewed by the same Fourth District Court of Appeal division, used some of the tortured analysis of the companion cases, but neither found reason to deny abused or neglected children the privacy protections enjoyed by their parents and the rest of society. ¹²³

a. The Facts and Holdings

The companion cases stem from the same basic fact pattern: a referee ordered that minors visit their fathers with whom they wanted nothing to do, contingent upon input or approval from their therapists. Apparently, this referee was in the habit of delegating visitation decisions to minors’ therapists. Both minors asserted privilege, presumably not wanting the fathers they disliked so intensely to know anything about what they were discussing with their therapists, and especially not anything they were discussing about their fathers. The minors undoubtedly realized that in either approving or disapproving visitation, and especially if asked to explain why, their therapists would reveal some details of what the minors had told them about their fathers. In one case, where the therapist refused to disclose information against the client’s wishes, the referee’s order said that was fine, and in another where the therapist did not refuse, the order declared that was okay, too. The Court of Appeal sought to harmonize these two orders.

i. Kristine W. ¹²⁴

The case concerned prospective communications between the therapist and the social worker. It did not arise from a hearing where the admissibility of a document or witness testimony was at issue. But beyond that, it is challenging to discern from the opinion exactly what was in dispute. Someone, perhaps the referee, the trial or appellate attorneys, the law clerk at the Court of Appeal reviewing the transcripts, or all
Seventeen year old Kristine had been physically abused and sexually molested by her father. Earlier in the case she had run away from her placement, skipped school and cut herself. Later she settled in with her uncle, and there was no evidence that these behaviors were still a problem at the time of the hearings at issue. The legal posture of the case is not clear from the opinion. The father could have been receiving reunification services, but there is no mention of any proposal to terminate his services, or whether he was receiving reasonable services. The Court of Appeal observed, “there is no practical possibility that she will be reunified with Father.” Kristine did not want contact with Father because she was angry, afraid and believed that he ‘will try to turn things around to say it is my fault.’ Indeed, Father claimed Kristine was sexually aggressive with him and blamed her for the molestation. Despite this, at some point during the early months of the case the referee ordered supervised visits with the father “with therapist[‘]s input and consideration of [Kristine]’s feelings.”

The referee had also ordered her to attend therapy. At first Kristine participated, but after being switched to a new therapist she soon refused to continue. Kristine told the court that she ‘very much feels in need to talk to someone confidentially’ but did not want to go to therapy because she did not trust the therapist and believed ‘that confidences are being broken,’ explaining ‘[e]very time I tell my therapist something, it gets back to my dad.’ However, a month later Kristine resumed therapy. At the agency’s request, the court ordered a psychological evaluation, which is exempt from the psychotherapist-patient privilege pursuant to Evidence Code Section 1017(a). But it seems neither the referee nor Kristine’s counsel were sure of that, so in two hearings they argued about whether privilege applied to the evaluation. After the issue was resolved, and knowing that her communications with the evaluator would not be confidential, Kristine refused to go. Kristine “made it clear to [the court] under no uncertain terms that she doesn’t want anybody to know what she’s talking to her therapist about, and did not trust the social worker.”

A few months and two hearings later, Kristine again raised psychotherapist-patient privilege, this time asking that the court order her “therapist not speak to the social worker about the therapy,” but the referee declined to order this. One can infer from the request that neither Kristine nor her counsel had been successful in persuading the therapist to remain silent. Here, a footnote in the opinion says, “The court stated that its ruling might not be in the child’s best interests in every case.” The adoption by the referee that he might be serving the interests of someone or some entity other than Kristine could have ended that matter right there, because a ruling by a juvenile court that is not in the child’s best interests is clearly an abuse of discretion and cannot withstand appellate review. But the Court of Appeal simply brushed the statement aside, implied the referee must have misspoken, and observed, “Of course, the juvenile court is required to focus on the child’s best interests.” This begs the question: is justice served if a bench officer issues a ruling saying that he may not be following the law?

The Court of Appeal and Kristine’s appellate counsel characterized the case as questioning whether “the juvenile court lacks the power to compel a dependent minor’s mental health therapist to disclose confidential communications between the minor and the therapist to the social worker over the objections of the minor and her counsel ....” But there is no support in the record as reported in the opinion, or in the opinion itself, that either court addressed this question. Kristine’s therapist was already disclosing to the Agency, and there was no request by anyone to compel the therapist to disclose. So, the opinion offers no guidance as to whether the therapist could refuse to disclose to the Agency under either the privacy laws described above in Part III - in effect years before Kristine’s case, yet not discussed at all in the opinion - or some other professional obligation to protect Kristine’s privacy.

Kristine asked the court to order her therapist not to speak the Agency and the court declined to do so. Thus, one question this case actually presented was whether the court had the duty or the power to limit
what the therapist disclosed to the Agency. Neither the juvenile court nor the Court of Appeal responded to this question. The simple answer was probably no. There was no evidence in the record that the therapist was an agent of the Agency or had been joined as a party to the case pursuant to Section 362(a) of the California Welfare and Institutions Code. There is no evidence that any party or the court had subpoenaed the therapist to testify.

Another puzzle in the opinion was the Court of Appeal’s extrapolation of the juvenile court’s orders and needs. The opinion states that the juvenile “court concluded that the Agency’s need for information prevailed over Kristine’s need for therapy to be privileged and confidential and the Agency was entitled under Evidence Code Section 1012 to receive information from the therapist related to the therapy.” Yet, there is nothing in the record as reported in the opinion suggesting that the juvenile court needed or wanted any information from the therapist. The referee was merely responding to the Agency’s arguments about its need for such information, which consisted only of “‘one letter that gives a general idea of whether or not the client is making progress ....’” and not details of therapy. One could speculate that at some future date the Agency might request a court order based on something it learned from the therapist, but neither such an order nor any request for confidential therapy information to support it was before either juvenile court or the Court of Appeal.

However, the Court of Appeal saw fit to expand the order “to the extent it permits disclosure by Kristine’s therapist of matters that reasonably assist the court in evaluating whether further orders are necessary for Kristine's benefit and preserves the confidentiality of the details of her therapy.” But allowing disclosure to the court, and not just the Agency, also means disclosure to the parent, a party to the case, the very thing Kristine feared most.

A critical problem with the Court of Appeal’s hollow order to preserve “the confidentiality of the details of her therapy” is that the court’s notion of piercing privilege and yet protecting details of therapy originated with In re Pedro M., discussed in Part IV.B.2.c.ii. below. In that delinquency case, the Court of Appeal upheld piercing a minor’s privilege in part because “the juvenile court carefully sought to circumscribe [the therapist]’s testimony ‘so that the details of the therapeutic session [would] not [be] disclosed.’” Even though the therapist testified in considerable detail about Pedro based on his communications and actions in therapy, the In re Pedro M. court characterized her testimony as not violating psychotherapist-patient privilege. She said he had no “‘motivation to change,’ ‘little to no’ empathy or remorse,” and that he was “‘passive-aggressive’ and dishonest.” The In re Kristine W. court wholly adopted the standard created by In re Pedro M. That standard provides almost no privacy in therapy.

A final example of the case’s disconnection from reality was the referee’s request for “the social worker’s assurance that she would respect Kristine.” It is hard to comprehend how the referee imagined that his ruling putting Kristine’s needs below those of the Agency would have done anything other than make her feel disrespected by both the Agency and the court. Indeed, Kristine’s counsel responded “that Kristine would not continue with therapy, and that this was ‘an ... example of the chilling effect that that ruling would have on our clients.’”

**ii. Mark L.**

Mark L. was removed from his adoptive parents after his adoptive father Paul hit his older sister Tasha, then age twelve or thirteen, on the head with a pot and stabbed her in the hand with scissors during an altercation. The criminal court placed the father on probation for five years and barred him from seeing the children “unless visitation was ordered by the family court.” The children eventually were returned to their adoptive mother, and the case was dismissed as to Mark. They were removed again two years later because of the adoptive mother’s drug use and domestic violence with her new boyfriend, and
because of her boyfriend’s sexual abuse of Tasha. 

At the contested six month hearing, Mark testified that he did not want to see Paul even in a therapeutic setting because he “was mean and beat him.” Mark had not seen Paul in three years. “In an earlier written submission, Mark stated he had ‘vivid memories’ of being physically abused by Paul and Paul once ‘pick[ed] him up and [threw] him across a room.’ Mark also stated he saw Paul abuse Tasha.” After Mark asserted privilege, the referee excluded his therapist from testifying “and struck references in the Agency’s reports to information he provided the social worker.” The referee ordered conjoint (family) therapy between Mark and each of his parents when approved by his therapist and his counsel. “The court assumed Mark’s counsel would advise the Agency if [the therapist] determined conjoint therapy to be appropriate ....”

By the contested twelve month hearing, conjoint therapy had not occurred. The social worker testified that Mark, age twelve, preferred to remain with his biological aunt and was “adamant that he does not want to return home.” She also said her ability to make a recommendation about conjoint therapy was “impeded” by “her inability to communicate with [the therapist].” Even though the father had complied with his case plan, the court terminated his reunification services, finding “detriment because Mark does not want to go home.” There is no indication in the opinion that the criminal court bar to the father having contact with Mark beyond the scope of court ordered visitation was ever modified, so it is unclear whether the referee could have ordered return even if it had found it was in Mark’s best interests to do so.

Ruling on the father’s writ petition, the Court of Appeal held that he was denied reasonable services at the twelve-month hearing because the referee established conditions that precluded Paul’s contact with Mark. Given that the referee had ordered contact, he did not have enough information to determine if detriment to Mark precluded return, and Paul was thus entitled to another six months.

The Court of Appeal also found that the juvenile “court misinterpreted section 317, subdivision (f) to preclude [the therapist] from testifying or providing any information to the court or the Agency at the six-month hearing.” But this statement is dictum because the Court of Appeal did not use this view to reach its holding on the issue before it from that hearing. Given that visitation was the only issue, the Court of Appeal admitted that “Paul was not prejudiced by the error because the order denying visitation is otherwise supported by substantial evidence.”

The Court of Appeal concluded that privilege “does not preclude [the therapist] from giving circumscribed information ... whether any therapeutic progress between the six- and 12-month hearings warranted conjoint therapy or visitation between Mark and Paul.” If the therapist were to simply provide an answer to this question to the social worker, this would seem to comply with the Court of Appeal’s intention. The Court of Appeal also suggested another means to solve the problem without piercing the privilege. “The court could have appointed another psychologist to examine and evaluate Mark, and under Evidence Code section 1017 there is no psychotherapist-patient privilege when the examination is by court order. Thus, the referee instead could have ordered such an evaluation on remand and not pierced Mark’s privilege. Unknown is what happened after the remand and whether Mark’s therapist revealed his confidences.

There are only three clear takeaways from the opinion. First, the ruling was not about Mark’s best interests; it was about satisfying the obligation for reasonable services to Paul. Second, under the facts and posture of the case and absent a change of circumstances, Paul’s services could not be terminated unless a therapist or other mental health evaluator communicated to the Agency and the court (possibly through the Agency) that visitation and conjoint therapy continued to be detrimental to the Mark. Finally, if the therapist were subpoenaed and ordered to testify regarding that limited question, such an action would be upheld by the Fourth District Court of Appeal. But, nothing in the opinion suggests that therapist could be
compelled to provide any information beyond answering that question.

The real problem with what the juvenile court referee did in the case was the contingent order at six months for conjoint therapy. In addition to the problematic nature of such orders, there was no indication from any professional involved in the case that contact between Mark and his father was warranted. Based on the Court of Appeal’s reasons for upholding the denial of visitation, nothing in the record suggests that the father would have been successful in appealing denial of a request for conjoint therapy if the referee had not ordered it. Conditioning the order on the therapist’s approval, coming on the heels of Mark’s assertion of privilege and the obvious impossibility of the therapist’s providing such approval, set up the requirement for a service to be provided to the father that the Agency could not possibly fulfill, as the Court of Appeal noted. This was the father’s only reasonable services argument.

If the referee had not made the order, the father would not have had a reasonable services issue on which to file a writ after the twelve month hearing.

More importantly, the Court of Appeal could simply have said that the referee’s impossible order for conjoint therapy was not supported by the evidence, as it said regarding the father’s request for visitation, and resolved the writ without a remand.

In both of these cases, the Court of Appeal phrased its discussions, and especially its holdings, using the names of the respective youths. The court did not make sweeping pronouncements using nouns such as minors or children that could reasonably be extended to apply to other cases with different facts. Even the referee in In re Kristine W., opining about how such conflicts should be handled in the future, stated, “that the need for therapy to be privileged and confidential would be balanced on a case-by-case basis ....” In the only two other dependency opinions on privilege to rely in part on these cases, this same Court of Appeal division upheld privilege for dependent minors.

b. The Companion Cases: Legislative Background

The psychotherapist–patient privilege rights of dependent minors were in no way diminished by case law until 2001. Ironically, the companion cases were a response to the legislature’s strengthening of privilege in 2000, when Senate Bill 2160 codified the right of minors and their counsel to assert the privilege. The bill made specific amendments to Section 317(f) of the California Welfare and Institutions Code and added § 326.5 of the Welfare and Institutions Code, which made minor’s counsel the child’s guardian ad litem instead of the child welfare worker. This was not a small or hastily considered change to the status quo. The Legislature amended this provision in the bill three times and its committees voted on the bill in five separate hearings.

The companion cases characterize SB 2160 as primarily an effort to obtain funding by meeting certain federal criteria, and to correct the archaic practice in California of allowing minors in dependency actions to be represented by the same counsel that represents the Agency. While the funding was an important consideration, the second characterization misrepresented the policy priorities in the bill.

Actually, in most non-rural counties at that time, courts were appointing separate counsel for minors, in some cases in some jurisdictions, and in nearly all cases in others, paid for by state court funds. In the legislative analysis cited by the companion cases, the very first reason listed for the bill was to ensure that all children in dependency proceedings had separate counsel. The companion cases curiously omit this key fact. As described by the bill’s author, “Even though all parents in child abuse and neglect proceedings are automatically afforded an advocate, and the county has its own attorney representing its interest, children are not automatically afforded counsel in these matters.” This bill constituted “a rule reversal” to Section 317(c) of the Welfare and Institutions Code, so that instead of the juvenile court only appointing counsel if the minor would benefit, the court could decline to appoint only if it made findings
on the record that the child would not benefit - in effect ensuring that minors without counsel would be a
rare exception.\(^{186}\)

The companion cases’ characterization of the reason for SB 2160 obscures the fact that at the time the
most glaring example of an urban county falling short in counsel for minors was San Diego, the juvenile
court from whence these cases came, supervised by the very same Fourth District Court of Appeal. In the
bill’s legislative analysis cited by the companion cases there are only three paragraphs describing the
views of organizations in support of the bill. The first paragraph refers to the Judicial Council. The other
two paragraphs are about the juvenile court in San Diego, with the key sentence being: “The Children’s
Advocacy Institute (CAI), point[ed] to a ‘year-old policy change in the San Diego County Juvenile Court,
in which children in dependency cases are routinely denied legal counsel, ‘unless the need arises’ or in the
most complex of cases.’”\(^{187}\) The “policy change” occurred because the state funding source was diverted
for other purposes in that county. The new bill would force a big shift in San Diego.\(^{188}\)

As the companion cases explained, “Historically, the social worker in a dependency case was the child’s
guardian ad litem,” and the holder of the psychotherapist-patient privilege.\(^{189}\) The court then quoted from a
brief submitted by the Agency. “Communication between children’s therapists and social workers was,
understandably, the norm .... Input from children’s therapists has played a vital role in helping both the
Agency and the juvenile court make decisions regarding the safety and welfare of dependent children.”\(^{190}\)
In the enactment of SB 2160, the Court of Appeal appears to have seen a crisis, with the juvenile court and
social workers unable to get “information from which reasoned recommendations and decisions regarding
the child’s welfare can be made.”\(^{191}\) Unacknowledged, but undoubtedly known by the court, was that the
Agency would incur more expense if the confidential information upon which it had heavily relied were
no longer available, because more social work would be required to complete reports and caseloads would
most likely have to be lowered to accomplish this.

Asserting that the amendments to Section 317(c) of the Welfare and Institutions Code did “not affect the
substantive law on the privilege,”\(^{192}\) or “change the scope of the privilege itself,”\(^{193}\) the Court of Appeal
decided to respond by restricting the use of privilege. However, the Legislature included no language in
Section 317(f), nor has any been added since, allowing a court to pierce this privilege. The Legislature
found no need to limit under what circumstances the privilege’s protections would be afforded. In fact,
one year before the Legislature created Section 317(f), it amended the statute protecting dependents’ case
files to say that if information in those files is privileged under state or federal law,\(^{194}\) those laws creating
and maintaining the privileged status of that information prevail over other laws granting access.\(^{195}\)

In 2006, both Assembly Bill 2480 and Senate Bill 678 set the age at which a minor is presumed to have
control over the release of his mental health information to twelve - establishing one of the lowest
thresholds in the nation and rejecting calls to set the age a sixteen - in what was clearly an intent to expand
the scope of minors’ exercise of privilege.\(^{196}\) The Assembly Judiciary Committee analysis concluded,

Ensuring that these privileges can be appropriately protected is very important for children in dependency
proceedings. These children often rely extensively on doctors, therapists and clergy in dealing with the
very difficult situation they are facing. Allowing them the ability to invoke or waive the privilege will help
ensure they can be completely honest with these professionals.\(^{197}\)

A cosponsor of AB 2480, The National Center on Youth Law (NCYL), said “this presumption ‘will
ensure that these privileges ... protect youths who are confiding with therapists and their clergy.’ NYCL
further states that “[y]outh deserve to hold these privileges to the same extent that all others who enter into
these confidential relationships.”\(^{198}\)

The revision to the therapy privacy rights of minors subject to dependency actions made by Section
56.103(e)(1) of the California Civil Code in 2008 (described above in Part III) provided an opportunity for a contraction of privilege if the Legislature had seen a need, which it did not.

In 2002, the Legislature specifically rejected the companion cases’ view of the “vital role” therapists play as the court’s information spigots.\(^{196}\) AB 1832 as introduced would have amended Section 317 of the Welfare and Institutions Code to read as follows:

\[(g)(1)\text{ Notwithstanding subdivision (f), any information that a child communicates during an assessment, evaluation, or treatment, that would otherwise be privileged, shall be excepted from those privileges for the limited purpose of providing information to the juvenile court, the county child welfare worker, and the child’s attorney to assist the juvenile court in determining the child’s case plan and any other orders that are in the best interests of the child.}\]^{200}\n
That version of the bill never received a hearing. Although a watered down, amended version that would have exempted from privilege a child’s diagnosis and “the psychotherapist’s recommendations for implementation of the case plan” passed through the Assembly, it never received a hearing in the Senate.\(^{201}\)

c. A Table with No Legs Cannot Stand
If one thinks of each authority cited by the companion cases in support of their holdings as a leg of a table, this analysis shows how each of those legs fails and the table does not stand.

i. Legislative History
Regarding information shielded by psychotherapist-patient privilege, the companion cases said that the “legislative history of section 317, subdivision (f) does not suggest the Legislature intended to make unavailable that important information.”\(^{202}\) But the cases offered absolutely no support for this assertion. There is nothing in the legislative history of SB 2160 to suggest that the Legislature intended for the courts to pierce minors’ psychotherapist-patient privilege. The Legislature carefully crafted the amendments to Section 317(f) precisely to protect minors’ privilege from intrusion. The Assembly Judiciary Committee analysis stated that it is important that a child of sufficient age and maturity be able to “exercise the privilege him or herself as to specific facts which he or she does not want disclosed to the court or others.”\(^{203}\)

ii. Pedro M.\(^{204}\)
But the greatest problem with \textit{In re Mark L.} and \textit{In re Kristine W.} is their misappropriation of the holding of \textit{In re Pedro M.},\(^{205}\) a delinquency case from the previous year about a sex offender. The issue before the delinquency court was whether to remand him to the California Youth Authority because he presented a danger to society. While on probation, Pedro “had failed to cooperate in a plan for psychiatric and psychological treatment as ordered by the court.”\(^{206}\)

In upholding the testimony of Pedro’s therapist in the face of an assertion of privilege, the court observed two key contrasts between delinquency and dependency cases that result in differences in the application of psychotherapist-patient privilege. The first is that the delinquent minor’s participation in therapy is a court ordered condition of probation resulting from the minor’s criminal acts - not the case for a dependent\(^{207}\) -and the second is that the delinquent patient has no expectation of privacy in that context:

Quite obviously, the court’s ability to evaluate appellant’s compliance with this particular condition of the court’s disposition order and its effect on his rehabilitation would be severely
diminished in the absence of some type of feedback from the therapist, and it would be unreasonable for appellant to think otherwise. (Contrast In re Eduardo A. (1989) 209 Cal. App. 3d 1038 [261 Cal. Rptr. 68] [holding that the psychotherapist-patient privilege applies to confidential communications made in court-ordered counseling of a parent in a § 300 case but that the application of the privilege does not prevent the court from acquiring from other sources information needed for proper evaluation of dependency status].)\textsuperscript{208}

Curiously, the companion cases quote the first sentence of the quotation above from In re Pedro M., but not the subsequent contrasting citation and explanatory parenthetical.\textsuperscript{209} Could the court have wanted a casual reader of the companion cases to be unaware of the privilege ““contrast” In re Pedro M. drew between delinquency and dependency cases, and the acknowledgment by In re Pedro M. of the applicability of privilege to dependency proceedings? This contrast is most dramatic when comparing the circumstances of a delinquent to those of a parent in a dependency proceeding, both having been found by a court to have willfully engaged in reprehensible harmful behavior and then ordered to engage in remedial treatment.\textsuperscript{210} Yet, the abusive or negligent parent is treated differently because the resources, procedures and goals in dependency court are unlike those in delinquency court. This contrast begs the question: if such parents are able to fully assert psychotherapist-patient privilege in dependency court, then why not their innocent children?

But the greatest problem with In re Pedro M. came in the next sentence, in which the opinion, with no cited authority, misinterpreted Section 1012 of the California Evidence Code.

\begin{quote}
Indeed, Evidence Code section 1012 itself permits the disclosure of a confidential communication between patient and psychotherapist to “those to whom disclosure is reasonably necessary for ... the accomplishment of the purpose for which the psychotherapist is consulted ....” In our view, this would include the juvenile court, where the patient is a delinquent minor who has been properly directed to participate and cooperate in a sex offender treatment program in conjunction with a disposition order placing the minor on probation.\textsuperscript{211}
\end{quote}

Again, In re Mark L. cites this phrase from the Evidence Code contained in the first sentence of this quotation from In re Pedro M. in its discussion of the “rationale” of In re Pedro M.,\textsuperscript{212} but does not cite the second sentence, which suggests that the In re Pedro M. holding is limited to sex offenders in delinquency cases.

In re Pedro M. cites no authority for its use of Section 1012 to expand the universe of those persons excepted from privilege, because there is none. The opinion violates the maxim: “the psychotherapist-patient privilege is to be liberally construed in favor of the patient.”\textsuperscript{213} The other case law interpretations of the Section 1012 exception understand it to be limited to members of the therapy team supervised by the therapist, or to third persons whose presence in the room with the patient and therapist is necessary to accomplish the purpose of the therapy, such as an interpreter or a family member participating in conjoint therapy.\textsuperscript{214}

The companion cases transfer from In re Pedro M., without citation to any other authority, the dubious assertion that “in the juvenile dependency context ... therapy has a dual purpose - treatment of the child to ameliorate the effects of abuse or neglect and the disclosure of information from which reasoned recommendations and decisions regarding the child’s welfare can be made.”\textsuperscript{215} What these cases ignore is that delinquency courts’ authority to fashion a specifically tailored “condition of probation that would be unconstitutional or otherwise improper” if done by any other court,\textsuperscript{216} does not give license to export those conditions of treatment to dependency court.

What is particularly misleading about the companion cases’ use of In re Pedro M. is that its invocation
comes immediately after the cases’ recitation of how the changes wrought by SB 2160 in Section 317(f) of the California Welfare and Institutions Code did not alter the substantive law of psychotherapist-patient privilege dictated by Section 1012 of the California Evidence Code. The companion cases mistakenly imply that the Legislature was aware of In re Pedro M.’s unprecedented and freakish re-engineering of the privilege, which was issued on June 12, 2000, just one week before SB 2160 passed through its final policy committee in the Legislature. And why would anyone have taken notice? In re Pedro M. was a delinquency case, while SB 2160 was exclusively about dependency. The Court of Appeal division that authored the companion cases would be the only one to assault the privilege by reinventing it in this way. So it is not true, as the companion cases obliquely assert, that SB 2160 was in any way a stamp of approval of In re Pedro M.’s version of the privilege.

Contrary to the holdings of In re Kristine W. and In re Mark L., there is not a statutory exception to the psychotherapist-patient privilege for disclosing the information to the court or a social worker because it is “reasonably necessary for ... the accomplishment of the purpose for which the psychotherapist is consulted ....” The only court ever to apply In re Pedro M. in a delinquency context was of course Division One of the Fourth District Court of Appeal, in the case of In re Christopher M.

iii. Eduardo A.

In re Kristine W. found unpersuasive:

Kristine’s suggestion that the Agency “could gauge the success (or non-success) of the therapy by seeing how she interacted with her caregivers, her teachers, her siblings and peers” or “request a diagnostic study or a bonding study.” Although undoubtedly there are many important sources of information concerning a child’s progress, the therapist’s input is invaluable. (Cf. In re Eduardo A., ... 209 Cal. App. 3d at pp. 1043-1044; In re Jasmon O., ... 8 Cal. 4th 398, 430.)

The signal “Cf.” means that the authority offers analogous support to the proposition and deserves further explanation. But In re Eduardo A. stands for the opposite proposition, as quoted at length in Part IV.B.1. above. In upholding psychotherapist-patient privilege, the case asserted that social workers’ assessment of the safety and well-being of children comes “from a variety of sources including the social worker’s personal observations as well as his or her interviews with the parent, neighbors, teachers, relatives, physicians, and even the children themselves; it need not depend on revelations by the treating psychotherapist.” More importantly, the case warns, “It would be unreasonable to expect a patient to freely participate in such treatment if he knew that what he said and what the therapist learned from what he said could all be revealed in court. A patient in therapy has and needs a justifiable expectation of confidentiality.”

iv. Jasmon O.

A further misappropriation in In re Mark L. is from In re Jasmon O. Here the quotation was, “[w]ithout the testimony of psychologists, in many juvenile dependency and child custody cases superior courts and juvenile courts would have little or no evidence, and would be reduced to arbitrary decisions based upon the emotional response of the court.” In re Kristine W., citing In re Jasmon O., said “the therapist’s input is invaluable.”

In In re Jasmon O. the Supreme Court majority opinion’s author Stanley Mosk actually was squabbling with the opinion’s dissenters that had argued the psychologists’ testimony was not very useful. But, the case had nothing to do with privilege. It was a very complicated appeal of hearings that had occurred three years earlier in San Diego County concerning return of a four-year-old. The Supreme Court overturned the decision by the Fourth District Court of Appeal. Here is the full quotation from the case:
The dissent dismisses much of the evidence relied upon by the superior court as insubstantial because it was offered through the testimony of psychologists. In addition to the evidence already referred to, such evidence included the declaration of the psychologist treating the father near the time of the termination hearing that he no longer believed that the father was able to take on the responsibility of being a parent and that the father was unable to recognize the child’s needs. It also included evidence of an independent psychologist that the father had a narcissistic personality disorder. Without the testimony of psychologists, in many juvenile dependency and child custody cases superior courts and juvenile courts would have little or no evidence, and would be reduced to arbitrary decisions based upon the emotional response of the court. It cannot seriously be argued that such evidence should be excluded, or denied substantial weight.227

Again, because this opinion does not deal with privilege, the only question addressed by Justice Mosk was whether any testimony by psychologists is ever useful. Certainly it has some value, especially when there are no privacy concerns because it has come from a court ordered evaluation,228 or privilege has been waived by the holder. It is notable that this opinion was issued six years before S.B. 2160 codified dependent minor’s rights to assert privilege.

v. Daniel C.H.229

The companion cases also relied on In re Daniel C. H.,230 opining that in “In re Daniel C. H., 220 Cal. App. 3d at 829-830 [court indicated minor’s therapist could give limited testimony despite child’s assertion of psychotherapist-patient privilege].”231

But once again, this is a less than honest use of the holding. The case included the issue of visitation between Daniel and his father, who molested him, and says that the juvenile court did not err in refusing to hear the therapist’s testimony because it would have been useless. Daniel’s therapist invoked the privilege for his patient. “Dr. Niederman wrote the court a note stating that he did not wish to report directly to the court concerning visitation because it would jeopardize his therapeutic relationship with Daniel.”232

Father also argues that the trial court should have followed the procedures outlined in Evidence Code sections 400 et seq. and 914 to determine the claim of privilege, because there allegedly were numerous questions that Dr. Niederman could have answered that were not privileged, such as how often Niederman meets with Daniel and for how long; whether he had communicated with Mother, Dr. Heenan, or Dr. Sherwood; his qualifications to treat Daniel; and his general conclusions about Daniel’s mental health. Father complains that Niederman should have been called to the stand and been permitted to answer those questions, and that once on the stand, the issue of privilege could have been addressed. This argument lacks merit.

The trial court heard argument before and during the trial concerning whether Dr. Niederman should have been permitted to testify. We find this sufficient. Although the court could have permitted Dr. Niederman to testify to some of the questions posed above, we do not think the court was required to do so. In fact, such testimony would have been a waste of the court’s time. Without further questions and answers that would clearly have been protected by the psychotherapist-patient privilege, the answers to the above questions would not have helped the court determine whether Daniel was molested, whether his mental state focuses on molest, or what disposition would be proper. Thus, the testimony would have served no real purpose.233

d. The Table Falls

None of the authorities cited by the companion cases support the holdings or rationale of the companion
cases. The companion cases could be described as a confused overreaction to a rebuke from the Legislature. These cases are contrary to the Legislature’s intent in several statutes strengthening the ability of minors to control release of their confidential mental health information.

But, assuming arguendo that these holdings have some utility, their facts, language and rationale make one aspect of their application is crystal clear. As a threshold matter there must be a specific and essential need for mental health information that cannot be obtained through any other means, and the court must weigh that impasse carefully against the privacy interests of a particular minor according to the unique circumstances of the case. There is nothing to suggest, as some have asserted, that these cases created a rule for piercing privilege that applies in the absence of a hearing followed by an individually and carefully crafted court order.

3. What a Difference a Decade Makes.
Subsequent to the companion cases, all two of the dependency cases dealing with minors’ psychotherapist-patient privilege originated in San Diego County, and were decided by the First Division of the Fourth District Court of Appeal.

a. Cole C. 234
In In re Cole C., the mother of foster children submitted to the court a letter from a therapist that she and the children saw prior to the filing of the original petition. 235 The therapist’s letter said that the therapist had been seeing the mother individually, had family therapy with the mother and the children, and sometimes met with the oldest child individually. 236 The letter contained details surrounding the therapy sessions with the mother and the children. 237 The children’s attorney asserted the psychotherapist-patient privilege on behalf of his clients. 238 The father argued that because the therapy occurred before the petition was filed, the mother was the holder of the privilege, and that she had waived it when she submitted the therapist’s letter to the court in her motion. 239 He also argued that the privilege is not absolute, and under In re Mark L., 240 information necessary to allow reasonable recommendations and decisions concerning the child’s welfare may be disclosed. 241

In an opinion written by one of the concurring justices in the companion cases, the court concluded that the holder of the privilege is determined at the time that “the confidential communication is sought to be introduced into evidence.” 242 Once counsel was appointed for the children, counsel had authority under Sections of 317(f) and 326.5 of the California Welfare and Institutions Code to assert the privilege on behalf of the children, even though the statements were made prior to the dependency and to a therapist the children shared with their mother. 243 The court did not use the analysis of In re Mark L., because at the time the girls saw the therapist, there were no dependency proceedings and the purpose of the therapy at that time was not to assist the court in making appropriate findings. 244 Ultimately the court concluded that disallowing the therapist’s letter under psychotherapist-patient privilege was proper and the therapist could only be called to testify as to therapy solely provided to the mother. 245

b. S.A. 246
In In re S.A., 247 came from the Fourth District Division One panel that included one of the justices from the companion cases, the author of In re Cole C. The case also came from the same trial judge as the In re Cole C. case. The holding upheld S.A.’s assertion of privilege in spite of her father’s assertion that her psychotherapist-patient privilege had been waived because her therapist “‘disclosed many statements and made many oral disclosures to the police and social workers,’ which appeared in their reports ....” 248 The court noted that S.A. did not authorize the disclosure. 249 The court was unpersuaded by the father’s claim that privilege did not apply because he and his daughter had “some joint sessions” with her therapist. 250
The court also upheld the privilege because S.A. admitted during her testimony that she did not tell her therapist about her father’s alleged sexual molestation of her, and presumably the therapist’s testimony would not have been helpful to the juvenile court in determining whether to take jurisdiction. Finally, the court believed the father’s goal “was to discredit S.A. and protect his reputation, and not to ... assist the Agency and the court ...” “Under the circumstances, the [juvenile] court did not abuse its discretion by opting for full confidentiality to protect S.A.’s substantial privacy interest.”

4. Conflict with Agency’s Duty to Report to the Court?

It has been argued that the prohibition in Section 56.103(e)(1) of the California Civil Code against further disclosure of mental health information by the statute’s authorized recipients, as well as psychotherapist-patient privilege, are not barriers to the social worker’s duty to provide the court with all information known by the Agency that is relevant to the welfare of the child. This assertion flows from Section 280 of the California Welfare and Institutions Code, which anachronistically states that for all disposition and status review hearings the “probation officer” shall prepare “a social study of the minor, containing such matters as may be relevant to a proper disposition of the case.” (A similar sister statute, Section 281 of the Welfare and Institutions Code, sets the same requirements for a report if ordered by the court, and will be subject to the same analysis here.) The sole additional authority for such a requirement is California Rule of Court 5.690(a), which only applies at disposition hearings, and requires the Agency’s social study to “include a discussion of all matters relevant to disposition and a recommendation for disposition.” There is as yet no case law interpreting Section 56.103(e)(1).

If the reporting requirement in Section 280 of the Welfare and Institutions Code were considered to be a further disclosure “authorized by law,” as required by Section 56.103(e)(1) of the Civil Code, the first question to be answered is whether any higher authority trumps this interpretation. One obvious greater constraint on the duty to report relevant information, if it is a confidential communication with a therapist, is psychotherapist-patient privilege, effective in all fifty states for adults and upheld at the greatest level of protection by the U.S. Supreme Court. This evidentiary privilege is as important to privacy as is the attorney-client privilege, according to the Court’s finding of “the imperative need for confidence and trust.” This is especially true for foster children, because it is the therapists’ job to heal, and children typically spend a lot more time with their therapists and have much more to say to them than their attorneys.

Case law more recent than the enactment of Section 56.103 of the Civil Code holds that psychotherapist-patient communications do not lose their privilege protection, absent a waiver by the dependent minor patient, simply by having been disclosed to the social worker by the therapist. Legislative intent is also instructive. As Part IV.B.2.c. described, the Legislature has been increasingly protective of foster children’s therapy privacy rights and psychotherapist-patient privilege in the past decade, not the reverse. Construing Section 56.103 to be less protective than its legislative history indicates also would fly in the face of the Legislature’s intent in this and other dependency legislation.

While Section 56.103(e)(1) of the Civil Code on its face allows further disclosure if “authorized by law,” such as if there is a valid release, that is only the second part of a two-pronged test. The first prong is that the subsequent disclosure be for the purpose of “coordinating mental health services and treatment.” However, courts rarely coordinate treatment for foster children, because this function is within the Agency’s discretion. A child welfare worker does not need a specific court order to commence therapy for a child. Nor is specific court approval needed for therapy by a school counselor or family therapy between child and a caregiver other than a parent. If mental health information disclosed to the child welfare worker under Section 56.103 were to be further disclosed to the court it would almost certainly be for deciding jurisdiction, disposition, visitation, custody, termination of rights or dismissal, purposes neither allowed by the plain language nor the legislative intent of the bill. None of the legislative
analyses for AB 1687 that created Section 56.103 mention these purposes. 266

If Section 56.103(e)(1) were considered to be protective of disclosure to the court and thus in conflict with Section 280 of the Welfare and Institutions Code, does Section 280 trump and create a valid exception to the ban on further disclosure in Section 56.103(e)(1) of the Civil Code? If it were necessary for the court to order a specific treatment, would a disclosure be “authorized by law”? This question may be answered by looking at the Legislature’s intent, which is found in the preamble to AB 1687:

It is the further intent of the Legislature not to expand existing law and to clarify that existing provisions regarding confidentiality of medical records and the federal Health Insurance Portability and Accountability Act (HIPAA) authorizes psychotherapists to provide health care and mental health information to caregivers of children and youth in foster care to facilitate providing health care and mental health care that meets the needs of these children and youth. 267

The legislative intent demonstrates the reality that the bill is merely a state codification of existing federal law, 268 so as to better inform therapists of the law, 269 and thus neither expands access, nor reduces protections. Courts are not children’s caregivers.

If the Legislature had intended to restrict psychotherapist-patient privilege and include courts in the list of the three persons authorized to receive information under the law, it surely would have done so. The only reference in the legislative analysis to the court as a recipient of information is a request by County Welfare Directors Association (CWDA) for an amendment to expand the bill to include children in custody, but not yet declared dependents by the court:

When children are brought into custody, a chain of events occurs prior to the child actually being found a dependent or ward. These events include multiple hearings, where petitions are filed and information [is] received by the court. In order to help the court determine whether a child should be declared a dependent or ward, it is necessary to have information about the child’s health and mental health. 270

But the fact that the Legislature made the amendment does not presume that the Legislature made the amendment for the reasons proposed by CWDA. In addition to the author’s explanation of the need for the bill quoted above, 271 the only stakeholder argument presented in the “Background” section of the bill in the legislative analysis prepared for versions of the bill creating Section 56.103 of the Civil Code was the following:

The Inter-Agency Council on Child Abuse and Neglect cites a scenario where currently, a child could be released from probation supervision to the care of Child Welfare services, but a probation officer would be unable to share the medical and behavioral history of that child with a social worker. This information gap can result in a range of complications from duplication of diagnostic work to conflicting prescription drugs. 272

The scenario described by the Inter-Agency Council is a more than adequate explanation for amending the bill to include children in custody, but not yet found to be dependents by the court.

Notwithstanding the analyses above, if there were a conflict between these two statutes, a compelled disclosure interpretation violates key rules of statutory construction. First, Section 280 of the Welfare and Institutions Code is a general rule, and Section 56.103(e) of the Civil Code is a specific prohibition. Absent any other rule compelling a different result, a specific statute trumps general one. 273 Second, Section 280 of the Welfare and Institutions Code was last amended in 1987, but Section 56.103 of the Civil Code was enacted in 2007. 274 A newer law prevails over an older one. Finally, compared to
California Rule of Court 5.690(a) regarding disposition hearing reports, a statute is higher authority than a rule of court.

Similar arguments regarding Sections 280 and 281 of the Welfare and Institutions Code also could be made as to information disclosed to the social worker via a court order or valid release. However, such disclosures do not by themselves waive privilege.

V. Recommendations

These recommendations to better protect confidential psychotherapist-patient communications are in three categories. The first is suggestions to minor’s counsel for advising and protecting clients. The second is a protocol for all those potentially involved in handling confidential mental health information: therapists, social workers and attorneys. The third is legislative changes.

A. How Minor’s Counsel Can Help Protect The Client’s Privacy

Minor’s counsel should discuss mental health information with clients early in the process, preferably at the detention or initial hearing. Clients should be educated about their privacy rights and encouraged to raise the issue with their therapist at the first therapy session. If clients are unclear or uncomfortable about their therapist’s understanding or intentions concerning clients’ privacy, clients should be advised to inform their attorney immediately so that the attorney can resolve the problem. Minor’s should also be warned not waive or release any protected mental health information without advice of counsel.

Minor’s counsel should do outreach education to therapists and social workers to explain the laws concerning privacy, because many social workers and therapists are not well versed in this area, or have not kept up with recent changes. Part of this education could encourage therapists to establish a routine early in therapy to discuss confidentiality with clients. It should also include a reminder that California law obligates therapists to assert privilege unless there has been a lawful waiver.

For example, parents whose children have been removed may be urged by the Agency to sign mental health information releases for themselves and their children. In California, therapists and social workers should be educated that for foster children placed out of home such releases are no longer valid, absent a court order, pursuant to SB 1407 (Cal. Civil Code Section 56.106, chaptered 2012). Nor are these releases valid for most foster youth age twelve or over placed in home, and in no event do such releases waive privilege.

Unless waived by the client age twelve or over, acting with the advice of counsel, counsel should aggressively assert privilege. For the client under twelve, counsel should assert privilege unless there is a clear detriment to the child in doing so - taking into account the benefits of the child’s future expectation of privacy in therapy.

Minor’s counsel should object to any proposed court order that conditions visitation on the therapist’s input. Such an order may by itself be contrary to law, force a violation of confidentiality, or trigger a finding of “no reasonable services.” The court or any party can always encourage the social worker to seek input from the therapist, subject to legal privacy protections.

B. A protocol to help therapists, social workers and judges to better protect therapy confidentiality

It is common for a social worker to want to consult a child’s therapist concerning any number of issues in a dependency case. Sometimes a therapist may be aware of decisions that are being made in a case and
wish to provide input. The protocol in this subsection uses existing California law to protect confidentiality and at the same time permits some limited disclosures intended to benefit the child.

Disclosure is limited by the fact that absent a court order or valid release, the only disclosure a therapist may make to a social worker about a dependent child under the age of twelve is “information concerning the diagnosis and treatment of a mental health condition of a minor [that] is reasonably necessary for the purpose of assisting in coordinating the treatment and care of the minor.” This disclosure allows the therapist to suggest additional services for the minor, but to protect the confidentiality of therapy this disclosure should not include confidential statements the minor has made in therapy. In this information for treatment and care the therapist also should avoid including his opinion about an issue central to the court case such as reunification, which is often a crucial area of confidentiality for the child in therapy.

(Other statutes mandate therapists’ obligations as child abuse reporters, and duty to warn of imminent harm to a patient or others.)

If either the therapist or the social worker desires communication with the other in the case of a child age twelve or over, they should discuss the situation with the child and his counsel. With the advice of counsel, the child can consider signing a release to permit the communication. Often, a release limited as to content and time can be crafted that meets the needs of all concerned.

Social workers are trained to make risk assessments regarding placement and visitation without guidance from others. However, sometimes the social worker may feel unable to fully assess the risk of return without additional information. If in the case of a child under the age of twelve when the therapist’s services recommendation is not adequate or the therapist is not willing to disclose anything, or in the case of a child age twelve or over when the child refuses to authorize disclosure, the worker has other options. One would be to ask the court to order a psychological evaluation or bonding study conducted by someone other than the therapist, which is not subject to privilege. Given the timeframes needed for these assessments, parties desiring them should not wait until just before the court hearing to make this request.

If an independent evaluator interviews the child, that evaluator often can avoid making communications within the child’s therapy an evidentiary issue by waiting to communicate with the therapist until after the interview. The evaluator can then present the evaluator’s observations and communications with the child to the therapist, and simply ask the therapist if that information is inconsistent with what is known by the therapist. If the answer is no, that simple exchange usually would not violate psychotherapist-patient privilege or create any basis for further query of the therapist by the court or any party. If the answer is yes, the evaluator can seek a limited waiver from the privilege holder.

Social workers sometimes submit external reports or letters to the court, or attach them to court reports. Any request to the child’s therapist for a written report intended for submission to the court, and thus to all parties, is subject to psychotherapist-patient privilege if it contains any diagnosis, information about what the child has said in therapy or advice the therapist has given the child. If under Section 56.103(e)(1) of the California Civil Code or pursuant to a limited release for disclosure to the worker signed by the child or legal representative, the therapist receives a request from a social worker for information that might reveal confidential therapist-patient communications, the therapist should refuse unless there has been a valid waiver. The therapist is required by law to assert privilege unless that has been waived.

Furthermore, if the requested disclosure comes via Section 56.103(e)(1) of the Civil Code, but is not subject to privilege, and the social worker intends to disclose it to the parties or is not able or willing to prevent disclosure, the therapist should also point out that information disclosed under that statute “shall not be further disclosed by the recipient unless the disclosure is for the purpose of coordinating mental health services and treatment of the minor and the disclosure is authorized by law.” If the social worker responds by asserting a duty under Section 280 of the California Welfare and Institutions Code, the
therapist could simply decline to disclose anything under Section 56.103(e)(1) of the Civil Code, since the statute is discretionary.

Unless privilege has been waived, if the social worker comes into possession of privileged information, the social worker should place any written material or notes concerning the privileged information in the case file in a sealed envelope marked “privileged,” in order to avoid any inadvertent disclosure during discovery.

If a social worker finds it necessary to seek privileged therapist-patient communications for submission to the court (understanding that privileged information does not lose its status unless waived, even if the social worker has it), she should first consult the child’s counsel rather that the therapist. The therapist is not the holder of privilege. The child’s counsel should then consult with the therapist and the child regarding a waiver, with the child the presumed privilege holder if twelve or older, and the attorney the holder otherwise. If the child refuses to participate in an evaluation, privilege is not waived, and the needed information is absolutely critical to the child’s safety or well being, the worker should present the problem to the court.

The following is an example of how the protocol might work in practice, either under Section 56.103(e)(1) of the Civil Code for a younger child, or with a limited release in place for an older child: If the social worker needed additional information about emotional risks to the child if reunified with the parents, the worker could ask the therapist what services would need to be in place to protect the emotional health of the child if the child were reunified. The extent of services recommended could assist the social worker in assessing risk.

From the perspective of the therapist obligated to preserve the confidentiality of patient communications, an answer to a question about services could allow an indirect recommendation to the social worker that probably would maintain the confidentiality of therapist-patient communications without revealing the child’s confidential statements about the parents. If return did not seem problematic, that might give rise to a recommendation that no services would be needed. If return were very risky, the therapist might conclude that no combination of services could adequately protect the child’s emotional health. Depending on the circumstances of each case, there could be a range of services recommendations in between these extremes that would assist the social worker in assessing risk.

C. Reforms That Would Help Protect Therapy Confidentiality
Those states without protections for disclosure of confidential mental health information at least as strong as those in California should strengthen their laws. States with exceptions for psychotherapist-patient privilege in dependency cases should eliminate these lapses in protection. In states where privilege is protected, minor’s counsel should assert it unless waived.

1. Cleanup
Some have interpreted the In re Kristine W. and In re Mark L. cases as creating a blanket rule in dependency cases for automatically waiving privilege. The California Legislature should explicitly declare that these cases are not good law.

Sections 280 and 281 of the California Welfare and Institutions Code should be amended to bar the inclusion of privileged information in a social study presented to the court, absent a valid waiver or a court order. (If the Agency believes such information should be before the court, it should file an individualized motion to that effect.) Such an amendment would simply restate existing law, but is needed because practice has not caught up with the law. In some counties, review reports often still include a detailed
report from the child’s therapist.

Section 827(a)(3)(A) of the California Welfare and Institutions Code should be amended so that, absent a valid release or waiver, the juvenile court cannot release information in case files that is otherwise confidential or privileged. The wording of the existing law is confusing.

Section 1027 of the California Evidence Code was enacted in 1970, decades before the Legislature codified a dependent minor’s right to invoke psychotherapist-patient privilege. It provides that the privilege is inapplicable if the patient is under sixteen, the victim of a crime, and disclosure “is in the best interests of the child.” Its use in a dependency case has not been documented in an appellate opinion in thirty years. It should be amended to clarify that it does not apply in dependency cases.

2. Limiting Disclosures About Children Placed Out of Home.

California children younger than twelve do not have an expectation of privacy in their therapy, because their parents presumptively have access to it. Therapists currently can shield confidential therapy information from parents or guardians when disclosure “would have a detrimental effect on the provider’s professional relationship with the minor patient or the minor’s physical safety or psychological well-being.” However, the presumption is that such disclosures are not detrimental. Another reform should reverse this presumption as to children removed from their parents’ care - so that such disclosures are by default barred as detrimental, unless the court determines that disclosure would not be detrimental. This would shield most confidential therapy information from parents or guardians when their children are placed out of home.

Under current law the child’s counsel holds privilege, and thus controls the use of such information in court subject to the narrow circumstances described in In re Mark L. If it is good public policy for parents not to use of the children’s therapy confidences in court (and it is), it doesn’t make sense for noncustodial parents to routinely have access to these confidences out of court. The potential for the misuse of such information in litigation is only partly diminished if the only bar is that it cannot directly be presented as evidence.

In order to complete the shield for a child removed from the physical custody of a parent, the law should also bar that parent from using disclosure releases to allow others to access the child’s confidential therapy information. If a minor’s counsel is considered to be the child’s “legal representative” under Section 56.11(c) of the California Civil Code, then counsel could perform this function. However, as described below this does create a potential for conflict if counsel turns the disclosure spigot on or off in order to further best interests advocacy - if such advocacy is against the client’s wishes.

3. Codify Loyalty at Age Twelve

California instructs counsel to maintain the highest duty of loyalty to the client. Yet Section 317(e) of the California Welfare and Institutions Code creates an enigma by on the one hand requiring the child’s dependency counsel to advocate for the client’s “interests” and not to advocate for return if safety is jeopardized, while on the other hand directing counsel to tell the court the child’s stated interests. But the Court of Appeal seems to have limited the role of minor’s counsel to advocating for “best interests,” in part relying on the fact that counsel is appointed as the child’s CAPTA guardian ad litem pursuant to federal law. Some dependency attorneys in California nonetheless follow the recommendation of the National Association of Counsel for Children (NACC) to use a sliding scale: best interests for non-verbal or less mature children, stated interests for older teens, and a mixture for those in between. The mix is based on the maturity and mental health of the child, and her ability to understand how the issues at hand affect her safety and emotional well-being.
The NACC has also published a hybrid standard, combining the stated interests standard of the American Bar Association (ABA) with the NACC’s blended representation model. NACC’s revised standard recommends advocating only stated interests unless the client is unable or unwilling to express a meaningful opinion, and then using a substituted judgment standard: what desires the attorney determines the child most likely would express if mature enough to do so. This standard reflects the fact that it is usually difficult, even impossible, for counsel to advocate for both the client’s best interests and stated interests where the two are in conflict. One reason to use the ABA/NACC hybrid standard is the reality that if a client believes that his lawyer may advocate against his stated interests, the client’s trust in his lawyer often is compromised - sometimes completely and irrevocably. The problem is worse if the lawyer has so advocated.

It is tempting for counsel to contact the child’s therapist to attempt to gain insight into the child’s motivations, and sometimes that is a necessary part of counsel’s investigation - especially when using a blended or best interests approach. But the potential damage caused by the possibility that counsel may advocate against the child’s stated interests becomes more extensive, as well as more complicated, where counsel has access to confidential communications between the client and her therapist.

Out of respect for the client’s privacy, the child’s attorney normally should avoid querying the therapist about details of therapy unless there is no other less intrusive means for counsel to perform his duties as a protector of that privacy. And if there is some need for counsel to query the therapist, counsel should take care to first consult with the client as to the purpose of the discussion so as to avoid undermining therapeutic progress and trust. California law giving child’s counsel unfettered access to the therapist was created at the same time counsel was designated as the presumed holder of privilege for a child under twelve, and became obligated to assert privilege unless waived by a child aged twelve or over. Arguably, the primary purpose of that access is for counsel to better perform the gatekeeper role by knowing what information needs to be protected if that information is actively being sought by the Agency or other parties.

If counsel’s access to confidential therapist-patient communications is presumed to be a vehicle for counsel to second-guess the client’s desires, the therapist may withhold information out of loyalty to the patient and to preserve the patient’s candor and trust in the therapist and in therapy. Alternatively, if the therapist lacks confidence in the attorney’s ability to determine best interests, she may withhold certain information she believes is inconsistent with what she believes is in the child’s best interests. But the worst outcome could be that the child who understands this process withholds information from both the therapist and the attorney that might raise safety or mental health concerns about what the child desires. Anyone who has ever worked with children in foster care knows that children often are surprisingly perceptive about how the system works, and may be distrustful of adults trying to help them.

One way to reduce the negative consequences of communications between attorneys and therapists about foster youth would be for all counsel to follow the suggestions described above. Unfortunately, foster youth have no guarantees that this will occur. And even a lawyer acting as the most careful protector of privacy may nevertheless learn of confidential patient-therapist communications - in the course of conversations with therapists or social workers about non-confidential matters - that may influence best interests advocacy.

Unless foster youth can be certain their confidences will not be used against them, a clear line should be drawn. One approach to partially resolve this dilemma would be to set a presumed age threshold for clients above which counsel must advocate for stated interests only. If that standard were presumed to apply at age twelve and above, those older children could speak freely with their therapists and be assured that their attorneys could not use those communications against their wishes. Such a presumed maturity
standard would work in the same fashion as the privilege holder standard in Section 317(f) of the California Welfare and Institutions Code, and be subject to individualized rebuttal as determined by the juvenile court.\textsuperscript{307}

One of the reasons to examine this issue now is that in 2012 California implemented laws extending foster care to age twenty-one. For non-minor dependents, as adults in foster care are called, it is unreasonable to expect that counsel would represent best interests over the client’s stated interests. But advocating best interests is what the law seems to say, because the legislature has not spoken on this point.

It may be that states wishing to create a stated interests standard for representation of dependent minors could only partially implement such a change, because the federal Child Abuse and Prevention Treatment Act (“CAPTA”) conditions certain foster care grants on states’ appointment of a best interests guardian ad litem for all dependent minors. However, Texas has not lost CAPTA funding despite mandating a stated interests standard of representation.\textsuperscript{308}

If California desires to stay compliant with the letter of CAPTA, California could amend either Rule of Court 5.662 or Section 326.5 of the Welfare and Institutions Code so that the juvenile court could appoint counsel for stated interests representation of a minor, age twelve or over, mature enough to understand the nature and effect of the proceedings,\textsuperscript{309} and also appoint a Court Appointed Special Advocate (“CASA”) to report best interests.\textsuperscript{310} In most California counties, however, there are not enough CASAs for all foster youth. Thus, if California desires to stay compliant with the letter of CAPTA, full implementation of stated interests representation may depend on Congress’ amending 42 U.S.C. § 5106a(b)(2)(A)(xiii) so that if an attorney is appointed as a CAPTA guardian ad litem for a minor, age twelve and over, mature enough to understand the nature and effect of the proceedings, that attorney may choose to represent stated interests only. Or, given that the Feds have chosen not to “mess with Texas,” federal approval may not be needed.

To avoid confusion, a bill enacting a threshold for stated interests representation should include a statement of intent by the legislature not to change existing law applicable to youth not affected by the legislation. In this way, the legislation would not create a presumption that immature or under age twelve foster children necessarily should be represented only according to a best interests standard.

VI. Conclusion

Therapists, social workers, attorneys and courts should absolutely protect the confidentiality of psychotherapist-patient communications in dependency cases. If any compromises are to be made in the cases of children under the age of twelve, the scale that balances confidentiality of psychotherapist-patient communications against information gathering should have a much longer arm on the confidentiality side. The greatest obligation we owe foster children is to help them heal from the trauma they have experienced. Anything that serves as a barrier to treatment should be presumed to be detrimental to foster children.

The primary objection to walling off therapy raised by some professionals in the foster care system is that it would deprive decision makers of essential information about children. Just as the Court of Appeal concluded in upholding therapist-patient privilege for parents in In re Eduardo A, good social work is at the heart of good decision making concerning foster children.\textsuperscript{311} Social workers are trained and experienced in risk assessment regarding placement and visitation,\textsuperscript{312} while most therapists are not. In many courts, social workers frequently are qualified as expert witnesses for such assessments. In performing risk assessment, their primary job function, social workers gather information from a variety of sources,\textsuperscript{313} one of which may be therapists. Social workers may need additional training to help them
respect the critical importance of trust in the therapeutic relationship. Judges and lawyers who have become inappropriately reliant on detailed reports from therapists also may need to be retrained to accept placement and visitation recommendations from social workers, rather than from therapists.

Just as the doctrine of mutual assured destruction was nuclear madness during the cold war, so is the idea that meaningful information will be obtained from therapy in which confidentiality is compromised. The reality is that the patient is unlikely to reveal information that he or she knows may be disclosed by the therapist.\(^{314}\)

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An analogy to this balancing analysis is the debate that for decades has divided family law mediation services in California. In some counties, divorce and custody mediators only present settlements to the judge. They do not make a recommendation to the judge if no settlement is reached and the details of mediation remain confidential. In others counties, if no settlement is reached, mediators then recommend a resolution to the judge and report on the statements and conduct of the parties during mediation. Bench officers in each of the two systems tend to prefer the system they use, and often cannot comprehend how courts function in the counties that do not. The arguments made on one side are that a bench officer could not competently settle such disputes without a recommendation, and that parties in mediation may act in bad faith if their conduct remains secret. The recommending approach costs less, because if there is no settlement there is rarely a need to have another evaluator assess the case to make a recommendation to the judge. On the other side, it is argued that parties are not likely to air their true feelings and reach a lasting settlement if they know anything they say could be reported to the judge.

Katner, supra note 1, at 546.

CAL. HEALTH & SAFETY CODE § 123115(a)(2) (West 2012); see discussion infra Part III.A.

Paruch, supra note 8, at 526-32.


Katner, supra note 1, at 539.

In re Kristine W., 114 Cal. Rptr. 2d 369, 374 (Ct. App. 2001).

Katner, supra note 1, at 525-26.

During an era in which it was physically impossible to stop an attack launched with nuclear warheads atop intercontinental ballistic missiles, under the MAD doctrine each superpower sought to deter the other by building a force of these missiles that could obliterate the attacker’s homeland afterwards—thus leaving both nations completely destroyed.


Id. at 36.

Therapists treating the same patient can communicate with each other without a release from the patient. CAL. CIV. CODE § 56.10(c)(1) (West 2012); 45 C.F.R. § 164.502(a)(1) (2012). It is good practice to so inform the patient. Because such communications do not occur during treatment sessions, the therapist receiving information has time for reflection and can take greater care to preserve the patient’s confidentiality.

ELLEN F. WACHTEL & PAUL L. WACHTEL, FAMILY DYNAMICS IN INDIVIDUAL PSYCHOTHERAPY: A GUIDE TO CLINICAL STRATEGIES 234 (1986) ("Ellen F. Wachtel, JD, PhD, is a graduate of Harvard Law School and New York University’s
doctoral program in Clinical Psychology. She has taught and supervised individual and family therapy in the doctoral programs at New York University and the City University of New York.


33 Katner, supra note 1, at 524, 529-36.

34 CAL. WELF. & INST. CODE § 369 (West 2012).

35 CAL. WELF. & INST. CODE § 366.27(a) (West 2012).

36 CAL. WELF. & INST. CODE § 361(a) (West 2012).

See infra text accompanying note 59.

38 45 C.F.R. § 164.512(e) (2012) (Health Insurance Portability and Accountability Act of 1996 (HIPAA) Administrative Simplification Rule); CAL. CIV. CODE § 56.10(b)(1),(3) (West 2012). But such disclosures by themselves do not abrogate the patient’s psychotherapist-patient privilege rights unless by specific operation of a court order. See discussion infra Part IV.B.

39 CAL. WELF. & INST. CODE § 361(a) (West 2012).

40 CAL. HEALTH & SAFETY CODE § 123115(a)(2) (West 2012).

41 CAL. CIV. CODE § 56.103(e)(1) (West 2012).

42 CAL. FAM. CODE § 6924(b) (West 2012) (The therapist determines the minor’s “maturity.”).

43 CAL. HEALTH & SAFETY CODE § 124260(b) (West 2012); CAL. WELF. & INST. CODE § 14029.8 (West 2012).


45 Id. Additional support for this conclusion comes from the fact that wherever “neglect” appears in the Welfare and Institutions Code pertaining to foster children it is joined to “abuse” using “or,” providing no difference in legal consequence between the two terms. By analogy, the term “elder abuse” encompasses neglect, because elder abuse “means an act, or failure to act ....” CAL WELF. & INST. CODE § 4900(b) (West 2012).

46 CAL. CIV. CODE §§ 56.05(g), 56.10(b)(7) (West 2012). A “patient who is a minor shall be entitled to inspect patient records pertaining only to health care of a type for which the minor is lawfully authorized to consent.” CAL. HEALTH & SAFETY CODE § 123110(a) (West 2012).

47 CAL. HEALTH & SAFETY CODE § 123105(e)(1) (West 2012).

48 See discussion of CAL. WELF. & INST. CODE § 326.5 infra in Part IV.B.2.b. Nor is the social worker a mental health treatment provider under statutes that allow a patient’s treatment providers to communicate with each other without a release by the patient. See 45 C.F.R. § 164.502(a)(1) (2012) (HIPAA Administrative Simplification Rule); CAL. CIV. CODE § 56.10(c)(1) (West 2012).

49 CAL. HEALTH & SAFETY CODE § 123115(a) (West 2012). This statute went into effect in 1996. In a case where a minor cannot consent to treatment, this section enables the therapist to prevent parental access that would be detrimental to the minor. Without knowing the intentions of the therapist, minor’s counsel might have to seek a protective order if detriment could occur.

50 HEALTH & SAFETY § 123110(a). This statute was effective in 1996. It is not necessary for a minor to actually have authorized the specific treatment at issue, only that he lawfully could have.

51 See CAL. FAM. CODE § 6924(b) (West 2012) (The therapist determines the minor’s “maturity.”).
See CAL. WELF. & INST. CODE § 361(c)(1) (West 2012).


CAL. CIV. CODE § 56.103(e)(1) (West 2012). “Any other person” includes a foster parent, guardian or parent with whom the child lives. This statute covers “a minor taken into temporary custody or as to whom a petition has been filed with the court, or who has been adjudged to be a dependent child.” CAL. CIV. CODE § 56.103(g) (West 2012).

CAL. CIV. CODE § 56.103(h)(1) (West 2012).

CAL. CIV. CODE § 56.11(c)(2) (West 2012), relying on FAM. § 6924(b) (The therapist determines the minor’s “maturity.”).

CIV. § 56.103(e)(2) (West 2012).

CIV. § 56.103(e)(1).


CAL. CIV. CODE § 56.10(c)(19) (West 2012) (subsection created by AB 1178 in 2007 as part of a package of three bills including AB 1687); see CAL. CIV. CODE § 43.92 (West 2012).


CAL. WELF. & INST. CODE § 317(f).

CAL. CIV. CODE § 56.11(c) (West 2012).

CIV. § 56.11(c)(2). There is no requirement that the minor actually consented to the specific treatment at issue, only that she lawfully could have.

Paruch, supra note 8, at 501.

Id. at 504.

Id. at 501-08.


Id.

Binder, No. 52C2535.


Id.

Paruch, supra note 8 at 509-10,

Id. at 511-13.

Id. at 514.
77 Id. at 10.
78 Id.
79 Id. at 17.
80 Id. at 11.
81 Id. at 11-12.
82 Id.
83 Id. at 22 (Scalia, J., dissenting).
84 Paruch, supra note 8, at 519-520.
85 Id. at 520-21.
86 Id. at 545.
87 Id. at 553-60.
88 Id. at 546-47.
89 Id. at 545 n.242, & 546 n.247.
90 Katner, supra note 1, at 559 & n.251 (citing Attorney ad Litem for D.K. v. Parents of D.K., 780 So. 2d 301, 304-08 (Fla. Dist. Ct. App. 2001) (describing and applying the statutory privilege to minors)).
91 D.C. CODE § 4-1321.05 (2012).
93 LA. CHILD. CODE ANN. art. 663D (2012).
94 LA. CHILD. CODE ANN. art.1034 (2012) (governing evidence at hearings to terminate parental rights is similarly worded). But according to Margot Hammond, Attorney Supervisor of the Louisiana Mental Health Advocacy Service, because youths age sixteen or older can sign themselves into psychiatric or substance abuse treatment in Louisiana, if they are in such treatment Federal HIPAA law overrides and gives the patient exclusive control over release of treatment information. Telephone interview by the author (Jun. 2010).
95 LOURDES M. ROSADO ET AL., JUVENILE LAW CTR., CONSENT TO TREATMENT AND CONFIDENTIALITY PROVISIONS AFFECTING MINORS IN PENNSYLVANIA (2d ed. 2006). As the citations in this treatise are to numerous Pennsylvania statutes and codes not verified by this writer, the reader is referred to the publication on line at http://www.jlc.org/sites/default/files/publication_pdf/consent2ndition.pdf.
96 Id. at 21-25, 35, 39.
97 Id. at 23, 25, 39.
98 42 PA. CONS. STAT. § 5944 (West 2012).
The other Juvenile Law Center publication that addresses confidentiality is ALISA G. FIELD & NINA W. CHERNOFF, JUVENILE LAW CTR., PENNSYLVANIA JUDICIAL DESKBOOK: A GUIDE TO STATUTES, JUDICIAL DECISIONS AND RECOMMENDED PRACTICES FOR CASES INVOLVING DEPENDENT CHILDREN IN PENNSYLVANIA 144-145 (4th ed. 2004), available at http://www.jlc.org/sites/default/files/publication_pdfs/pajudicialdeskbook.pdf. Neither publication contains any guidance for attorneys or the court as to how to address psychotherapist-patient privilege. One of the authors of CONSENT TO TREATMENT AND CONFIDENTIALITY PROVISIONS AFFECTING MINORS IN PENNSYLVANIA, supra note 95, reported her understanding that if treatment is court ordered, a dependent minor’s counsel would not assert privilege. Telephone interview with Riya Shah, Attorney, Juvenile Law Center (Sept. 23, 2011).

Email from Jonathan Budd, Assoc. Executive Dir., Kid’s Voice (Jan. 5, 2011) (on file with author).


1. Does the Child Welfare Agency have complete access to what foster children say to their therapists? If not, what are the limitations on access? Yes, they have access to what they say.
2. In answering the question above, does it matter whether children are placed in home or out of home? Yes, it makes a difference. If the child is placed in the home and the parents still have parental rights then the parent has to sign a waiver.
3. How common is it for counsel for child to try to block such Agency access? Not very common.
4. Do parents of foster children have complete access to what foster children say to their therapists? If not, what are the limitations on access? No. The parent does not have any access if the parent’s parental rights have been terminated or if the child is in Long Term Foster Care. If there is no termination, then the parent has the usual rights subject to the client/therapist duty of confidentiality.
5. In answering the question above, does it matter whether children are placed in home or out of home? Yes, see above.
6. How common is it for counsel for child to try to block such access by parents? It is rare, but it has been done for example when a child discloses information to his therapist that he is not ready for the parent to hear.
7. Does the court have complete access to what foster children say to their therapists? If not, what are the limitations on access? Almost. They don’t have access to the therapist’s notes.
8. In answering the question above, does it matter whether children are placed in home or out of home? Yes, if the child is a state ward then the court will have more access.
9. How common is it for counsel for child to try to block such access by the court? Not very common at all.


1. Does the Child Welfare Agency have complete access to what foster children say to their therapists? If not, what are the limitations on access? Typically, the only information provided by therapists regarding therapy is whether the child is attending, whether they are participating, what general topics they are addressing, goals and whether they are meeting those goals. Specific statements made by the child are only typically shared when there is a concern for the safety of the child or others. In that case, the therapist would report to our child welfare organization and then to the Child Abuse and Neglect Hotline. Occasionally what the child states regarding where they would like to live or what their wishes are will be disclosed.
2. In answering the question above, does it matter whether children are placed in home or out of home? No
3. How common is it for counsel for child to try to block such access by the Agency? Not common. Typically any information that I receive as the child’s counsel is information also provided to the agency.
4. Do parents of foster children have complete access to what foster children say to their therapists? If not, what are the limitations on access? No. Unless the statements relate to the safety of the child or another person, no information would be provided to the foster parent or biological parent.
5. In answering the question above, does it matter whether children are placed in home or out of home? No.
6. How common is it for counsel for child to try to block such access by parents? Not at all. In the 7 years I’ve been practicing in this field, I have only blocked any access on a handful of occasions and those instances were when I believed the therapist or psychologist disclosed something inappropriate or harmful to the child’s relationship with the family or the child’s emotional well-being.
7. Does the court have complete access to what foster children say to their therapists? If not, what are the limitations on access? Does it matter whether the information comes via a report or testimony by the therapist, or second hand via a report or testimony by the social worker? Typically the reports we receive from therapists only include whether the child is attending, whether they are participating, what general topics they are addressing, goals and whether they are meeting those goals. If the court wanted more information they could certainly obtain it through testimony of the therapist or scheduling a hearing for more information, so in that respect there are no limitations to that access.
8. In answering the question above, does it matter whether children are placed in home or out of home? No.
9. How common is it for counsel for child to try to block such access by the court? There are definitely occasions when counsel for the parents or the child will attempt to block admission of testimony and reports that are detrimental to their clients. This happens pretty often. The Judge then decides whether the information is relevant and appropriate to be disclosed. If the information is contained in reports without the therapist present to testify to this information or is only being reported second hand by the social worker, the information is objectionable and it happens often that we attempt to prohibit access. In my experience, yes the Judge can determine whatever he thinks is relevant. I suppose we could
Question 1: Does the Child Welfare Agency have complete access to what foster children say to their therapists? If not, what are the limitations on access?

Answer: Generally, CWA access depends on the age of the child. In addition to HIPAA constraints, the Illinois Mental Health and Developmental Disabilities Confidentiality Act (IMHDDCA) governs access to children’s mental health records. The following individuals have access: (1) children over 12; (2) parents of children under 12; (3) parents/guardians for children 12-18 if the child consents and the therapist believes access is consistent with the child’s best interests; (4) guardians for individuals over 18; and (5) attorneys/GALS for children over 12 if the court has authorized such access. (Other individuals are also entitled to notice but their right of access is uncommon in juvenile court cases.) See 740 ILCS 110/4.

For children under 12 living in foster care, the CWA has access to their mental health records, both oral statements and written reports. The CWA Guardianship Administrator issues consents permitting the therapist to talk to CWA staff. Likewise for children over 12, the CWA Guardianship Administrator also issues consents permitting the therapist to talk to CWA staff. However, CWA access is limited to cases in which the child over 12 consents. The practice in Illinois is for the CWA to request a child over 12 sign a consent to release information at the time treatment is initiated. In most cases CWA staff receives information about therapy via a therapy report or oral conversation with the therapist. Generally CWA staff receives a summary of the treatment objectives and progress in treatment, not extensive detail about the child’s statements. However, detail regarding the child’s statements is available to the CWA when either the CWA or the child have signed consents. It is uncommon for a child to refuse to sign a consent or to revoke a consent, but it occurs occasionally. It is very rare for the CWA to request a judicial override because most clients sign.

Question 2: In answering the question above, does it matter whether children are placed in home or out of home?

Answer: By in home or out of home, we assume you mean living in the care of a parent. Yes the CWA access to mental health records is limited if a child is living in the custody of a parent. In Cook County, Illinois, most children living with their parents are NOT in the guardianship of the CWA. In these cases, unless the parent signs a consent (or the child if over 12), the CWA cannot access the information. If a parent refuses to sign a consent, the court can order the parent to execute a consent or can enter a court order permitting the CWA access.

Question 3: How common is it for counsel for child to try to block such access by the agency?

Answer: It is not common for counsel for child to block CWA access. As described in question 1 and assuming parental rights have not been terminated, it depends on the age of the child. For children under 12 the parents have a right of access to the information. For children over 12 the parents can only access the information if the child consents and the child’s therapist believes the release of information is in the child’s best interests. If the child or therapist refuses access, the parent can request the court enter and order for release. Under Illinois law, noncustodial parents maintain a right of access. As such, for children in foster care, the parents maintain a right of access consistent (depending on the age of the child). In limited cases, parents have abused this right to receive therapeutic information. In those cases, the court has issued a protective order to limit the parent’s right of access.

Question 4: Do parents of foster children have complete access to what foster children say to their therapists? If not, what are the limitations on access?

Answer: Our office has sought protective orders to prohibit access in limited numbers of cases. In most cases, the parents have utilized the internet to re-disclose the child’s information. Our office requested and received a protective order to limit parental access to information and by limiting such access we limited re-disclosure. Attorneys from our office may seek orders to block access when proportional access is contrary to the child’s interests and/or when the parents have abused their rights of access.

Question 5: In answering the questions above, does it matter whether children are placed in home or out of home?

Answer: No. Under the IMHDDCA, custodial and non-custodial parents both have access to records. Parents of children under the guardianship of a CWA may seek access to records in the same manner as parents who have full guardianship/custody of their children.

Question 6: How common is it for counsel for child to try to block such access by parents?

Answer: Our office has sought protective orders to prohibit access in limited numbers of cases. In most cases, the parents have utilized the internet to re-disclose the child’s information. Our office requested and received a protective order to limit parental access to information and by limiting such access we limited re-disclosure. Attorneys from our office may seek orders to block access when proportional access is contrary to the child’s interests and/or when the parents have abused their rights of access.

Question 7: Does the court have complete access to what foster children say to their therapists? If not, what are the limitations on access? Does it matter whether the information comes via a report or testimony by the therapist or second hand via a report or testimony by the social worker?

Answer: The court’s access to a court ward’s therapy is generally not limited as the court can order the release of the information or introduce the information as part of the court proceeding. See 705 ILCS 405/1, 740 ILCS 110/10. Illinois Juvenile Court judges are charged with ferreting out relevant information, which in may include therapeutic information. In some cases, however, the court may need to provide advance notice to the therapist prior to entering an order to release records or summons to testify. See 740 ILCS 110/10(d).

However, in the vast majority of court proceedings in Cook County, Illinois, therapeutic information is disclosed by (1) caseworker summaries of conversations with the therapist; (2) therapy reports; (3) and/or testimony of the therapists. Often this testimony involves therapy goals, progress towards these goals, attendance, and any additional needs. Unless directly relevant to a particular hearing, the exact statements of a child are not regularly disclosed. Rather a summary of the needs and progress are presented to the court. However, if the exact statement a child made to a therapist is relevant to the proceedings, the court can seek this evidence.

Question 8: In answering the question above, does it matter whether children are placed in home or out of home?

Answer: No.
Question 9: How common is it for counsel for child to try to block access by the court?

Answer: Motions seeking orders blocking court access are not common. The Juvenile Court Act states that "[i]n all proceedings under this Act the court may direct the course thereof so as promptly to ascertain the jurisdictional facts and fully to gather information bearing upon the current condition and future welfare of persons subject to this Act. This Act shall be administered in a spirit of humane concern, not only for the rights of the parties, but also for the fears and the limits of understanding of all who appear before the court." 705 ILCS 405/1-2(2). Information is generally shared with the Juvenile Court so as to fully assist the court in protecting the child's best interests.

Author’s email exchange with Indiana attorney in 2011.

See In re Daniel C.H., 269 Cal. Rptr. 624 (Ct. App. 1990) (The Court of Appeal held child therapist allowed to assert therapist-patient privilege.); In re Cole C., 95 Cal. Rptr. 3d 62 (Ct. App. 2009) (The Court of Appeal held that disallowing evidence of therapist’s statements under psychotherapist-patient privilege was proper.).

CAL. EVID. CODE § 1012 (West 2012).

In re Daniel C. H., 269 Cal. Rptr. at 630.

CAL. CIV. CODE §§ 56.05(g), 56.10(c)(16) (West 2012); 45 C.F.R. § 160.103 (2012).


CAL. EVID. CODE § 1024 (West 2012).


People v. Wharton, 809 P.2d 290, 305 n.3 (Cal. 1991).

CAL. WELF. & INST. CODE § 317(f) (West 2012).

Id.

Id.

Id. at 70-71

Id. at 70.

Id.


In re Kristine W., 114 Cal. Rptr. 2d, 369, 369 (Ct. App. 2001).

In one of the cases, In re Cole C., 95 Cal. Rptr. 3d 62, 73 (Ct. App. 2009), discussed in Part IV.B.3.a., infra, review was denied, but there a parent would have been asking the Supreme Court to pierce the privilege, which the Court of Appeal had declined to do. It should be noted that while privilege protections are discussed here as they apply to minors in the dependency court, minors whose parents are in family court for custody proceedings may face similar privacy violations.
In re Kristine W., 114 Cal. Rptr. 2d, 369 (Ct. App. 2001).

Id. at 369-70.

Id. at 370.

Id.

Id. at 374.

Id. at 370.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id. at 371.

Id.

Id.

Id. at 371 n. 4.

In re William B., 78 Cal. Rptr. 3d 91, 98 (Ct. App. 2008); In re Robert L., 24 Cal. Rptr. 2d 654, 659 (Ct. App. 1993).

In re Kristine W., 114 Cal. Rptr. 2d at 371 n. 4 (citing In re Chantal S., 913 P.2d 1075, 1081-82 (Cal. 1996)). In re Chantal S. is not directly on point. It simply says that juvenile courts should not use Family Law presumptions in crafting custody exit orders because although both courts “focus on the best interests of the child, the juvenile court has a special responsibility” greater than that of the family court. In re Chantal S., 913 P.2d at 1082.

The referee might have meant that applying his ruling to other cases with different facts might not be in the best interests of those children. But that is not how the Court of Appeal appeared to interpret the comment.

In re Kristine W., 114 Cal. Rptr. 2d at 371.

A footnote explains the scope of the ruling using the phrase “required to disclose,” id. at 374 n.8, but the rest of the opinion and the order uses the phrases “permitting ... to receive” and “permits disclosure,” id. at 369, 374.


In re Kristine W., 114 Cal. Rptr. 2d at 374.

See id at 369-71; CAL. WELF. & INST. CODE § 362(a) (West 2012). Absent joinder, Kristine’s other options were to stop seeing that therapist, report the therapist to the state licensing agency, or bring a civil privacy suit. The author’s experience today is that simply invoking the acronym HIPAA is enough to scare most therapists into silence.

In re Kristine W., 114 Cal. Rptr. 2d at 371.
148. *Id.*

149. *Id.* at 374.

150. *Id.*; *In re Pedro M.*, 96 Cal. Rptr. 2d 839 (Ct. App. 2000).

151. *In re Kristine W.*, 114 Cal. Rptr. 2d at 373 (quoting *In re Pedro M.*, 96 Cal. Rptr. 2d at 841).

152. *In re Pedro M.*, 96 Cal. Rptr. 2d at 841.

153. *Id.* at 842.

154. *In re Kristine W.*, 114 Cal. Rptr. 2d at 525.

155. *Id.*


157. *Id.* at 501-02.

158. *Id.* at 502.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 504.

163. *Id.*

164. *Id.* at 502. Not stated in the opinion is the therapist’s obligation under Section 1015 of the California Evidence Code to assert the privilege in the face of any and all requests for confidential information, unless there is a valid waiver. See Roberts v. Super. Ct. of Butte Cnty., 508 P.2d 309, 316 (Cal. 1973).

165. *In re Mark L.*, 114 Cal. Rptr. 2d at 502-03.

166. *Id.* at 503.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 507.

172. *Id.*
The U.S. Supreme Court defined dicta thusly:

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. 264, 399-400 (1821). In this criminal case involving the sale of District of Columbia lottery tickets in Virginia in contravention of that state’s law, the Court slapped down defense counsel’s attempt to argue using dictum from Marbury v. Madison, 5 U.S. 137 (1803). Cohens, 19 U.S. at 399-402. The term dicta is so widely used, one has to go back that far to find a definition in a Supreme Court opinion. The California Supreme Court does not appear to have ever offered its own definition, which is remarkable given that Stanley Mosk, the court’s longest serving justice, was known for his aggravation at the improper use of the plural form of the word in reference to a single instance.

In re Mark L., 114 Cal. Rptr. 2d at 504. It is not clear whether information supposedly stricken from the record included that substantial evidence. "The information the court struck from the Agency’s reports at the six-month review hearing was unhelpful to Paul. The therapist initially reported that Mark did not mention Paul in therapy, and later reported that Mark did not want any contact with Paul." Id. at 504 n.6. The Court of Appeal does not explain on what basis it was examining this stricken information. Given that the court was looking, it can be assumed that if anything was stricken indicating that the therapist might have been in anyway inclined to support visitation or conjoint therapy in the future, this would have been mentioned in the opinion to support its remand-based entirely on the possibility that Mark would agree to see his father if ordered by the court.

Id. at 506 (citations omitted).

Id. at 506 n.8.

It may be argued that this order was an improper delegation of authority. In re Donnovan J., 68 Cal. Rptr. 2d 714, 715-16 (Ct. App. 1997) (Court cannot delegate sole discretion as to whether visits occur to therapist.). In what may be form over substance, the Court of Appeal has permitted others to determine when visitation should commence as long as the court makes an underlying order that visitation should occur at some point. In re Moriah T., 28 Cal. Rptr. 2d 705, 708 (Ct. App. 1994) (Visitation order that delegates “time, place and manner” to the Agency is valid, unless the Agency has “complete discretion” as to whether visits occur.). However, in Mark’s case, the referee said, "I don’t have evidence before me to indicate that the conjoint therapy would ... be appropriate." In re Mark L., 114 Cal. Rptr. 2d at 579. From a practical standpoint, he really was delegating the decision as to whether visits should occur to the therapist and minor’s counsel. See supra text accompanying note 165. The Court of Appeal could have decided the case on this issue alone if it had wished to do so.

In re Mark L., 114 Cal. Rptr. 2d at 507.

Id. at 504.

In re Kristine W., 114 Cal. Rptr. 2d 369, 371 (Ct. App. 2001).

See discussion infra Part IV.B.3.

In re Mark L., 114 Cal. Rptr. 2d at at 505; In re Kristine W., 114 Cal. Rptr. 2d at 372.


Id. In 2000, the author of this article was Legislative Counsel for the California Judges Association and was urged by the Chief Executive Officer of the Administrative Office of the Courts to support SB 2160. San Diego County’s situation was part of these discussions. The Association fully supported the bill.
Id at 8. According to the former head of the San Diego Public Defender’s Child Advocacy Unit, charged with representing dependent minors, it was the practice during the year or two preceding the enactment of SB 2160 for minors’ counsel to be relieved of their duties when cases were permanently planned - that is when the goal for children placed out of home became adoption, legal guardianship or long term foster care. Email from Gary Seiser, Deputy County Counsel (appellate counsel for the companion cases) (Dec. 29, 2011) [on file with author] (citing Seiser’s email exchange with San Diego County Superior Court Judge Ana Espana). Seiser is a lead author of the authoritative treatise, CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE.

Not that there would be an appropriation to pay for it. The bill’s big charade was that “[b]ecause courts are already required to appoint counsel if they determine that the minor would benefit from same, it is not anticipated that there would be any significant change in the number of cases involving court-appointed counsel”, and therefore no significant cost impact. Appropriations Comm. Fiscal Summary, Analysis of SB 2160, 2 (Cal. 2000) (as amended Apr. 25, 2000), available at http://leginfo.ca.gov/pub/99-00/bill/sen/sb_2151-2200/sb_2160_cfa_20000519_105908_sen_comm.html.

In re Kristine W., 114 Cal. Rptr. 2d at 372; see In re Mark L., 114 Cal. Rptr. 2d at 505.

In re Kristine W., 114 Cal. Rptr. 2d at 372; see In re Mark L., 114 Cal. Rptr. 2d at 505.

In re Mark L., 114 Cal. Rptr. 2d at 376; In re Kristine W., 114 Cal. Rptr. 2d at 373 The justices in the companion cases seem to be saying that minor’s therapy in dependency actions should be similar to the recommending mediation model in family court, discussed in supra note 18. To this day, San Diego remains a recommending county in family law.

In re Mark L., 114 Cal. Rptr. 2d at 505; In re Kristine W., 114 Cal. Rptr. 2d at 373.

In re Kristine W., 114 Cal. Rptr. 2d at 373.

Case files include both those kept by the court and the Agency. CAL. WELF. & INST. CODE § 827(e) (West 2012). Long before this legislation, however, federal statutes prevailed when in conflict with state law because of the federal Supremacy Clause. U.S. Const., art. VI, c. 2.

CAL. WELF. & INST. CODE § 827(a)(3)(A) (West 2012) (enacted 1999 by SB 199 (Cal. 1999)). SB 199 was intended to open for public scrutiny the files of children that die in foster care, but it has spawned much confusion. There is as yet no case law interpreting it. Because subsequent sentences in the paragraph that is § 827(a)(3)(A) do not explicitly bar the release of privileged documents, the result has been mixed interpretations such as Los Angeles Superior Court Local Rule 7.2(a)(2) (2012) that says that persons entitled to inspect juvenile court records without a court order under CAL. WELF. & INST. CODE § 827(West 2012) are not entitled to inspect privileged documents. However, Los Angeles Superior Court Local Rule 7.2(b)(2)(d) (2012) says that persons seeking access by court order under § 827 may be granted access “if good cause exists.” But this local rule and § 827(a)(3)(A) arose from the era in 1999, when § 827(a)(3)(A) was created, when the social worker was the dependent’s guardian ad litem and held therapist-patient privilege, and not all foster children had attorneys. In this context, the standard for privilege probably often was regarded as nothing more than clear detriment to the minor. See CAL. WELF. & INST. CODE § 827(a)(3)(A) (West 2012) (court may only release protected information if not detrimental to the minor).

The catch-all sentence at the end of the paragraph that is § 827(a)(3)(A) that says the paragraph does not limit the ability of the court to perform its duties could perhaps be interpreted to negate privilege in certain situations. Outside of in camera review of the file, however, to the extent that § 827(a)(3)(A) somehow might be interpreted to allow the court or others to pierce privilege - it is superseded by the more recent protective statute CAL. WELF. & INST. CODE § 317(f) (West 2012). And, the specific operation of § 317(f) supersedes the general provision in § 827(a)(3)(A), according the statutory interpretation mandate of CAL. CIV. PROC. CODE. § 1859 (West 2012). For more about statutory interpretation, see discussion infra Part IV.B.4.


In re Mark L., 114 Cal. Rptr. 2d 499, 505 (Ct. App. 2001); In re Kristine W., 114 Cal. Rptr. 2d 369, 372 (Ct. App. 2001).


202 In re Mark L., 114 Cal. Rptr. 2d at 506-07; In re Kristine W., 114 Cal. Rptr. 2d at 374.


204 In re Pedro M., 96 Cal. Rptr. 2d 839 (Ct. App. 2000).

205 Id.

206 Id. at 840.

207 Id. at 841.

208 Id.

209 In re Mark L., 114 Cal. Rptr. 2d 499, 506 (Ct. App. 2001); In re Kristine W., 114 Cal. Rptr. 2d 369, 373 (Ct. App. 2001).


211 In re Pedro M., 96 Cal. Rptr. 2d 841 (emphasis omitted).

212 In re Mark L., 114 Cal. Rptr. 2d at 506.


215 In re Mark L., 114 Cal. Rptr. 2d at 506; In re Kristine W., 114 Cal. Rptr. 2d at 373 In fact, Deputy County Counsel Gary Seiser, appellate counsel in the cases, claims credit for the “dual purpose” concept. Email from Gary Seiser, Deputy County Counsel (Dec. 6, 2011) (on file with author).

216 In re Pedro M., 96 Cal. Rptr. 2d at 841.

217 Id.

218 In re Christopher M., 26 Cal. Rptr. 3d 61 (Ct. App. 2005).


220 In re Kristine W., 114 Cal. Rptr. 2d at 374.

221 In re Eduardo A., 261 Cal. Rptr. at 70.

222 Id.

223 In re Jasmon O., 878 P.2d 1297 (Cal. 1994)

224 Id.

225 In re Mark L., 114 Cal. Rptr. 2d at 506 (quoting In re Jasmon O., 878 P.2d at 1314-15).

226 In re Kristine W., 114 Cal. Rptr. 2d at 374 (citing In re Jasmon O., 878 P.2d at 1314-15).

227 In re Jasmon O., 878 P.2d at 1314-15.

228 CAL. EVID. CODE § 1017 (West 2012); see In re Mark L., 114 Cal. Rptr. 2d at 506 n.8 (suggesting use of an independent
evaluator instead of the therapist).


230 Id.

231 In re Mark L., 114 Cal. Rptr. 2d at 506; see In re Kristine W., 114 Cal. Rptr. 2d at 373 (nearly identical parenthetical).

232 In re Daniel C. H., 269 Cal. Rptr. at 628.

233 Id. at 632-33.

234 In re Cole C., 95 Cal. Rptr. 3d 62 (Ct. App. 2009).

235 Id. at 70.

236 Id.

237 Id.

238 Id. at 71.

239 Id. at 70.

240 In re Mark L., 114 Cal. Rptr. 2d 499 (Ct. App. 2001).

241 In re Cole C., 95 Cal. Rptr. 3d at 72-73.

242 Id. at 72.

243 Id.

244 Id. at 73.

245 Id.

246 In re S.A., 106 Cal. Rptr. 3d 382 (Ct. App. 2010).

247 Id.

248 Id. at 390.

249 Id. at 389.

250 Id. at 390.

251 Id. at 391. The court did not reveal whether the result would have been different if S.A. had testified that she had told the therapist about the molestation.

252 Id.

253 Id.

254 CAL. CIV. CODE § 56.103(e)(1) (West 2012).


CAL. R. CT. 5.690(a) (2012).


Jaffee, 518 U.S. at 10 (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).

In re S.A., 106 Cal. Rptr. 3d 382, 390 (Ct. App. 2010).

CAL. CODE OF CIV. PROC. § 1859 (West 2012); People v. Black, 113 P.2d 746, 750-51 (Cal. Ct. App. 1941) ("Once the intention of the legislature is ascertained it will be given effect even though it may not be consistent with the strict letter of the statute. In construing a statute it must be remembered that no law is to be construed in such a manner as to result in a palpable absurdity." (citations omitted)); Silver v. Brown, 409 P.2d 689, 692 (Cal. 1966) ("The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in the light of the statute’s legislative history, appear from its provisions considered as a whole.").

CAL. CIV. CODE § 56.103(e)(1) (West 2012).

Even if a child needing therapy absolutely refuses to participate it has not been the author’s experience that such an order would be sought, because the lack of available sanctions against the child essentially makes such an order unenforceable. If a social worker believes a reluctant child needs therapy before returning home, usually that worker simply declines to make a recommendation for return until the child agrees to engage. If the reunification clock runs out, the issue of the child’s therapy is never the sole deciding factor for return, and upon return the child’s therapy becomes the parents’ responsibility.

It is conceivable that a court might want some supporting information from the child’s individual therapist before ordering a reluctant parent to engage in family therapy. However, it has not been the author’s experience that courts want or need anything more than the knowledge that the therapist is not opposed to this recommendation by the child welfare worker before agreeing to include family therapy in the case plan. When an abused or neglected child old enough to engage in family therapy recently has been or is about to be returned home, the need for family therapy generally is presumed.


Assemb. Bill No. 1687, § 1(c) (as chaptered Oct. 12, 2007); See CAL. CIV. CODE § 56.103(h) (West 2012) ("(1) Except as described in paragraph (1) of subdivision (e), nothing in this section shall be construed to limit or otherwise affect existing privacy protections provided for in state or federal law. (2) Nothing in this section shall be construed to expand the authority of a social worker, probation officer, or custodial caregiver beyond the authority provided under existing law to a parent or a patient representative regarding access to medical information.")


Id. at 6 (quoting CWDA).

See supra text accompanying note 61.


CAL. CODE OF CIV. PROC. § 1859 (West 2012).

CAL. WELF. & INST. CODE § 280 (West 2012); CAL. CIV. CODE § 56.103 (West 2012).
CAL. R. CT. 5.690(a) (2012).

See supra text accompanying note 178.


45 C.F.R. § 164.512(e) (2012) (HIPAA Administrative Simplification Rule); CAL. CIV. CODE, § 56.10(b)(1),(3) (West 2012). Otherwise, if the child age twelve or over “is the alleged victim of incest or child abuse” or a danger to self or others, and “is mature enough to participate intelligently” in treatment, then only the child controls access to his mental health information. CAL. FAM. CODE § 6924(b) (West 2012); CAL. HEALTH & SAFETY CODE §§ 123110(a), 123115(a)(1) (West 2012). If the child is under twelve, the parent might be able to sign a release, CAL. HEALTH & SAFETY CODE § 123105(e)(1) (West 2012), but the therapist could refuse to disclose based on best interests. CAL. HEALTH & SAFETY CODE § 123115(a)(2) (West 2012). There is no legal authority for social workers to sign mental health information releases. See supra Part III.B.

CAL. CIV. CODE § 56.103(e)(1) (West 2012). The therapist may disclose this information, but is not required to do so. Care most likely means mental health services. See supra Part III.A. Disclosure of such information about a foster child age twelve or over requires a release signed by the child. CAL. CIV. CODE § 56.103(h) (West 2012).

In the author’s experience, many children’s therapists already refuse to provide an opinion about reunification or custody.


CAL. CIV. CODE § 56.10(c)(19) (West 2012); see CAL. CIV. CODE § 43.92 (West 2012).

CAL. EVID. CODE § 1017 (West 2012); see In re Mark L., 114 Cal. Rptr. 2d 499, 506 n.8 (Ct. App. 2001) (suggesting use of an independent evaluator instead of the therapist).

CAL. EVID. CODE § 1012 (West 2012). While obviously there is a tension between privilege and the disclosure of diagnosis permitted by CAL. CIV. CODE § 56.103(e)(1), the conditions for disclosure of diagnosis to persons other than the social worker or caregiver are very limited, unless privilege has been waived. See supra Part IV.B.4.

CAL. EVID. CODE § 1015 (West 2012). Absent a court order, a therapist now is also barred from releasing mental health information to the parents of a foster child placed out of home, pursuant to SB 1407 (Cal. Health and Safety Code Section 123116, chaptered 2012). CIV. § 56.103(e)(1).

See supra Part IV.B.4.

Only the child, if twelve or older, presumably can waive privilege. If under twelve, only the child’s attorney can. CAL. WELF. & INST. CODE § 317(f) (West 2012).

Although a child age twelve or over presumably can waive privilege, the child’s counsel should be notified if waiver is sought so that the child can fully understand the consequences of waiver – for example, that a report submitted by the therapist to the court will be shared with all parties and may subject the therapist to cross-examination in a hearing. See In re Kristine W., 114 Cal. Rptr. 2d 369, 373-74 (Ct. App. 2001); see discussion supra Part IV.B.2.a.i.

See supra Part IV.B.2.d.

See supra Part IV.B.4.

CAL. EVID. CODE § 1027 (West 2012).

Id.

There has been but a single application of CAL. EVID. CODE § 1027 reported in dependency law, used against a mother three decades ago who tried to invoke the privilege on behalf her child to prevent the admission of her child’s psychotherapist-patient communications that supported the allegations against the mother. In re Courtney S., 181 Cal. Rptr. 843, 847 (Ct. App. 1982). Given that the statute likely was enacted in contemplation of this possibility, but impossible today because of In re S.A., 106 Cal. Rptr. 3d 382, 391-92 (Ct. App. 2010), it would seem to be irrelevant in the
new millennium and ripe for repeal.

CAL. HEALTH & SAFETY CODE § 123115(a)(2) (West 2012).

Here, children “removed from a parent's care” or “placed out of home” mean children who are the subject of a petition filed for their removal. (Just before this article was sent to the printer, the author’s proposal here to limit disclosures was enacted unanimously via California Senate Bill 1407 [Reg. Sess 2011-2012].)

See supra Part IV.B.2.a.ii.


See In re Kristen B., 78 Cal. Rptr. 3d 495, 500 (Ct. App. 2008).


See NAT'L ASS'N OF COUNSEL FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES (2001). The NACC also recommends:

Client directed representation [that] does not include “robotic allegiance” to each directive of the client. Client directed representation involves the attorney’s counseling function and requires good communication between attorney and client. The goal of the relationship is an outcome which serves the client, mutually arrived upon by attorney and client, following exploration of all available options.

NAT'L ASS'N OF COUNSEL FOR CHILDREN, AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (NACC REVISED VERSION) 8 (1999) [hereinafter ABA STANDARDS].

ABA STANDARDS, supra note 302, at 9 (recommending using “objective criteria” for substituted judgment).

Id. at 4, 7. Where stated interests would put the child in serious danger, the hybrid standard urges the attorney to first counsel the client on the wisdom of her position, and if that fails, request the juvenile court to appoint a separate guardian ad litem to represent best interests while the attorney represents stated interests. In circumstances where the attorney believes the child is in imminent danger, the attorney should take whatever steps are necessary to protect child. Id. at 7.

In re Kristine W., 114 Cal. Rptr. 2d 369, 374 (Ct. App. 2001).


Janet Sherwood, Chair of the Executive Committee of the NACC Board of Directors, suggested the following amendment to CAL. WELF. & INST. CODE § 317 (West 2012):

(e) (1) Counsel shall be charged in general with the representation of the child’s interests. To that end, counsel shall make or cause to have made any further investigations that he or she deems to be reasonably necessary to ascertain the facts, including the interviewing of witnesses, and shall examine and cross-examine witnesses in ... all contested hearings. Counsel may also introduce and examine his or her own witnesses .... and shall participate ... in the proceedings to the degree necessary to adequately represent the child. If the child is age 12 or older and is not under a disability that prevents the child from being able to formulate a position on the issues before the court, counsel must represent the child’s stated interests. If the child is under the age of 12, counsel must represent the child’s stated interests to the extent that the child is mature enough to formulate a position. If the child cannot meaningfully participate in formulating a position on a specific issue, the attorney may substitute his or her judgment for the child’s and formulate and present a position which serves the child’s interests.

(2) If the child is four years of age or older, counsel shall interview the child to determine the child’s wishes and assess the child’s well-being .... Counsel shall advise the court of the child’s wishes and present any nonprivileged evidence that is relevant to the child’s safety, protection, or well-being ....
Email from Janet Sherwood, Chair of the Executive Committee of the NACC Board of Directors (Feb. 18, 2012) (on file with author).


A CASA is a trained volunteer who may act as an “officer of the court appointed to investigate proceedings on behalf of the court.” CAL. WELF. & INST. CODE § 103(h) (West 2012).
A CASA shall do all of the following:
1. Provide independent, factual information to the court regarding the cases to which he or she is appointed.
2. Represent the best interests of the children involved, and consider the best interests of the family, in the cases to which he or she is appointed.
3. At the request of the judge, monitor cases to which he or she has been appointed to assure that the court’s orders have been fulfilled.
CAL. WELF. & INST. CODE § 102(c) (West 2012).


Id.

Id.
JUDICIAL APPROACHES TO SPECIAL EDUCATION:
RESIDENTIAL PLACEMENTS FOR CHILDREN WITH MENTAL ILLNESS
UNDER IDEA+

Ben Conway*

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Introduction

Children with disabilities are entitled to a free, appropriate public education (FAPE), including placement at residential programs when necessary.¹ In some cases, school districts offer such placements. In other cases, parents are forced to turn to the courts. Families of sufficient means also have the additional option of funding the placement on their own and seeking reimbursement. When are youth with mental illness entitled to residential placement through the education system?

Under the Individuals with Disabilities Education Act (IDEA),² all children are entitled to a FAPE in a placement that is the least restrictive environment (LRE).³ This placement is determined through an individualized educational program (IEP).⁴ If a child has a disability that prevents him or her from access to education, then a FAPE consists of the support and services necessary to assist the child in accessing education along with appropriate placement.⁵ In cases where a child’s mental health condition impedes his or her access to education, a FAPE includes the mental health services the student requires to access education.⁶

Children with mental illness can present a variety of internalizing or externalizing behaviors that impact their education.⁷ Like all other related support and services in special education, schools must provide mental health services in a placement that is the LRE.⁸ “To the maximum extent appropriate,” children with disabilities should be educated in regular classes with their nondisabled peers in a comprehensive

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² Ben Conway is an education attorney at Public Counsel in Los Angeles, the largest pro bono law firm in the nation. Ben earned his bachelor’s degree from the University of Michigan and his J.D. from the Gould School of Law at the University of Southern California. This Article is for Cowboy Zeke who’s taught me more about mental illness than any book, case, or client. Your strength of will is unbelievable and inspires me to push on whenever I think I can’t.

². Id. § 1400.
³. Id. § 1412(a)(5).
⁴. Id. § 1412(a)(5)(B)(i).
⁵. Id. §§ 1401(9), (26), (29), 1412(a)(1)(A).
⁶. IDEA and its implementing regulations do not use the term mental health services. Nonetheless, many related services are mental health services. E.g., 34 C.F.R. §§ 300.34(a) (2014) (related services include psychological services, counseling services, and rehabilitation counseling); id. § 300.34(c)(2) (counseling services); id. § 300.34(c)(8) (parent counseling and training); id. § 300.34(c)(10) (psychological services); id. § 300.34(c)(14) (social work services); id. § 300.104 (residential placement).
school. Some children’s behavioral challenges are severe enough that they must attend intensive day treatment programs while continuing to live at home. But the only way to enable a child with severe mental health challenges to access his or her education is through an educational placement at a residential program.

Broadly speaking, a residential program is a placement at which a child is placed away from his or her home—whether it is an educational placement is the core question in most cases. In some cases, the student may need to leave his or her home state to attend school at a residential program, while in others the student is able to—or even entitled to—placement closer to his or her home. Every residential program is different, and a particular residential program may not be appropriate for a particular child.

School districts often resist placing youth at residential programs. Residential placements are costly compared to even the most expensive nonpublic day schools and are among the most restrictive educational placements available. When the student who needs residential placement is in the foster care or youth probation system, this resistance is often augmented by questions—feigned or real—of residence and responsibility.

This Article explores the landscape of cases regarding residential programs. It is intended to serve as a

9. Id.
11. E.g., Seattle Sch. Dist., No. 1 v. B.S. ex rel. A.S., 82 F.3d 1493, 1497–98, 1502–03 (9th Cir. 1996) (finding that where the child’s assaultive behavior problems had escalated to the point of the child’s requiring restraints, a period of hospitalization, and ultimately expulsion from the school’s day program, such that no educational services were provided for six months, the hearing officer and district court properly ordered residential placement through an IEP).
12. E.g., id. at 1501 (noting that the child required “intensive, round-the-clock care, in order to address [a student’s] behavioral disabilities and enable her to benefit from her education”). While IDEA’s implementing regulations require that parents not be assigned the nonmedical costs, including room and board, of a residential program when such placement is necessary, 34 C.F.R. § 300.104 (2014), neither IDEA nor its implementing regulations define what a residential program actually is.
13. E.g., Seattle Sch. Dist., No. 1, 82 F.3d at 1496–98 (Washington student parentally placed in a residential program in Montana).
14. E.g., Todd D. ex rel. Robert D. v. Andrews, 933 F.2d 1576, 1578–79, 1581–82 (11th Cir. 1991) (holding the district court was incorrect in ordering a Georgia youth to attend a residential program in Texas when his IEP goals required placement closer to home).
15. E.g., Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings, 903 F.2d 635, 639 (9th Cir. 1990) (while there was “no dispute that Michelle requires[d] a residential placement in order to receive an appropriate education,” the parents and school district were unable to identify a mutually agreeable residential program); Clevenger ex rel. Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514, 515–16 (6th Cir. 1984) (comparing two residential programs to determine which was appropriate).
16. E.g., Eschenasy ex rel. Eschenasy v. N.Y.C. Dep’t of Educ., 604 F. Supp. 2d 639, 651–52 (S.D.N.Y. 2009) (holding that a particular residential program was not appropriate where the child did not make progress academically and was asked to leave because of behavioral challenges).
17. IDEA refers to local educational agencies. 20 U.S.C. § 1401(19)(A) (2012). Local educational agencies can include, inter alia, school districts, county offices of education, and independently operated charter schools. Id. This Article refers to local educational agencies collectively as school districts throughout.
18. E.g., Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1st Cir. 1993) (explaining that the objective LRE’s preference for mainstreaming precludes placement in a residential educational program if the student could access an education in a day program); Clovis Unified Sch. Dist., 903 F.2d at 635, 639 (the placement sought by parents in 1985 was $150,000 per year); Residential Treatment Centers, Md. Coal. Families for Children’s Mental Health, www.mdcoalition.org/resources/childrens-mental-health/155-residential-treatment-centers (last visited Aug. 25, 2014). In the author’s experience, yearly costs at various residential programs between 2007 and 2014 have ranged from $120,000 to $150,000.
19. E.g., Orange Cnty. Dep’t of Educ. v. Cal. Dep’t of Educ., 668 F.3d 1052, 1053–55 (9th Cir. 2011) (five years of litigation to determine what agencies were responsible for the educational placement of a foster youth in a residential program).
20. As originally conceived, this Article focused particularly on residential placements for court-involved youth.
practitioner’s guide to understanding application of IDEA and the right of children with disabilities to a FAPE. First, it briefly discusses what it means to guarantee a FAPE in the LRE under the requirements of IDEA, before turning to who is responsible for providing it. Next, it reviews what IDEA means by “educational benefit,”21 previewing how courts’ frequent disregard of the statute’s text has led to much of the confusion in the current state of the law. The Article then explores several key areas of confusion within the law, with a particular focus on the statute’s “medical exception,” before setting out the core tests utilized by the various circuit courts of appeals to determine whether placement at a residential program is appropriate. After this, the Article briefly discusses unilateral placements by parents and their attempts to seek reimbursement from the appropriate educational agency.

When read closely, case law regarding residential programs is riddled with inconsistencies, conflations, and contradictions.22 But when read as a whole, the body of law is similar if not uniform across circuits so long as appropriate attention is paid to the semantics of each circuit’s wording of the inquiry—with the notable exception of the Tenth Circuit. For the most part, cases requesting residential placement for a FAPE are reliable in unilateral placement cases and vice versa.

I. TOMMY

Tommy struggled all his life in school despite being in special education since first grade. He has depression and severe, school-based anxiety, the latter of which may stem from his intellectual disability that went unidentified until he was seventeen.24 For a decade, California schools passed Tommy from grade to grade and failed to identify his mild-bordering-on-moderate intellectual disability. As he grew older, he began presenting behavioral challenges as a result of his disabilities. In sixth grade, he started acting out in class. In seventh grade, he was regularly being suspended. And in eighth grade, he was expelled from school for a fight. Tommy did not succeed in comprehensive public schools. His school district offered placement in a private school that serves only children with disabilities through his IEP.

But Tommy’s behaviors worsened in severity and frequency over the course of the first semester. He was increasingly sullen and would rarely speak either at home or at school. He made no friends and developed no meaningful relationships with any school staff. Some weeks he sat quietly in the back of the room doing nothing, while other weeks he swore at teachers and threatened his classmates. By the spring, he could rarely sleep through an entire night due to night terrors and experienced anxiety attacks during the school day. He began skipping school altogether. His private school documented all of these issues and discussed them with the school district at multiple IEP team meetings, but neither proposed any services or accommodations to address Tommy’s deteriorating mental health and its impact on his education. His mother repeatedly asked for help and finally a mental health evaluation confirmed his severe depression and anxiety and recommended educational placement in a residential program. The school district did not act on this recommendation for over four months.

While the school district did nothing, Tommy’s behaviors continued to escalate. An off-campus altercation led to Tommy’s arrest and detention in a juvenile hall. A school psychologist at the juvenile hall evaluated Tommy and identified his intellectual disability and behaviors consistent with diagnoses of bipolar disorder and anxiety disorder. She confirmed that he needed placement in a residential program in

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21. See infra Part III.
22. See infra Part V.
23. "Tommy’s" story is based on a former client of the author. Some facts were changed to maintain confidentiality.
order to access his education. The county agency operating the juvenile hall’s school adopted that recommendation at an IEP team meeting. The director of special education from his home district participated in that meeting and did not dispute the IEP placement.

The residential placement was made four years after Tommy’s mental health began to impede his access to an education and nearly a year after a school-based mental health evaluation recommended residential placement.

Tommy thrived at his residential program. His behaviors first stabilized with continual prompting. Then he began acquiring positive replacement behaviors and relied decreasingly on adult prompts. He made academic progress for the first time since elementary school. But it was several thousand miles from home. The school district refused to convene IEP team meetings and the county only funded one trip for his mother to visit him and participate in in-person family counseling to help her understand his IEP and his developmental and mental health needs. Although his emotional functioning improved, due to his cognitive deficits he did not understand why he was in a locked placement so far from home.

About nine months into placement, his behavior began to deteriorate. Placement staff suggested that Tommy was ready to step down to a less restrictive setting closer to home, but that he still would need a residential program to access an education. His school district now claimed that the juvenile court had placed Tommy there outside the IEP process, even though their director of special education had attended the underlying IEP. They disavowed all responsibility and cynically offered to convene an IEP team meeting to offer him placement as soon as he returned home but not before. The juvenile court still maintained jurisdiction and indicated that he would likely be redetained if he returned home before an appropriate placement was arranged.

Informal attempts to resolve the dispute and bring Tommy home failed. Counsel filed an administrative due process complaint, engaged in extensive motion practice, and the case finally settled before hearing. The district agreed to transition Tommy to an unlocked residential program less than twenty miles from his mother’s home. He completed high school there and enrolled in a vocational program to build further independence skills.

Tommy is like the dozens of children for whom the author has obtained residential placement, whose emotional and behavioral needs are ignored until the only recourse is among the most restrictive and expensive. This Article does not address the myriad school-based services that should be provided to address a child’s mental health and behavioral needs prior to reaching the point Tommy did. Instead, it focuses on the law once a child’s disabling condition reaches that point of extraordinary impact.

II. IDEA GUARANTES A FAPE IN THE LRE FOR ALL CHILDREN WITH DISABILITIES

The core guarantee of the IDEA is the right to a free, appropriate public education in the least restrictive environment—a FAPE in the LRE—through an individualized educational program (IEP). The term “IEP” generally appears in four different contexts in special education. An IEP can refer to a written description of a disabled child’s unique program of special education and related services. The IEP is also the specific program that (should) enable the child to access an education. An “IEP team” is a group

25. IDEA requires states to afford an “impartial due process hearing” process to resolve disputes between parents and school districts. 20 U.S.C. § 1415(f)(1). In the author’s experience, this is generally referred to as a “due process” hearing or an “administrative due process hearing.” The hearing process includes the right to counsel, the right to present evidence, and the right to present, confront, and compel the attendance of witnesses. Id. § 1415(h). Such a hearing is the primary method for exhausting administrative remedies prior to filing in state or federal court. Id. § 1415(i)(2).

26. Id. § 1401(9).

27. Id. § 1414(d)(1)(A).
of stakeholders—parents, teachers, service providers—who meet to review and modify the IEP as necessary. The “IEP meeting,” or “IEP team meeting,” is the meeting at which the IEP is developed or modified. In most cases, to establish the appropriateness of a residential program a child must first be evaluated by a school district, found eligible for special education, and be offered an IEP.

A. Eligibility for Special Education

To determine whether a child is eligible for special education, educational agencies must identify children who may have disabilities. After this, educational agencies must evaluate such children in all areas of known and suspected disability. Evaluations must then be administered by staff who are both trained and knowledgeable in evaluating children with disabilities and also capable of obtaining, integrating, and interpreting existing data. IEP teams must then consider relevant assessment data to create an IEP that meets the full extent of the student’s academic, developmental, and functional needs.

Most students who are placed at residential programs are eligible for special education when they suffer from a “serious emotional disturbance.” But there is no requirement for a particular classification in order to access a residential program. Eligibility for emotional disturbance is based on long-term functioning: a single episode does not establish eligibility nor does a brief remission obviate eligibility.

A district cannot deny eligibility for special education by focusing only on a youth’s high functioning at a residential program. In a case from the Second Circuit, Treena Muller was adopted from an orphanage and began exhibiting behavioral and emotional problems early in life. After the third psychiatric hospitalization in two months, she was discharged to a residential program where she “responded well, both emotionally and academically.” Treena’s school district evaluated her for the first time three months into this residential placement. The district dismissed Treena’s long history of behavioral and emotional problems as a mere “tendency for depression.” Instead, it focused solely on her high level of functioning within the residential program and found her ineligible for special education altogether.

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28. Id. § 1414(d)(1)(B).
29. E.g., id. § 1414(d)(3)(A), (E).
30. Id. § 1412(a)(3). In the author’s experience, though IDEA places the child-find duty on the state educational agency, in most instances that duty is delegated to the local educational agency.
31. Id. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4) (2014).
32. 20 U.S.C. § 1414(b)(3); 34 C.F.R. §§ 300.34(c)(10), 304(b)(1), (c)(1)(iv), (c)(6).
33. 20 U.S.C. § 1414(c)(1), (d)(3); 34 C.F.R. § 300.324(a)(1)(ii)–(iv).
34. E.g., Muller ex rel. Muller v. Comm. on Special Educ. of the E. Islip Union Free Sch. Dist., 145 F.3d 95, 102–03 (2d Cir. 1998); N. v. D.C. Bd. of Educ., 471 F. Supp. 136, 138 (D.D.C. 1979). A serious emotional disturbance is a condition that occurs over a long period, to a marked degree, and that adversely affects the child’s educational performance. 34 C.F.R. § 300.8(c)(4)(i). In addition to those three criteria, a child must exhibit at least one of the following:
   • An inability to learn that cannot be explained by intellectual, sensory, or health factors;
   • An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
   • Inappropriate types of behavior or feelings under normal circumstances;
   • A general pervasive mood of unhappiness or depression; or
   • A tendency to develop physical symptoms or fears associated with personal or school problems.
Id. § 300.8(c)(4)(ii)–(A)–(E). A child does not have an emotional disturbance if he or she is “socially maladjusted” unless it is determined that he or she nonetheless has an emotional disturbance. Id. at (c)(4)(ii).
35. See 20 U.S.C. § 1412(a)(3)(B) (clarifying that the child-find duty does not require classification by disability so long as every child with a disability is offered the special education and related services he or she needs to access his or her education).
36. 34 C.F.R. § 300.8(c)(4)(i).
37. Muller, 145 F.3d at 103–04.
38. Id. at 98.
39. Id. at 99.
40. Id. at 98–99.
41. Id. at 99.
42. Id. at 99–100.
Second Circuit found that Treena’s long history of behavioral and emotional problems “amounted to more than a mere conduct disorder.”

A district also cannot deny eligibility by viewing behaviors in isolation. Treena’s behaviors included “suicide attempts, . . . arson attempts, . . . lies, cutting classes, failure to complete homework, stealing things, quitting the basketball team, . . . defiance, poor grades and academic performance.” Many of these behaviors “are not unusual or ‘inappropriate’ by themselves,” but in combination they established that she exhibited inappropriate behaviors under normal circumstances.

B. Determining the Procedural and Substantive Adequacy of an IEP Under Rowley

Courts still apply the following two-pronged test from Rowley to determine whether school districts provide a FAPE under IDEA: (1) whether the respondents complied with the procedures set forth in IDEA, and (2) whether the IEP was uniquely tailored and reasonably calculated to provide the child with some educational benefit. These prongs are usually referred to as procedural FAPE and substantive FAPE, respectively.

Amy Rowley was a Deaf elementary student who had above average cognitive ability. Amy’s parents wanted her school district to provide a sign language interpreter, but the district instead provided only an FM transmitter linked to a hearing aid. While Amy passed easily from grade to grade and was an above-average student, she had the potential to do much better. Justice Rehnquist, writing for a divided court, held that IDEA does not require IEPs to maximize the potential of children with disabilities commensurate with the opportunities afforded to their non-disabled peers, “[r]ather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education.”

A procedural error only results in a denial of a FAPE if it: (1) impedes the right to a FAPE; (2) significantly impedes parental participation; or (3) causes a deprivation of educational benefit.
example, failure to have a formal written offer of a FAPE at the beginning of the school year is a procedural violation of IDEA, but it does not cause a denial of a FAPE if it does not cause harm because the parents know what the offer is, had already decided to reject it, and received the written offer just a few days later. But a FAPE has been denied when there was a failure to disclose testing results indicating a diagnosis of autism, because without knowledge of those results, the child’s parents could not meaningfully participate in the IEP process.

In assessing whether an IEP provides a substantive a FAPE, courts engage in a fact-intensive inquiry, including academic progress, progress toward annual goals, and access to the general curriculum. Schools are not required to maximize educational benefit, but only to offer a “basic floor” of educational opportunity.

As described below in Section II.B, courts analyzing residential placements do not usually engage in this standard FAPE analysis. In unilateral placement cases, courts often use this analysis in the first prong, evaluating the district’s offer of a FAPE, but they do not strictly apply it in the second prong analyzing the appropriateness of the parents’ placement.

C. The Least Restrictive Environment—the Objective and the Subjective

Least restrictive environment (LRE) has two meanings in IDEA. Though neither the statute nor case law refer to the distinction in this way, the two meanings are best understood as the objective LRE and the subjective LRE.

The objective LRE refers to the continuum of placements, starting with full-time placement in a general education program with nondisabled peers—literally the least restrictive environment—and continuing up to the most restrictive environments, namely hospitals and institutions. Residential programs are not expressly described on the federal continuum, but are instead separately defined in the regulations. Residential programs fall near or at the most restrictive end of the LRE continuum.

The subjective LRE refers to IDEA’s core mandate that children with disabilities be removed from the general population “only when the nature or severity of the disability” is such that the child cannot access an education. Courts use one of three tests to determine the subjective LRE. The Fifth Circuit developed the two-prong Daniel R.R. test, which the Second, Third, Tenth, and Eleventh Circuits also


57. id. at 215.
58. 34 C.F.R. § 300.115 (2014).
59. id. § 300.104.
60. See, e.g., Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1st Cir. 1993) (explaining that the objective LRE’s preference for mainstreaming precludes placement in a residential educational program if the student could access an education in a day program).
use. The Sixth Circuit developed the three-prong Roncker test, which the Fourth and Eighth Circuits also use. The Ninth Circuit alone uses its four-prong Rachel H. test.

This Article does not further discuss the different LRE tests. While residential placement cases often mention LRE, courts do not usually apply an LRE analysis to determine whether residential placement is appropriate.

D. Related Services

An appropriate education must include mental health services when those services are necessary for a student to benefit from his or her education. Federally mandated educationally related mental-health services, among other things, include: counseling services by social workers, psychologists, counselors, and other qualified personnel; medical services for assessment and evaluation; parent counseling and training; psychological services; planning and case management; and rehabilitation counseling. However, IDEA and its implementing regulations “clearly convey[] that the list of services in § 300.34 is not exhaustive.”

E. Non-Medical Residential Programs

Since its enactment in 1975 as the Education for All Handicapped Children Act, IDEA and its implementing regulations have always required that educational agencies place children in residential programs when that is required to provide educational benefit: if placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

The only change to that mandate is to place greater emphasis on the person by updating the reference

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64. Roncker ex rel. Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983).


69. 34 C.F.R. § 300.34(c)(2) (2014) (counseling services); id. § 300.34(c)(5) (medical services for assessment and evaluation); id. § 300.34(c)(8) (parent counseling and training); id. § 300.34 (c)(10)(i–ii) (psychological services); id. § 300.34(c)(10)(v) (planning and case management); id. § 300.34(c)(12) (rehabilitation counseling).


72. Kruelle, 642 F.2d at 692 (quoting 45 C.F.R. § 121a.302 (1979)).
from “handicapped child” to “child with a disability.” But as discussed more in Section VI below, the real question is when residential placement is necessary to enable a child to access his or her education.

III. COURTS’ APPROACHES TO ACADEMIC AND FUNCTIONAL NEEDS

The core guarantee of IDEA is a FAPE—free, appropriate public education. But what is an education? Is it just instruction in academic areas like reading, writing, and arithmetic? The plain language of IDEA is clear: measurement of educational benefit includes both academic and functional performance. In developing an IEP, the IEP team “shall consider . . . the academic, developmental, and functional needs of the child.”

Following the text of IDEA, special education evaluations must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information.” Evaluation materials must be provided and administered in the way “most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally.” Reevaluation is warranted whenever “the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation.” Prior to exiting a child from special education, the local educational agency must provide the child a summary of his or her “academic achievement and functional performance.” Assistive technology is equipment “used to increase, maintain, or improve functional capabilities of a child with a disability.” An IEP document must include, among other things: a statement of “present levels of academic achievement and functional performance”; a statement of annual goals “including academic and functional goals”; and a description of the accommodations needed to “measure the academic achievement and functional performance.”

Where Congress intended to limit educational benefit to academic achievement, it did so specifically. IDEA does not limit educational benefit to academic achievement. Yet courts regularly disregard the plain language of IDEA, so the definition of educational benefit varies from circuit to circuit (and sometimes from case to case). For example, in the Ninth Circuit, educational benefit can include academic, social, and behavioral needs among others—academic achievement tests are “not the sine qua non of ‘educational benefit.’” But, when determining whether a residential placement is educational in nature, “educational” no longer includes “medical, social, or emotional problems . . . quite apart from the learning process.”

73. 45 C.F.R. § 300.104.
75. Id. § 1414(b)(2)(A).
76. Id. § 1414(b)(3)(A)(ii).
77. Id. § 1414(a)(2)(A)(i).
78. Id. § 1414(c)(5)(B)(ii).
79. Id. § 1401(1).
80. Id. § 1414(d)(1)(A)(i)(I).
81. Id. § 1414(d)(1)(A)(i)(II).
82. Id. § 1414(d)(1)(A)(i)(VI)(aa).
83. Though perhaps one could read the requirement for states to monitor “educational results and functional outcomes” as such a separation? See id. § 1416(a)(2)(A).
85. Seattle Sch. Dist., No.1 v. B.S. ex rel. A.S., 82 F.3d 1493, 1500 (9th Cir. 1996).
A. Standards for Reviewing Residential Placements

The most difficult task in carefully parsing cases on residential programs is that courts conflate several distinctions in their analysis. These distinctions are not always vital, but courts’ lack of specificity does little to help clarify an already imprecise inquiry.

Most importantly, courts often interchangeably apply cases involving disputes over whether a residential placement is necessary for a FAPE with unilateral placement cases.\footnote{87} As used in this Article, a FAPE case is one in which the parent is advocating for the school district to place the child in a residential program through his or her IEP. The child is not yet in the desired placement and the core dispute is what educational program is necessary to provide a FAPE. A unilateral placement case is one in which a parent has withdrawn his or her child from public programs, placed the child at the parent’s own expense, and then seeks reimbursement from the educational agency. The child is already in the desired placement and, while what is necessary for FAPE is at issue, the core dispute is who will pay.

This cross-referencing is further complicated, as described below in Section VI, by the Seventh and Fifth Circuits’ articulation of analyses that are nominally different from the majority approach but do not seem to be substantively much different than one another. Though placement and related services are two different things, many courts conflate them when discussing residential programs.\footnote{88} This leads to a second confusion when courts apply “the medical exception” as if it were a single doctrine as described below in Section IV.

Courts next waver in the target of the medical exception analysis: some courts look to the purpose\footnote{89} (i.e., what motivated the placement), where other courts look into the nature of the service and placement (i.e., what is being provided and by whom).\footnote{90} As described below in Section VII, in unilateral cases courts may look to both. The standard of review at the district and appellate court levels is another moving target. This Article does not discuss it, but it is a vital consideration in determining whether to appeal an administrative decision.

These challenges are all layered on IDEA’s necessarily subjective standard requiring that a child be afforded a FAPE in the LRE. This shifting landscape does not lend itself to clean categories and tests, regardless of what any given case professes. The root of these conflations and confusions seems to be a departure from the statutory text and purpose of IDEA, as described below in Sections V, VI, and VII. Nonetheless, this nuance also leaves room creatively for the zealous advocate who understands where there is firm ground in the law and where there is mush.

IV. The Medical Services Exemptions

IDEA provides two similar but distinct relevant medical exceptions.\footnote{91} The first medical exception is that “related services” include the medical services of a physician only for diagnostic and evaluation purposes.\footnote{92} Any medical services for any reason other than diagnostic and evaluation purposes are not...
related services, and therefore not the responsibility of the school district.\textsuperscript{93} If a service is medical (and not for diagnosis or evaluation), the school is completely exempted from providing it.\textsuperscript{94}

The second medical exception is that educational agencies are responsible for all “non-medical” costs of residential program placements.\textsuperscript{95} In comments to the 2006 regulations, the Department of Education’s Office of Special Education and Related Services explained that this means that “visits to a doctor for treatment of medical conditions are not covered services under Part B of the Act and parents may be responsible for the cost of the medical care.”\textsuperscript{96} It was not written as a complete bar to such placements, but rather as a limitation of certain services.\textsuperscript{97}

The seminal Supreme Court case on the related services medical exception determined that catheterization was a related service where it could be performed by a lay person with minimal training and was necessary to enable the youth to attend school.\textsuperscript{98} Amber Tatro was born with spina bifida that, among other challenges, made her unable to void her bladder without catheterization every three to four hours.\textsuperscript{99} “The procedure is a simple one that may be performed in a few minutes by a layperson with less than an hour’s training. . . . [A]nd Amber [who was eight at the time of the decision] soon will be able to perform this procedure herself.”\textsuperscript{100} In preschool, her school district offered her an IEP but refused to offer catheterization.\textsuperscript{101} The Supreme Court set out a twofold inquiry: (1) Was the service a supportive service? (2) Was the service a medical service for purposes other than diagnosis and evaluation?\textsuperscript{102}

In finding that catheterization was a supportive service, the Court focused on IDEA’s purpose of making public schools available to children with disabilities.\textsuperscript{103} The Court reasoned that services “that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school.”\textsuperscript{104}

In finding that catheterization was not a medical service, the Court made three key determinations.\textsuperscript{105} The Court first determined that the regulatory definition of medical services as those provided by a physician was reasonable\textsuperscript{106} and clarified that this clause exempted only services that must be provided by a physician.\textsuperscript{107} Catheterization was comparable to the nursing services provided to nondisabled students, such as on-site administration of medication.\textsuperscript{108} The Court next clarified that the school would not be required to provide a service that could be performed outside the school day while still enabling the child

\textsuperscript{93} Irving Indep. Sch. Dist. v. Tatro ex rel. Tatro, 468 U.S. 883, 890 (1984) (noting the second issue was whether catheterization “is excluded from this definition [of related services] as a ‘medical servic[e]’ serving purposes other than diagnosis or evaluation” (second alteration in original) (quoting 20 U.S.C. § 1401(26))).

\textsuperscript{94} See 20 U.S.C. § 1401(26).

\textsuperscript{95} 34 C.F.R. § 300.104.

\textsuperscript{96} \textit{id.} § 300.104; Assistance to States, \textit{supra} note 70, at 46,581.

\textsuperscript{97} See 34 C.F.R. § 300.104.

\textsuperscript{98} Tatro, 468 U.S. at 885, 894.

\textsuperscript{99} \textit{id.} at 885.

\textsuperscript{100} \textit{id.}

\textsuperscript{101} \textit{id.} at 885–86.

\textsuperscript{102} \textit{id.} at 890.

\textsuperscript{103} \textit{id.} at 891.

\textsuperscript{104} \textit{id.}

\textsuperscript{105} \textit{id.} at 892–93.

\textsuperscript{106} \textit{id.}

\textsuperscript{107} \textit{id.} at 894.

\textsuperscript{108} \textit{id.} at 893–94.
to attend school. Finally, the Court noted that the family had sought no equipment from the school, only the services of qualified personnel.

A year before Tatro, an Illinois district court upheld a denial authorization for a facility on the grounds that the proposed placement was “a psychiatric hospital providing psychiatric services.” The plaintiffs urged that psychiatric services should be considered psychological services, and therefore “related services” under IDEA. But “[p]sychiatrists, in contradistinction to psychologists ... are licensed physicians whose services are appropriately designated as medical treatment.” Psychiatric services (as opposed to psychological services) are still generally considered medical services that are exempted from IDEA.

A month after Tatro, another Illinois district court allowed reimbursement for psychological services provided by a psychiatrist. That court focused on Tatro’s analysis of whether the service must be provided by a physician—including a psychiatrist. Because the therapy at issue was recommended (but not provided) by the school and could have been provided by a nonphysician, the therapy was a related service despite being provided by a psychiatrist, but reimbursement would be capped at the rate a non-psychiatrist would have charged.

Tatro and its early progeny focused on the nature of the service itself. If the service was not a supportive service—not required to enable the child to attend school—or needed to be provided by a physician, then it was an excluded medical service. The service’s purpose was never considered.

V. THE RESPONSIBILITY OF STATE EDUCATION AGENCIES

State educational agencies are ultimately responsible for ensuring that every child with a disability has access to a FAPE. Generally states ensure availability of a FAPE by clearly delegating responsibility to local school districts and enabling those districts to provide a FAPE. But as described below, in limited circumstances state educational agencies are directly responsible for educating youth.

A. Consolidating Responsibility

The purpose of including responsibility for residential placements in IDEA and its implementing regulations was “to assure a single line of responsibility with regard to the education” of children with disabilities, and to ensure that “the State educational agency shall be the responsible agency” at the end of that line.

When it enacted IDEA, Congress was concerned that “in many States, responsibility [for services] is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered.” Congress created this single line of authority through state departments of education in an

109. Id. at 894.
110. Id. at 895.
112. Id. at 1344.
113. Id.
115. Id.
116. Id. at 1445 (ordering reimbursement reduced commensurate with rate that would be charged by a non-psychiatrist mental health professional).
effort to prevent interagency disputes over services:

Without this requirement, there is an abdication of responsibility for the education of handicapped children. . . . While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.  

Further,

[a] cost-benefit philosophy supported these interlocking goals [of providing federal support for the education of children with disabilities]. Instead of saddling public agencies and taxpayers with the enormous expenditures necessary to maintain the handicapped as lifelong dependents in a minimally acceptable institutionalized existence, Congress reasoned that the early injection of federal money and provision of educational services would remove this burden by creating productive citizens.

For example, the Orange County Department of Education followed both the letter and the intent of IDEA in Orange County—discussed below in Section V.B—by placing the student in a residential facility and maintaining that placement while disputing responsibility. But in the author’s experience, it is rare for a school district to make such a placement if they have a remotely plausible argument against responsibility. The state education agency is ultimately responsible for ensuring that a FAPE—including placement at a residential program when necessary—is available to every child.

B. Direct Responsibility of the State Educational Agency

The state educational agency becomes directly responsible to provide a FAPE to a particular child when it either expressly assumes direct responsibility or fails to ensure that a FAPE is available to all children. States expressly assume direct responsibility for providing a FAPE in limited circumstances. For example, the California Department of Education directly operates California Schools for the Deaf. Hawaii, an anomaly, places responsibility for providing a FAPE directly on the state department of education which acts as both the state educational agency and the statewide-local educational agency for all students. When a state expressly assumes direct responsibility for providing a FAPE, it is in fact responsible.

Absent express responsibility, state educational agencies can become directly responsible for providing a FAPE by their action or inaction. When states fail to ensure that a FAPE is available to all children, they trigger direct state responsibility for a FAPE. This broadly occurs in two scenarios: when they do not

121. Kruelle, 642 F.2d at 691 (citing S. REP. NO. 94-168).
122. Orange Cnty. Dep’t of Educ. v. Cal. Dep’t of Educ., 668 F.3d 1052, 1054 (9th Cir. 2011).
123. Perhaps one reason for this is that California law prohibits school districts from filing for due process against one another. See CAL. GOV’T CODE § 7586 (West 2008). The district in this position can file against the student claiming responsibility. 20 U.S.C. § 1415(b)(6) (2012); 34 C.F.R. § 300.507 (2014). But if it has already placed the youth, it must maintain the placement through the pendency of the proceedings—stay put. 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a). The author is aware of no case awarding a district reimbursement for maintaining stay put, even if the district is ultimately successful on the merits.
124. CAL. EDUC. CODE § 59002 (West 2003).
clearly delegate responsibility, and when a local school district is unable or unwilling to serve a child with a disability, particularly when the state’s actions or inaction impedes the student’s right to a FAPE.

Sometimes states fail to clearly delegate responsibility to school districts and thus become directly responsible for providing a FAPE. For a number of years, California law did not establish what school district was responsible for foster youth placed through an IEP at a residential program. The student in Orange County, A.S., is a crossover youth—a foster youth who “crossed over” to the juvenile delinquency system—whose biological parents’ educational decision-making rights had been terminated by a juvenile court. He had a foster parent who continued to hold educational rights even after he stopped living with her in 2004. When his 2006 IEP team determined that he required a residential placement, the county office of education agreed to fund the placement but disputed responsibility, forcing A.S. to file for due process against that office, the state, and two other school districts. California law did not clarify what agency was responsible for A.S. until a 2007 amendment to the California Education Code—nearly a year and a half after his placement. Because California law failed to delegate responsibility for such students, the California Department of Education was directly responsible for providing A.S. a FAPE during that time.

States also become directly responsible for providing a FAPE when a local school district is unable or unwilling to serve a child with a disability. In the early 1990s, Georgia law and policy effectively barred school districts from offering placement at in-state residential programs. Todd D. was an eighteen-year-old Georgia youth with schizophrenia and borderline intellectual disability whose parents declined a proposed placement in Texas, arguing in part that he should be closer to home to work on his transition goals. The district court ruled against the parents based on the convenience for the state of maintaining its existing policies. The Eleventh Circuit rejected this approach that ignored Todd’s unique needs. The state would be directly responsible to provide Todd a FAPE if his parents could prove on remand that state policy in fact prevented the district from serving Todd in a local program.

Similarly, an Illinois family recently survived a state education agency’s Rule 12(b) motion to dismiss where they had alleged that the state’s refusal to approve the only placement appropriate for their child denied their child a FAPE. The plaintiffs credibly alleged that (1) but for the state’s failure to approve

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127. Doe ex rel. Gonzalez v. Maher, 793 F.2d 1470, 1491–93 (9th Cir. 1986) (holding that a court may order a state to provide services directly to a disabled child where a local education agency has failed to do so), aff’d, Honig v. Doe, 484 U.S. 305, 329 (1988); Orange Cnty. Dep’t of Educ., 668 F.3d at 1063 (finding the state responsible for providing a FAPE when California law did not clearly delineate what district was responsible for a child).
128. 34 C.F.R. § 300.227(a).
129. Todd D. ex rel. Robert D. v. Andrews, 933 F.2d 1576, 1578 (11th Cir. 1991) (holding that where Georgia law and policy barred the school district from offering an appropriate educational placement, the state was directly responsible).
130. Orange Cnty. Dep’t of Educ., 668 F.3d at 1055, 1057.
131. Id. at 1054.
132. Id.
133. Id. at 1054–55.
134. Id. at 1060–63.
135. Id. at 1063 (citing Gadsby ex rel. Gadsby v. Grasmick, 109 F.3d 940, 953 (4th Cir.1997)) (holding that for the time period during which “California law failed to make any school district responsible for [the student’s] education . . . CDE [was] the agency responsible” for providing a FAPE).
137. Id.
138. Id. at 1581–82.
139. Id.
140. Id. at 1583.
the only appropriate placement, the school district would have placed the child at that placement; and (2) there was no appropriate placement other than the one sought in the complaint.\textsuperscript{142} The court considered this a jurisdictional issue and couched its order in the language of traceability—whether the plaintiff could establish a causal link between the state’s action and the alleged harm.\textsuperscript{143}

But families are not always successful linking state action to denials of a FAPE.\textsuperscript{144} At the administrative level, some hearing officers in cases basing a denial of a FAPE on the state’s failure to approve a program have found that a particular placement is inappropriate in part because it is not state approved.\textsuperscript{145} On appeal, courts then rule that the parent lacks standing to challenge the state’s withholding of approval because the denial of a FAPE is caused by the hearing officer’s decision.\textsuperscript{146} So the parent in this situation cannot win at the hearing because the hearing officer cannot award the relief they seek. But neither can the parent seek relief against the state because the denial is nominally caused by the hearing officer’s decision. This could be an instance in which a direct filing in state or federal court is appropriate on the grounds that exhaustion of administrative remedies would be futile.\textsuperscript{147} The state educational agency may fail to ensure availability of a FAPE when it fails to resolve interagency disputes.\textsuperscript{148} Yet generally, states comply with IDEA by clearly delegating responsibility for providing a FAPE to local educational agencies—primarily school districts.\textsuperscript{149}

C. Responsibility Based on Students’ Residency Versus Parents’ Residency

Responsibility for providing a FAPE to California students with disabilities usually follows the student. For students in traditional families, the school district in which a child resides with his or her parent(s) is responsible for that child’s education.\textsuperscript{150} When a youth is detained at a juvenile detention center, the county office of education in which the detention center is located is responsible regardless of where the

\begin{enumerate}
\item Id. at 1097–98.
\item Id. at 1095–96.
\item As discussed below, state accreditation is not necessary to determine that a program is appropriate, but it is often a factor in such determinations.
\item In some jurisdictions, a hearing officer’s decision that a placement was inappropriate prevents plaintiffs from establishing a causal link with the state department of education. M.M., 963 F. Supp. at 189; Yamen \textit{ex rel.} Yamen v. Bd. of Educ. of Arlington Sch. Dist., 909 F. Supp. 207, 209–20 (S.D.N.Y. 1996).
\item There is growing consensus among the circuits that exhaustion is an affirmative defense in special education cases, not a jurisdictional bar. See Payne \textit{ex rel.} D.P. v. Peninsula Sch. Dist., 653 F.3d 863, 870 (9th Cir. 2011) (holding that “the exhaustion requirement in [20 U.S.C.] § 1415(f) [(2012)] is not jurisdictional”), overruled on other grounds by Albino v. Baca, 747 F.3d 1162, 1171 (9th Cir. 2014) (holding that exhaustion is raised as an affirmative defense, it should be decided on a motion for summary judgment, not on an unenumerated Rule 12(b) motion); McQueen \textit{ex rel.} McQueen v. Colo. Springs Sch. Dist. No. 11, 488 F.3d 868, 873 (10th Cir. 2007) (noting that Jones v. Bock, 549 U.S. 199 (2007), “casts doubt” on any characterization of exhaustion as jurisdictional); Mosley v. Bd. of Educ. of City of Chi., 434 F.3d 527, 532–33 (7th Cir. 2006) (finding the exhaustion requirement in IDEA is a claims-processing rule).
\item These cases are based on a recent series of Supreme Court decisions holding that where, as in IDEA, a federal statute is silent as to whether exhaustion must be pleaded as an element of a claim, failure to exhaust is not a jurisdictional bar but rather an affirmative defense that must be raised and proved by the defendant. Jones, 549 U.S. at 212–13 (holding that because Prison Litigation Reform Act is silent, the usual federal practice of regarding exhaustion as an affirmative defense to be pleaded and demonstrated must be followed); Eberhart v. United States, 546 U.S. 12, 16 (2005) (reaffirming the holding of \textit{Kontrick v. Ryan}, 540 U.S. 443 (2004), in which the Court admonished lower courts to carefully distinguish between jurisdictional and claims-processing rules).\textsuperscript{143}
\item See Kruelle v. New Castle Cnty. Sch. Dist., 642 F.2d 687, 696–98 (3d Cir. 1981) (discussing the importance of a single line of responsibility to prevent such disputes from causing denials of service).
\item Id. at 696.
\item CAL. EDUC. CODE § 48200 (West 2006 & Suppl. 2014); id. § 56028 (West 2003 & Suppl. 2014); Katz v. Los Gatos-Saratoga Joint Union High Sch. Dist., 11 Cal. Rptr. 3d 546, 553 (Ct. App. 2004) (holding that Education Code “[s]ection 48200 embodies the general rule that parental residence dictates a pupil’s proper school district”).
\end{enumerate}
youth came from. When a court places a foster youth in a group home or foster family home, the school district in which that home is located is responsible for educating the youth. If a noneducational public agency, including a juvenile court, makes a residential placement by itself outside the IEP process, then that noneducational public agency “shall be responsible for the residential costs and the cost of noneducation services of the individual,” and if that residential placement is located within California, then the school district in which the placement is located becomes responsible for the child’s education. When a youth is placed in a hospital—including a psychiatric hospital—the school district in which the hospital is located is responsible.

There are several key exceptions to this general rule that responsibility follows the youth. First, California foster youth have the right to remain in their school of origin when a court-ordered (noneducational) placement would otherwise force them to change schools; the school district of the school of origin remains responsible for educating that foster youth.

Second, when a student requires an educational placement in an out-of-state state residential program, responsibility stays with the district in which the youth’s parent lives, regardless of the youth’s location. This responsibility continues even after the student turns eighteen. But a “parent” for special education purposes includes a court-appointed education rights holder, such as a court-appointed special advocate. The result is that a school district that has never seen a child can be responsible for offering and funding a residential placement simply because some good Samaritan volunteered to help a child in need.

Third, when a youth transfers from one California school district to another, during an academic year, while the youth is residentially placed through an IEP, and the new district does not have a contract with the residential facility, the originating special education local plan area is responsible for maintaining the placement for the remainder of the academic year. Generally, when a youth transfers from one California district to another, the receiving district must offer comparable services for thirty days and then either adopt the previous IEP or develop, adopt, and implement a new IEP.

Fourth, if a noneducational public agency places a child in an out of state residential facility “without the involvement of the school district . . . in which the parent or guardian resides,” then that noneducational public agency is fully responsible for the costs of that placement, including the cost of any special education.

151. EDUC. § 48645.2 (West 2006).
152. Id. § 48204 (West 2006 & Supp. 2014).
153. Id. § 56159 (West 2003).
156. Id. § 48853.5(e) (West 2006 & Supp. 2014).
157. Id.
158. Orange Cnty. Dep’t of Educ. v. Cal. Dep’t of Educ., 668 F.3d 1052, 1053 (9th Cir. 2011) ("We hold as a matter of California law that the California agency responsible for funding a special education student’s education at an out-of-state residential program is the school district in which the student’s parent, as defined by California Education Code section 56028, resides.").
159. EDUC. § 56041 (West 2003) (stating that responsibility stays with the district of the parent for non-conserved youth and with the district of the conservator for conserved youth); Orange Cnty. Dep’t of Educ., 668 F.3d at 1058–59 (explaining the application of section 56041).
161. Id. § 56325(c). California local plans are created by special education local plan areas (SELPAs), which can be large districts or consortia of smaller districts. See id. § 56195.1.
162. Id. § 56325(a).
163. CAL. GOV’T CODE § 7579(d) (West 2008).
The availability of reimbursement for court placements as de facto unilateral placements is discussed below in Section VII. It is unclear whether these provisions would be a bar from seeking reimbursement from a school district if the placement was educationally necessary but made without the involvement of the district due to the district’s refusal to participate.

D. Interdistrict Transfers

How does a youth transfer districts while physically remaining in a residential program? Under California law, a youth does not legally “reside” at a residential program. So when the parent(s) move to the jurisdiction of another school district while the youth is still in placement, the youth has also changed legal residence, and thus transfers districts. Understanding transfer provisions is particularly important when representing court-involved youth in residential placements.

First, when a detained California youth’s IEP team places the youth in a residential program, the youth likely immediately becomes a transfer student—by leaving the juvenile detention facility, the youth disenrolls from the juvenile court school. Children with disabilities in the juvenile-delinquency system retain their right to a FAPE. Because the youth never “resided” in the detention facility (for the same reasons they do not reside at the residential program), the youth transfers from the county office of education back to the district in which the “parent” resides. The county office of education is responsible for maintaining the placement through the end of the academic year plus extended school year, and then the home district will be responsible for offering a FAPE. It is not clear how the interplay of the thirty-day transfer provisions and the requirement to have an IEP in effect at the beginning of a school year affects students in this situation.

Second, whenever a student’s parent changes, then the youth will have transferred if the new parent lives in a different school district. While most students do not experience changes of parents, it is common for court-involved youth, particularly foster youth, to experience such changes of legal parent (for example, if the natural parents’ rights are terminated or a court-appointed special advocate resigns).

In sum, it is undisputed that educational agencies are responsible for residential placement when it is educationally necessary. And since the inception of IDEA, courts have struggled to determine when residential placement is educationally necessary.

VI. JUDICIAL APPROACHES TO DETERMINING WHETHER A RESIDENTIAL PLACEMENT IS NECESSARY

Courts apply one of four tests to determine whether a residential placement is educationally necessary. A

164. A California minor’s residence is determined by the parent with whom he or she maintains his or her abode. Id. § 244(d) (West 2012). The residence of an unmarried minor with a living parent cannot be changed by that minor’s own act. Id. § 244(e). An adult in California can only have one residence at a time, and one residence cannot be lost until another is gained. Id. § 244(b)–(c). Thus, a minor retains his or her parent’s residence because the minor does not maintain an abode in a residential program and cannot lose his or her parent’s residence absent an affirmative act by the parent.


166. See 34 C.F.R. § 300.102(a)(2) (2014) (limited exception to a FAPE for youth aged 18–21 in adult correctional facilities). Youth in adult correctional facilities who were found eligible for special education prior to their adult incarceration are entitled to special education and related services, but do not enjoy the full rights of other youth with disabilities. L.A. Unified Sch. Dist. v. Garcia, 741 F.3d 922, 922–23 (9th Cir. 2014) (under California law, the school district in which the youth legally resides is responsible for serving youth in adult correctional facilities).


168. Gov’t § 244(d).

169. E.g., Orange Cnty. Dep’t of Educ. v. Cal. Dep’t of Educ., 668 F.3d 1052, 1054 (9th Cir. 2011) (holding that plaintiff’s biological parents’ rights were terminated and assigned to his foster parent).
The majority of circuits inquire whether the placement is “primarily educationally-based,” looking to whether the child’s educational needs are severable from his or her social, emotional, and medical needs. Nearly two decades of relatively consistent law among the courts of appeals later, the Seventh Circuit departed from this approach and instead chose to look to whether the services are “primarily oriented” toward academics, with what appears to be a narrow exception allowing functional skills to be considered for children with moderate to severe developmental disabilities. Another decade later, the Fifth Circuit created a test requiring courts to look at every element of a placement and “weed out” any unnecessary elements. After at least thirty-three years of litigation on residential placements, the Tenth Circuit took IDEA out of context in purporting to take a pure textualist approach. As described below, this approach likely runs afoul of the text of IDEA and its implementing regulations.

Despite inconsistencies, there still exists a large amount of consensus regarding approaches to residential program and unilateral placement cases. Residential program cases generally fall into one (or both) of two categories: either the family is seeking an offer of a FAPE at a residential program, or the family has unilaterally placed the child and is seeking reimbursement. Unilateral placement cases are discussed in detail in Section VII below, but briefly, courts apply a progressive three-prong approach to unilateral placement cases, determining: (1) whether the educational agency offered a FAPE; (2) if not, whether the parents’ placement was appropriate or proper; and (3) if so, whether equity warrants full, partial, or no reimbursement.

The analysis of whether a residential placement is educationally necessary for the purpose of determining a FAPE is almost identical to the analysis of whether a unilateral placement is appropriate (prong two). Cases about unilateral placement cite FAPE cases and FAPE cases cite unilateral placement cases. The only difference in most circuits—discussed in more detail below—is that in a unilateral placement cases, the placement does not need to comply perfectly with state educational standards. The author has not identified any decision noting that these are in fact separate types of cases nor one stating that courts nonetheless generally use the same analysis.

The Fifth, Seventh, and Tenth Circuits have recently created tests that are ostensibly for unilateral placements. It is unclear how a residential placement FAPE case would be analyzed in those circuits, but given the similarity to the majority approach, it seems likely that the Fifth and Seventh Circuits would apply their unilateral test to a FAPE case, but the Tenth Circuit’s trajectory is less clear.

A. Kruelle: The Majority Test

The First, Second, Fourth, Sixth, Eighth, Ninth, Eleventh, and District of Columbia Circuits have all adopted the Third Circuit’s Kruelle test, which was based in part on North, a 1979 District of Columbia district court case.

Ty North was educationally placed in a residential program following an administrative hearing, but was

170. See infra Part VII.B.
171. See infra Part VI.
172. See id.
173. See infra Part VII.B.ii.
176. See infra Part VIII.
discharged “because the school could no longer deal with his emotional and other problems.” His parents—who could not control his behaviors—requested another residential placement, but the school district did nothing. When his parents refused to accept him, the residential placement staff transferred him to the custody of children’s services, which placed him in a mental health unit at a local hospital, and his parents filed against the district. The school district “vigorously argue[d] that plaintiff’s problems [were] emotional, social, and otherwise non-educational, and that they should not be saddled with the responsibility of providing him with living arrangements not strictly of an educational nature.” After hearing testimony, the court found that Ty’s “needs are so intimately intertwined that realistically it is not possible for the Court to perform the Solomon-like task of separating them” and awarded a preliminary injunction ordering the school district to fund residential placement.

Two years later, the Third Circuit applied similar analysis to determine that Paul Kruelle was entitled to a residential program in 1981. Paul had a profound intellectual disability with global developmental deficits; for example, he was unable to feed himself. At age ten, Paul was educationally placed in a residential program, but when his family moved to Delaware his new school district put him in a day program similar to an environment in which had previously failed him. The Third Circuit focused on whether the placement “may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social, or emotional problems that are segregable from the learning process.” The “inextricability of medical and educational grounds for certain services,” its unseverability, “is the very basis for holding that the services are an essential prerequisite for learning.”

A decade later, the Ninth Circuit in Clovis adopted Kruelle and looked to whether a youth’s “placement may be considered necessary for educational purposes, or whether the placement [in a psychiatric facility] is a response to medical, social, or emotional problems that is necessary quite apart from the learning process.” Everyone agreed that placement at a residential program was educationally necessary for Michelle, and she was placed in a residential program. Her behaviors deteriorated while she was in a residential program to the point that she was transferred to a psychiatric hospital. Michelle’s program was primarily implemented by hospital staff who determined what, if any, educational programming she would receive on a given day. The educational services she received were not provided by the hospital, but by the local school district, which sent its own teachers in. The hospital was under the supervision of the California Department of Health Services, not the Department of Education. Applying Kruelle, it determined that Michelle’s hospitalization was a medical placement to address an “‘acute’ psychiatric crisis” rather than an educational placement.

178. Id.
179. Id.
180. Id. at 140.
181. Id. at 141.
183. Id. at 688.
184. Id. at 689.
185. Id. at 693.
186. Id. at 694.
188. Id. at 639.
189. Id.
190. Id. at 645.
191. Id. at 646.
192. Id.
193. Id. at 645.
While the exact language varies, a majority of circuits use the Third Circuit’s *Kruelle* segregability test. Unlike the *Tatro* test for related services focusing on the nature of the service, the key to the *Kruelle* inquiry is the purpose of the placement (though the nature of the placement is a part of that analysis as evidenced by *Clovis*). The Fifth, Seventh, and Tenth Circuits diverge.

**B. The Seventh Circuit**

The Seventh Circuit analyzes whether the “primary orientation” of services is educational or not. Dale M. transferred into his school district at age fourteen, and “became a serious disciplinary problem.” The following year, he was placed in a therapeutic day school where he only attended twenty days in his first semester, though he did well when he was present. After his arrest and psychiatric hospitalization, Dale’s mother unilaterally placed him in a residential program. The majority decision found that the residential placement was for the sole purpose of “confinement” to “keep Dale out of jail” after having determined that the residential placement did not provide “psychological services” to Dale. On the one hand Dale clearly had “psychological problems that interfered with his obtaining an education,” but because he had “the intelligence to perform” and “no cognitive defect or disorder such as dyslexia” his problems were “not primarily educational.”

A vigorous dissent criticized Judge Posner for mischaracterizing the facts on record: “the program at Elan involves three separate components, life skills, counseling and class work. . . . [N]one of us who wear black robes are in an institutional position to second guess the Illinois Department of Education that approved the program as a permissible [educational] placement for Illinois school children.” Until residential placement was at issue, the school district agreed that Dale’s problems were related to his educational progress.

Thus, Dale M. ignored IDEA and proposed a very narrow view of educational benefit. If followed faithfully, the Seventh Circuit would likely only consider *academic* benefit—progress in reading, writing, math, and other core academic content—for all children except those with severe to profound developmental disabilities. Despite Judge Posner’s purported departure from longstanding precedent in

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194. E.g., Indep. Sch. Dist. No. 284 v. A.C. ex rel. C.C., 258 F.3d 769, 774 (8th Cir. 2001) (“IDEA requires that a state pay for a disabled student’s residential placement if the student, because of his or her disability, cannot reasonably be anticipated to benefit from instruction without such a placement.” (citations omitted)); Mrs. B. ex rel. M.M. v. Milford Bd. of Educ., 103 F.3d 1114, 1122 (2d Cir. 1997) (“The fact that a residential placement may be required to alter a child’s regressive behavior at home as well as within the classroom, or is required due primarily to emotional problems, does not relieve the state of its obligation to pay for the program under federal law so long as it is necessary to insure that the child can be properly educated.”); Doe ex rel. Doe v. Ala. State Dep’t of Educ., 915 F.2d 651, 665 (11th Cir. 1990) (“[T]he state must provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” (citations omitted)); Burke Cnty. Bd. of Educ. v. Denton ex rel. Denton, 895 F.2d 973, 980 (4th Cir. 1990) (finding the child’s emotional challenges were “segregable” from his educational challenges where he performed well when he attended school); McKenzie v. Smith, 771 F.2d 1527, 1534 (D.C. Cir. 1985) (quoting *Kruelle*, 642 F.2d at 693); Clevenger ex rel. Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514, 516 (6th Cir. 1984) (“Richard’s main learning problem is his inability to cooperate with authority.”); Abrahamson v. Hershman, 701 F.2d 223, 227 (1st Cir. 1983) (“[R]esidential placement was essential if Daniel was to receive the round-the-clock training he needed in order to make any educational progress.”).


196. Id. at 814.

197. Id.

198. Id.

199. Id. at 817 (“[T]he Elan School does not provide psychological services, at least to Dale. For him all it provides is confinement. . . . Elan is a jail substitute.”).

200. Id.

201. Id. at 819.

202. Id.

203. See id.
other circuits, district courts in the Seventh Circuit continue to essentially apply the *Kruelle* standard.\(^{204}\)

C. The Fifth Circuit

The leading Fifth Circuit case, *Michael Z.*, was a unilateral placement case and the Fifth Circuit took care to describe the test it articulated as applying specifically to unilateral placements.\(^{205}\) In *Michael Z.*, the Fifth Circuit rejected the *Kruelle* approach, contending—without referring to IDEA’s extensive provisions regarding functional needs—that *Kruelle* “expands school district liability beyond that required by IDEA.”\(^{206}\) Instead, the Fifth Circuit in *Michael Z.* set forth a two-prong test asking whether (1) the residential placement was essential in order for the disabled child to receive a meaningful educational benefit, and (2) it was primarily oriented toward enabling the child to obtain an education.\(^{207}\)

A concurring opinion questioned whether this new test was in fact distinct from *Kruelle*.\(^{208}\) “Though linguistically obtuse, *Kruelle* essentially asks a straightforward question: Does the child, because of her disability, require a residential placement to obtain the meaningful benefit to which she is entitled?”\(^{209}\) This test is discussed in detail below in Section VII.B.1. It is unclear whether the Fifth Circuit would analyze a FAPE residential placement case under its usual four-prong *Michael F.* test for FAPE\(^{210}\) or whether it would use the first prong of its new *Michael Z.* test. Based on the similarities noted by the concurrence, there should not be a significant difference in the Fifth Circuit from the majority approach, but at least one district court has interpreted *Michael Z.* to impose a very strict definition of education as academic.\(^{211}\)

D. The Tenth Circuit

The Tenth Circuit reviewed the approaches discussed above and rejected them.\(^{212}\) Its analysis focused heavily on the unilateral placement aspect of that case.\(^{213}\) But because it clearly and forcefully rejected *Kruelle*’s segregability test, it is unclear how the Tenth Circuit would now analyze a residential-placement FAPE case. Of the circuits, the Tenth Circuit is the furthest from the majority. The case is discussed in detail below.

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206. *Id.* at 299.
207. *Id.*
208. *Id.* at 303.
209. *Id.* at 303 (Prado, J., concurring).
210. *Id.* at 293–94 (discussing Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. *ex rel.* Barry F., 118 F.3d 245, 247 (5th Cir. 1997)).
213. *Id.* at 1235–39.
VII. UNILATERAL PLACEMENT CASES: REQUESTS FOR REIMBURSEMENT

In unilateral placement cases, parents place their child in a private program without the consent of or referral by their school district and then seek reimbursement from the district.

Both conceptually and functionally, courts apply the three-prong approach recently reiterated by the Supreme Court in Forest Grove to unilateral placement cases, determining: (1) whether the educational agency offered a FAPE; (2) if not, whether the parents’ placement was appropriate or proper; and (3) if so, whether equity warrants full, partial, or no reimbursement.214 But in name, courts call this a two-prong test (whether the district failed to offer a FAPE and whether the placement is appropriate), after which the equities are balanced.215 Regardless, this test is consecutive and dispositive. If the educational agency offered a FAPE, the parent’s claim fails and the inquiry ends.

The right to reimbursement for unilateral placements was initially created by courts interpreting their statutory authority to “grant such relief as [it] determines is appropriate” in resolving special education disputes.216 Congress subsequently created rules relating to the right to reimbursement for unilateral placements, tacitly endorsing Burlington and its progeny.217

As with residential program law generally, unilateral placement decisions are not always clear in their analysis. Many cases conflate the first two prongs, discussing denial of FAPE hand-in-hand with the appropriateness of the parent’s placement.218 Other cases barely articulate any overall test and instead review specific elements.219 But these are often important cases, so the author has put them where they fit best.

Very few families can afford the cost of placement at a residential program, so unilateral placement as it is most commonly executed—the parent paying out of pocket—is available only to a narrow portion of the population. But unilateral placement law is important for all practitioners regardless of the socioeconomic status of one’s clients because in some cases an agency may seek reimbursement for a noneducational residential placement from the caregiver of a family. In such a case, the family may be able to shift liability to the school district, as the following families did.220

M.M. was a young woman whose anxiety was so severe that she “would become overwhelmed by her surroundings, leading to regressive behavior and an inability ‘to problem solve effectively or to think clearly and logically.’”221 Her clinical social worker recommended a residential placement, but her school district refused to offer a residential placement.222 Instead, the district advised M.M.’s mother to turn her

218. See, e.g., Seattle Sch. Dist., No 1 v. B.S. ex rel. A.S., 82 F.3d 1493, 1500–02 (9th Cir. 1996).
219. See, e.g., Ashland Sch. Dist. v. Parents of Student E.H., 587 F.3d 1175, 1183–86 (9th Cir. 2009).
220. E.g., E.M. v. N.Y. City Dep’t of Educ., 758 F.3d 442, 461 (2d Cir. 2014) (concluding that a parent who has not yet paid for the unilateral placement has standing because of a contractual obligation to pay tuition).
221. Mrs. B. ex rel. M.M. v. Milford Bd. of Educ., 103 F.3d 1114, 1117 (2d Cir. 1997).
222. Id.
over to the foster-care system. While the placement was pending, M.M.’s father died. With no alternative, Mrs. B. gave M.M. over to the foster-care system to achieve residential placement, but then that system took the proceeds from the father’s life insurance policy from this new widow to pay for the placement. The Second Circuit affirmed a district court order finding that M.M.’s placement should have been funded by her school district.

This is not the only case in which a school district has forced parents to relinquish their children to foster care because the district refused to pay for a residential program. In Christopher T., San Francisco Unified School District forced at least two families to do exactly this. Citing Kruelle, the Northern District of California not only ordered prospective placement for both youth, but it also ordered the district to reimburse both the parents and the foster care system for the costs it incurred implementing the placement that should have been provided by the district.

A. If the Educational Agency Offered a FAPE, then Reimbursement is Not Available

Educational agencies enjoy a “safe harbor” from reimbursement claims if they make “a FAPE available by correctly identifying a child as having a disability and proposing an IEP adequate to meet the child’s needs.” However, “IDEA does not require [a student] to spend years in an educational environment likely to be inadequate and to impede her progress simply to permit the School District to try every option short of residential placement.” This prong of analysis essentially applies Rowley’s examination of substantive and procedural compliance to the district’s offer of a FAPE.

First, an educational agency must meet its child-find duty to identify, locate, and evaluate the child for special education regardless of whether the child has previously attended public schools. Merely having child-find procedures in place is not sufficient when a local educational agency “unreasonably fail[s] to identify a child with disabilities” because Congress placed “paramount importance [on] properly identifying each child eligible for services.”

Next, an educational agency must timely complete its evaluations. The school district in Tice conceded that it failed to timely assess Matthew and the Fourth Circuit found that the “six-month delay directly resulted in there being no IEP in place at the time of” the unilateral placement. If the educational agency is prevented from completing evaluations, however, relief may be denied under the equities analysis discussed below.

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223. Id.
224. Id. at 1117–18.
225. Id. at 1118.
226. Id. at 1122.
228. Id. at 1120–21.
230. Seattle Sch. Dist., No. 1 v. B.S. ex rel. A.S., 82 F.3d 1493, 1501 (9th Cir. 1996) (citations omitted).
232. Forest Grove Sch. Dist., 557 U.S. at 245.
234. Id. While the express holding of Tice, applying a strict liability standard to a procedural error, has been superseded by statute, Tice remains reliable because the Fourth Circuit discussed how the delay in assessment resulted in the child not being served, which is similar to the “impede the right to a FAPE” prong of the current harmless error test.
235. See, e.g., Patricia P. ex rel. Jacob P. v. Bd. of Educ., 203 F.3d 462, 469 (7th Cir. 2000) (“[P]arents who . . . do not allow a school district a reasonable opportunity to evaluate their disabled child, forfeit their claim for reimbursement . . . .”
The educational agency must find the child eligible for special education. But if a child is not in fact eligible for special education, then an educational agency’s failure to find, identify, and evaluate the child does not deny that child a FAPE and the inquiry ends.

After evaluating and determining eligibility, the educational agency then must make an offer of a FAPE. This offer must be procedurally correct. In refusing to consider a school district’s “post hoc rationalization,” the Fourth Circuit in *Tice* declared that where no IEP was offered, “no professional decision had been made to which deference was due.” Without clearly discussing the underlying facts, the Ninth Circuit in *Union* similarly emphasized the importance of the written offer because the purpose of prior written notice requirement is “to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional services were offered.” Failure to make a written offer prevents the parents from being able to make a decision whether to accept or oppose the offer. In sum, “a school district’s failure to propose an IEP of any kind is at least as serious” a failure to offer an appropriate IEP.

The purported offer of a FAPE must address the known needs of a child. In *Seattle*, the Ninth Circuit considered a former foster youth with a long history of emotional and behavior challenges, including diagnosed attachment disorder and a personality disorder. Though she was “exceptionally bright,” she was “deteriorating” academically “unable to make productive use of what she learned.” The school district evaluated her when she was eight, but found her ineligible for special education. She was so disruptive to her peers that “the School District had even expelled her” when she was just ten. The district reevaluated her five months after expelling her and found her eligible, but recommended a school-based program despite a number of clinicians recommending residential placement. The Ninth Circuit ordered the school to fund a residential program, holding that the educational agency was not allowed to keep her in an inadequate environment simply “to try every option short of residential placement.”

(citations omitted).

236. *See Muller ex rel. Muller v. Comm. on Special Educ.*, 145 F.3d 95, 102 (2d Cir. 1998) (explaining that whether a student is disabled such that he or she is eligible for special education under IDEA is “determined by the individual school district in accordance with state law”).

237. *See Maus ex rel. K.M. v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282, 294–98 (S.D.N.Y. 2010) (finding that a student with social disabilities that did not impair her educational performance was not eligible for special education services under IDEA and thus procedural violations by the district’s committee on special education did not deny her a FAPE).

238. *See Tice*, 908 F.2d at 1208 (finding that a school district’s failure to provide timely evaluations of a child identified as disabled was a procedural error that amounted to a failure to provide the child a FAPE as required by IDEA).

239. *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994) (“The Supreme Court has explained the great importance of . . . procedural components of IDEA.”).

240. *Tice*, 908 F.2d at 1208.

241. *Union Sch. Dist.*, 15 F.3d at 1526.

242. Id. The *Union School District* case, like the Fourth Circuit’s 1990 decision in *Tice*, appears at a glance to provide a strict error analysis to procedural FAPE claims, even though the Ninth Circuit had two years earlier shifted toward a harmless error test in *W.G. ex rel. R.G. v. Board of Trustees*, 960 F.2d 1479 (9th Cir. 1992). Nonetheless, *Union School District* is likely reliable on this point because although it does not expressly articulate harm, it discusses how the failure to make a formal written offer prevents the parents from participating in the IEP process. *Union Sch. Dist.*, 15 F.3d at 1526.


244. *Mrs. B. ex rel. M.M. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1115–16 (2d Cir. 1997).


246. Id. at 1500–01.

247. Id. at 1497.

248. Id. at 1500.

249. Id. at 1497–98.

250. Id. at 1501.
Similarly in *Mrs. B.*, the child had anxiety such that she “would become overwhelmed by her surroundings, leading to regressive behavior and an inability ‘to problem solve effectively or to think clearly and logically.’” Even her teachers remarked that the child was “not producing or learning in our program.” She failed to meet “nearly all” of her IEP objectives and “over the course of three years, despite being of average to slightly below-average intelligence, [she] did not advance more than one grade level in any subject.” The school district denied her a FAPE when it knew her emotional and behavioral challenges were impeding her ability to access an education, but “offered no plan to deal with her worsening behavior.”

When a child has already attended the school’s placement or a similar placement, the court should look to actual progress in that environment. The court should examine both the academic and nonacademic educational benefit—or lack thereof—from the proposed placement. This FAPE analysis of actual progress accords with common substantive FAPE analysis in which courts sometimes limit their inquiry about the offer to what was known at the time of the IEP team meeting. If the educational agency failed to offer a FAPE, the court moves on to consider the appropriateness of the parent’s unilateral placement.

**B. Appropriateness of the Placement**

As discussed above, the analysis of whether a residential placement is educationally necessary for the purpose of determining a FAPE is the same in most circuits as the analysis of whether a parent’s unilateral placement is appropriate (prong two). The key difference is that a unilateral placement does not have to comport with all of the requirements of IDEA. In *Carter*, the Supreme Court expressly stated that a unilateral placement does not have to be certified by the state educational agency. “IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free”; to deny children a free appropriate education because their parents did not follow the same procedures prescribed for school districts “would defeat this statutory purpose.”

Both the Second and Ninth Circuits have recently confirmed that for reimbursement “*parents need not show that a private placement furnishes every special service necessary to maximize their child’s potential.*” But the Tenth Circuit ignores the Supreme Court on this point and requires that the

251. *Mrs. B.*, 103 F.3d at 1117 (quoting the child’s psychological report from the Yale Child Study Center).
252. Id. at 1117.
253. Id. at 1121.
254. Id.
255. Id. at 1120–21; *Seattle Sch. Dist.*, 82 F.3d at 1500 (applying Sacramento City Unified Sch. Dist. v. Rachel H. ex rel. Holland, 14 F.3d 1398 (9th Cir. 1994)).
256. *Seattle Sch. Dist.*, 82 F.3d at 1500.
257. Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999) (“[A]n IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” (quoting Fuhrmann ex rel. Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3d Cir. 1993))).
260. Id.
261. Id. at 13.
placement be state certified as described below.\textsuperscript{264} If the educational agency failed to offer a FAPE and the parent’s unilateral placement is appropriate, then most circuits move on to consider the equities. The Fifth and Tenth Circuits are exceptions.

1. \textit{The Fifth Circuit}

The Fifth Circuit ostensibly departs from \textit{Kruelle}, though it is not yet clear to what extent that departure is meaningful. Shortly after \textit{Forest Grove}, the Fifth Circuit set forth a two-prong test to determine whether a unilateral residential placement is appropriate, asking whether (1) the residential placement was essential in order for the disabled child to receive a meaningful educational benefit, and (2) it was primarily oriented toward enabling the child to obtain an education.\textsuperscript{265} Even if the parent survives this inquiry, the court is then to “weed out inappropriate treatments from the appropriate (and therefore reimbursable) ones.”\textsuperscript{266}

Leah Z. was a young woman with multiple mental and developmental disabilities whose chief behavior problem in high school was frequently leaving class during which time she would engage in a variety of maladaptive behaviors.\textsuperscript{267} In the middle of ninth grade, her school district transferred her to another school, but the teacher assigned to that class was on parenting leave and the district hired an uncertified teacher to staff the class who they failed to inform of Leah’s primary issue of fleeing class.\textsuperscript{268} After just two weeks in this classroom, she became so violent at home that her psychiatrist recommended admission to a residential program and the parents promptly placed her in it.\textsuperscript{269} Two months into this placement, the school district held an IEP team meeting at which it refused to offer residential placement and instead offered essentially the same program that had already failed Leah.\textsuperscript{270}

In examining \textit{Kruelle} and its progeny, the Fifth Circuit expressed concern—echoing \textit{North} from thirty years prior—that “[b]y requiring courts to undertake the Solomonic task of determining when a child’s medical, social, and emotional problems are segregable from education, \textit{Kruelle} expands school district liability beyond that required by IDEA.”\textsuperscript{271} The Fifth Circuit found that the IEP was clearly inappropriate.\textsuperscript{272} Applying its new test, the district court’s findings below established that residential placement was essential for Leah to receive educational benefit but the Fifth Circuit remanded for findings on whether the placement was primarily educationally oriented.\textsuperscript{273} In a concurring opinion, Judge Edward Prado did “not interpret our two-part test for the propriety of a residential placement as departing from that of the other circuits that have addressed this issue.”\textsuperscript{274} He noted that while the Fifth Circuit’s second prong is not expressly in the \textit{Kruelle} test, courts applying \textit{Kruelle} “have instead gone on to determine whether the particular placement for which the parents are asking to be reimbursed is itself proper.”\textsuperscript{275}

At least one district court in the Fifth Circuit has followed \textit{Michael Z.’s} dicta regarding the limiting

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\textsuperscript{266} \textit{Id.} at 301.
\textsuperscript{267} \textit{Id.} at 289–90.
\textsuperscript{268} \textit{Id.} at 290.
\textsuperscript{269} \textit{Id.}
\textsuperscript{270} \textit{Id.} at 291.
\textsuperscript{271} \textit{Id.} at 299.
\textsuperscript{272} \textit{Id.} at 295.
\textsuperscript{273} \textit{Id.} at 301.
\textsuperscript{274} \textit{Id.} at 302.
\textsuperscript{275} \textit{Id.} at 303.
}
liability of districts for only academic services. 276 R.C. was a high school student with varying diagnoses, including bipolar disorder, anxiety disorder, ADHD, and Asperger’s syndrome. 277 R.C. was absent for much of the second semester of eleventh grade due to school-based anxiety causing him to fail several classes. 278 He was placed in a residential program for approximately four months, returned home briefly, and then was unilaterally placed at a second residential program after which his parents requested reimbursement. 279 A district court judge felt that R.C.’s parents’ representation that he had failed eleventh grade was “misleading” because of R.C.’s “excessive absence” from school that year. 280 While the court was “concerned about plaintiff’s having to be admitted to residential facilities and psychiatric programs, . . . the core of the IDEA is to provide access to educational opportunities.” 281 Because R.C. was successful when he was able to attend school, the court disregarded his allegation that he was unable to attend school for significant periods of time due to his disability. 282 The court ignored the core argument that R.C.’s anxiety prevented him from accessing educational opportunities.

After conducting an “analysis of the services as a whole,” but before balancing the equities, courts “must then examine each constituent part of the placement to weed out inappropriate treatments from the appropriate (and therefore reimbursable) ones.” 283 Because Michael Z. was remanded and no published opinion has applied this aspect of the test, it is unclear how this weeding out would be applied and how it interacts with the Fifth Circuit’s concern over the difficulty of the “Solomonic task” of disaggregating services that are essential for education from those that are not. It may operate similar to Tatro—looking to the nature of the services themselves (whereas the focus of the first part of the Michael Z. analysis is the purpose of the placement).

2. The Tenth Circuit

The Tenth Circuit in Jefferson recently reviewed the varying approaches to appropriateness described in Section VI and invented its own test. 284 Applying a selective reading of IDEA, the Tenth Circuit analyzes whether (1) the school district provided a FAPE, (2) the residential placement is accredited in its state, (3) the residential placement provided specially designed instruction to meet the unique needs of the child, and (4) any additional services are related services intended to support education. 285 This Jefferson four-prong test takes the place of the first and second prongs of the Burlington-Forest Grove test to determine the appropriateness of a parent’s choice of residential placement in unilateral placement cases. 286

Elizabeth E. was attending a private day school for children with disabilities pursuant to a settlement agreement when she was psychiatrically hospitalized for assessment purposes. 287 The school district had a separate agreement with the private school that the school would refund the school district for days Elizabeth did not attend. 288 But the district withdrew Elizabeth from the private school because she was in...
the hospital.\textsuperscript{289} The school district then asserted that Elizabeth was no longer even a student of the school district—allegedly mooting the settlement agreement.\textsuperscript{290} The parents informed the school district that they were transitioning Elizabeth to a residential program out of state and requested an IEP team meeting to discuss the change.\textsuperscript{291} The school district refused to engage in any meaningful discussion.\textsuperscript{292} The parents filed for due process, requesting that the school district fund a residential program for Elizabeth and at every level—administrative, district court, and court of appeals—the school district only challenged the appropriateness of Elizabeth’s placement, conceding its denial of a FAPE.\textsuperscript{293}

While it appears to have achieved the correct result for Elizabeth E., the Tenth Circuit’s new approach is problematic on at least two levels. First, Jefferson’s second prong goes against two decades of precedent that parents need not meet IDEA’s procedural requirements such as accreditation,\textsuperscript{294} despite the Supreme Court’s recent affirmation that Carter is still good law,\textsuperscript{295} and current regulations confirming that.\textsuperscript{296} Second, Jefferson’s fourth prong may also go awry of Carter inasmuch as it requires parents to exercise a level of expertise in determining what services are educationally necessary. That expertise is supposed to be provided by the school district in the first instance: “[t]his is IDEA’s mandate, and school officials who conform to it need not worry about reimbursement claims.”\textsuperscript{297} When their child is denied a FAPE and parents place him or her in a substantively appropriate placement at their own expense, “it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials.”\textsuperscript{298} Jefferson has not yet been applied within the Tenth Circuit, so it remains to be seen what actual impact this will have on families.\textsuperscript{299}

C. Balancing the Equities

An undercurrent of equity flows through the entire body of reimbursement cases. In 1985, Burlington started from the question of whether parents should be reimbursed when they avoided the IEP process.\textsuperscript{300} In 1993, Carter laid this out even more clearly, noting that under IDEA “[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required.”\textsuperscript{301}

Then in its 1997 reauthorization of IDEA, when Congress codified the authority for reimbursement, it also included equitable considerations.\textsuperscript{302} First, Congress allowed reduction or denial of reimbursement

\begin{itemize}
  \item \textsuperscript{289} Id.
  \item \textsuperscript{290} Id. at 1230–31.
  \item \textsuperscript{291} Id. at 1231.
  \item \textsuperscript{292} See id.
  \item \textsuperscript{293} Id. at 1231–32.
  \item \textsuperscript{294} Compare id. at 1237, with Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter, 510 U.S. 7, 14 (1993) (“Parents’ failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement.”).
  \item \textsuperscript{295} Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247 (2009).
  \item \textsuperscript{296} 34 C.F.R. § 300.148(c) (2014).
  \item \textsuperscript{297} Carter, 510 U.S. at 14.
  \item \textsuperscript{299} Only one case to date cites Jefferson Cnty. Sch. Dist. R-1 for a general proposition. M.S. ex rel. J.S. v. Utah Sch. for the Deaf & Blind, No. 2:13-cv-420 TS, 2014 U.S. Dist. LEXIS 118942, at *8, n.9 (D. Utah Aug. 25, 2014) (quoting Jefferson Cnty. Sch. Dist. R-1, 702 F.3d at 1229) (“IDEA provides federal funding to states to assist with the education of disabled children on the condition that states comply with the Act’s ‘extensive goals and procedures.’”).
  \item \textsuperscript{300} Sch. Comm., 471 U.S. at 372.
  \item \textsuperscript{301} Carter, 510 U.S. at 16.
\end{itemize}
when a parent either (1) failed to state their concerns that the IEP team meeting prior to removal or (2) failed to provide written notice ten business days in advance. In 2009, Forest Grove reiterated that courts may broadly exercise “discretion to reduce the amount of a reimbursement award if the equities so warrant.” Courts exercise this “broad discretion” to achieve different results under similar circumstances.

Failure to present a child for evaluation will generally bar reimbursement. Patricia P. placed her son in a parochial school for his first year of high school. When he was not allowed to return she nominally enrolled him in her local school but within two weeks unilaterally placed him in an out-of-state residential program with no notice. She filed for administrative due process, seeking reimbursement less than six weeks later. Over the next three years, her “sole action evidencing a willingness to avail her son for evaluation . . . was her offering to allow School District staff to travel [from Illinois] to Maine to evaluate” him at the residential program. The Seventh Circuit denied reimbursement on the equities because Patricia P. failed to make a “genuine” effort to give the district a “reasonable opportunity” to evaluate her son. But it cautioned that school districts would be held to the same standard: “this Court will look harshly upon any party’s failure to reasonably cooperate with another’s diligent” attempts to comply with IDEA.

But a New York district court found “no showing that [the parents] acted unreasonably” in a similar case where the parents did not bring their residentially placed child back in state to proffer him for evaluation. The Eschanasys first requested a special education evaluation in the spring of their son’s eleventh grade year, but then unilaterally placed him in a residential program before the district could complete its evaluation. For over three months, the school district requested the parents either to present their son for evaluation or at least provide copies of the evaluations conducted at the residential program; the parents did not. After finding that he was substantively denied a FAPE and that one of the unilateral placements was appropriate, the court found “no showing [that the parents] acted unreasonably under the circumstances” and awarded full reimbursement for the appropriate placement.

Still there are some general guidelines for evaluating equities beyond the importance of presenting the child for evaluation. Though not required, parents should provide written notice or state their concerns at an IEP team meeting prior to unilaterally placing their child per the plain language of IDEA. Parents should act before sex and drugs become a concern—in an appeal of
the remand from *Forest Grove*, the Ninth Circuit used such evidence in the equities phase to deny reimbursement even though the child was denied a FAPE and the placement was appropriate. 321

Parents should be prepared to prove that school district officials have acted unreasonably to overcome the presumption in some circuits that school officials “are properly performing their obligations under IDEA.”322 On the other hand, parents must be mindful of their own subjective reasons for requesting residential placement: in a subsequent appeal in *Forest Grove*, the Ninth Circuit rejected the “contention that, as a matter of law, his parents’ subjective reasons for private school enrollment cannot be a valid equitable consideration.”323

Further, if a district has provided English-speaking, literate parents with a generic statement of parental rights that contains notice of their right to seek reimbursement, the parents cannot rely on the district’s failure to specifically notify them of this right.324

Essentially, if the district is perceived as trying at all to work with the parents, the parents must prove their own good-faith attempt to cooperate.325 While the overwhelming majority of cases seriously considering the equities go at least in part against the parents, courts do occasionally find against a school district, even where the parent is arguably partially to blame.326

**VIII. COMMONALITIES AMONG THE CIRCUIT TESTS**

Of course, whenever possible, advocacy for youth with mental illness should start well before the child needs a residential program. In most of the residential placement cases in which parents won, the child’s mental illness had been unaddressed or underaddressed for years. The author’s own experience is that early and intensive interventions can often prevent the need for residential placement. But attorneys do not always meet our clients in time to engage in early advocacy.

When read as a whole, the circuits—except the Tenth Circuit—apply similar analyses to residential placement cases. Though the wording changes, the majority look to whether the purpose of the placement is educational—necessary, primarily educational, insegregably educational, essential for educational purposes, primarily oriented toward enabling education. The careful attorney will be mindful, however, to articulate the nuanced differences when citing cross circuit authority to link facts to their home circuit’s test.

For the most part cases requesting residential placement for a FAPE are reliable in unilateral placement cases and vice versa. In all but the Tenth Circuit, the analysis for appropriateness in FAPE cases is identical to the analysis of appropriateness for unilateral placement cases under the second prong of *Forest Grove*.

The key challenge in residential placement cases is establishing the ongoing link between a child’s mental illness and the child’s inability to access an education, especially when the symptoms prevent them from consistently attending school. IDEA was established to give all children with disabilities access to an education. Congress sought to ensure access to those children whose disabilities were so severe that they

321. See id. at 1241.
323. *Forest Grove Sch. Dist.*, 638 F.3d at 1238.
325. Patricia P. ex rel. Jacob P. v. Bd. of Educ., 203 F.3d 462, 469 (7th Cir. 2000); see also *Ashland*, 587 F.3d at 1186.
326. E.g., *Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227, 1242 (10th Cir. 2012) (holding the school district’s failure to notify parents of its intent to evaluate excused the parents’ failure to present the child for evaluation).
were unable or not allowed to attend school.

In most circuits, children with developmental disabilities should still have access to residential placements when necessary. But as the circuits move further away from IDEA’s combined focus on academic and functional performance and increasingly impose their own ideas of what education is, it has become more difficult to obtain residential placement for youth with mental illness.
MINDFULNESS OF ATTORNEYS FOR CHILDREN WHEN ASSESSING PARENTAL CAPACITY

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Cases in which Attorneys for Children (AFCs) must evaluate parental capacity are some of the most complex cases because the stress of litigation can overshadow parental strengths and exacerbate parental weaknesses. Cases where parental capacity is at issue often include allegations that a parent’s substance abuse, mental illness, intellectual disabilities, physical disabilities and/or terminal illness impairs a parent’s ability to properly care for the child. In all cases, the AFC must assess the client’s position and counsel the client on the repercussions of each option. In cases where parental capacity is at issue, and especially if the client’s position is a desire to stay with the parent whose capacity is being challenged, then the AFC must also assess what resources are in-place and/or available to make the child’s position a viable option. What is parental capacity? Generally, parental capacity is the ability of the parent to put the needs of the child in perspective and that often means before the needs of the parents. For even the healthiest and wealthiest of parents meeting the needs of the child requires support such as child care,

1 The lawyer’s duties as counselor and advisor include: “[d]eveloping a thorough knowledge of the child’s circumstances and needs,” “[i]nforming the child of the relevant facts and applicable laws,” “[e]xplaining the practical effects of taking various positions, which may include the impact of such decisions on the child and other family members or on future legal proceedings,” “[e]xpressing an opinion concerning the likelihood that the court will accept particular arguments,” “[p]roviding an assessment of the case and the best position for the child to take, and the reasons for such assessment,” and “[c]ounseling against or in favor of pursuing a particular position, and emphasizing the entire spectrum of consequences that might result from assertion of that position.” Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings § 42-2(3-6). See also, Report of the Working Group on the Best Interests of the Child and the Role of the Attorney, 6 Nev. L.J. 682, 684-685 (Spring 2006) (lawyer should “let the child talk” and “listen to the child,” begin with the child’s agenda, gather information from collateral sources, explain the attorney-client relationship, encourage the child to speak with others, explain the court process, help child understand that she has right to have wishes advocated for without attribution, and help child understand the different pressures operating on her); Robert D. Fleischner and Dara L. Schur, Representing Clients Who Have or May Have “Diminished Capacity”: Ethics Issues, Clearinghouse Review Journal of Poverty Law and Policy (September-October 2007), at 356 (“Clients often direct their attorneys to take positions that may undermine their long-term goals. When getting the client’s input on a strategic decision in a case, ask the client more than once and in different ways. For example, perhaps your client was experiencing disability-related difficulties when you first asked about a particular issue. Asking again at a different time may yield a more informed decision. Trying to get to know the client and gaining an understanding of the client’s long-term goals will help you in counseling the client about how to proceed in the short term”).
housekeeping or passive income. For parents living in poverty, which can be caused by or lead to mental or physical illness, less traditional supports such as therapy, parenting classes or structural accommodations may be necessary. Parental capacity assessments must be accessible to parents who utilize available tools to engage proactively to address the child’s needs and not only to parents who can demonstrate independent capacity.

The Children’s Law Center of New York (CLC) is unique in that it is one of the few organizations in the country that specializes in providing a strong and effective voice to children in custody/visitation, guardianship, domestic violence and related child protective cases in New York City Family Courts and Integrated Domestic Violence Parts in Supreme Courts. CLC delivers high quality representation, providing children with respectful, supportive, informed and passionate advocates who give a voice to their unique needs not only in the courtroom, but through mediation and negotiation as well. As AFCs, it is our role and responsibility to effectively represent the child not only in the courtroom, but also to employ strategies to reach a resolution which provides children the time and connection free from the family conflict, that they generally seek from both of their parents that hopefully allows them to move forward in their childhood. However, most parents that seek the redress of the family court are at a point where coming to a resolution is not as simple as it sounds. Law school does not train attorneys to address the psychological, medical, developmental, and social dynamics involving families. Attorneys are taught to think analytically and critically; we are not taught how to be sensitive to the emotions and interpersonal issues of families. Yet, AFCs must assess and address these issues every day working in a specialty which requires delving into the innermost aspects of families and their relationships, and participating in legal proceedings that impact the most intimate aspects of an individual’s life. Not surprisingly, if they are aware of weaknesses or deficiencies in their parenting, many individuals are reluctant to share details about those challenges, especially when they know that they may be used in litigation.

To give the court a child-centric perspective on which party is best able to fill the specific needs of the particular child is the crucial role of the AFC. This entails gathering information about all of the placement or living arrangement options, actively listening to the child and adroitly ensuring that information gets before the judge through litigation or in a settlement proposal. In assessing parental capacity, it is critical to be mindful of the lens that we bring to the case, which generally includes our own experiences and ideas about what it means to be a good parent. In a custody or visitation case where parental capacity is at issue, these ideals can become biases that prejudice social workers, attorneys and judges to prefer one potential caregiver over another and may distract from an inquiry into the child’s best interest. Inevitably, in litigation, one party will be chosen over the other, but for the court to accurately decide the best interest of the child, the AFC must be able to look past opinions of ideal parenting to represent the explicit wishes of the child. In some cases, this might mean favoring custody or increased visitation to a parent who is abusing drugs, mentally ill, developmentally delayed, physically disabled and/or fighting a life threatening illness.

Prejudices often manifest as a logical instinct that a parent who has more will provide more for the child. That may mean the home with the most resources, the home with the most luxuries or even the home that is most likely to be available to the family long-term. When parental capacity is at issue, a parent with physical challenges, a lower IQ, and/or lower likelihood of survival is at a disadvantage for proving that their home can offer the child “more.” However, from the child’s perspective, a home and a parent with less tangible accommodations, but more intangible benefits might be the more comforting and supportive home. Assuming that the home is not a danger to the child’s health or well-being, cultural preferences should yield to the preferences of the child.

While things like being poor or homeless will obviously make some tasks more difficult, it is critical that the child be heard and the court be given the opportunity to learn about how the child experiences the
parent in order to identify and support the parent’s strengths. The child may be so bonded to a parent that the comfort and care they receive from that parent cannot be matched by what the more impressive parent has to offer, whether tangible or not.

American culture idealizes the able-bodied, neuro-typical, educated and sober parents. Prejudices assume that the parent closer to our ideal is what’s best for the child. These prejudices tend to be based on generalized notions that people who strive for - and especially those who achieve - American values, are happy and well-adjusted, as well as willing and able to give more to their children. However, where the best interest of the child is the determining standard, the quality of life the parent can offer the child should be measured by the child’s preferences and not merely by quantitative data such as income, IQ or life-expectancy.

A caregiver who is more educated might be more supportive of the child’s education and more appealing to attorneys and judges, but a parent need not be educated or even literate to engage with a child and encourage the child to work hard and seek out resources. The assumption is that an educated parent is better equipped to educate their children, but children need more than access to information to succeed because merely having access to the information without motivation or encouragement does not guarantee that the child will capitalize on the opportunity. Therefore, it is unclear that a more educated parent will encourage education more than an uneducated parent.

A parent who is suffering from untreated depression, anxiety or chronic pain may be emotionally unavailable. A parent who is treating those ailments with prescription drugs may be considered to demonstrate a commitment to their health and be perceived as having greater capacity to parent, even if they are addicted to painkillers or other prescription medication. While often a diagnosis of mental illness cultivates the same prejudices as drug use, the assumption is that a parent who uses illicit drugs will not be available physically and/or mentally to provide for the safety of the child. However, consideration must be given to what the parent does offer the child and the child’s desires should not be overshadowed by the AFC’s generalized fears about what might happen. Inquiry can be made to ensure that drugs are not kept or used around the child, but evidence of illicit drug use should not, in and of itself, disqualify an otherwise fit parent from gaining custody or visitation.

Physical disabilities often become the core issue in the litigation between parents. In a recent case, the father asserted that the mother should be disqualified from primary custody of the child by her illness, just as, in his view, a blind or deaf person should not be granted custody of his or her child, solely as a result of his or her disability. This, however, is not the law in New York.

To the contrary, Janus v. Janus is clear that “a handicapping condition…alone cannot be grounds to deny custody to an otherwise qualified parent.” Thus, the court must focus on a parent’s “actual and potential physical capabilities, his adaptation to his disability, his ability to supervise the children and whether his disability impaired his ability to interact with those persons providing education and medical care to them.” Accordingly, the court concluded that the father’s paraplegic condition was not grounds for granting the mother custody because being wheelchair-bound did not have an “adverse impact upon his parenting skills.”

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3 Id.
4 Id.
5 Id. See also Gollogly v. Thompson, 70 A.D.3d 1373 (4th Dep’t 2010) (petition to modify custody order dismissed where “father failed to establish that the child was affected by respondent mother’s mental health issues”); Doe v. Roe, 139 Misc. 2d 209, 220 (Sup. Ct. New York County 1988) (“It is well settled that the fact of a handicapping condition alone cannot deny custody to an otherwise qualified parent…The question which must be answered is the effect, if any, of the handicapping condition on the child”); Hatz v. Hatz, 116 Misc. 2d 490, 492-493.
The question which must be answered is what effect, if any, the condition has on the child. Accordingly, an AFC must look beyond which party is closer to an “ideal” parent and instead, listen to what the child wants, needs and receives from each option. By giving a voice to the child, the court is better able to understand the complex dynamics within each home on a day to day basis, a task that becomes rather difficult once the parties are engaged in the high-stress situation of adversarial litigation. The child can better recount how things were leading up to the case and can better report how things have changed over the course of an investigation and trial.

A parent with a terminal illness almost always causes emotional and financial strain on a family. However, the imminence of death is insufficient to render a parent unfit. In many cases, children, understandably, want to spend as much time as possible with a dying parent. Though time with the parent may be largely spent caring for the parent, supports can be put into place that would alleviate the child of caregiving responsibilities but still facilitate a relationship between parent and child.

The best interest of the child should not be determined by what the most ideal option is, but rather, which of the child’s preferences is most aligned with their safety. So long as a parent’s addiction, disability or illness does not endanger the child, the child should be given a voice in court to advocate for placement with their preferred parent. The AFC must listen to what the client says and research the options well enough to see past prejudices about what a parent in certain situations would be able to offer and instead to get an accurate understanding of what each parent actually offers and what the child values most about each option. It is important that in custody and visitation cases where parental capacity is at issue, that the AFC identify supports that a less-than-ideal parent has in place as well as what supplements can improve the living situation for the child. By presenting a holistic view of the child’s choice, the court is better able to make a decision that is truly in the best interest of the child, and not just the option that is closest to the ideals of outsiders.

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(Fam. Ct. Rensselaer County 1982) (The court must consider “the person’s actual and potential physical capabilities, learn how he or she has adapted to the disability and manages [his/her] problems, consider how the other members of the household have adjusted thereto, and take into account the special contributions the person may make to the family despite—or even because of the disability”). Cf. Leo v. Leo, 39 A.D.3d 899, 901 (3d Dep't 2007) (“[T]here is a real concern about the mother’s ability to manage her mental health care. Moreover, there was considerable proof revealing the significant emotional trauma caused to the child by these episodes”); see, Cobane v. Cobane, 57 A.D.3d 1320, 1322 (3d Dep't 2008) (cited at AB22). In Cobane, the court found no error in awarding custody to the father, who had a seizure disorder, and stated that, “[a]lthough the father had a seizure disorder, which he had not always kept under control, his testimony—which was accepted by the court—established that he was currently seeking medical treatment, regularly took his medication, ceased driving and had a plan in place in case he had a seizure.”
“I remember going to court...I felt like I was a piece of meat and the sharks were swimming around me and taking little pieces out of me. And then I remember we had a break and one of the attorneys said, “I don’t know why you’re taking this personally.”

This quote from a social worker exemplifies what is often at the root of interpersonal conflicts between social workers and lawyers in the child welfare system. In their 2008 article *Legal Ethics and High Child Welfare Worker Turnover: An Unexplored Connection*, Frank Vandervort and his colleagues at the University of Michigan argue that a contributing cause of high social worker turnover in juvenile court is the differences in ethical codes of social workers and lawyers. Defining the client, duties of confidentiality, role identity, and approach and overall framing of interventions are four examples of differences that can lead to misunderstandings, increase stress, and impede the administration of justice even when both the lawyer and the social worker are operating in a civil and ethical manner.

Ethical codes and professional standards differ between lawyers and social workers on issues as fundamental as what constitutes a “client”. Social workers have a broad definition of “client” that can simultaneously include the child, family, and society at large. Lawyers, on the other hand, have a very narrowly defined client: typically a single person or entity. A lawyers’ duty of loyalty to a single client continues even after the death of that client. Likewise, the duties and standards differ as to confidences. Social workers are expected to fully disclose all facts in a case, particularly those that impact the safety of children and other family members. A “good” social worker, is generally seen as one who brings all relevant information to the table. A social worker that “hides the ball” is often seen as being detrimental to the case. In contrast, lawyers are held to strict notions of confidence – prohibiting them at times from disclosing material facts that would have significant implications in a case. Lawyers owe a strict duty to “maintain client secrets” that allow for few exceptions. Although there are exceptions to this, most courts draw these exceptions very narrowly and only in the most extreme situations is disclosure of any kind permitted. Role identity also differs as to whether and if one ought to act as an advocate versus collaborator. Although all social workers must act as advocates (at times forcefully), and all attorneys understand that collaboration is part of effective advocacy, the primary duty and hence starting place of each professional is different. Social workers generally approach cases as collaborators. They typically have a family systems perspective where greater impact is placed on how individual actions impact all parts of the system; hence they place a greater premium on collaboration. Lawyers, on the other hand, are first and foremost advocates for their clients. This difference in perspective is also reflected in how they approach a case and frame an intervention. As a whole, social workers are typically more concerned with...
optimizing outcomes; their goal is to maximize the entire system. Social workers are trained to focus on individual and family systems and objectives – the operative question being “how can we work together to create an optimal outcome for everyone involved,” and they set objectives in the case accordingly. In contrast, because our legal system is predicated on individual rights, lawyers are trained to focus on their clients’ enforceable rights. Thus, lawyers approach the situation by identifying and advising with regard to what an individual client is entitled to as a matter of law.

These ethical and professional differences often times cause friction especially when we forget the constraints imposed upon us by our individual roles in the system. Given that professionally our ethical codes compel us to view even common situations from different lenses, are we simply doomed to unhappiness and high worker turnover? Probably not, but the issues are not likely to get better unless they are given attention. Some suggestions for improvement include understanding how individual roles might drive behavior, “working on” the system,9 encouraging the court systems we work in to become “learning systems”, and promoting a more civil work environment.

Understanding the roles and constraints of others in your system may diffuse tensions by clarifying expectations and explaining some behavior. For example, the social worker quoted at the beginning of this article might have thought that the lawyer seemed nice until they got into court. But with the greater understanding that the lawyer’s questions stemmed from his or her duty to advocate for the client, that social worker might not have been upset or confused by what happened in court. Likewise, a lawyer who can appreciate the constraints and varied objectives of the social worker or supervisor, is more inclined to exercise patience and creativity in pursuing their client’s cause and can understand that some outcomes are not the result of the social worker’s personal preferences or even professional judgment so much as a product of the constraints and duties they face on a daily basis. Another benefit of understanding roles and constraints of the ethical frameworks of the people with whom we work is that such an understanding may help to differentiate the person from the role and hence improve working relationships. Understanding that that sometimes social workers would like to pursue remedies not consistent with policy, but have to do so to avoid risking their livelihood, and understanding that lawyers must advocate for their client’s wishes in all but the most extreme circumstances may help to explain individual behaviors. In short, when we are in individual roles in a case, we may be significantly constrained as to what end we are obligated to pursue. Gaining a clear understanding of these roles and sharing expertise within your group is another way to help promote a more civil and effective workplace.

When we “work in the system”, such as when we are working on a specific case, we are typically more limited in our options. In essence, we must “play the part” we are expected to play in the large system, and our options are often more constrained. For example parents’ attorneys are ethically constrained to advocate for their clients’ stated interest, social workers and agency attorneys are compelled to take positions required by policy, and judicial officers are, in many cases, as much constrained by their authority as they are empowered by it. By comparison, if we gather together to “work on the system” such as developing and implementing system improvement efforts, operations meetings, etc., we have the option for more frank conversations, greater creativity, and a loosening of the role we must play. To be clear, we cannot abandon our ethical obligations, but often times when issues are addressed on a systemic level, we open up degrees of freedom to act in individual cases and support structures that promote better decision making. But even if we take the time to “work on the system,” we cannot escape working “in the system” as well. Even with the best systems in place, there will be times when behavior in the system is a challenge.

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8 See Preamble at note 3.
9 The distinction of working “in” a system vs. working “on” a system was first introduced to author Jaasko-Fisher by Eric Allenbaugh of Allenbaugh and Associates. See http://www.allenbaugh.com/
In addition to increasing our understanding roles and ethical constraints of others in the system, and to developing strategies to “work on” the system, we can increase effectiveness and create better outcomes by creating learning systems. A learning system entails creating regular opportunities to learn together. It is critical that this learning happen together rather than in individual silos. Learning as a core group not only ensures everyone is operating with the same information, but also it builds community and gives us an opportunity to understand how others view the information presented. Such learning efforts provide a chance to dispel myths, problem solve, and improve implementation efforts that everyone can support. Even in cases where one group or another cannot support a particular program or action, issues related to the conflict can be more efficiently and justly resolved when everyone is presented with the same information and has an opportunity for open and honest dialogue to better understand why a particular entity is supporting a given position. In the end, it is an opportunity to promote greater understanding which promotes a more civil workplace.

Finally, promoting a culture of civility in our work can help us to find greater satisfaction with our work, help us better serve our clients, and help us find solutions that are in the best interest of justice. Our jobs as advocates in the child welfare system are hard enough as is – most people in society do not want to even read about many of the issues we deal with, let alone be immersed in them on a daily basis – so BE NICE TO EACH OTHER! But civility goes beyond simply being nice. As one scholar addressing whether politeness was a virtue noted: “‘Politeness is a poor virtue, if it is actuated only by fear of offending good taste, whereas it should be the outward manifestation of a sympathetic regard for the feelings of others.’ Thus Politeness is only a virtue if it is accompanied with sincerity.” But not only is civility a matter of sincerity, it is a practiced skill. It can be taught, and its benefits can be realized both individually and in a system. Civility is good for business, personal health, and the pursuit of justice. A civil process promotes better outcomes for children and families, and increases the likelihood that you will remain a productive professional over the long term.

What do we mean by “civility”?

Civility, defined as acting with respect for self and others, enhances the practice of law, benefits the parties involved in the legal system, and supports the pursuit of justice. Justice Sandra Day O’Connor states that “[p]ersonal relationships lie at the heart” of lawyers’ work and this “human dimension remains constant”....[C]ivility can only enhance the effectiveness of our justice system, improve the public’s perception of lawyers, and increase lawyers’ professional satisfaction.” Justice Steven Gonzalez makes an important distinction between what he calls “true civility” and “false civility.” He explains that there cannot be “one rigid definition of civility” because true civility depends on “the context, cultural factors, and on so many other things.” Apparent politeness alone, for example, using polite words with a patronizing or insincere tone, does not necessarily indicate respect. “It is the substance that brings dignity and true civility to our courts and to our system.” True civility, Justice Gonzalez argues, is not only fair to all parties involved and in the interests of justice, but also has professional benefits for the advocate: it enhances a lawyer’s reputation “as a true officer of the court.”

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10 For more about becoming a “learning system” see Peter M. Senge, The Fifth Discipline: The art & practice of the learning organization (2006).
13 Id.
14 Id. at 387
16 Id. at 26
17 Id.
18 Id.
19 Id. at 28
What is the price we pay for incivility?

Incivility is not simply a matter of failing to be nice. Defined by one leading expert as “mild aggressive behaviors that are characteristically disrespectful or rude” uncivil behavior can include things like rudeness or lack of courtesy, interrupting conversations, not returning phone calls or emails in a timely manner, taking credit for others’ efforts, showing up late or leaving meetings early, excluding others from a network or team, using a demeaning or condescending tone texting or emailing during a meeting or conversation, and showing little interest in another’s opinion. Incivility in its various forms cost all of us in terms of economics, health and well being, and ultimately in the legal profession incivility hampers our ability to promote justice.

From a business perspective, incivility costs money. In terms of work performance, those who are the target of uncivil behavior experience decreased effectiveness, helpfulness, reputation, motivation, creativity, and overall job performance. Studies suggest that targets of incivility reduce their time at work, spend less time doing their work when there, and have a lowered commitment to their organizations. In a survey conducted by Christine Porath and associates, employees were asked how they responded when they were the target of incivility in the workplace. They reported their response to workplace incivility as follows:

- 48% intentionally decreased their work effort.
- 47% intentionally decreased the time spent at work.
- 38% intentionally decreased the quality of their work.
- 80% lost work time worrying about the incident.
- 63% lost work time avoiding the offender.
- 66% said that their performance declined.
- 78% said that their commitment to the organization declined.
- 12% said that they left their job because of the uncivil treatment.
- 25% admitted to taking their frustration out on customers.

Targets of incivility also see direct impact on their work performance. Studies demonstrate impact on performance even for employees who felt targeted by one time, low intensity acts of incivility. Based on nearly a decade of research on the issue, Porath and Pearson report that of the employees identified as targets of incivility, 50% reported a reduction in creative ideas, 61% performed lower on verbal tasks and 20% had a reduction in recall.

Incivility not only negatively impacts the target, but also it has a negative impact on witnesses of the incivility. For example, exposure to incivility reduces volunteerism, leads to dysfunctional ideation, and a reduction in creativity and productivity. A study examining the degree to which observing a minor

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23 Id.
24 Id.
Incivility impacted student’s willingness to be helpful was conducted as follows: Students were given the opportunity to help norm a personality inventory for extra credit in a college psychology class. They were told that to receive the extra credit, they merely needed to show up for the test at the appointed time and complete the inventory. They were cautioned that the one thing they could not do was be late for the test. If any student appeared late for the test they would not be permitted to sit for the test and would not get extra credit. In the control group, all students appeared on time for the test, and upon exit, the test proctor “accidentally” knocked some books off the proctor table – 90% of the students stopped to help the proctor by picking up books. In the test group, an experiment confederate arrived late. The proctor advised the late student he could not take the test but added “What is it with you undergrads here at XXX [university name]? You always arrive late; you're not professional. I conducted this type of study at other universities, and I can tell you that students here at XXX leave a lot to be desired as participants.” Again, upon leaving the room the proctor “accidentally” knocked books of the table, but this time only 38% of the student stopped to help.

Similarly, in a 2007 study conducted by Porath and Ezra, participants were asked to unscramble the anagram “remdue”. The correct answer to the puzzle is “demure”, however, some participants erroneously unscrambled the puzzle to “murder”. The issue with this error is that there simply are not the correct letters to spell murder (muder requires 2 “r”s as opposed to 2 “e”s). Participants who had been exposed to a minor incivility preceding administration of the test were 7 times more likely to make this error. This test is one of many that demonstrate how exposure to incivility may not only impair cognitive functioning, but also may create an inclination to less social behavior.

The studies addressing the impact of observing acts of incivility are of particular relevance in jurisdictions with open courtrooms where parents, social workers, and perhaps even youth observe the court proceedings. Even if incivilities are not directed at that person, there is an impact on all of the individuals observing the bad behavior. In short, the capacity of the system to efficiently distribute justice is diminished and the costs for the poor results we get are inflated by the bad behavior.

The price we pay for incivility includes inefficiency, impaired cognitive functioning, and incivility costs money. The law firm O’Melveny & Myers estimated that 1 partner’s incivility cost the firm over $2.8 million. Over the course of a few years, the firm lost 6 attorneys and 2 paralegals as a result of the partner’s actions. Incivility is tolerated at times with the notion that the person behaving badly is “the rainmaker.” However, when we balance the revenue brought in by the uncivil rainmaker against that which they cost, it seems unlikely that such an individual is a net benefit to the firm.

Uncivil behavior is often tolerated and even justified in other ways within the legal profession as well. We see it justified in the litigation context in particularly with a logic akin to the idea that “litigation is war” or the idea that working in a litigation environment requires the mental toughness to tolerate incivility and not be so “thin skinned.” But a closer look at the profession seems to suggest that this approach is a poor one for both lawyers and their clients. Lawyers as a class, it turns out, are not as tough and resilient as they might think. In reality, as a profession, lawyers are more susceptible to mental health and addiction issues.

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26 Id.
27 Id.
28 Id.
29 Id.
30 Id.
31 Id.
32 Id.
33 O’Connor supra note 12 at 386.
As a profession, lawyers are at heightened risk for mental health and addiction issues. When compared to general population, lawyers suffer increased levels of depression, obsessive-compulsive disorders, anxiety, and alcohol problems. One study notes that as profession, lawyers are 3.6 times more likely to be depressed when compared to 104 other occupational groups. Another study documents that lawyers have a prevalence rate of obsessive compulsive disorder nearly ten times that of the general population and suffer from anxiety at four times the rate of the general populace. Perhaps most disturbing is a study conducted by Benjamin, Sales, and Beck, which reported that 71% of female lawyers in the study reported having issues with alcohol use whereas the prevalence rate in the general population is only 8%. Likewise, male lawyers reported at 67% compared to only 20% of males in the general population. But why does this occur? Does the profession simply attract those prone to such conditions or is some other dynamic at play?

Although there are a number of possible explanations for the state of lawyers as a profession, leading theories suggest that it is due to the acculturation process of law school combined with continuing practice conditions. Typically, law students as a whole are actually healthier than the general population. However, law schools often promote an environment where students are given high workloads with inadequate time to complete the work, isolated from friends, family, and other psychological resources, and saddled with high student debt and diminishing chances to make an adequate return on their law school investment. Similar environments are found post graduation in the halls of large corporate firms and small “kitchen table” solo practices. Our compromised position as a profession is exasperated by incivility. Perhaps equally important is the impact that such conditions have on our ability to render our ultimate “product” – justice.

Incivility also compromises perceptions of justice. Lawyers and non-lawyers see justice differently. When asked how they knew whether justice was served in a case, the majority of lawyers said justice is served if they believe the outcome of the case was fair; whereas the majority of non-lawyers consider justice being served where the procedure was fair. In general, non-lawyer participants in the legal system want to give their views, tell their stories, and share in the discourse of the case. Although they might not be pleased with the outcome when they lose, as long as they have been given the opportunity to provide their voice, they feel the system was fair and justice was served. Thus, how we administer justice is of great importance to societal views of whether justice is served and ultimately whether the public feels the profession as a whole is serving its role in society. Although outcomes are important, when it comes to notions of justice, lawyers may seem to put too much emphasis on what is done in a case and not enough emphasis on how the results were reached. For example, in a study by Sheet and Braver of gender differences in satisfaction with divorce settlements, women were more satisfied with settlements because through mediation they perceived that they had control over the process.

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34 Id.

35 Id.

36 Id.

37 Id.


Another study conducted in Red Hook, New York, found that 86% of the defendants thought the court process was fair, “regardless of race, socioeconomic status or disposition of the case.” The most significant factor in the perception of fairness was that the judge “treated them with respect, helpfulness, and objectivity.” The next significant factor was that court actors (judge, attorneys, court officers) treated them with respect and communicated clearly. It was noted that the court and attorneys at Red Hook “clearly explained the proceedings, answered questions, and listened to what the defendants had to say”.

Given that the public views justice not only in terms of outcomes, but more importantly focuses on the process by which the outcome is obtained, civility can play a key role in perceptions of justice and legitimization of the judicial process. As officers of the court, lawyers are the public face and stewards of the justice system. Specifically, a more civil legal system helps to keep the focus on the merits of the case, enhances access, promotes faith in the system, and ultimately leads to better, more just outcomes. One way to promote a more civil legal system is to engender a culture that focuses on consciousness, creativity, and community.

**Consciousness**

Consciousness is the first pillar of civility. It involves being aware of both yourself and others. Consciousness is central to the development of mindfulness, facilitates our ability to practice discernment, promotes values congruence as a measure of your intentions against your actions, a concept key to a happy, healthy professional life. Being conscious develops our emotional intelligence because it increases our attention on our interactions with others and enhances awareness of our impact on them. All of which enables us to respond rather than react to situations. Thus consciousness is key to having a centered presence that allows you to be proactive as opposed to reactive in your interactions with others.

Being conscious of yourself and understanding your own personal feelings and triggers can be key to improving relationships with clients, opposing parties, and the court in general. Perhaps the simplest way to think of “triggers” is to consider how you react when *that person* calls or someone uses *that word or phrase* that you just can’t stand. Often these triggers put us in a position of reacting to a situation rather than responding to the issue. The difference between reacting and responding is sometimes subtle, but important. It is similar to when a doctor gives you a prescription for a health concern – you want your body to respond to the medication in a positive way rather than react negatively to the medication, such as when you experience the negative consequences of a drug allergy. Being conscious of your own feelings and triggers gives you the opportunity to pause and choose to respond with an appropriate tool rather than simply reacting in a way you might later regret.

Making conscious decisions however is not always as easy as it might sound. In addition to having to cope with factors such as time pressure, fatigue, and stress, we are also unconsciously impacted in a number of ways by psychological phenomena such as implicit bias, priming, and vicarious trauma. As human beings, we are all subject to bias, both conscious and implicit. Many of these biases serve us well and are simply a cognitive phenomenon that allows us to efficiently navigate our day-to-day world. But unexamined bias also leads us to make mistakes, misunderstand our options, and pre-judge people and events in a way that negatively impacts our practice and in some cases our client’s choices. One of the simplest and best tools for combating implicit bias is simply slowing down our decision making process and making our decision making process more explicit to ourselves and more transparent to others. Likewise, the phenomenon of priming causes us to be led to conclusion about what we believe we see, hear, and ultimately know.

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42 Id.
Being conscious of how others may be experiencing the situation is critical to civil, effective advocacy. Oftentimes, being curious about how another is experiencing our interaction with them leads to better, more civil interactions as does taking the time to understand others’ intentions and needs. This consciousness of the other opens options for resolutions, creates mutual respect and trust as part of the process, and allows attorneys to better see mutually beneficial resolutions for themselves and their clients.

Ultimately, enhanced consciousness makes us better lawyers by allowing us to better understand the issues our clients bring more clearly from multiple perspectives. Greater consciousness also allows us to better understand the human, personal, and emotional experience of the client. In times of crisis, it allows the lawyer to sit calmly and centered amidst the client’s crisis, being both fully engaged and at the same time separate and distinct from the client so as to render advice that is both emotionally sensitive to the situation and at the same time professionally and legally sound.

Creativity

The second pillar of civility is creativity. Civil and effective advocacy requires all parties to see the situation from the perspectives of all involved; to convey the human, personal, and emotional experience of the client; and to anticipate others’ needs, issues, and challenges. Creative processes include making art or music, dancing, writing, gardening, experimenting, taking a different route, or doing anything that enables us to suspend or quiet the cognitive control centers of our brains. In two studies using magnetic imagining of jazz musicians and rappers, researchers compared the brain images of when the subjects played a simple melody or rapped lyrics from pre-set music to the brain images of when they improvised. In both studies, researchers found that when engaged in a creative process of improvisation, the jazz musicians and rappers showed decreased activity in the executive functioning and inhibition parts of the brain and increased activity in the sensorimotor and language areas, as well as those areas that involve introspective thinking. When we can suspend our cognitive control centers, such as when we daydream, we activate the areas of the brain that house unconscious forms of information processing. This allows us to expand beyond our habits of thinking about and ways of interpreting stimuli. Engaging in creative processes promotes civil advocacy because it supports consciousness and self-awareness, fosters being in a state of flow, expands perspective, and supports effective problem solving.

In a study measuring creative responses to the question of what can you do with a brick, then comparing the brain images of those subjects, researchers found that the subjects with a higher level of creative responses had activated parts of the brain identified with consciousness and self-awareness.

An essential state of consciousness to support creativity is flow. Mihaly Csikszentmihalyi defines flow as “a state in which people are so involved in an activity that nothing else seems to matter; the experience is so enjoyable that people will continue to do it even at great cost, for the sheer sake of doing it.” In this state, people feel a “strong, alert, in effortless control, unselfconscious, and at the peak of their abilities.” Flow states are not associated with subjective feelings, instead “the essence of flow is the removal of the interference of the thinking mind…Absorption in a task indicates the absence of the self, and a merging of your awareness into the activity you are engaged in.”

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45 Id.
46 Id.
47 Csikszentmihalyi, Flow: The Psychology of Optimal Experience, 1990, p. 4
48 http://www.pursuit-of-happiness.org/history-of-happiness/mihaly-csikszentmihalyi/
49 Id.
The state of flow, in and of itself, promotes civility because there is a connection between flow and conscientiousness. In a 2012 study, researchers found that “those who were more dutiful and persevering also tended to report higher levels of flow in their daily lives. This association is probably due to the fact that conscientiousness is positively related to other variables that are also associated with flow, such as social problem solving, life satisfaction, subjective happiness, positive affect and intrinsic motivation. Conscientious individuals are also more likely to spend the time practicing to master challenging tasks, conditions which make flow more likely.”

Creativity supports civility also by expanding perspectives. Creative process involves looking beyond our first impression of stimuli to discover other ways of seeing and interpreting. Think about a kaleidoscope. Contained in the cylinder are the same shapes, colors, and forms, yet each turning of the cylinder reveals a different pattern. Just recognizing that there is more than one pattern is significant in the process of expanding perspectives. Over time, we can develop not only this awareness, but we can create a habit of looking for yet another pattern. This allows us to address our own biases and assumptions, become more curious about perspectives of others, and see more possibilities.

Finally, because creativity facilitates consciousness and expands our perspectives, it supports creative problem solving. By suspending the cognitive regions of the brain and activating the unconscious forms of information processing regions, we can widen our inquiry to more holistically determine the problem and find more solutions. For example, think of the toy for toddlers where there is a ball with different holes cut into shapes such as a star, circle, square, oval, and there are blocks in those shapes. The toddler puts the right shaped block into the right shape into the ball. Lawyers are trained to look for the legally significant facts that fit into the shape of a specific element of statute. But human problems don’t come in neat shapes. The facts are messy and overlap and there are some facts that are left on the floor because there is no element of a statute that matches them. Yet, those facts might be equally or more important to the client or situation, or they might contain the key to a resolution. Through creative process we can suspend our cognitive regions and open our minds to a broader range of potentialities. In so doing, we are more likely to act civilly, find resolutions that best serve the parties, and support the interests of justice.

Community

The third pillar of civility is community. As humans we live a shared inter-dependent existence. When he discusses his work with the Truth and Reconciliation Commission, Archbishop Desmond Tutu often speaks of Ubuntu, a South African humanist philosophy. He explains that we exist only in relation to other. He elaborates that our humanity is inextricably tied to each other, that we need to see ourselves in others, and that each of us needs the other to be the best he or she can be because that is the only way each of us can be the best we can be. When we operate with this awareness, we strive to understand others in order to build and strengthen our community. Doing so improves our health and increases positive social skills. All of which leads to greater civility which can enhance the experience and outcome for our clients.

Working to serve and strengthen our community is a fundamental value. Civic Humanism, rooted in the 14th and 15th centuries, is a founding value of our country, and is a core aspect of civility. Put in its simplest form, Civic Humanism posits that humans are free, autonomous beings, able to make choices for themselves, and with this freedom comes a con-commitment duty to serve the common good for the collective. Being of service for the common good fosters civility because it promotes physical and psychological well-being and builds positive social skills. Research shows that serving others decreases stress hormones and that even witnessing helping behavior can boost the immune systems of college

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students. According to the Dalai Lama, long term happiness comes from being of service to others’ well-being. Because helping others activates the parts of the brain that are involved in pleasure and reward, serving others may produce the same sort of pleasure as gratifying a personal desire. Altruism and service increase a sense of meaning, self-esteem, and satisfaction with one’s daily activities and feelings of living up to one’s potential. They also increase feelings of connectedness and reduce feelings of isolation and depression. Moreover, collaborating with others can build social skills. Collective action and the sense of common purpose can build social trust, increase one’s faith in humanity, and help to broaden perspectives and see the best in others. Volunteers exhibit positive emotions and social skills such as openness, agreeableness, and extraversion.

A strong sense of community has many positive benefits for both the profession and the individual lawyer. In a 2015 study of lawyer happiness, differences in lawyers such as firm size, salary, and law school made little difference in lawyer happiness. The one statistically significant factor was whether lawyers felt they were being of service to a cause bigger than themselves. Given the high stress associated with the practice of law, staying connected to others both within and outside the practice is critical for a lawyers’ mental health. A lawyers’ position in the community also improves if there is a willingness on the part of the lawyer to help explain what that role is and how it may constrain action (i.e. duty of confidentiality, duty as advocate, etc.). Finally, it is critical that a lawyer maintain a community within the law – someone who the lawyer can dialogue with about the practice of law; someone who can fully understand what it means to practice law. Isolation is a key accelerator of depression, substance abuse, and suicide. Having a community to reduce isolation is central to a lawyer maintaining a civil, sustainable practice.

Conclusion

Whether acting as lawyers, judges, social workers, or parents, we are all an integral part of the child welfare legal system. As such, to be of our highest service, we must understand the context of the broader community we serve as well as help others understand our role in that community. As mentioned previously lawyers, judges, and social workers not only play different roles in this system, but each have different expectations of the others, and each have different professional obligations and ethical considerations. By learning to see and appreciate that each of us are at once autonomous human beings and highly interconnected parts of a larger system, we can maximize both individual and system potential, more effectively work together, and behave in ways that promote civility so as to promote more just outcomes for the children and families we serve.

50 Constance Flanagan and Matthew Bundick, Civic Engagement and Psychosocial Well-Being in College Students, Liberal Education, Vol. 97, No. 2

51 http://www.ucanews.com/2011/12/02/dalai-lama-offers-key-to-happiness

52 http://www.nytimes.com/2011/05/17/opinion/17brooks.html?_r=0

53 Constance Flanagan and Matthew Bundick, Civic Engagement and Psychosocial Well-Being in College Students, Liberal Education, Vol. 97, No. 2

54 Id.

55 Id.

QUALITY SERVICE REVIEWS: A MECHANISM FOR CASE-LEVEL ADVOCACY AND SYSTEM-WIDE REFORM

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There has been an increasing pressure from federal, state and tribal governments, community partners and advocates to hold child welfare agencies accountable for the services and supports provided to children, youth and families involved with human services systems. Child welfare systems, for example, have made significant strides in their capacity to collect and interpret quantitative data related to performance such as time to permanency, number of placements children experience, percentage of children placed in family-based settings and rate of repeat maltreatment. Systems have also increased their capacity to track and report on interventions including number of interactions (visits, planning meetings) with children, parents, and caretakers, or number of mental health, substance abuse and domestic violence treatment referrals made. Systems continue to strive to answer not just how much they are doing on behalf of children, youth and families but how well they are supporting and serving them and whether interventions are successful. It is widely recognized that the quality of work and interventions has direct impact on the well-being outcomes of children and families.

When advocates, frontline staff and administrators discuss “the direct work with families,” they are often referring to – either directly or indirectly – the guiding principles and expected actions to support families, or the practice model for the system. A case practice model supports workers, supervisors, managers and administrators in understanding, performing and communicating the actions that should be taken to achieve positive outcomes for a child or youth and family. As depicted below in two case practice model examples, there are certain key elements or functions of case practice that must be present to achieve good outcomes. The expectation is that each of these practice elements are performed in partnership with children/youth/parents/caretakers. They include:

- **engaging children, youth, parents and caretakers** in a working relationship;
- **assessing** for strengths, protective capacities, urgent and underlying needs of children, youth and families, and doing so both formally and informally;
- **teaming** to work in collaboration with professionals or formal supports and informal supports;
- **planning** to support goals, such as for physical and emotional well-being, safety and permanency;
- **effectively implementing needed supports and services.**

These elements inform the actions, interventions and strategies employed by workers and their partners to achieve positive outcomes and successfully close cases. Attorneys and advocates are uniquely positioned through their interactions and relationship with their clients to recognize when these elements are working to support their clients.

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1 We use this term to refer to all helping systems, including child welfare, juvenile justice, children’s and adult mental health, etc.
Figure 1: Case Practice Model from the District of Columbia’s Child and Family Services Agency

Figure 2: Case Practice Model from Children Youth and Families Division of the Victorian Government, Department of Human Services

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As advocates know, how well systems are working to assess, engage, plan and support children, youth and families is critical. From the federal level, the Children’s Bureau uses **Child and Family Service Reviews (CFSRs)**, an interview protocol and process, with each state’s child welfare system in order to ensure conformity with federal child welfare requirements, determine outcomes with children and families and assist states in helping children and families achieve positive outcomes. During this review process, a select number of cases are reviewed in order to assess overall system performance, identify areas of strength and those needing improvement. The results from CFSRs are used to inform the development of system-specific Program Improvement Plans and strategies that are intended to improve overall case and system practice in the areas identified as needing improvement.

The CFSRs were loosely based on a qualitative case review system developed and implemented in the state of Alabama’s Family and Children’s Services as a key component of the settlement agreement in the *R.C. v. Hornsby* class action lawsuit. This type of qualitative review continues to play a significant role in continuous quality improvement efforts for evaluating system reform and case practice in a significant number of states and counties across the country.9,10

**Quality Service Reviews: The Purpose and Relationship to System Reform**

The **Quality Service Review (QSR)**, developed by Human Systems and Outcomes Inc., is a hands-on, qualitative review process that uses a jurisdiction-specific protocol to assess practices and system performance. QSRs provide a case-based assessment for learning and development and the results can be used to improve outcomes for all children and families who are served by systems. The QSR is implemented in multiple jurisdictions as an element of continuous quality improvement and has the capacity to serve three key functions:

1) **Clinical training for frontline workers and supervisors**: The experiences of discussing a case while participating in the review and hearing feedback from the reviewers, provide an opportunity for frontline workers and supervisors to understand how specific elements of practice are evident in an actual case – this form of experiential learning can then be incorporated into the current case as well as the other cases in the worker and supervisor’s purview.

2) **Norming of practice**: A well-understood practice model and approach is central to support positive outcomes for the child and family. Through the QSR process of providing feedback to frontline workers and supervisors, which can then be transferred to a broader caseload, and the system’s inter-rater reliability process that occurs with reviewers and quality assurance staff, there are multiple structured opportunities for understanding and for standardizing quality of practice across multiple systems.

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6 The Children’s Bureau has completed two rounds of CFSRs and began conducting the third round in all states, which will occur between 2015 and 2018.

7 Outcomes related to issues such as placement stability, permanency, connections with parents and sibling and provision of services to meet educational, physical and mental health needs are assessed.

8 A sample of approximately 65 cases of children and youth, representative of that system’s child welfare population and based on the key demographic information, are reviewed.

9 The term **Quality Service Review** is used here but this protocol and process is known by other names. For example, Qualitative Review in New Jersey and Community Service Review in the Department of Behavioral Health in the District of Columbia.

10 The Qualitative Network, facilitated by Paul Vincent and Ray Foster of the Child Welfare Policy and Practice Group (CWPPG), convenes on a quarterly basis to discuss opportunities, challenges and strategies for implementing and using OSRs as part of continuous quality improvement. The Qualitative Network consists of members from across the country including (but not limited to) California, Florida, New Jersey, Indiana, Maryland, Michigan, Oklahoma, Utah, Virginia and Wisconsin.

11 Human Systems and Outcomes Inc. is now identified as the QSR Institute, a subsidiary of the Child Welfare Policy and Practice Group.


3) **Real-time, rapid assessment and data feedback:** The feedback and qualitative data collected through the QSR process can be shared in real-time with workers, supervisors, management, administrators and the larger community. QSR data provides “the stories behind the numbers” and systems have an opportunity to quickly track and adjust initiatives and practices in response to QSR findings and the themes they reveal.

**Quality Service Reviews: The Process**
Each QSR is usually focused on one child or youth, selected through a stratified random sample and involves case file reviews and interviews with key members of that child and family’s team – including the immediate family members, the focus child\(^{14}\), the frontline caseworkers and supervisor, service providers (including educational, mental health, substance abuse treatment, mentors, CASAs, etc.), extended family members, substitute caregivers (foster parents and congregate care providers) and attorneys (for the agency, parent and child/youth). Participation in the QSR is voluntary and steps are typically taken to gain the informed consent of participants.

After the review team\(^{15}\) completes the record review and interviews with all of the key members of the team for the case, they synthesize the information to assess key indicators related to the child and family’s status\(^{16}\) and practice/system performance\(^{17}\) (see Appendix A and Appendix B). Based on the assessment, the review team (1) assigns ratings\(^{18}\) to the indicators of the child and family’s status and practice/system performance, (2) provides feedback to the frontline workers and supervisors and helps develop next steps to build on strengths and address challenges, (3) meets with the quality assurance team and/or other reviewers to present results/findings from the review and ensure inter-rater reliability and (4) completes a redacted narrative or “(child and family) story” documenting their assessment, findings and justifying the ratings assigned. This process provides for real-time feedback, and creates qualitative data and case examples that can be used to further understand strengths and challenges in case practice and system performance.

In addition to the case-specific feedback, the QSR data provides an opportunity to understand and highlight the strengths and challenges in case practice and the overall functioning of a local service system. Strengths in specific areas of practice may include, for example, a strong working relationship between a mental health treatment provider and teacher. Engagement in a working relationship with birth parents, for example, may be identified as an area in need of improvement. Upon understanding both quantitative and qualitative data trends, systems can implement practice and policy enhancements, amendments or modifications to support practice improvement. Systems can also track, in real-time, the impact of those changes through subsequent QSRs.

**Quality Services Reviews, Child and Family Service Reviews: Why attorneys and advocates should care**
Attending to **Advocacy Issues**, as presented in the National Association of Counsel for Children’s Recommendations for Representation of Children in Abuse and Neglect Cases\(^{19}\), means connecting key components and expected outcomes of good case practice to the legal process. Attorneys and advocates who work for children and youth are key members of any well-formed and functioning child and family team.

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\(^{14}\) Either an interview or observation is conducted with the focus child depending on the focus child's age and developmental stage.

\(^{15}\) QSRs are conducted by a team of two reviewers with a trained and “certified” reviewer in the lead role.

\(^{16}\) Indicators related to Child and Family Status may include: safety, behavioral risk, stability, permanency, living arrangement, physical health, emotional well-being, learning and development, caregiver function and family functioning.

\(^{17}\) Indicators related to Practice/System Performance may include: engagement, assessment, teaming, pathway to case closure, long-term guiding view, resource availability, planning, implementation of supports and services and tracking and adjusting.

\(^{18}\) Ratings are on a scale of 1-6 – with 1-3 being unacceptable and 4-6 being acceptable (see Appendix C and Appendix D).

Often attorneys and advocates cite a lack of coordination between the in-court work and out-of-court work as a reason for delays in moving a case forward. However, whether the issue is stabilizing a child’s placement with a relative by ensuring the right community-based supports are in place; moving to increase visitation between a child and his or her prospective long-term caretaker; or taking other steps to promote reunification, adoption or guardianship, attorneys rarely have the opportunity to provide feedback to quality assurance entities in real-time and in a manner that can impact a specific case as well as system-wide practice.

As part of the QSR process, attorneys and advocates are expected to be interviewed by reviewers and offer their perspective about the case. Reviewers want to know about the strengths, challenges and functioning of the child, family and the service systems. Attorneys should welcome the opportunity to participate in these reviews because they can:

- provide new information to reviewers that allows for the assessment of how the out-of-court work may or may not support the in-court goals;
- highlight any discrepancies between the work on behalf of the child, youth and family and the desires of the child and family;
- highlight strengths and gaps in collaboration with family members and other areas of case practice; and
- ensure that the needs of the child and parents are heard and that the safety, permanency and well-being of their client are promoted.

Through participation in the QSR process, attorneys and advocates are also able to provide feedback on system-level strengths and challenges. QSR is meant to be a mechanism for the identification of systemic trends, informed by those who regularly interact with those systems. The expectation is that honest feedback or input does not result in negative consequences for any participants.20

Recommendations for attorneys and advocates to promote the QSR process and good case practice:

At the case specific level, attorneys and advocates should:

- **Participate in QSRs when they are conducted.** The participation of attorneys and advocates provides a unique perspective to reviewers to inform the overall assessment of the child and family status and practice/system performance.
- **Request a copy of the reviewer’s written case narrative.** The reviewer’s written case narrative is prepared by a trained and objective reviewer who does not have a decision-making role in a case. The narrative provides specific information and a current assessment of what is going on in a case – both strengths and challenges from multiple perspectives. Reviewing and discussing this independent assessment with others involved in a case can help attorneys and advocates support their clients in achieving successful case closure or to further understand the barriers to achieving successful case closure.
- **Ask questions which directly relate to the key indicators that support good case practice.** In court and in meetings with clients and workers, attorneys should discuss activities that promote good case practice such as teamwork and service coordination:
  - Do our actions reflect a pattern of effective teamwork and collaboration that benefit the child and family?
  - Is there effective coordination and continuity in the organization and provision of service across all responsible individuals and service settings?

20 Reviewers are instructed to immediately report any safety or concerning risk issues to the designated leader of the review team.
Understanding activities that support good case practice can inform the ‘asks’ attorneys make of caseworkers and service providers and improve the attorney’s or advocate’s ability to make suggestions for next steps to support their clients.\textsuperscript{21}

\textit{At the system level, attorneys and advocates should:}

- \textbf{Advocate for child welfare systems to make the data collected through the QSR and CFSR available and accessible.} The rigorous QSR process produces a significant amount of data that can and should be used to inform practice and policy changes and enhancements. The community — including families and professionals — deserves a well-functioning system that is transparent about its strengths and areas of challenge. Attorneys and the broader community should advocate for systems to regularly share data as a form of accountability.

- \textbf{Promote the use of QSR data to inform system-wide practice changes.} The QSR process is an integral part of continuous quality improvement efforts and should be used to inform system-wide practice changes — including identifying areas of strength that should be promoted and opportunities for improvement. In systems where QSRs are not currently being used, attorneys should advocate for their use as a part of a comprehensive continuous quality improvement strategy.

Appendix A: Shared Practice Protocol Listing of Indicators (QSR Protocol for the District of Columbia’s Child and Family Services Agency and Department of Behavioral Health)
the child(ren) with the assistance, supervision, nurture, protection and emotional and other support(s) necessary for adequate daily caregiving and child development.

10a. CAREGIVER SUPPORT OF THE CHILD. Degree to which: • The parents or foster caregivers with whom the focus child is currently residing are willing and able to provide the child with the assurance, supervision, nurture, protection, and support necessary for daily living. • Where necessary, specialized supports are provided in the home to meet any therapeutic care needs of the child and to assist the caregivers in meeting those needs.

10b. GROUP CAREGIVER SUPPORT OF THE CHILD. Degree to which the child's caregivers in the group home or facility are supporting the child's care, protection, education, and development adequately on a consistent daily basis.

11. FAMILY FUNCTIONING & RESOURCEFULNESS. Degree to which the parents or caregiver (with whom the child has a goal of reunification or a concurrent goal for permanency) • Has the capacity to take charge of its issues and situation, enabling family members to live together safely and function successfully. • Takes advantage of opportunities to develop and/or expand a reliable network of social and safety supports to sustain family functioning and well-being. • Is willing, available, and able to provide the child with the protection, assistance, supervision, and support necessary for the child's growth, development, and well-being.

12. VOICE & CHOICE. Degree to which: • The child, parents, family members, and caretakers are active ongoing participants (e.g., having a significant role, voice, choice, and influence) in shaping decisions made about child and family strengths and needs, goals, supports, and services.

PRACTICE PERFORMANCE INDICATORS

This Shared Practice Protocol provides ten qualitative indicators for measuring core practice functions being provided with and for the child/youth and the child’s parents and/or caregivers. Performance indicators look back over the past 90 days.

1. RESPONSIBILITY TO CULTURAL IDENTITY & NEED. Degree to which: • The cultural identity of the child and family has been assessed, understood, and accounted for in the service process. • The natural, cultural, or community supports appropriate for this child and family are being identified and engaged. • Necessary supports and services provided are being made culturally appropriate. NOTE: This indicator is applied to all families.

2. ENGAGEMENT. Degree to which those working with the child and family (youth, parents, relatives, caregiver, and others) are: • Finding family members who can provide support and permanency for the child. • Developing and maintaining a culturally competent, mutually beneficial trust-based working relationship with the child and family. • Focusing on the child's and family's strengths and needs. • Being receptive, dynamic, and willing to make adjustments in scheduling and meeting locations to accommodate family participation in the service process, including case planning.

3. TEAMWORK & COORDINATION.

TEAM FORMATION - Degree to which: • A group of motivated, qualified people - including any informal supporters a parent or youth may invite who bring skills and knowledge appropriate to the needs of the child and family - have been identified, recruited, and made commitments to participate as team members for them. • The collective team has the ability to plan, organize, and execute effective services for the child and family, given the level of complexity and cultural background involved.

TEAM FUNCTIONING - Degree to which: • Members of the team collectively participate in the teaming process on an ongoing basis. • Actions of the team reflect effective family-centered teamwork and collaborative problem solving that support meeting the child and family's near-term needs and long-term goals as revealed in present results. • Members of the team have a working relationship the child and family and with each other.

TEAM COORDINATION: Degree to which: • Adequate leadership is evident in preparing team members in advance of meetings for upcoming decisions, facilitating teamwork activities, organizing family-centered planning and service decision processes for the child and family, and following-up on commitments made by team members to ensure that contributions are made. • Effective service organization and integration efforts are evident in the assessment, planning, and delivery of interventions to the child and family.

4. ASSESSMENT & UNDERSTANDING. Degree to which those involved with the child and family understand: • Their strengths, needs, risks, preferences, and underlying issues. • The outcomes desired by the child and family from their involvement with the system. • The "big picture" situation and dynamic factors that impact the child and family sufficiently well to guide intervention. • What must change for the child to function effectively in daily settings and activities and for the family to support the child effectively. • What must change for the child/family to have better overall safety, well-being, substance supports, transitions and life adjustments. • The path and pace by which permanency will be achieved for a child who is not living with nor returning to the family of origin.

5a. PATHWAY TO CASE CLOSURE. To what degree: • Is there a clear, achievable case goal including concurrent and alternative plans? • Does everyone involved, including family members, know and agree on what specific steps need to be achieved in order to achieve the case goal and close the case safely? • Is the child/family making progress on these steps and informed of consequences of not meeting the necessary requirements within the required timelines? • Are team members planning for the youth's transition from care in AYP/A cases? • Are reasonable efforts being made to achieve safe case closure for all case goals?
5b. **LONG-TERM GUIDING VIEW.** To what degree: • Is there a guiding view for service planning that includes strategic goals for this child that will lead to his/her functioning successfully in his/her home, school, and community including the child’s new major developmental or expected placement transition?

6. **PLANNING.** Degree to which meaningful, measurable, and achievable life outcomes (e.g., safety, permanency, well-being, daily functioning in fulfilling life roles, transition and life adjustment, education) for the child and family are supported with well-reasoned, agreed-upon goals, intervention strategies, and actions for their attainment.

7. **SUPPORTS & SERVICES.** Degree to which: • Supports, formal and informal, and services planned for the child, parent or caregiver, and family are available and provided on a timely and adequate basis. • The combination of supports and services fit the child and family situation so as to maximize potential results and benefits while minimizing conflicting strategies and inconveniences. • Delivery of planned interventions is sufficient and effective to help the child and family make adequate progress toward attaining the life outcomes and maintaining those outcomes beyond case closure.

8. **MEDICATION MANAGEMENT.** Degree to which: • Any use of psychiatric/addiction control medications for this child/youth is necessary, safe, and effective. • New and/or current generation drugs have been tried, used, and/or appropriately ruled out. • The child/youth and parents have a voice in medication decisions and management. • The child/youth is routinely screened for medication side effects and treated when side effects are detected. • The use of medication is being coordinated with other treatment modalities and any treatment for any co-occurring conditions (e.g., seizures, diabetes, asthma, addiction, obesity).

9. **MANAGING CHRONIC HEALTH CONCERNS.** [Applies to a child having a chronic health condition that requires coordination of ongoing specialized care and treatment]. Degree to which coordination of care and treatment for the child’s chronic health needs is • Supporting adequate communications among the child’s health care providers. • Resolving any medication conflicts that could arise among multiple prescribers. • Sharing essential medical information between the primary care physician (PCP) and other specialists. • Providing education and support to the child and caregiver on the use of medications and home-based treatments, and • Ensuring adequate health care management of treatment for all chronic health concerns of the child.

10. **TRACKING & ADJUSTMENT.** Degree to which those involved with the child and family are: • Carefully tracking the child’s/family’s intervention delivery processes, progress being made, changing family circumstances, and attainment of functional goals and well-being outcomes for the child and family that lead to system independence and safe case closure. • Communicating (as appropriate) to identify and resolve any intervention delivery problems, overcome barriers, and replace any strategies that are not working. • Adjusting the combination and sequence of strategies being used in response to progress made, changing needs, and knowledge gained from trial-and-error experience to create a self-correcting intervention process.
Appendix B: New Jersey Qualitative Review Summary of Instrument Indicators (Qualitative Review Instrument, Department of Children and Families, New Jersey)

Child and Family Indicators

Safety of the Child: Is the child protected and safe from abuse, neglect, and exploitation in his/her daily settings? Is the child free from unreasonable intimidations and fears? Do parents and caregivers provide the attention, actions, and supports necessary to protect the child from known risks of harm?

Stability: Are the child’s daily living and learning arrangements stable and free from disruption? To what degree is the child stable at home, at school, and in the community? Are the appropriate services being provided to achieve stability and reduce the probability of disruption?

Living Arrangement: Is the child in the most appropriate placement consistent with the child’s needs for family relationships, connections, age, ability, special needs and peer group? Is this living arrangement consistent with the child’s language and culture?

Family Functioning and Resourcefulness: Does the family, with whom the child is currently residing and/or with whom the goal is to reunify, have the capacity to take charge of their situation to live together safely and function successfully? Do family members take advantage of opportunities to develop and/or expand a reliable network of social and safety supports to help sustain family functioning and well-being? Is the family willing and able to provide the child with the care and nurturing, discipline, supervision, and material support necessary for daily living?

Progress toward Permanency: Is the child living with caregivers that the child, caregivers, and other stakeholders believe will remain lifelong? If not, are timely permanency efforts being implemented to ensure that the child soon will live in enduring relationships that provide a sense of family, stability, and belonging?

Physical Health of the Child: Is the child in good health and are the basic physical health needs met? Has optimum health status been maintained? If the child has a serious or chronic physical illness, is the child achieving his/her best attainable health status given the disease diagnosis and prognosis?

Emotional/Behavioral Well-Being: Is the child presenting age-appropriate emotional, development, adjustment, resiliency and protective factors?

Learning & Development: Is the child’s learning appropriate for their age group? Is the child attending school regularly (age appropriate)? Are they meeting the standards for grade level promotions? Are developmental milestones met and the child progressing as he/she should? Are there any identified developmental delays with the child?
Practice/ Performance Indicators

Engagement of the Child & Family: Is the case manager and team using engagement strategies, including special accommodations with any difficult-to-reach family members, to create/ maintain family engagement and participation in the change process? (2) Are collaborative and open trust-based working relationships with the child, family, resource family being developed to support ongoing assessment, understanding, and service planning? (3) Are those providing supports relying on a mutually beneficial partnership with the child, family, and/or resource family that sustain their interest in and commitment to a change process?

Family Teamwork: TEAM FORMATION: (1) Do the appropriate formal and informal supports for this child and family form a working team that meets, talks, and plans together? (2) Does the team have the skills, family knowledge, and abilities necessary to organize effective services for this child and family, given their particular needs and cultural background? TEAM FUNCTIONING: To what degree: (1) Do members of the family team collectively function as a unified team in planning services and evaluating results? (2) Do actions of the family team reflect a coherent pattern of effective teamwork and collaborative problem solving that benefits the child and family?

Functional Assessment & Understanding: (1) Is there an understanding of the child and family’s strengths, needs, risks, and underlying issues that must change for the child to live safely and permanently with the birth family or a resource family, independent of agency supervision? (2) Are the substantial strengths, needs, and risks of the child and family identified through existing/current assessments, both formal and informal, so that there is a shared understanding of the family’s situation? (3) If the child is not living with the family of origin, have the strengths and needs of the current caregiver been identified?

Case Planning Process: Is the child’s/family’s plan individualized and relevant to the family’s needs, goals? Are supports, services and interventions coherent and uniquely matched to the child’s/family’s situation?

Plan Implementation: Are the services and activities specified in the child and family plan 1) being implemented as planned, 2) delivered in a timely manner, and 3) at an appropriate level of intensity and length of time? Are the necessary supports, services, and resources available to the child and family to meet the needs identified in the plan?

Tracking and Adjusting: Are the child and family status, service process, and results routinely followed along and evaluated? Are services modified to respond to the changing needs of the child and family and to apply knowledge gained about service efforts and results to create a self-correcting service process?

Provision of Health Care Services: To what degree are the health care services provided commensurate with what is required for the child to achieve and maintain his/her best attainable health status?

Resource Availability: To what degree are an adequate array of supports, services, and other resources (both formal and informal) available to support implementation of the child and family planning process? Are resources available in a timely manner, at the appropriate frequency and duration? Are the services and supports provided in a setting that is conducive to the needs of the child and family? Do the child and family have a choice of the type of services and the service providers?

Family & Community Connections: When children and family members are living temporarily away from one another, to what degree are family connections maintained through appropriate visits and other means, unless compelling reasons exist for keeping them apart? Are significant others from the community able to keep-in-touch with the youth, (e.g., best friend, youth’s pastor)?
Family Supports: Are the parent(s) and/or resource family being provided the training, in-home support, supervision, resources, support-development assistance, and relief necessary to provide a safe and stable living arrangement for the child that meets the child’s daily care, development, and parenting needs? If the child presents special needs with more extensive care requirements, to what degree is the family provided specialized support commensurate with what is required to meet the child’s needs while maintaining the stability of the home and the family commitment to the child?

Long-term View: Is there an explicit plan for this child and family that should enable them to live safely and independent from the child welfare system? Does the plan provide direction and support for making smooth transitions across settings, providers, and levels of service?

Transitions & Life Adjustments: To what degree: (1) Is the current or next life change transition for the child and/or parent/resource caregiver being planned and implemented to assure a timely, smooth, and successful adjustment for the child/family after the change occurs? (2) If the child is returning home or school following temporary placement in foster care, treatment, or detention, then are transitional staging plans, support arrangements, and ongoing checks being made to assure a successful transition and life adjustment in daily settings following the return?
## Appendix C: QSR Indicator Rating Matrix

<table>
<thead>
<tr>
<th>UNACCEPTABLE</th>
<th>ACCEPTABLE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1—Adverse</strong> Status/Performance:</td>
<td><strong>5—Good Ongoing Status/Performance:</strong></td>
</tr>
<tr>
<td>Status/practice may be absent or not operative. Performance may be missing (not done). Strategies may be contraindicated</td>
<td>At this level, the status/system function is working dependably for this person, under changing conditions and over time.</td>
</tr>
<tr>
<td><strong>2—Poor Status/Performance:</strong></td>
<td><strong>6—Optimal &amp; Enduring Status/Performance:</strong></td>
</tr>
<tr>
<td>Status/practice at this level is fragmented, inconsistent, lacking necessary intensity, or off-target.</td>
<td>At this level there is excellent, consistent, and effective status/practice for this person in this function area.</td>
</tr>
<tr>
<td><strong>3—Marginally Inadequate Status/Performance:</strong></td>
<td><strong>4—Fair Status/Performance:</strong></td>
</tr>
<tr>
<td>Status/practice at this level may be underpowered, inconsistent, or not well-matched to need.</td>
<td>Status/practice is minimally or temporarily sufficient to meet short-term needs or objectives.</td>
</tr>
</tbody>
</table>

### IMPROVEMENT vs. REFINEMENT vs. MAINTENANCE

- **Improvement:** Status/practice may be absent or not operative, not optimally implemented, or not matching need. Requires increased intensity or implementation.
- **Refinement:** Status/practice matches well with need, but is not maximized. Requires enhancement to optimize performance.
- **Maintenance:** Status/practice is sufficient to meet current needs, consistently implemented, and matches need. Requires minimal adjustment to maintain performance.

STATUS INDICATOR RATINGS

A QSR review determines the individual's present states of well-being, functioning capacities, and supports. The QSR reviewer examines the individual's situation to discern qualitative patterns; patterns can be positive and improving for the individual served or a pattern can be less than adequate, not progressing toward increased independence.

Based on the patterns detected via observations, interviews, record reviews, and analyses, the QSR reviewer selects an appropriate level out of six possible pattern descriptions to provide a qualitative appraisal and rating of the individual's current status for each indicator. Presented below are general definitions of the rating levels and timeframes applied for individual status indicators:

- **Level 6 - Optimal and Enduring Status.** The situation has been generally optimal [best attainable taking age and ability into account] with a consistent and enduring high quality pattern evident, without being less than good (level 5) at any point or any essential aspect. The situation may have had brief moments of minor fluctuation, but functioning in this area has remained generally optimal and enduring, never dipping below level 5 at any moment. Confidence is high that long-term needs or outcomes will be or are being met in this area—perhaps reaching the level indicated for stepping down services in this status area.

- **Level 5 - Substantially Good and Stable Status.** The situation has been substantially and consistently good with indications of stability evident, without being less than fair (level 4) at any moment or in any essential aspect over that time period. The situation may have had brief moments of minor fluctuation, but functioning in this area has remained generally good and stable, never dipping below level 4 at any moment. This status level is consistent with eventual satisfaction of major needs or attainment of long-term outcomes in the area.

- **Level 4 - Minimally Adequate to Fair Status.** The situation has been at least minimally adequate at all times over the past 30 days, without being inadequate at any point or any essential aspect over that time. The situation may be dynamic with the possibility of fluctuation or need for adjustment within the near term. The observed pattern may not endure or may have been less than minimally acceptable in the recent past, but not within the past 30 days.

- **Level 3 - Marginally Inadequate Status.** The situation has been somewhat limited or inconsistent over the past 30 days, being inadequate at some moments in time or in some essential aspect(s) over this time period. The situation may be dynamic with a probability of fluctuation or need for adjustment at the present time. The observed pattern may have endured or may have been less than minimally acceptable in the recent past and somewhat inadequate.

- **Level 2 - Substantially Poor Status.** The situation has been substantially limited or inconsistent, being inadequate at some or many moments in time or in some essential aspect(s). The situation may be dynamic with a probability of fluctuation or need for improvement at the present time. The observed pattern may have endured or may have been inadequate and unacceptable in the recent past and substantially inadequate.

- **Level 1 - Adverse or Poor and Worsening Status.** The situation has been substantially inadequate and potentially harmful, with indications that the situation may be worsening at the time of review. The situation may be dynamic with a high probability of fluctuation or a great need for immediate improvement at the present time. The observed pattern may have endured or may have recently become unacceptable, substantially inadequate, and worsening.
SERVICE SYSTEM PERFORMANCE INDICATOR RATINGS

Based on discernment of patterns obtained via observations, interviews, record reviews and analyses, the QSR reviewer selects an appropriate level out of six possible pattern descriptions to provide a qualitative appraisal and rating of the service system’s current performance for each indicator. A rating reflects the degree of performance adequacy that the service system provides for each core practice function at the time and place of review. The same general logic is applied to system performance rating levels as is used with the status indicators. The general interpretations for performance indicator ratings are defined as follows:

- **Level 6 - Optimal and Enduring Performance.** The service system practice/system performance situation has been generally optimal [best attainable given adequate resources] with a consistent and enduring pattern evident, without ever being less than good (level 5) at any point or in any essential aspect. The practice situation may have had brief moments of minor fluctuation, but performance in this area has remained generally optimal and stable. This excellent level of performance may be considered “best practice” for the system function, practice, or attribute being measured in the indicator and worthy of sharing with others.

- **Level 5 - Good and Stable Performance.** The service system practice/system performance situation has been substantially and consistently good with indications of stability evident, without being less than fair (level 4) at any moment or in any essential aspect. The situation may have had some moments of minor fluctuation, but performance in this area has remained generally good and stable. This level of performance may be considered “good practice or performance” that is noteworthy for affirmation and positive reinforcement.

- **Level 4 - Minimally Adequate to Fair Performance.** The service system practice/system performance situation has been at least minimally adequate at all times over the past 30 days, without being inadequate (level 3 or lower) at any moment or in any essential aspect over that time period. The performance situation may be somewhat dynamic with the possibility of fluctuation or need for adjustment within the near term. The observed performance pattern may not endure long term or may have been less than minimally acceptable in the recent past, but not within the past 30 days. This level of performance may be regarded as the lowest range of the acceptable performance spectrum that would have a reasonable prospect of helping achieve desired outcomes given that the performance level continues or improves. Some refinement efforts are indicated at this level of performance at this time.

- **Level 3 - Marginally Inadequate Performance.** The service system practice/system performance situation has been somewhat limited or inconsistent, being inadequate at some moments in time or in some essential aspect(s) over this time period. The situation may be dynamic with a probability of fluctuation or need for adjustment at the present time. The observed pattern may have been less than minimally acceptable (level 3 or lower) in the recent past and somewhat inadequate. This level of performance may be regarded as falling below the range of acceptable performance and would not have a reasonable prospect of helping achieve desired outcomes. Substantial refinement efforts are indicated at this time.

- **Level 2 - Substantially Poor Performance.** The service system practice/system performance situation has been substantially limited or inconsistent, being inadequate at some or many moments in time or in some essential aspect(s) recently. The situation may be dynamic with a probability of fluctuation or need for improvement at the present time. The observed pattern may have endured for a while or may have become inadequate and unacceptable in the recent past and substantially inadequate. This level of inadequate performance warrants prompt attention and improvement.

- **Level 1 - Absent, Adverse, or Poor Worsening Performance.** The service system practice/system performance situation has been missing, inappropriately performed, and/or substantially inadequate and potentially harmful, with indications that the situation may be worsening at the time of review. The situation may be dynamic with a high probability of fluctuation or a great need for immediate improvement at the present time. This level of absent or adverse performance warrants immediate action or intervention to address the gravity of the situation.
REPRESENTING CHILD CLIENTS WHO RECANT SEXUAL ABUSE IN DEPENDENCY CASES

Lorraine M. Augustini, Esq., CWLS
Susan Cohen Esquilin, Ph.D., ABPP

One of the most challenging situations attorneys for children, acting pursuant to a client-directed model, face occurs when the child-client in a dependency matter recants allegations of sexual abuse that appear to have significant evidentiary support. This paper explores the psychological dynamics in these situations and offers some suggestions for attorneys navigating the complexities of these cases.

It is always possible that a recantation could occur because the initial allegation was untrue and the child subsequently decides to tell the truth. If this is the case, the issue of protecting the child from further abuse does not arise. However, if the original allegation is true, there is significant risk in simply taking the recantation at face value. It is therefore critical to have an understanding of why children may recant true allegations. Such an understanding can help both child advocates and judges take actions that address the child’s needs for protection but also are supportive of the child’s psychological needs.

In the last decade, there has been a heated discussion in the literature about whether recantation of sexual abuse allegations is a frequent occurrence.\(^1\) One major article reports that recantation rates in empirical studies of sexually abused children vary from 4% to 27%.\(^2\) Much of the current argument about the frequency of recantation rests on analyses of the methodology employed by different researchers, most specifically the nature of the particular samples that were studied. It is beyond the focus of this article to review these issues in detail. However, the varied rates found also may reflect differences in the samples regarding who the alleged perpetrators are. In much of the general literature examining questions of recantation, the samples of sexually abused children include many children who report sexual abuse by people outside the immediate family and who are not in the role of father figures. In dependency courts, the allegations these children make are typically about fathers or father figures (step-fathers, mothers’ paramours, significantly older brothers) who are in significant relationships with the mothers. Thus, the allegations typically involve sexual abuse by these individuals as well as potential neglect by the non-offending caregiver for inadequate protection of the child. A recent study by Malloy, Lyon, and Quas that focused specifically on children whose allegations resulted in dependency court filings found a recantation rate of 23.1%.\(^3\) While it is quite likely that recantation will be an issue in a significant minority of child welfare cases where sexual abuse is alleged, these cases present complex challenges to lawyers representing children in dependency proceedings.

Duties Of Child’s Attorney

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Attorneys for children owe the same duties of loyalty, diligence, regular communication, competent representation, and confidentiality that attorneys owe to their adult clients. There is no separate Code of Ethical Conduct or Model Rules of Professional Conduct for lawyers representing minors. A challenge for attorneys for children arises when the client’s stated goal, objective or wish, seemingly collides with the important interest children possess in safety. The scenario posited in this article involving the child who has been sexually abused, recants the allegations, and whose stated wish, if accomplished, is likely to place the child at serious and significant risk of being re-abused, is one of the most challenging situations for children’s lawyers, and when faced, goes to the heart of how lawyers for children practice and carry out their responsibilities to the children they represent.

In an effort to keep lawyers for children honest and client-directed in such challenging situations, Professor Jean Koh Peters reminds us to ask how we would handle this situation if the client were an adult. The answer is clear. The attorney would counsel the client, thoroughly review the pros and cons of both sides, and provide the client with the benefit of the attorney’s best advice, and then allow the well-counseled client to make the decision. The attorney would then abide by the client’s decision, barring some extraordinary circumstances.

Not so with child-clients and particularly clients who are have been sexually abused. Some attorneys argue that a child’s interest in safety and right to be free from abuse and neglect trumps all else. Perhaps the attorney feels a duty to protect children, as most adults do, from consequences of decisions the adult feels the child cannot fully appreciate or comprehend.

Rule 1.14 of the Model Rules of Professional Conduct regarding representing a client with diminished capacity provides some guidance in situations where the client’s ability to make adequately considered decisions in connection with the representation is diminished because the client is a minor. The attorney must first assess whether and to what extent the client’s capacity to make decisions, after being counseled and given advice, is diminished. If the lawyer concludes, after conferring with the client, that the client’s capacity is diminished and the client is at “risk of substantial physical …or other harm, the lawyer may take reasonably protective action.” Protective action includes a range of steps the lawyer may take such as consulting with others who know the client well, retaining an expert to evaluate the client or consult with the attorney, or requesting the appointment of a guardian ad litem.

Jennifer Renne, in her book, “Legal Ethics in Child Welfare Cases,” suggests factors to consider when determining capacity:

- Client’s cognitive ability
- Client’s emotional and mental development & stability
- Client’s ability to communicate and articulate reasons for her wishes/decisions;

6 Comment on MR 1.14
7 MR 1.14 (b)
8 MR 1.14 (b)
• Consistency of the client’s decisions—after giving the client a period of time to think about the decision or choice, does the decision change?
• Strength of the client’s wishes; and
• Opinion of others.\textsuperscript{9}

As Renne correctly notes, “The lawyer should focus on the client’s decision-making process and not on whether she approves of the decision.”\textsuperscript{10} In other words, simply because the lawyer disagrees with the client’s position or thinks it unwise does not mean that the client’s ability to make a reasoned decision is impaired.

Professor Koh Peters argues that lawyers for children can be guided by Rule 1.14, and can “understand the rule in terms of three practical defaults for action in his representation of his client:

1. \textit{The relationship default}—the lawyer must meet and get to know his client.
2. \textit{The competency default}—the lawyer should initially presume some level of competency for his client on each issue in the representation in which a client’s point of view would ordinarily be sought.
3. \textit{The advocacy default}—the lawyer should initially attempt to advocate for the positions expressed by his client.”\textsuperscript{11}

Professor Peters asserts that “lawyers can and must individualize every representation, in a way that allows the maximum possible participation of the client so that the representation reflects the uniqueness of each child client.”\textsuperscript{12} For each client, the attorney must strive to ensure that the

\begin{footnotesize}
\textsuperscript{10} Id. at 36.
\textsuperscript{12} Id. at 1509.
\textsuperscript{xiii} Summit, Roland C. \textit{The Child Sexual Abuse Accommodation Syndrome}. 7 Child Abuse and Neglect, 188 (1983).
\textsuperscript{xiv} Id. at 177.
\textsuperscript{xv} Id. at 177.
\textsuperscript{xvi} Donalek, Julie G. \textit{First Incest Disclosure}. 22 Issues in Mental Health Nursing 580 (2001).
\textsuperscript{xvii} Id. at 581.
\textsuperscript{xxi} Summit, Roland C. \textit{The Child Sexual Abuse Accommodation Syndrome}. 7 Child Abuse and Neglect, 188 (1983).
\textsuperscript{xxiv} Petronio, Sandra, Flores, Lisa, & Hecht, Michael L. \textit{Locating the Voice of Logic: Disclosure Discourse of Sexual Abuse}. 61 Western Journal of Communication 101 (1997).
\end{footnotesize}
client’s values, goals and wishes inform and direct the litigation at every stage, even in the most difficult cases.

**Psychological Factors In Recantation**

Summit discussed the concept of recantation of sexual abuse allegations in a seminal article on the Child Sexual Abuse Accommodation Syndrome that summarized his clinical observations and those of his colleagues. Over thirty years ago, he wrote, “Whatever a child says about sexual abuse, she is likely to reverse it. Beneath the anger of impulsive disclosure remains the ambivalence of guilt and the martyred obligation to preserve the family. In the chaotic aftermath of disclosure, the child discovers that the bedrock fears and threats underlying the secrecy are true. Her father abandons her and calls her a liar. Her mother does not believe her or decompensates into hysteria and rage. The family is fragmented, and all the children are placed in custody.” As stated above, while the current empirical literature suggests that Summit’s statement about the frequency of recantation is inaccurate, it remains the case that there is a significant number of children in dependency cases who do recant allegations at some point. In addition to the issue of recantation, Summit wrote that children who have been sexually abused typically delay disclosure, and that both the delay in disclosure and subsequent recantation are related to common dynamics present in these situations.

Summit originally identified issues of secrecy, helplessness, and entrapment or accommodation as the dynamics that underlie a child’s delayed disclosure and recantation. He made the point that there are rarely witnesses to incidents of child sexual abuse and that perpetrators of sexual abuse deliver both implicit and explicit communications about the maintenance of secrecy. Summit made the further argument that children are subordinate and helpless in their relationship with authority figures. Finally, Summit argued that sexual abuse of a child by an individual in authority is likely to happen repeatedly and that children feel entrapped by these repeated experiences and begin to develop psychological mechanisms (accommodation) by which to manage the experience and their reactions.

In the years since Summit published his original article, there has been an enormous number of empirical studies published on many aspects of the child’s experience of sexual abuse, and, generally, most of these studies support the dynamics Summit proposed, at least to a certain extent.

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xxii Id. At 379.
As has been indicated, the typical disclosure of child sexual abuse occurs after some period of secrecy. This period may vary in length. In general, victims describe a “silencing culture” in the family, and a particular sense of isolation in the family. In addition, there is often a distance that exists between the victim and the mother, and a yearning for the mother’s concern and attention. There are multiple reasons that victims may believe it is important to keep the incest a secret. These include a fear that disclosure will destroy the family and a concern that the attention given by the offender will be lost. Child victims in therapy report fear as the most common feeling associated with the sexual abuse experience, and this was discussed by every child in a study reported by Foster and Hagedorn. Fear suggests anticipated negative consequences of what is happening as well as what non-compliance or disclosure might precipitate. In a study of 218 sexual abuse victims referred to local prosecutors’ offices, older children, those from incestuous families, those who felt more responsibility for the abuse, and those who feared negative consequences of telling delayed for longer periods of time before disclosing.

The experiences reported during the period of silence suggest a chronic level of tension in the child. Thus, studies that look at the child’s experience of disclosure typically indicate that there is period of active withholding of the information, creating a “pressure cooker effect,” in which children are experiencing a conflict between wanting to disclose, thereby stopping the abuse, and the wish and need to keep the secret. As mentioned above, Summit identifies ambivalence in “impulsive” disclosures, seeming to suggest that children typically disclose in this manner essentially when they become emotionally overwhelmed by the situation. While this does happen, the more recent literature suggests that there are a number of factors associated with when and to whom a disclosure is made, in addition to an experience of being emotionally flooded.

Of major importance is the repeated finding that, adolescents in particular, typically disclose to peers and not to adults. When they do so, they often ask the peers to keep the disclosure a secret. Confiding in a friend is not the same as disclosure to adults and, in fact, the child making the disclosure may not anticipate that the peer will tell anyone else. This type of disclosure is a way of relieving tension without having the possible negative consequences a child might anticipate from telling an adult. This child may not, in fact, have any specific anticipation about the potential consequences if the friend tells an adult. If the friend feels overwhelmed with the information and discloses to school personnel or to the friend’s own parent, an unanticipated disclosure to authorities may occur.

The literature discusses other variables that are often present at the time of a disclosure. The characteristics of the person to whom the disclosure is made is of major significance. As stated, most adolescents tell peers, while younger children typically tell a parent or a parent figure. It has been argued that children who tell adults are selecting someone they think can do something to stop the abuse. In addition, children and adolescents are likely to select someone who will not react negatively to their accounts, i.e., someone who will believe them, not blame them, and support them.

Studies suggest that the aftermath of a disclosure is often fraught with problems. For many youngsters, disclosure to a parent may result in a lack of response or the negative responses they
feared. Even in cases where children are believed, the child may feel responsible for inducing pain in a parent. In summarizing, Donalek wrote, “No fantasy rescue and resolution of issues followed first incest disclosure. Some were heard and understood, others denied and ignored. Whatever the response, if any, disclosure was always an experience of profound loss.” xxvi In reviewing the literature, Reitsema and Grietens agree that the responses of the person to whom the child discloses have a critical impact on the child’s emotional trajectory, and are associated with the severity of the psychological symptoms the child exhibits as well as later adjustment. xxvii

Furthermore, in selecting the people in whom children confide, “trustworthiness, responsiveness, and understanding are prerequisites for disclosure” and children must feel that they are “in control of what happens to the information once they disclose.” xxviii However, the typical experience once a disclosure is made, even if the recipient of the information is a supportive adult, is that the child and the person to whom they disclose do, in fact, lose control over what happens next. Families may break up, and children may be placed out of the home. Often not considered by authorities is that “The consequences for the suspected offender...were of great concern to some of the children.” xxx As there are often criminal consequences of these allegations, concerns about the well-being of the perpetrator are important. The process of the investigation and the legal encounters may, in themselves, create distress. Children report feelings of frustration regarding the length of the process, unhappiness at undergoing numerous interviews, feeling as though their privacy has been invaded by medical exams, and experiencing anxiety and exposure related to participating in criminal proceedings. xxx

Hypothetical Case Part I

You have been assigned to represent 13 year old Jordan as her attorney in a case of child abuse and neglect. According to the complaint for protective services, Jordan confided in her friend that her step-father was molesting her. The friend told the guidance counselor who immediately called in a referral to the child abuse hotline and an investigation ensued. Jordan was jointly interviewed by the police and the child welfare worker, and gave a detailed description of the abuse, which initially began as fondling and then progressed to digital penetration. According to Jordan, the abuse began when she was 10 years old, and she tried to tell her mother on several occasions, but her mother ignored her. She said her step-father told her he was teaching her how people show love.

Because of Jordan’s statements and the mother’s unwillingness to have the step-father leave the home, Jordan was placed in a foster home. She was allowed weekly visitation with her mother and younger half-brothers, who are the product of the marriage between Jordan’s mother and step-father and who have been placed in another foster home. The resource parent has told the caseworker that Jordan has reported that her mother is very distressed and has been crying about how bad it would be for her and the younger children if the step-father went to prison. Jordan said that her younger siblings do not know why the children removed from the home and have asked Jordan when they will all be able to go home. The resource parent further added that Jordan also told her that she was always very uncomfortable around the step-father because of how he looked at her.
The issues outlined above that contribute to delayed disclosures also create risk factors for recantation if they are not addressed in some manner. Attorneys for children should consider advocating for interventions that reduce the possibility of a recantation once a disclosure is made. These interventions may help reduce the risk of recantation in a case like this:

1. Insuring that the child has regular contact with all family members with whom the child wishes to have contact. Some contacts may need to be supervised to avoid direct and indirect pressure on the child, but contacts the child wishes should not be eliminated without careful review. Special attention should be given to instituting contacts with extended family members who may be sources of support.
2. Insuring that the child’s friendship circle and school activities are not disrupted.
3. Insuring that there are therapeutic supports for siblings, separate from the client initially. A focus in these discussions would be the removal of responsibility for the family disruption from the victim so as to enable the siblings to understand and express support for the victim. This requires a carefully considered approach to informing the siblings as to what occurred.
4. Insuring therapeutic support for the non-offending parent. This support needs to begin by making room for and addressing the parent’s ambivalence, helping that parent find other sources of support, and ultimately needs to work on building a stronger and healthier relationship between the parent and the child.
5. If desired by the child, regular status updates on the condition of the offending parent should be provided to the child.

Based on their empirical study, Malloy, Lyon, and Quas wrote, “Recantation appears to reflect susceptibility to pressures from influential adults”, and report, “child age, child-perpetrator relationship, nonoffending caregiver unsupportiveness, and initial foster care placement” predicted recantation. In this study, being younger (and more vulnerable to adult pressures), being abused by a parent figure, not receiving emotional support from the non-offending parent, and initially being placed in foster care were the factors linked to increasing the likelihood of recantation. These authors also found an association between recantation and the number of times the children were interviewed, although they point out that repeated interviews may have been triggered by the recantation itself.

Two major classes of factors appear to be responsible for recantations and therefore need to be addressed in working with children who recant. The first factor appears to be a general sense of loss of control that most victims experience. Such a loss of control produces feelings of powerlessness and vulnerability. These children were out of control during the abuse itself, they may have disclosed to peers and expected the peer to keep a secret, and they cannot control the events that follow the disclosure to authorities. In addition, a child who loses the support of family members subsequent to a disclosure or who is residually separated from the family is likely to feel alone in the world, and as though she/he is the one being punished. A recantation may appear to a youngster as the only way to assert some level of control over their lives, and reduce their isolation.

The second class of factors relates specifically to the concerns the child has about the consequences of disclosure on significant others. Even without direct pressure by the offender or
the non-offending caregiver to recant, the child may be acutely aware of the emotional pain, as well as the financial consequences, borne by family members. The child may be worried about siblings and the loss of contact those youngsters may have with a father-figure. The child may be distressed simply by knowing about the non-offending parent’s distress, especially if that parent is perceived as relatively weak and in need of protection. The child may be worried about the offender’s well-being. Such concerns are likely to be exacerbated in cases in which the child does not experience the abuse as frightening and views the offender as someone who is more of a peer and an ally in the family; this is especially true if the non-offending parent is experienced as distant and uninvolved. Such victims may feel responsible for the abuse itself and become concerned about the consequences for the offender if this person is incarcerated.

**Hypothetical Case Part II**

Before the next hearing, you schedule an appointment to meet with Jordan at her resource family’s home. During this private meeting, Jordan tells you that she lied about the abuse because she was angry with her step-father because of his strict rules. She tells you that she misses her family, her mom and siblings, and desperately wants to go home.

After you and Jordan talk, you speak with her resource parent who tells you that Jordan feels totally responsible for the break-up of her family and her mother’s mental status, and that she frequently cries herself to sleep. The resource parent asked Jordan if her step-father really did those things, and Jordan just put her head down and didn’t respond.

When a child recants, the attorney faces difficulty in knowing how to approach the client, in assessing the child’s decision-making capacity, and in deciding on the focus of the attorney’s advocacy efforts. The attorney’s initial reaction is to talk with the client about the initial disclosure and the most recent statements of recantation in an effort to understand the client’s position. Next, the attorney is likely to counsel the client about the effects, or lack thereof, of the recantation, the concerns the court will have about the client’s change in position, and the possibility that the recantation may not achieve the client’s desired result; for instance, the client returning home, the case being dismissed.

Confronting a recanting youngster with the inconsistency of her statements rarely produces much change and effectively disrupts the alliance with the attorney. As William Wesley Patton noted, children who have been physically or sexually abused by a trusted caregiver develop a strong distrust of others. xxxii Therefore, he submits, when attorneys for children fail to follow the client’s stated wish or the attorney “appears to disbelieve the child’s narrative…” the potential psychological harm to the abused child can be intensified by this further, perceived or actual, betrayal.xxxiii

Children will rarely provide their attorneys or anyone related to the legal system with any underlying familial issues resulting in recantations. To assess whether this is going on, attorneys need to approach their clients with understanding and inquire as to their experiences related to the disclosure and its aftermath, as opposed to focusing the interview on what the child has said about the allegations before and after the recantation. Attorneys, therefore, should refrain initially from
confronting the client about what she said initially and what she is now saying. Rather, questions like the following can be asked:

- What did you think would happen to you when you told your friend you had been sexually abused? Who else did you think would find out? What did you think anyone would do?
- What did you think would happen to you when you made your allegation to the police and child protective services? What did you think would happen to your step-father? To your mother? To your siblings?
- As a result of your allegation, what did happen to you? To your mother, your siblings? To your step-father?
- How do you feel about what has happened to each of these people?
- What do you think will happen to each of these people, now that you have said the allegation was a lie?
- What do you think will happen if you ever make a sexual abuse allegation again?

The answers to these questions can help the attorney assess the likely reasoning of the child and therefore his/her capacity for decision making. These questions also do not convey to the child the lawyer’s disbelief of her current narrative which could undermine the trusting relationship lawyers need to have with the clients. Unfortunately, it will often become clear that the children have made a decision, based upon the untreated dynamics in the family, to simply take the onus on themselves and represent themselves as liars driven by relatively petty issues. They are essentially sacrificing their own needs to the needs of others in this process in order to maintain a relationship with their families. It may not be possible to move a child from this position and it may be likely that the Court’s decision will be contrary to the child’s wishes. However, even in that case, it may be possible to advocate for some of the same issues discussed earlier as well as others identified by the child that would allow the child to be able to maintain some sense of control as well as address the child’s concerns about the rest of the family.

Conclusion

In the challenging situation wherein a child-client in a dependency matter recants allegations of sexual abuse that appear to have significant evidentiary support, there are no simple answers; however, the lawyer who strives to maintain a normal, trusting and open attorney-client relationship, and avoids at all costs undermining or conveying disbelief of the client’s narrative, will have served the client well. The lawyer’s responsibility as counselor and advisor, someone who seeks first to understand the client and her position, is more likely to achieve a good result for the client. Having a greater understanding of the psychological dynamics of a child who has been sexually abused will guide children’s attorneys as they strategize and advocate for supportive services for their clients while working toward the client’s stated wishes and goals. In the end, a client who has had a lawyer who values the client’s position instead of judging, listens with a genuine desire to understand the client’s experiences and feelings instead of trying to convince the client of the “better” course of action, will be better able to assist the client throughout the litigation and achieve a result that is consistent with the client’s wishes and interests.
REASONABLE EFFORTS AND CHILDREN’S ATTORNEYS

Judge Leonard Edwards

Children’s attorneys are not raising the reasonable efforts issue in court. In the research for my recently published book entitled Reasonable Efforts: A Judicial Response, I made a number of discoveries. First, most reasonable efforts issues are raised by parents after a termination of parental rights judgment. Second, parties rarely litigate the reasonable efforts early in the case. Third, children’s attorneys (GAL’s) almost never raise the reasonable efforts issue.

These are significant problems. Raising the reasonable efforts issue after the termination is too late. The case is usually several years old and the child has been out of the home for most if not all of that time. The child will suffer trauma no matter the outcome of the case. The reasonable efforts issue needs to be raised early in the case. For example, the federal and state requirement that “reasonable efforts to prevent removal” is rarely litigated. It should be. Removing a child is a critical event – one that deserves much more than the brief court hearing that usually follows the physical removal. The Resource Guidelines recommend that the shelter care hearing take an hour of court time. Moreover, the reasonable efforts to “effect the safe reunification of the child and family (if temporary out-of-home placement is necessary to ensure the immediate safety of the child)” should be addressed early and often. Dependency cases are emergencies and waiting around for months and years does not serve the child or family well.

The attorney/gal for the child should be active in reasonable efforts litigation. This is not an issue between the parents and the agency as some children’s attorneys tell me. The child’s attorney should be demanding that reasonable efforts be expended to identify, find, and engage the father, for example. After all, he represents 1/2 of the child’s relatives. The child’s attorney should be insisting on frequent and meaningful visitation. The studies are clear that the child is better served if there is regular visitation, even if parental rights are ultimately terminated.

The child’s attorney sometimes seems to forget that the first goal in dependency proceedings is family reunification. To that end good quality services delivered in a timely fashion will serve that goal and their client’s interests. For example, most children are traumatized by the removal and subsequent placement. The child usually needs therapeutic services. Obtaining quality therapy in a timely fashion is a reasonable efforts issue that the attorney for the child should pursue aggressively. Often parent-child therapy is helpful in the reunification process as the child’s behavior may be a barrier to reunification. Children’s attorneys should argue these and other issues in trial court and in the appellate courts.

Children’s attorneys should be active participants in fulfilling a principle goal of the federal and state dependency laws: holding the social services agency accountable for providing services to the child and family throughout the case. Appropriate and timely services to the parents will also serve the child’s best interest.

2 45 CFR §1356.21(b)
3 See Edwards, L., “Judicial Oversight of Parental Visitation in Family Reunification Cases,” Juvenile and Family Court Journal, Vol 54, NO. 3, Summer 2003, pp 1-24 (also found online at judgeleonardedwards.com)
RECONCILING BEST INTERESTS WITH PARENTAL RIGHTS IN COMPETING ADOPTION CASES: AN OVERVIEW OF D.C. CASE LAW AND PRACTICE POINTERS FOR GALS

Jessie Forsythe
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Introduction

In the District of Columbia and many other jurisdictions, the Guardian ad litem (“GAL”) in an abuse or neglect case is charged with representing the best interest of the child. In D.C., the GAL is tasked with the duties of an independent investigator who ensures all relevant information is before the court, and of a zealous advocate for the client’s best interest. It is not uncommon for the GAL’s assessment of the child’s best interest and subsequent representations to conflict not only with the wishes of the parents but also their constitutional rights, and this is particularly true in cases with a permanency goal of adoption. A child’s permanency goal may be changed to adoption for a variety of reasons, but generally, this change occurs when a parent has made little or no progress in ameliorating the conditions that led to neglect. Those cases might include parents who have abandoned or maintained inadequate contact with their children, suffer from chronic and untreated mental health or substance abuse issues, or have demonstrated prolonged inability to keep their children safe.

Some of the most complicated of these cases for GALs are competing adoptions – cases in which there are two sets of caregivers seeking to adopt the child. In most jurisdictions, in order to grant an adoption, the parent must consent, or their consent must be waived, if the parent’s rights are intact at the time of the adoption trial. But what happens when a parent consents to one adoption petitioner, and not to the other? In deciding which petitioner to support, GALs are especially challenged in cases where a very young child has been with the same foster parents for an extended period of time, often the duration of a neglect case, and the parent proffers an alternative caregiver on the eve of the adoption trial. Sometimes, the case law, and the parental preference, aligns with a child’s best interest. In other words, placement with the parent’s choice of caregiver is in the child’s best interest, for a number of reasons that might include the child’s strong relationship with the caregiver, the caregiver’s understanding of and ability to meet the

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4 In this paper, “competing adoption cases” refers to cases in which two parties, usually both the foster parent and a non-foster parent, often a relative, have filed a competing adoption, guardianship, or custody case. “Contested adoption cases” refers to those in which the biological parent opposes the adoption.

child’s needs, and the importance to the child of retaining biological family relationships, including relationships with the birth parents.

However, often times, the child’s permanency goal has been changed to adoption because the parent has not made much progress in ameliorating the conditions that led to neglect. In those cases, the child is often residing in a long-term foster home, with caregivers she identifies as parents and to whom she is attached. Moving the child to the parent’s choice of caregiver, then, has the potential to disrupt this attachment or reinforce abnormal attachment patterns, which carries with it a host of psychological, emotional, and physical consequences. Supporting the parent’s choice of caregiver can also conflict with the GAL’s best interest analysis where there are concerns about the fitness of the parent’s choice, and where the child’s relationship with the birth parents or family is not healthy or appropriate. These cases can bring the best interest of the child and the “fundamental liberty interest of natural parents in the care, custody, and management of their child” into direct confrontation, and it is the GAL’s challenge to advocate for the best interest of the child while ensuring that the child’s interests are served regardless of the legal outcome of the case.

This paper uses of the lens of the evolving case law in the District of Columbia regarding competing adoption cases to outline investigation and advocacy strategies to assist a GAL to explore and assess parents’ proposed caregivers. It will provide practice tips for ensuring that these caregivers are thoroughly evaluated early in the case, as well as approaches for cases in which a caregiver is not introduced until very late in the case.

**Parental Right To Consent To An Adoption Petitioner**

The cornerstone Supreme Court case for termination of parental rights (TPR) cases is *Santosky v. Kramer*. In *Santosky*, the Supreme Court established that parents’ fundamental liberty interest in determining the care, custody, and control of their children is protected by the fourteenth amendment and “does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.” The Court held that a “clear and convincing evidence” standard of proof appropriately satisfies due process. With this heightened standard, the Supreme Court sought to “fairly [allocate] the risk of an erroneous fact finding” between the State and the natural parents.”

Subsequent cases from the District of Columbia Court of Appeals (DCCA) have reiterated this standard and have used the “clear and convincing” standard in assessing whether the lower court has appropriately considered a parent’s choice of caregiver in a competing adoption case. Specifically, *In re T.J.* extended

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8 These cases include adoption cases in D.C. where parental rights are terminated via a successful adoption case rather than through an independent termination of parental rights case.
9 *Santosky v. Kramer*, supra, 455 U.S. at 753.
10 *Id.* at 769.
11 *Id.* at 761.
12 In D.C., courts consider the following factors when terminating parental rights and/or granting an adoption petition:
   (1) the child’s need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages;
   (2) the physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child;
   (3) the quality of the interaction and interrelationship of the child with his or her parent, siblings, relative, and/or caretakers, including the foster parent;
   (3A) the child was left by his or her parent, guardian, or custodian in a hospital located in the District of Columbia for at least 10 calendar days following the birth of the child, despite a medical determination that the child was ready for discharge from the hospital, and the parent, guardian, or custodian of the child has
the finding in Santosky and found that “the parent’s choice of a fit custodian for the child must be given weighty consideration which can be overcome only by a showing, by clear and convincing evidence, that the custodial arrangement and preservation of the parent-child relationship is clearly contrary to the child’s best interest” (emphasis added). 13 Even with this heightened standard intended to protect parental rights, the DCCA has historically given great weight to the best interest of the child. In In re C.A.B., the court stated that, “[w]e have repeatedly emphasized that it is the child’s best interest, not the fundamental right to parent that is paramount in adoption cases” 14 and in In re S.M., the court found that “[t]he presumptive right of a fit parent over an adoptive parent…must necessarily give way in the face of clear and convincing evidence that requires the court, in the best interest of the child, to deny custody to the natural parent in favor of an adoptive parent.”15 Since that time, the DCCA has struggled with how to resolve the tension between the parents’ constitutional rights and the best interest of the child in contested and competing adoption cases. The result is an ever-growing body of case law that, while attempting to guide the lower courts in balancing these competing interests, has appeared to swing between prioritizing one over the other. This has led to changes in practice if not in the law.

**Delay In Proposing Caregivers**

The conflict between best interest and parental rights in adoption cases most often occurs when the parent’s preferred caregiver is significantly delayed in becoming involved in the neglect case – and with the child. These delays are generally caused by either the parent or the foster care agency, and raise questions about who should shoulder the responsibility for identifying kinship caregivers early in a case. In some cases, it is the parent who introduces a caregiver at the eleventh hour, right before (or sometimes during) an adoption or TPR trial. These late-introduced caregivers can prove especially problematic for the GAL, as it can be challenging to complete a thorough assessment so late in the case. Often, the GAL, and the foster care agency, have limited, or no, information about such a caregiver, and have not been able to assess her fitness or relationship/interactions with the child.

In deciding competing adoption cases, the DCCA has factored in whether the parent delayed in either making efforts towards reunification or in providing an alternative caregiver. For example, the court in In re An.C. found that “[a]lthough…the wishes of a fit parent as to the custody of his or her child constitute an important factor in the judge’s calculus, the TPR judge could rationally find…that in this case the father’s statement of preference came far too late…and that further delay would be detrimental to the children’s well-being.”16 Similarly, in In re B.J., the court stated that “a biological parent’s choice of related caretakers should not be afforded the same weighty consideration where the neglected child had been in the custody of foster care for a considerable length of time before the biological parent demonstrated any interest in exploring possible familiar placement options.”17 Extended delay on the part of the parents to achieve reunification is also disfavored as being contrary to the best interest of the child. In In re D.H., the court articulated that “there is a strong public policy…disfavoring the protracted

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14 In re C.A.B., 4 A.3d 890, 899 (D.C. 2010).
15 In re S.M., 985 A.2d 413, 417 (D.C. 2009).
17 In re B.J., 917 A.2d 86, 93-94 (2007) (internal citations omitted).
retention of child in foster care, and a ‘wait and see’ option indefinitely deferring adoption...is inappropriate where a birth parent’s ability to reunite with the child within a reasonable time is entirely speculative.”18 These findings are indicative of the court’s willingness to place at least some of the responsibility for identifying family placements on the parents. Additionally, the court has recognized that where the delay is the fault of the foster care agency, the child should not suffer because of the agency’s failures.19 However, the DCCA has also made clear that delay is merely one factor the court must weigh in applying weighty consideration.20

Such late introductions of caregivers by parents can also cause the GAL to question the parental motives. Does the parent truly want the proposed caregiver to be the primary parent of the child, or is she proposing the caregiver as a “proxy” in an effort to delay the adoption or in the hopes that once the child is in the proposed caregiver’s care, the parent will be able to take the child back? This situation can be problematic where the GAL has concerns about the parent’s fitness and ability to care for and keep the child safe. In fact, the DCCA has looked unfavorably on those cases in which the parent seems to have offered a relative caregiver as a proxy rather than as a legitimate or sincere permanency option. This was the case in In re B.J where the proffered relative did not make any efforts during the six years that the children were in foster care to get custody of those children. The court concluded that the mother’s choice of caregiver in this case seemed to be an attempt to avoid a termination of rights rather than a choice of placement made with the children’s best interest in mind.21

In other cases it is the foster care agency that causes the delay in assessing potential caregivers that the parents prefer. Even when some parents do introduce caregivers early in the case, there can be agency delay in following up on these proposals and fully evaluating their suitability as caregivers when a child is in a safe, stable, and often times, pre-adoptive foster home. In other cases, the agency may rule out the parent’s choice of caregiver as a placement option for the child for legitimate, or not so legitimate, reasons. In D.C., often when caregivers are ruled out early in a case, it is because they are unable to meet foster care licensing requirements, which may or may not actually impact their fitness as caregivers. These requirements can range from prior involvement with child protective services or criminal convictions to bedroom size and other space issues in the home.22 It is also important to note that some GALs may be reticent to explore parental choices when the child is in a stable foster home, and where the foster care agency previously ruled out the parental preferences as unviable caregivers. However, a caregiver’s inability to be licensed may not, in and of itself, overcome the parental presumption and natural parent’s right to designate a caregiver for her child, and these “ruled out” caregivers may reappear and file for adoption later in the case.

**Early Identification And Assessment Of Caregivers**

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19 See In re K.D., 26 A.3d 772, 781-82 (D.C. 2011) (finding that “where an adoption is ‘demonstrably in the child’s best interest,’ the child ‘cannot be punished for the alleged wrongs of the bureaucracy’... Thus, the interests of natural and potential adoptive parents ‘must give way before the child’s best interests.’”) (internal citation omitted).
20 In re D.M., 86 A.3d 584, 588 (D.C. 2001) (“We have never upheld a trial court’s failure to give weighty consideration to a parental preference on account of parental dilatoriness; nor has this court ever held that weighty consideration was unnecessary because the parent waited too long to propose a custody arrangement. At most, we now make clear, dilatoriness is simply a factor to be considered as part of the weighty consideration that is due.”).
21 In re B.J., supra, 917 A.2d at 94 (confirming the trial court’s finding that “the presentation of [the proposed caregiver] at this late date appears to be an attempt by [the parent] to prevent a TPR rather than the suggestion of a placement that would be in the best interest of [the children].
22 See 29 DCMR § 6000, et. seq.
In order to avoid reaching an adoption trial and having little to no information about the parent’s choice of caregiver, GALs should advocate for early identification and investigation of relative adoptive resources.

GALs struggle most with overcoming the parental preference, or determining whether to support the proposed caregiver, when there is a lack of information about the proposed individual. However, lack of information in and of itself may be not sufficient to overcome the parental presumption/preference. D.C. case law makes clear that to overcome the parent’s consent to a caregiver, the trial court must make detailed findings that the preferred caregiver is unfit or that placement with that caregiver would be clearly contrary to the child’s best interest. The DCCA does not relax the standard, even when a parent proposes a caregiver during the course of a TPR trial and even when that caregiver has not filed a petition for adoption. This reality may present several practical barriers for a GAL who has determined that placement with the non-preferred – and potentially previously unknown – caregiver is not in the child’s best interest.

Obtaining as much information about a proposed caregiver early in the case is key. The role of the GAL must necessarily include investigating and then advocating for or against the parent’s proposed caregiver. Even though the foster care agency is tasked with identifying and vetting placement options, it is important for the GAL to conduct her own independent investigation. Such exploration may yield additional information that is helpful to the agency in ruling a proposed caregiver in or out; provide strong facts for not supporting a parent’s choice of caregiver; bolster the GAL’s legal argument for disagreeing with the agency’s dismissal of a caregiver; or elicit evidentiary information to be presented at a later adoption trial.

Another reason early identification of potential caregivers is important is that the child may develop an attachment to her foster parent, and if the parent’s choice of caregiver is not introduced until late in the case, there is a risk that that attachment will be severed. This risk is noteworthy for children in the foster care system, who have often experienced significant trauma and retraumatization, formed insecure attachments to their primary caregivers, or developed abnormal attachment patterns by virtue of neglect, removal and placement changes. As secure attachments are critical to healthy development and relationships, it is important to consider a child’s attachment history when deciding what caregiver to support.

Indeed, in D.C., the importance of attachment and a child’s connection to her primary caregivers has long been recognized as a crucial factor in determining which adoptive placement is in a child’s best interest. The rationale behind these decisions emanates from the understanding that children in foster care develop close relationships to their foster parents and that disrupting these relationships has the potential to be damaging to the child. The court in In re K.D. emphasized that it was loath to set aside lightly “a stable and desired environment” where children have resided for a long time and credited the trial court, which “ultimately concluded that moving [the child] from her current home…would subject her to psychological harm,” with “[giving] extensive consideration to the merits of the mother’s choice of caretaker.” The court was perhaps most emphatic when it stated that “it is generally contrary to the child’s best interest to take [her]out of a loving home, when she ha[s] lived [there] for a substantial period of time as a result of her biological parents’ inability or unwillingness to care for her.”

24 See, e.g., In re D.M., supra, 86 A.3d at 586, 590.
26 See In re L.L., 653 A.2d 873, 883 (D.C. 1995) (referring to the removal of a child under such circumstances as “ruthless beyond description”) (quoting Hazuka’s Adoption, 29 A.2d 88, 90 (Pa. 1942); In re K.D., supra, 26 A.3d at 779; see also In re R.E.S., supra, 19 A.3d at 794.
27 In re L.L., supra, 653 A.2d at 883.
28 In re K.D., supra, 26 A.3d at 779.
29 In re R.E.S., supra, 19 A.3d at 794 (internal citations omitted).
to her potential caregivers is a pressing concern in the best interest calculus. Language regarding the importance of a child’s attachment to or bonding with a caregiver - and the detriment that comes with disturbing such a bond – is a mainstay of weighty consideration case law.

Historically, expert evaluations of a child’s interactions and level of attachment and/or bonding with a potential permanent caregiver have been pivotal in competing adoption cases. The court has found them to offer critical insight into a child’s relationships and guidance regarding a child’s best interest. Such evaluations play a prominent role in well-established D.C. case law, even where they were one-sided, providing information about one set of competing caregivers only (usually the foster parents the child is living with). However, it is possible that emerging case law, in its focus on parental rights, will minimize the influence of such evaluations.

The court’s reasoning in In re Ta.L offered a brief glimpse into this possibility. Although vacated and pending rehearing en banc, Ta.L indicated a hesitation on the part of the DCCA to consider one-sided attachment or bonding studies because such studies do not offer an equal assessment of two competing caregivers, but rather reinforce the obvious: that a child is more bonded to the person she has had more opportunity to bond with. Such a shift may push GALs to develop additional ways to establish that removal from a non-preferred caregiver would be detrimental to the specific child at issue. In other words, evaluations that have been critical to a non-preferred petitioner’s case – and accompanying expert testimony regarding the trauma that comes with severing a child’s attachments - might be significantly devalued where the parent’s preferred caregiver does not participate in such an evaluation or has not had the benefit of developing a meaningful bond prior to participating. In the past, the court may have been satisfied to acknowledge that a lack of opportunity to develop a relationship with a child is a natural consequence of a sometimes contentious neglect and permanency process that can be disadvantageous to a parent’s preferred caregiver. But going forward, it seems the court may be more critical of this reality and more exacting with respect to the government’s efforts to identify potential preferred caregivers early in the life of a case and integrate them into the life of the child in question.

A. Ensure Caregivers Identified/Proposed

Both the parent and the agency play a key role in the early identification of caregivers. In D.C., the child welfare agency convenes a Family Team Meeting (FTM) within the first seventy-two hours that a child is removed from the home. That meeting, or any other meeting during the early life of the case, is an important opportunity to collect all possible caregiver names from the parents. In doing so, it is important to ensure that the GAL and/or the agency are both clear and creative in making this request. This early in a case, parents may be rightly focused on reunification and the return of their children and as a result be

30 In An.C., supra, 722 A.2d at 40, the court upheld a TPR where the foster parents wanted to adopt and the biological father requested instead that his children be placed with a family member pending his release from prison. The court noted that “inaction on the part of the parents, as well as their apparent lack of interest in the children, brought about the bonding between the foster mother and the children which the father is now asking the court to undo. That bonding, however, is now a fact of life.” Id.
31 See, e.g. In re T.W.M., 18 A.3d 815, 820-21 (D.C. 2011) (adoption by foster parents affirmed, despite involvement throughout life of case of a cousin preferred by parents; court’s decision was based in large part on the child having spent most of her life in foster parent’s care and expert testimony about effect of severing attachment between the caregiver and the child).
32 See, e.g. In re C.A.B., supra, 4 A.3d at 893-94.
33 See In re K.D., supra, 26 A.3d at 776, 779-80.
34 See In re Ta.L., 75 A.3d 122, 133-34 (D.C. 2013) (“[T]he results of a bonding study that is so disparate in terms of bonding opportunities between a preferred petitioner and a competing petitioner cannot be sufficiently meaningful to prove by clear and convincing evidence that the preferred custodial arrangement is clearly contrary to the children’s best interest. In other words, without fair and equitable attachment and bonding studies, a trial court cannot find, as a matter of law, that there is clear and convincing evidence in the record that a custodial relationship, preferred by the biological parents, with an otherwise fit and suitable caregiver would be clearly contrary to the children’s best interest merely because the children are found to be attached to the competing petitioner.”)
35 See In re K.D., supra, 26 A.3d at 781-82.
reluctant or unwilling to provide names of alternative caregivers with whom the child might form a bond. Clarity about the role of these proposed caregivers (as temporary kinship foster parents for the child, family supports, or lifelong connections) may help encourage the parent to provide caregiver options. If the child will not be returned home immediately, explaining to the parents that failure to identify potential kinship placements will result in the child’s placement in stranger foster care can help to facilitate early relative caregiver identification.

Creativity in making these requests can open a larger pool of caregiver options. There may not be any family members willing to take care of the child, but the parent could identify godparents, neighbors, friends, members of their church, etc., who may be viable options. Ensuring that the parent is aware that her choice does not have to be limited to relatives may assist the agency/GAL in identifying a caregiver that the parent supports early in the case. Although it is important to have these meetings and conversations early in the case, the GAL also may consider convening these meetings during the life of the case at regular intervals, or at key moments in the case (for example, when the permanency goal is changed), to continue to encourage the parent to provide names of possible caregivers for the child. The GAL may also want to consider asking the court to order that the parents provide potential caregiver names to the agency at other important intervals throughout the case, such as at the initial hearing, disposition hearing, and first permanency hearing.

In identifying proposed caregivers early, it is helpful for the GAL to know the relevant statutes, court rules, and even the agency’s written policy regarding engaging caregivers, if any. Being able to point to such law and policy is often a powerful advocacy tool, both informally with the agency and more formally through requests for court orders, in ensuring that parents’ proposed caregivers are fully assessed and considered during the life of the case.37 Ensuring that the agency fulfills its responsibilities does not take the onus off of the birth parents to identify possible caregivers. After all, the birth parent often has the most information about the child’s life prior to her entry into foster care and is usually in the best position to generate the names of appropriate caregivers. In addition to convening informal meetings to have the parents identify caregivers, the GAL might also consider advocating with the parent’s attorney, or asking the court to inquire whether the parent would like the agency to explore anyone to care for the child. Finally, the GAL’s client, depending on her age and developmental level, may also be a source of caregiver suggestions; the GAL should consider exploring this issue with her client and, if appropriate, bringing such names to the agency and/or parent. The GAL should explore this issue with the child more than once throughout the life of the case, as the child might develop relationships with potential permanent caregivers after coming into care, or may re-engage with a relative who is a potential caregiver after being in care for some time.

B. Investigate/Assess Proposed Caregivers
Once a caregiver is identified, the GAL should conduct an independent investigation of each proposed individual. One place to start is holding one-on-one interviews with the caregivers. When conducting such interviews, the GAL should consider bringing a second individual, such as an investigator, in case testimony regarding the caregiver is required later in the case. Another tool the GAL can employ is taking a witness statement, especially if the caregiver says things that the GAL wants to

37 See, e.g., D.C. Code § 2312 (a-1) ("at a minimum, the Agency shall invite parents, relatives, caregivers, community representatives, service providers, and the guardian ad litem appointed to represent the child’s best interest to attend a family team meeting") (emphasis added); Super. Ct. Neg. R. 22 (requiring that the agency disposition report include "identification of the relatives or friends who have been contacted about providing a placement for the child" and "the terms of visitation, including visitation with siblings and other relatives") (emphasis added); Super. Ct. Neg. R. 25 (requiring that the court make findings at disposition which include "whether relatives or friends have been contacted about providing a placement for the child, the steps taken to involve extended family members when appropriate to plan for a safe and permanent home for the child, and further efforts that are required"); D.C. Child and Family Services Agency Policy, “Temporary Licensing of Foster Homes for Kin”, September 20, 2011.
memorialize/draw his/her attention to later on in a trial. Such statements can also serve as an important impeachment tool, if necessary.

Possible topics for the GAL to consider during such caregiver interviews include:

- **The caregiver’s involvement in the child’s life prior to entering foster care:** what type of relationship did the caregiver have with the child? How often did she visit/have contact with the child? Does the child know her? What does the child call her?

- **The caregiver’s relationship with the parent:** how does the caregiver describe her relationship with the child’s birth parent/parents? Does the caregiver have any concerns about navigating this relationship once the caregiver becomes the child’s temporary custodian? What type of access will the caregiver give the parent to the child? Will he or she listen to the recommendations of the agency/GAL/professionals in terms of parental visitation? How much of a protective factor will the caregiver be, if there are serious concerns about the child’s safety around the parent? How much will the caregiver encourage the child’s relationship with the birth parent, if appropriate?

- **The caregiver’s awareness of the underlying case issues:** does the caregiver know why the child came into care? When did the caregiver become aware that the child was in foster care? Did the caregiver have concerns about the care the parent was providing? What action did the caregiver take in response to those concerns?

- **The caregiver’s knowledge of the child:** is the caregiver familiar with the child’s needs and services, including her physical health, education, mental health, and development? Is the caregiver able and/or willing to meet those needs and ensure the child gets the services she needs?

- **The caregiver’s willingness:** does the caregiver understand the responsibilities involved in being a foster parent and/or adoptive parent? Is the caregiver willing to take on those responsibilities? Does the caregiver understand what their role will be in relation to the birth parent?

- **The caregiver’s ability:** does the caregiver have any issues that would make them inappropriate, unable, or unfit? Does the caregiver have any past or current substance abuse issues? Mental health concerns? Competing family obligations? Housing issues? Physical health impairments?

- In addition to caregiver interviews, it may be helpful for the GAL to run background checks based on public records for the proposed caregivers. In many jurisdictions, criminal, civil, domestic violence, mental health, and/or family cases are available to the public. If the family is going through the licensure process many of these checks may be completed by the agency. However, having this information upfront can help the GAL assess her position regarding the suitability and fitness of the parent’s proposed caregiver, as well as generate evidence for a future adoption trial. In addition, if the GAL supports the caregiver, but finds information in the caregiver’s background that might be a barrier to licensure, the GAL can develop strategies to address those barriers early in the case.

Another potential assessment tool is for the GAL to gather clinical impressions from the various professionals on a case. The child’s or parents’ mental health providers and social workers may be able to offer valuable insights into the quality of the child’s relationship with each of the proposed caregivers, how the child views the different adults in her life, and the potential impact of separation from or placement with any particular caregiver. Occasionally, the GAL may disagree with the clinical impressions of such professionals, so it may become necessary to consult with other professionals or clinicians, such as non-agency social workers, in order to get an alternate clinical opinion. Such information may generate expert testimony to use later at trial.

In assessing caregivers, the GAL might consider asking the court to order, or arrange through private means, evaluations involving the child, parent, foster parent, and/or proposed caregivers. Such evaluations might include parenting capacity assessments, psychological evaluations, interaction assessments, bonding and attachment evaluations, etc. These evaluations can provide information regarding the various caregivers’ abilities and willingness to care for the child; the quality of relationship between the child and the caregivers; and the strength of the bond and attachment between the child and
the caregivers. Such data can help the GAL form her position regarding whose adoption petition to support, serve as a source of evidence for trial, or help inform a clinically appropriate transition plan, if the child is moved from her current caregiver.

Finally, it is crucial for the GAL to keep thorough records during her assessment of the caregiver and encourage the foster care agency to do the same. Often it can be several years before a child reaches permanency, and during those years, the child may very well change social workers, therapists, GALs, etc. In order to preserve arguments in support of or against a parent’s choice of caregiver, the GAL should carefully document any efforts the GAL and agency has made to engage the parent in offering caregiver options, attempts to involve proposed caregivers in the case, and any concerns or positive information about the caregivers. This information will help the GAL effectively rebut the parental presumption/preference or support the parent’s choice of caregiver at any resultant adoption trials, and will ensure that the GAL is able to zealously and thoroughly advocate for the child’s best interest.

C. **Encourage Visitation**

Unless there are serious concerns about the proposed caregiver’s fitness and/or relationship with the child, the GAL should consider whether encouraging frequent, ongoing relationships with the proposed caregiver is in the child’s best interest. The GAL may consider several important factors in creating the parameters of visitation, including whether the visits should be supervised or unsupervised and include or be separate from the birth parents’ visitation.

If the GAL supports the caregiver, this visitation will help the child and caregiver foster a bond with each other and give the GAL and agency a chance to assess the relationship. In addition, the GAL might consider other ways, beyond visitation, to integrate the caregiver into the child’s life. For example, perhaps the proposed caregiver could help to facilitate birth parent visitation by providing transportation, a location for visits, or serving as a designee to supervise visits. The proposed caregiver could serve as a respite option for the child’s foster parent when needed. Such visitation may also include involving the caregiver in the child’s medical, therapeutic, and educational appointments and meetings, to help the caregiver learn about the child’s needs and again, assist the professionals in further assessing the caregiver’s ability to adequately parent the child.

The GAL may also consider supporting visitation with the parent’s proposed caregiver even if she does not support ultimate placement with and adoption by the caregiver. First, the court may grant the adoption petition of the parent’s choice, even without the GAL’s support, in light of the parental preference in competing adoption cases. By encouraging visitation, the GAL can place her client in a position where she is less traumatized by a removal from the foster parent, as at least the child will be familiar with the proposed caretaker. Further, ongoing and consistent visitation helps to ensure the child has strong relationships with and lifelong connections to relatives.

D. **Increase Caregiver Cooperation**

Emotions can run high in competing adoption cases. Often, when caregivers start filing petitions and “fighting” over the child, the relationship breaks down between the foster parent and the parent’s choice of caregiver, or the parties are unable to develop a relationship at all. Unfortunately, attorneys and social workers can contribute to this tension by encouraging foster parents not to openly communicate with parents and other family, or by emphasizing the adversarial relationship between the parties. Children may often perceive that these tensions exist, and this can cause children’s relationships with either or both sets of caregivers to become strained, and may make the child feel like she has divided loyalties and has to “choose” between her caregivers.

GALs can play a key role in minimizing this conflict, which may serve two purposes. Most importantly, when caregivers get along, the child may feel less tension in her own relationships with them, and if the
child has to be moved eventually, she will feel like that move is supported by her foster family and biological family alike. When the caregivers are more open to each other and see their roles as cooperative rather than adverse, resolution of the case short of trial may be more likely. A parent may be comfortable with the foster parent and consent to the adoption. What was once a competing adoption trial may turn into an agreement between the foster and biological families regarding ongoing post adoption contact. Therefore, the GAL might consider introducing the foster and biological families and opening the lines of communication early in the case. This can be done in a variety of ways depending on the comfort level of the families. In D.C., the foster care agency convenes “icebreaker” meetings between the foster parents and the birth parents when the child is first removed, and encourages frequent communication and co-parenting (if possible) throughout the time the child is in foster care. Foster and birth families can exchange letters, emails, and pictures, communicate via phone, and even work together in facilitating appointments and visitation for the child. Thus, when these methods are effective, whatever the permanency outcome, the child has the benefit of having all the adults in her life who care about her involved, invested, and working together towards her well-being.

Advocacy Regarding Late-Introduced Caregivers

The reality of these complex cases is sometimes, despite the GAL’s best efforts, a caregiver does not come forward until late in the life of the case, and the parent consents to placement with that caregiver. This section will focus on possible strategies and advocacy tips to ensure the client’s best interest are protected when the GAL has little to no information about the proposed caregiver.

One strategy to consider at this juncture in the case is mediation. Sometimes, getting all parties in the room together can go a long way to resolve the case before reaching a heated, contentious adoption trial. The GAL can play an important role in these mediations by re-focusing the parties on the best interest of the child and pushing a resolution that ensures the child can retain her relationships with all of the important adults in her life. In some jurisdictions, judicial mediation is an available, and helpful, option. Sometimes, when parties hear from a judge that the law and facts are not on their side, they may become more willing to seek settlement in a particular case.

The most devastating consequence in competing adoption trials for the child can be the loss of the child’s relationship with one or several caregivers. Therefore, the GAL should consider helping to negotiate visitation agreements with the caregiver who does not prevail in the adoption trial. Such agreements can be powerful settlement tools, as a caregiver may be more interested in maintaining a relationship with a child than actually being the primary parental figure. In D.C., such agreements are called post-adoption contact agreements (PACs), and are judicially enforceable.38

In some cases contentious litigation is unavoidable, and it can be challenging for the GAL to help overcome the parental preference where little is known about the parent’s choice of caregiver. When the parent’s choice does file an adoption petition in advance of trial, in addition to fully assessing the caregiver (albeit on a more expedited timeline) as outlined in Section IV.B., the GAL can also utilize the discovery and pretrial process to gather more information about the proposed caregiver (using some of the above suggested interview questions as a guide for discovery interrogatories). The GAL might also consider whether to bring expert witnesses onto the case or to request the evaluations discussed in Section IV.B., if not done so already, in order to establish the importance of the relationship the child has with each of the parties and the effects on the child of separation from the current caregiver.

Finally, as GAL, it is important to consider how to present evidence of the child’s opinion to the court. In D.C., the child’s opinion is one of the factors the court is required to look in adoption and termination of

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38 See D.C. Code § 4-361 (2010).
parental rights cases. However, it may not be in the child’s best interest to testify, based on the child’s age, developmental level, understanding of the proceedings, or possible traumatic response to the witness experience. The GAL therefore may need to explore alternate ways to get the child’s opinion before the court, such as through the child’s statements to others in the case (if hearsay exceptions allow for it) and lay and expert observations and interpretations of the child’s interactions with caregivers.

Sometimes, a parent may introduce a previously unknown caregiver during the trial itself. This surprise introduction may occur when the parent testifies that he/she has identified someone to whose petition he/she would consent, or when a parent’s witness suddenly volunteers that he/she is willing to file for adoption. In those situations, the GAL’s best tool to overcome the parental preference is cross examination. Through cross, the GAL can seek to establish the caregiver’s lack of involvement in the case and in the child’s life, absence of knowledge of the child’s needs, and any other facts about the caregiver that the GAL can elicit to rebut the parental preference. In addition, the GAL might consider calling the agency social worker as a rebuttal witness after such testimony to establish the caregiver’s lack of engagement in the case.

Ultimately, in some cases, the GAL may fully support adoption with the foster parent as in the child’s best interest, but may still struggle with overcoming the parental preference. In those cases, the GAL has a duty to zealously advocate for the position consistent with the child’s best interest, but may still need to explore ways to resolve the case and minimize the trauma of separation to the child, especially where the GAL does not think the foster parent is likely to prevail.

Conclusion

However the case law, in D.C. and nationwide, evolves around competing adoptions, some basic propositions remain true. Parents have the right to direct and make decisions about their children’s upbringing, which necessarily includes the right to select a caregiver for the child, and that decision carries great legal weight. GALs must therefore carefully consider and evaluate the parent’s choice, but that choice may not be determinative of or consistent with what is in the best interest of the child. However, by identifying, investigating, and assessing these caregivers early on in the case, the GAL will be in a better position to reconcile what is in a child’s best interest with the parent’s right to choose a caregiver, or in the alternative, to gather evidence to overcome the parental preference.

REPRESENTING A PARENT IN DEPENDENCY COURT WHO ALSO HAS A PARALLEL (RELATED) CRIMINAL CASE

Paul DeQuattro

Introduction

In essence, a state’s separate, parallel criminal proceedings against a parent implicate two fundamental rights recognized by the Constitution: the Fifth Amendment privilege against self-incrimination and the fundamental liberty interest of parenting one’s child. Asserting either interest usually means sacrificing the other.

These notes, submitted in conjunction with an NACC breakout session entitled “Taking the Fifth and Losing the Baby,” are meant to support dependency court lawyers representing parents whose alleged acts or omissions also form the bases of a pending criminal prosecution or investigation. A parent’s statements about the event or its surrounding and background circumstances may encompass either admissions of conduct or circumstantial evidence of a relevant mental state. Such evidence may likely be offered against her in the criminal case, or just as problematic, the statements may dissuade her from testifying in the criminal case. These cases invariably involve serious abuse or even a child’s death.¹

If for no other reason than the expected insistence by the parent’s criminal defense attorney, the dependency counsel should initially and immediately in the dependency court assert her client’s Fifth Amendment privilege to remain silent. If the client quickly resolves her criminal case, or if the client chooses to waive the privilege to embrace the confessor role and speak to best interests, she may easily do so, later. Of course, when she does plead guilty or nolo contendere, she no longer may lawfully assert the privilege.

A formal motion for a stay of the dependency proceedings should be considered under certain circumstances, even if the chance of success seem dim.² Perhaps in the criminal case, defense counsel may wish to argue for suppression of the parent’s statements to social workers, who may be working informally with the police, based upon an involuntariness claim. The parent’s efforts to stay the dependency process may be ancillary, but necessary to support such a claim.

Separately, if continuances are essential to obtain discovery and expert opinion in the dependency case, requests for delays by parent’s counsel would be necessary and ethically proper.³

Concurrent Proceedings Requiring Distinct Handling

¹ Typically, abuse is statutorily defined, as in District of Columbia statute D.C. Code § 16-2301 [burning, biting, or cutting a child; striking a child with a closed fist; inflicting injury by shaking, kicking, or throwing the child; etc.]; and see California Welfare and Institutions Code section 300, subdivision (d) [sexual abuse or exploitation], subdivision (e) [permanent disfigurement or physical disability, multiple acts of physical abuse causing bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness; or the willful, prolonged failure to provide adequate food], and subdivision (f) [death of another child through abuse or neglect].

² At least one progressive, constitutionally-minded appellate court so provided in R.M. v. Dept of Human Res., 75 So. 3d 1195, 1202-1203 (Ala. Civ. App. 2011) [trial court erred by denying stay as parent’s Fifth Amendment rights threatened by termination proceeding].

³ ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases, Standard 5.
The concurrent (or parallel) dependency/criminal case scenario that suggests special treatment by the dependency lawyer is the serious abuse case where the parent has an existing parental relationship with some other minor who is the subject of the dependency proceeding. To be colorable, the relationship must be firmly established, parental in nature, and the minor’s state of mind should be no worse than ambivalent about continuing it. A juvenile court and most statutory schemes would likely not tolerate a continuing relationship between a parent who is alleged to have committed serious abuse and the victimized minor; the parental burden to obtain services in such a case would be heavy.

And, where a child has died as a result of abuse, the granting of services for any surviving sibling may be unlikely.4

Where there is little or no parental relationship with a subject minor, keen representation may still be helpful to the client especially if she has already made statements to emergency responders, police, physicians, and social workers. But a parent who has yet to establish a parental relationship with a minor, and remains silent in the dependency court, can be fairly assured of little chance of reunification. She should be so advised by her dependency counsel. Actually, it’s more likely no such services will even be offered that parent except perhaps to entice a plea and avoid a protracted hearing.

Admitting or submitting to a dependency petition that does not truly reflect the degree of the parent’s culpability in a bargain to obtain services is a ‘risk avoidant’ tactic. In such a case, the chance of reunification is held out to be a victory of sorts. But any chance of ultimate success seems illusory. A parent should not admit or submit in court to child abuse allegations he won’t possibly own.5 Over a tortuous 12 to 18 month reunification period, the truth (“I didn’t do anything”) will be eventually revealed, and the therapist’s report will hedge on parental progress.

Though, the assertion of the 5th Amendment right to be silent is, in a way, much better than a barely comprehensible story denying abuse. This is so because for the latter, the court will be making a credibility determination as to the parent’s explanation of the injuries, leaving it to the imagination of the court to express how bad it is. But silence, on the bright side, may merely produce an adverse inference as to whether there was parental abuse. At least with jurisdiction established without also sullying the parent’s credibility, a parent may have a chance to establish an avenue for services with the minor. (That’s how it would look on black and white in a transcript on appeal, anyway.)

The service plan must be designed to ameliorate the conditions existing at the time of the abuse that are within the parent’s control. Those conditions might be alcohol and drug addiction, untreated mental and emotional conditions, a lack of impulse control springing from the first two conditions, and unreasonable expectations of child behavior.

Sex abuse is another story. A forensic psychologist with a sub-specialty needs to be consulted for risk opinions with a view towards the comparative ages and genders of the minor victim and subject minor.

The presence of some of those conditions might help the court understand how an adult could seriously abuse a child. “Why(?)” is the second most pressing question following “What(?)” by social workers and

4 “It is only common sense that the times when a parent commits felony child abuse, and an infant dies, and the parent should still be offered reunification services regarding the surviving children are going to be extremely rare.” (In re Alexis M. (1997) 54 Cal. App. 4th 848, 853.)

5 Although, there is evidence such an occurrence is not fantasy: “In considering this problem of the ‘confession dilemma,’ a few basic (and for the most part commonplace) truths must be kept in mind. Few crimes carry as much (or as much deserved) social opprobrium as child molestation. Most people would rather be accused of bank robbery. ... [¶] But by the same token, it cannot be denied that it is an outrageous injustice to use the fact parents deny they have committed a horrible act as proof that they did it. That really is Kafkaesque.” (Blanca P. v. Superior Court (1996) 45 Cal. App. 4th 1738, 1752-1753.)
judges confronting parental abuse. Offering provable dysfunctional reasons, and the desire and ability to treat them, may provide satisfactory answers if not actual ones.

In terms of the Fifth Amendment, a parent’s submission to the existence of any relevant dysfunction seems too equivocal to assist the prosecutor in the criminal case. The risk of waiver seems nil. In some jurisdictions, the fact the parent accepts or signs a services plan is explicitly not to be regarded as evidence in any proceeding.\(^6\) However, before a credible argument can be made to provide services, counsel must offer the report or testimony of an expert that the parent has the cognitive abilities to participate in those services. If there is silence without apparent dysfunction or no ability to address the dysfunction, there is little chance of reunification. An argument might preserve the issue for appeal, but any error would be harmless and will get little else.

Demonstrated dysfunction, coupled with the apparent ability of a parent to respond to services directed at those conditions, are relevant for two reasons. In the short term, the court might be persuaded there is a basis to believe that future abuse might be prevented if the parent eliminated the conditions contributing to the abuse. In the long term, hopefully the court will accept the resolution of the targeted dysfunction as success, and not use the social worker’s measure: an admission of guilt.

None of those areas of human dysfunction mentioned above require, for successful treatment, an admission of guilt to child abuse. Any service plan that requires a parent to admit criminal conduct should be objected to on Fifth Amendment grounds.

Finally, the efforts to obtain services for a silent parent are immeasurably aided by the availability of credible witnesses who can attest to the existence of the parent-child relationship. Many solid inferences may be taken and argued from the simplest observations of a parent and child together. Find as many as possible such witnesses, and have each testify as to every different sort of observed parent-child interaction. Considerable time for uncovering those witnesses and preparing them as witnesses should be reserved. Without attempts to reconcile the reunification shortcoming silence produces, a predictably bad result will befall the parent.

### Initial Hearing in Dependency Court

If dependency counsel learns prior to the initial hearing that she will be appointed to represent a parent who is alleged to have committed serious child abuse, counsel should make reasonable efforts to immediately contact that parent to potentially interview him, but at least advise him. He should be advised not to make statements to social workers, police officers, or inmates, if he is incarcerated. Also, the client should be instructed not to sign any consents for release of information until a court orders him to do so.

If the parent informs counsel that statements have already been made, notes of the particulars of the giving of those statements should be made and preserved, while memories are fresh. If the reports are delivered to you prior to the noticed hearing date, which was the procedure in one county I practiced, you should try and interview the parent in the relative privacy of your office or the jail visiting area. The limiting conditions of time, space, and privacy experienced by dependency counsel at the courthouse is awkward and farcical. (“Pssst…hey buddy, wanna sign here?”)

At the first opportunity in court on the record, inform the court and the parties that the Fifth Amendment privilege is being invoked on behalf of your client. Specify that the invocation intends to bar interviews by social workers and any other individual connected with the dependency proceedings for any purpose.

Make it clear to the court and everyone in earshot, that the invocation is being made upon your insistence, and that the invocation will be reconsidered prior to adjudication. For any and all requests from the social worker to the parent, stipulate that you will accept them on his behalf. If you appear to be the bad guy in all this, mission accomplished.

 Obtain from the parent contact information regarding the parent’s criminal defense counsel.

**Interviewing the Client**

Spending precious time with a client is the surest way to build trust. Countless practice standards list client interviewing as the barest of prerequisites for competent counsel. Thorough interviewing of a parent in a serious abuse case may require two people: the lawyer and the investigator. One, preferably the investigator, carrying out your instructions as to the disputed facts, and the other, usually the lawyer, explaining and developing a potential avenue to services and a reunification plan while maintaining silence. Reunification may not be realistic, but a reasonable goal is attempting to maintain a parental relationship at a time when it’s critically at stake.

Help the client understand the dependency case participants’ expectations of parents.

**Communication with Defense Counsel**

The parent’s dependency attorney should have open lines of communication with the attorney representing the client in criminal proceedings. (ABA Standard 6, Action comment.) There may be several areas of common concern where cooperation with defense counsel will enhance the client’s representation.

Before you make the call, be alert to a potential confidentiality issue where the victim in the criminal case proceeding is not the subject minor in the dependency proceeding. Learn and understand the limits of disclosure in such a circumstance. If confidentiality rules permit, be prepared to provide copies of social workers’ notes and reports. If not, you can at least suggest avenues to pursue based on the known dependency facts.

Inform the defense counsel that you have asserted the client’s Fifth Amendment privilege in the dependency court and case, but also explain that the invocation has serious consequences for the parent. Explain those consequences. Ask defense counsel for a copy of the charging document. Ask defense counsel, if possible, to not allow the issuance of a blanket criminal protective order that unnecessarily includes minors who are subject to the juvenile court. Tell defense counsel that if a sentence of one year or less is possible, then ‘sooner rather than latter’ is best. If confidentiality rules permit, offer to provide a juvenile court minute order that reflects juvenile court authorization for visitation or contact with a minor. In some jurisdictions, the family or juvenile court is required to contact the criminal court to coordinate protective orders.

Further, inform the defense counsel that you may have a need to obtain confidential psychiatric or psychological evaluations of the client for potential use in the dependency case. Defense counsel may have questions and concerns about your intentions. Ask defense counsel if there are experts that should be reserved for the defense case.

**The Obvious Problem**
What’s different about representing a parent in a serious abuse case where there’s a concurrent criminal prosecution? Answer: Not much, except that the only avenue for possible reunification with a dependent minor may be inaccessible because of the parent’s silence. For so long as the client claims the privilege, he cannot do what the dependency court usually expects: he cannot admit the conduct, cannot admit the reasons behind the conduct, cannot express regret for the conduct, and in the end, cannot easily get a therapist’s okay that he has dealt with the problem. Also, the parent is in jail with a $1 million bail; so, there’s that problem too.

Also, a dependency case attorney usually need not be concerned with the state of mind of the parent who has abused his child, even in serious cases. In criminal cases, however, ‘knowledge’ and ‘willfulness’ issues, are always important and sometimes determinative. Seemingly unimportant facts in a dependency proceeding take on special meaning insofar as a parent’s culpability in the criminal case context.

There is something else palpably different, even though in both scenarios, one must conduct investigations to isolate some other person as the guilty child abuser, or a medical investigation of the injuries to discern whether the injuries are a result of abuse, and a forensic evaluation of your client as to propensities for violence and abuse. But with concurrent proceedings, the criminal defense lawyer is likely going to control the client’s ability to participate effectively in any aspect of the dependency proceedings.

Any attempt to preserve a client’s relationship with his children in a dependency case, assuming there is a positive one to preserve, has its own obstacles. But he doesn’t live in a vacuum, and so there are ancillary consequences to those attempts. Pleas to the court, statements to the social worker, testimony in court, admissions made in group settings for program participants etc. All of that potential evidence may be relevant and admissible in a criminal prosecution. If the ancillary consequence includes a life sentence, then the huge obstacles to reunification just got bigger.

Systemic Restrictions On Use of Dependency Evidence

Restricted Use of Parental and Professional Statements and Testimony: States frequently enact provisions designed to limit the admissibility of evidence adduced through a dependency proceeding. They can be a combination of limited use (only) provisions and immunity tantamount to the protection afforded by the Fifth Amendment. Mostly, however, the protection afforded by such statutes are not co-extensive with the Constitutional protections. Care must be taken to assess their reach.

Commonly, state statutes provide a process for an agency attorney or district attorney to petition a court for an order of inadmissibility. Unless prejudice is shown to the criminal prosecution, upon a less than burdensome standard, the Colorado court can order inadmissible, any testimony obtained pursuant to compulsory process. The statute proscribes the use of a parent’s admission to the juvenile petition in the criminal proceedings, as well as any statements made to any treating professionals. In California, to encourage parents’ cooperation in the dependency proceedings, testimony by a parent, guardian, or other person who has the care or custody of the subject minor is not admissible as evidence in any other action or proceeding.

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7 See for example, People v. Martinez (Colo. 2003) 74 P.3d 316 where, at trial, the only material fact at issue was the defendant’s culpability, and specifically, whether he shook the child knowing that his actions were practically certain to cause her death.

8 Colorado Revised Statutes (2015) § 19-3-207. See also California Rules of Court, Rule 5.548 for similar process.

The two statutes are distinguished, however, as the California statute does not provide immunity from the use of evidence derived from the testimony, and therefore the parent should not be prevented from asserting the privilege of silence.\textsuperscript{10}

\begin{itemize}
\item Immunity. A statutory process exists for the parent, actually any witness who may possess relevant but incriminating evidence, to request immunity. Immunity is part of the prerogative of the executive branch of government. Prosecutors agree to a grant of immunity when it suits their needs. You’ll know when it suits their needs as you will be approached with the offer.\textsuperscript{11}
\item Judicial Use Immunity: Courts have devised an exclusionary rule, grounded in the state or federal constitutional privilege against self-incrimination, which allows a willing parent to self-incriminate as part of the reunification process without fear that his or her testimony will be used in a future criminal prosecution.\textsuperscript{12} But those cases do not stand for the proposition that the court may compel an unwilling parent, on pain of contempt, to testify over a valid Fifth Amendment objection.
\end{itemize}

\section*{The Fifth Amendment}

The Fifth Amendment to the federal Constitution states that “no person ... shall be compelled in any criminal case to be a witness against himself.” A parent may invoke the right in a dependency case, unless it is perfectly clear that an answer cannot possibly tend to incriminate the witness. Moreover, the privilege covers not only answers that would in themselves support a conviction, but also includes answers that would furnish a link in the chain of evidence needed to convict, or which might lead to other evidence that could be used in a criminal prosecution.

A parent may not invoke the privilege by a general refusal to be questioned. In other words, in a dependency context, the privilege cannot be invoked in advance. A witness who testifies voluntarily about a particular subject waives the ability to invoke the privilege if additional questions on the same subject are put in that same proceeding.\textsuperscript{13}

\section*{Adverse Inference}

In civil cases, the Supreme Court has held that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.\textsuperscript{14} In general civil practice, adverse inferences from a party’s assertion of the Fifth Amendment are generally insufficient to substantiate a claim. The party with the burden must offer some evidence other than adverse inferences to support its claim.\textsuperscript{15}

The drawing of an adverse inference against a parent invoking the Fifth Amendment should not be automatic. First, for adverse inferences to be permissible, the questions that produce the invocation must seek responses that would otherwise be admissible in evidence. Second, an adverse inference will be permitted only when the questioning that elicited the invocation is well founded. A common example frequently given to illustrate those inferences that may be permitted from Fifth Amendment invocations, and those that may not, follows:

\begin{itemize}
10 \textit{Kastigar v. United States} (1972) 406 U.S. 441 [32 L. Ed. 2d 212, 92 S. Ct. 1653] [statutory immunity against testimony use, alone, is more limited than Fifth Amendment privilege the statute purports to replace];
11 See for example, Colorado statute section 13-90-118.
15 See \textit{Curtis v. M&S Petroleum, Inc.}, 174 F.3d 661, 675 (5th Cir. 1999); \textit{LaSalle Bank Lake View v. Seguban}, 54 F.3d 387, 391 (7th Cir. 1995).
Within a civil suit, a defendant is asked the question "did you ever pick up the gun?" The defendant refuses to answer asserting his Fifth Amendment privilege. The plaintiff then introduces into evidence the fact that defendant's fingerprints were found on the gun. The jury then may be instructed that from defendant's silence, it can infer that defendant picked up the gun. However, it cannot be instructed that it can infer from defendant's refusal to answer that particular question, that the defendant fired the gun, or that he disposed of the gun at the crime scene. That would be constructing an inference on another inference.

Conclusion

In a straightforward neglect case, the parent’s drug abuse arguably presents a potential jurisdictional basis especially if the minor is a baby. While a parent’s denial of a drug problem is initially unsurprising, if it persists, that denial may create a second problem: denial of the first problem. Of course if the parent is correct, he has the opportunity to prove it by religiously testing negative. That insistence of ‘innocence’ combined with the evidence of non-use should win him reunification. In a case where the 5th Amendment is invoked, however, the parent needs to consider alternate ways to satisfy evidentiary standards in obtaining services to otherwise maintain an established parental relationships.
SCHOOL STABILITY AND THE NEED FOR INFORMED EDUCATION RIGHTS HOLDERS

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Background

Youth who find themselves in foster care are a segment of the youth population who, due to their special circumstances and challenging backgrounds, require extra care and expertise when it pertains to decisions regarding their education. More than one third of youth in foster care change schools five or more times during the course of their education and these disturbances result in these children falling behind in school.¹ In addition to the constant change in school environment, many youth in foster care have the added difficulty of dealing with traumatic past experiences where there was abuse or even simply the traumatic experience of being taken away from their family.² As a result of disruptions to their education and traumatic past experiences, less than 50% of children in California’s foster care system graduate from high school.³ Even when compared only to other disadvantaged youth, youth in foster care are statistically further behind in their education achievement.⁴ When we look past primary education, we see yet another concerning trend - only 3% of foster children graduate from college.⁵

Just over ten years ago, California created significant mandates for all stakeholders involved in the educational life of a child in foster care. Effective January 1, 2004, AB 490 (Steinberg), Chapter 862, imposed new duties and rights related to the education of dependents and wards in foster care. The Act’s key provisions are as follows:

1. Establishes legislative intent that foster youth are ensured access to the same opportunities to meet academic achievement standards to which all students are held, maintain stable school placements, be placed in the least restrictive educational placement and have access to the same academic resources, services and extracurricular and enrichment activities as all other children;
2. Makes clear that education and school placement decisions are to be dictated by the best interest of the child;
3. Creates school stability for foster children by allowing them to remain in their school of origin for the duration of the school year when their placement changes and remaining in the same school is in the child’s best interests;
4. Requires county placing agencies to consider placement decisions the child’s school attendance area;
5. Requires Local Educational Agencies (LEAs) to designate a staff person as a foster care education liaison to ensure proper placement, transfer and enrollment in school for foster youth;
6. Makes LEAs and county social workers or probation officers jointly responsible for the timely transfer of students and their records when a change of schools occurs;
7. Requires that a comprehensive public school be considered as the first school placement option for foster youth;
8. Provides that a foster child has the right to remain enrolled in and attend his/her school of origin pending resolution of

⁴ Id. at 9-10.
school placement disputes; allows a foster child to be immediately enrolled in school even if all typically required school records, immunizations, or school uniforms are not available; requires an LEA to deliver the pupil’s education information and records to the next educational placement within 2 days of receiving a transfer request from a county placing agency; requires school districts to calculate and accept credit for full or partial coursework satisfactorily completed by the student and earned while attending a public school, juvenile court school or nonpublic, nonsectarian school; authorizes the release of educational records of foster youth to the county placing agency, for purpose of compliance with WIC 16010, case management responsibilities required by the Juvenile Court or law, or to assist with transfer or enrollment of a pupil; ensures that foster youth will not be penalized for absences due to placement changes, court appearances, or related court ordered activities.

San Diego County used this legislation as a launch pad for increased collaboration and coordination across systems and created the Foster Youth Services Advisory Committee.

The Foster Youth Services Advisory Committee, chaired by our Presiding Juvenile Court Judge, brings together representatives from our school districts, Child Welfare Services, Dependency Legal Group of San Diego (minor’s and parent’s counsel), probation, and multiple community-based organizations. The focus is on problem solving, increasing communication, cross systems collaboration and coordinated support to ensure appropriate and timely school placement of all students in foster care. In addition, our staff hosts bi-monthly regional collaborative meetings which bring together child welfare workers and supervisors and school district personnel to address concerns and create solutions. One of the gaps that has been identified through these collaborative efforts is the need for a pool of Educational Rights Holders when students do not have an adult in their lives who can provide this educational advocacy and support.

The San Diego child welfare community relies heavily on Voices for Children (VFC) to appoint CASAs, Court Appointed Special Advocates, who advocate and make educational-related decisions for youth in foster care in San Diego County. CASAs are volunteers recruited and trained by VFC to follow the education status of their case children and serve as Educational Surrogates. Voices for Children is the sole entity designated by San Diego County courts to provide this service for all foster children, regardless of their level of care, including for children placed in group homes or other types of placement where caregivers cannot or will not hold the legal education rights. Unfortunately, although VFC makes valiant efforts to assign a CASA for every child who needs an Educational Rights Holder, they are not always able to do so immediately.

Traditionally, school districts have been able to fill the gap of providing educational rights holders to children for whom no other individual can be identified. While under current federal law, educational representatives or surrogates are under no obligation to actually meet a child before assuming education rights, in California, Assembly Bill 2060 amended Welfare and Intuitions Code 361 (E) (5) to require that when an educational representative or surrogate is appointed for the child, the representative or surrogate must meet with the child, investigate the child's educational needs and whether those needs are being met, and, prior to each review hearing, provide information and recommendations concerning the child's educational needs to the social worker or, for a ward, the probation officer, make written recommendations to the court and participate in those portions of the review hearing that concern the child's education. This common-sense requirement that an education rights holder actually be in a position to make informed decisions made it more difficult for school districts to find and retain volunteer education surrogates and heightened our need to establish a pool of volunteers.

Additionally, commonly we were finding teenage students, who have been in foster care for a significant period of time and who are no longer working toward reunification with a parent, are in the most need of an immediate Education Rights Holder. Due to the special needs of youth in foster care, the child’s
educational rights holder must be someone who understands those special educational needs and is able to make the best decisions for the child’s education. In California courts, when appointing an educational rights holder, the court selects a “responsible adult.”6 This court appointed educational rights holder is responsible for making sure all of the child’s educational needs are met and to advocate for the child’s education rights.7 With the added provisions regarding the educational rights of a youth in foster care, added training and supervision are beneficial for someone who will become an educational rights holder for a youth in foster care. Often, these students require much education resources and support. To address the gap that has been created between the need for educational rights holders and the ability to fill that need, various agencies in San Diego County have come together to create the Education Rights Holder Program.

The Educational Rights Holder Program

Through the Educational Rights Holder Program, community volunteers are recruited, evaluated, and trained to serve as Education Rights Holders for students in foster care who need an advocate. These volunteers participate in trainings that include basic knowledge about being an Education Rights Holder and what it means to be trauma informed, the issues commonly encountered by an Educational Rights Holder, and changes in applicable law. The goal of the program is to provide a volunteer to serve temporarily in this capacity, while continued efforts are made to locate a relative, friend, caregiver, or CASA to serve as a permanent education rights holder. As the program prepares to enter its first year, the community volunteers will consist of law students from the University of San Diego who are interested in child welfare. It is hopeful in the future that this program will expand to include members of the general community to serve as volunteers as well. All volunteers are not only required to complete a training before being added to the pool of available Education Rights Holders, but also must participate in a background clearance. This pool will be managed by San Diego County Office of Education, Foster Youth and Homeless Education Services, and will be available to readily provide a volunteer whenever requested by either the County Social Worker or the child’s attorney.

Education Consultant Program

Although the focus of our work has been on providing educational rights holders to youth who do not have an adult available to hold the position, through our work it has become clear that another need also exists. Some youth have an adult in their lives who may be willing and able to serve as an educational rights holder but need support to fulfill that role in a way that provides full access to the services available. Therefore, we have created the Educational Consultant Program.

Volunteers from the University of San Diego and San Diego Volunteer Lawyers Program, Inc. will be available to assist Education Rights Holders, whether part of the program or not, with any questions or issues that may arise during the course of their duties. The program understands that making the best education decisions for students in foster care is a significant responsibility and the Consultants serve as an identified resource for the holders. It is also the hope that with the knowledge these consultants are available for assistance, individuals who are present in the student’s daily life, particularly the caregiver, will become more comfortable with the student’s education issues and become more open to accepting the role of Education Rights Holder. The Educational Consultant Program aims to reduce the need for trained volunteer Educational Rights Holders by properly empowering individuals who already are familiar with the youth and the youth’s educational needs.

Conclusion

6 2015 California Rules of Court. Rule 5.650
7 Id.
When a student’s educational needs are met, it allows for the opportunity to pursue and achieve a successful future. Students in foster care experience great challenges in education, more so than their non-dependent peers, and are often in need of consistent supports and strong educational advocacy on their behalf. Meeting the educational needs of a youth in foster care through a collaborative network of individuals, entities, and volunteers trained to understand these challenges and the trauma youth in foster care have experienced while simultaneously working to engage individuals already involved with the youth is paramount for the Education Rights Holder and Education Consultant Program.

We have already seen such community collaboration and educational advocacy for students in foster care with the Foster Education Project, a Berkeley Law Student-Initiated Legal Service Project (SLP), in Alameda County. Collaborating with the National Center for Youth Law (NCYL) and other project partners, this SLP has recruited and provided trained law students to serve as education rights holders for youth in foster care in Alameda County since 2004. 

It is the hope that the Education Rights Holder and Education Consultant Program will achieve similar results in meeting the needs and encouraging the educational success of students in foster care in San Diego County.

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SIBLING RELATIONSHIPS:
PRESERVING THE REAL PERMANENT CONNECTION

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Federal Law

The Fostering Connections Act of 2008\(^1\) was the first time that Congress passed a law that preserves sibling relationships while children are in foster care.\(^2\) The provision regarding preservation of sibling relationships requires that in order for a state to be eligible for foster care and adoption assistance, it shall have a plan approved by the Secretary which:

(31) provides that reasonable efforts shall be made—

(A) to place siblings removed from their home in the same foster care, kinship guardianship, or adoptive placement, unless the State documents that such a joint placement would be contrary to the safety or well-being of any of the siblings; and

(B) in the case of siblings removed from their home who are not so jointly placed, to provide for frequent visitation or other ongoing interaction between the siblings, unless that State documents that frequent visitation or other ongoing interaction would be contrary to the safety or well-being of any of the siblings.\(^3\)

(emphasis added). As seen above, State plans should require a IV-E agency to make reasonable efforts to (1) jointly place children in foster care, unless contrary to the safety and wellbeing of the siblings, or (2) facilitate frequent visitation or ongoing contact, unless contrary to the safety and wellbeing of the siblings. If the siblings are not jointly placed, or if frequent visitation or ongoing contact is not facilitated because it is contrary to the safety and wellbeing of the siblings, the State must provide documentation.

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\(^1\) Clancy Jo Johnson, J.D., M.A.L.S., Law Clerk at Denver Juvenile Court.


\(^3\) Mandelbaum, Randi, Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption, 41 N.M. L. Rev. 1, 9-10 (2011) (“This statute, which is the most recent amendment to the Adoption Assistance and Child Welfare Act [Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified at 42 U.S.C.A. § 671)], initially enacted in 1980, marks the first time that Congress has expressed concern for the sibling relationship.”).
The Children’s Bureau, an office of the Administration for Children and Families (ACF), published a webpage providing guidance for the Fostering Connections Act. As part of that webpage, it published a Program Instruction, which provided guidance on the siblings provision and the flexibilities afforded to a title IV-E agency in complying with the law, among other topics. The Bureau clarified that documentation in cases where joint placement or visitation or other ongoing contact was contrary to the safety and wellbeing of the siblings must include “reasons that it is contrary to the safety or well-being of the siblings to be placed together or to have frequent visitation.” The Bureau encouraged state agencies to:

- develop standard protocols for caseworkers to use in making decisions about when it would be contrary to a child’s well-being or safety to place siblings together or to provide for frequent visitation. A standard decision making tool could assist workers with guidelines in making this important decision, and address difficult situations, such as a sibling’s refusal for visitation.

The Bureau also encouraged state agencies to “periodically reassess sibling visitation and placement decisions in cases where siblings are separated or not visiting to determine if a change is warranted.” The Bureau also instructed that visitation or other ongoing interactions must be frequent and at least once monthly.

The Bureau instructed that state agencies have flexibility in several aspects of sibling placement and visitation. First, the title IV-E agency has flexibility to define “sibling” or “sibling groups,” as the Bureau has “no plans to issue regulations or policy that will define [those terms].” Second, the agency “may establish its own standards for visitation and contact between siblings consistent with the law.” However, the Bureau added the caveat that “sibling visitation or other ongoing interactions must be frequent,” meaning at least once a month, and that it “expects decisions on the frequency of sibling visitation and contact to be on a case by case basis.” Third, the agency can “determine the most appropriate settings for visitations and protocols for supervision.” The Bureau illustrated the third point with the example that facilitation of visits and ongoing interactions “may be through other relatives, foster parents or mentors.”

The Bureau concluded its guidance on sibling placement and visitation by establishing some strong expectations. It stated that agencies are expected to revisit and strengthen their sibling visitation and placement policies in order to “ensure that siblings are always placed together unless there is a bona fide safety or well-being concern that prevents placement together or frequent visitation.” It urged agencies to review their “foster family home recruitment strategies to determine if there are ways to increase the

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7 Children’s Bureau, Implementation of the Fostering Connections to Success and Increasing Adoptions Act of 2008 Working Document, Program Instruction, Section G, 22 (July 9, 2010).
11 (emphasis added)
number of resource homes available for sibling groups.” Its final statement regarding preserving sibling relationships was: “[t]he courts can play an important role in sibling placement and sibling visitation.”

To financially aid agencies to preserve sibling relationships, the Bureau added compensation for the costs associated with facilitating sibling visits:

A title IV-E agency may claim as an allowable administrative cost the cost of transporting siblings removed from their home and not jointly placed (regardless of whether these siblings are in foster care, guardianship or adopted) to sibling visits and can also claim incidental costs associated with such visits, such as the costs of the siblings’ meals during such visits.12

It is unclear whether States have been directly notified of the 2010 Program Instruction issued by the Children’s Bureau.

The Fostering Connections Act and its associated Program Instruction published by the Children’s Bureau clearly urges Title IV-E agencies and courts to presumptively place siblings in the same foster placement, and to ensure visitation or ongoing contact occur if joint placement does not occur. However, Fostering Connections Act “is a funding statute, and as such, does not provide assurance for any given group of siblings that contact will continue.”13 Although the Federal Government has established a system to periodically review state data, called the Children and Family Services Review (CFSR),14 the data gathered has been criticized as being unreliable, subjective, and nonreplicable.15 The conclusions reached in the final CFSRs have been said to “give an unearned seal of approval to lousy systems and penalize those that are doing relatively well.”16 The outcomes of the CFSR can result in federal funds being withheld from agencies, however, funds are not withheld until State Improvement Plans have been developed and reviewed years later.17

Rounds one and two of the CFSR considered a state’s statistics for jointly placing siblings and visitation18, however, the sample sizes were typically 30 cases or less19 that may have been hand-picked

by the agency being reviewed. Further, the cases were oftentimes reviewed subjectively by agency stakeholders. Round three of the CFSR is currently underway, but it does not appear that data regarding the preservation of sibling relationships will be included. Further, even if round three were to consider sibling relationship preservation, the data would be even more unreliable and subjective than previous rounds because it leaves most of the data gathering to the state agencies.

State Law

The Fostering Connections Act strongly encourages preservation of sibling relationships, but it is up to the states to “vigorously support these connections.” The vast majority of states have statutes that address siblings in foster care, but the degree to which they protect and preserve sibling relationships varies. For example, some states mirror the federal statute almost verbatim by requiring an agency to make reasonable efforts to jointly place siblings in foster care, while some states add details to supplement the federal language, presumably increasing accountability of state agencies through ongoing court reviews. Further, the standard for the exception to joint placement varies greatly. Some states have the endangerment standard for joint placement, visitation or ongoing contact, like the Federal statute, and others use the best interest of the child standard to gauge whether an agency must make efforts to jointly place, facilitate visitation or ongoing contact. Other states seem to equate the endangerment standard with the best interest of the child standard.


21 CFSR Round 3 Resources https://training.cfsrportal.org/resources/3044; Children’s Bureau, Final Notice of Statewide Data Indicators and National Standards for Child and Family Services Reviews, October 10, 2014,


26 For example, Arizona, Ariz. Rev. Stat. Ann. § 8-513.D; Missouri, Mo. Rev. Stat. § 210.565; Nebraska, Neb. Rev. Stat. § 43-1311.02 (with additional requirements such as providing the siblings with reasons why such placement, visitation or ongoing contact would be contrary to the safety or well-being of any of the children); New Mexico, N.M. Stat. Ann. § 32A-4-22; North Dakota, N.D. Cent. Code § 27-20-32.2; Pennsylvania, 42 Pa. Cons. Stat. § 6351(b.1) (not identical but substantially similar; although it requires visits to occur at least twice a month); Washington, Wash. Rev. Code § 13.34; and Wisconsin, Wis. Stat. § 938.365 (as to joint placement) and Wis. Stat. § 938.335 (as to frequent visitation or ongoing interaction).

27 For example, Nebraska, Neb. Rev. Stat. § 43-1311.02 (with additional requirements such as providing the siblings with reasons why such placement, visitation or ongoing contact would be contrary to the safety or well-being of any of the children); Pennsylvania, 42 Pa. Cons. Stat. § 6351(b.1) (not identical but substantially similar; although it requires visits to occur at least twice a month).

28 For example, Arizona, Ariz. Rev. Stat. Ann. § 8-513.D; Missouri, Mo. Rev. Stat. § 210.565; Nebraska, Neb. Rev. Stat. § 43-1311.02 (with additional requirements such as providing the siblings with reasons why such placement, visitation or ongoing contact would be contrary to the safety or well-being of any of the children); New Mexico, N.M. Stat. Ann. § 32A-4-22; North Dakota, N.D. Cent. Code § 27-20-32.2; Pennsylvania, 42 Pa. Cons. Stat. § 6351(b.1) (not identical but substantially similar; although it requires visits to occur at least twice a month); Washington, Wash. Rev. Code § 13.34; and Wisconsin, Wis. Stat. § 938.365 (as to joint placement) and Wis. Stat. § 938.335 (as to frequent visitation or ongoing interaction).

29 For example: Georgia, Ga. Code Ann. § 15-11-135(e) (“In any case in which a child is taken into protective custody of DFCS, such child shall be placed together with his or her siblings who are also in protective custody or DFCS shall include a statement in its report and case plan of continuing efforts to place the siblings together or document why such joint placement would be contrary to the safety or well-being of any of the siblings. If siblings are not placed together, DFCS shall provide for frequent visitation or other ongoing interaction between siblings, unless DFCS documents that such frequent visitation or other ongoing interaction would be contrary to the safety or well-being of any of the siblings.”); Massachusetts, Mass. Gen. Laws Ann. ch. 119, § 23(c) (placement) (“The department shall also seek to identify any minor sibling or half-sibling of the child and attempt to place these children in the same foster family if, in the judgment of the department, that placement would be in the best interests of the children.”), and Mass. Gen. Laws Ann. ch. 119, § 268(b) (visitation and ongoing interaction) (“The court or the department shall, whenever reasonable and practical and based upon a determination of the best interests
As the Children’s Bureau said in its Program Instruction, “the Court can play an important role in sibling placement and visitation,” however, some states do not have explicit authority to enter orders regarding sibling placement and visitation so the courts may be hesitant to do so. There are different degrees of court authority: nonexistent, implied, discretionary, and mandatory. For example, the court authority in the nine states without any child welfare statutes regarding preservation of sibling relationships appears to be weaker than states where courts have at least implied authority to enter orders on specific matters like the preservation of sibling relationships. A statutory mandate for a court to enter an order upon a certain set of circumstances would presumably be the strongest protection regarding sibling relationships. While no states currently mandate a court to order joint placement of siblings, there are a minority of states that require a court to enter orders regarding sibling visitation while children are in foster care, and some require that visitation be ordered if certain conditions are met.

Very few states have statutes that more specifically provide courts with authority to order a IV-D agency to make efforts to jointly place children, provide frequent visitation, or provide ongoing contact. It is

of the child, ensure that children placed in foster care shall have access to and visitation with siblings… “); and Oklahoma, Okla. Stat. tit. 10A, §§ 1-7-107.

New York, N.Y. Fam. Ct. Act § 1055 (as to placement only) (Joint placement is presumptively in the best interest of the children unless placement is contrary to a child’s health, safety, or welfare).

See generally Mandelbaum, Randi, Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption, 41 N.M. L. Rev. 1 (2011) (discussing the lack of explicit authority in statute to enter orders regarding post-adoption visitation and contact which results in some courts being hesitant to do so).

Alabama, Delaware, Idaho, Kentucky, Montana, South Dakota, Tennessee, Rhode Island and Wyoming did not have such statutes prior to the 2015 state legislative sessions. Note that some of these states had court rules that governed preservation of sibling relationships, but as states differ as to how rules are made this analysis was based solely on state statutes.

For example, Hawaii provides a set of guiding principles for children in foster care, which includes ensuring that the child in foster care has contact or visitation with siblings, and later provides in the same statute that “sua sponte or upon appropriate motion, the family court may issue any necessary orders to any party, including the department, department of education, or department of health to ensure adherence to the guiding principles.” Haw. Rev. Stat. § 587A-3(a)(3), Haw. Rev. Stat. § 587A-3(b).

At least up to the 2015 state legislative sessions.

Hawaii, Haw. Rev. Stat. § 587A-28(e)(5) (At the Return Hearing, if the court finds that the child’s physical or psychological health or welfare has been harmed or is subject to threatened harm by the acts or omissions of the child’s family, the court shall order reasonable supervised or unsupervised visits for the child’s sibs, unless such visits are determined to be unsafe or detrimental to, and not in the best interests of, the child); Nebraska, Neb. Rev. Stat. § 43-1311.02(2) (When siblings are not placed together in a joint-sibling placement, the department shall make a reasonable effort to provide for frequent sibling visitation or ongoing interaction between the child and child’s siblings unless the department provides the siblings and the court with reasons why such sibling visitation or ongoing interaction would be contrary to the safety or well-being of any of the siblings. The court shall determine the type and frequency of sibling visitation or ongoing interaction to be implemented by the department (presumably by court order)); New Hampshire, N.H. Rev. Stat. Ann. § 169-C:19-d (The court shall ensure that children with an existing relationship and are separated have access to and visit in rights with such sibs), N.H. Rev. Stat. Ann. § 169-D:14 (adjudicatory hearing) (If a child is in need of services, the court shall order the dept. to make an investigation which includes sib relationships and residences for the purpose of preserving relationships between sibs who are separated as a result of court ordered placement); Pennsylvania, 42 Pa. Cons. Stat. § 6351(b.1) (If a sibling of a child has been removed from his home and is in a different placement setting than the child, the court shall enter an order that ensures visitation between the child and the child’s sibling no less than twice a month, unless a finding is made that visitation is contrary to the safety or well-being of the child or sibling); and Virginia, Va. Code Ann. § 16.1-252(F)(2) (If the court determines that removal of the child is proper at the preliminary removal order hearing, the court shall order that reasonable visitation be allowed between the child and his siblings, if such visitation would not endanger the child’s life or health).

Indiana, Ind. Code § 31-28-5-4(a)-(b) ((conditional) If the department denies a request for sibling visitation under section 3 of this chapter, the child’s guardian ad litem or court appointed special advocate may petition the juvenile court with jurisdiction in the county in which the child receiving foster care is located for an order requiring sibling visitation. If the juvenile court determines it is in the best interests of the child receiving foster care to have sibling visitation, the juvenile court shall order siblings visitation and establish a schedule for the sibling visitation); and Maine, Me. Rev. Stat. tit. 22, § 4068(1) ((conditional) If the court determines that it is reasonable, practicable and in the best interests of the children involved, the court shall order the custodian of the child who is the subject of the child protection proceeding and any party who is the custodian of a sibling of the child to make the children available for visitation with each other. The court may order a schedule and conditions pursuant to which the visits are to occur).

Washington. Generally, the court must order the dept. to make RE to jointly place sibs, unless it is contrary to the safety and well-being of the children. If so, the Court must order the dept to make RE to facilitate sib visit’n or frequent and ongoing interaction., Wash. Rev. Code § 13.34.130(6) (Disposition Order) (If the court has ordered a child removed from his or her home pursuant to subsection (1)(b) of this section, the court shall consider whether it is in a child’s best interest to be placed with,
still only a small minority of states that provide a statutory mandate for a IV-D agency to make reasonable efforts to jointly place siblings in foster care,\footnote{40} facilitate sibling visitation,\footnote{41} or to facilitate other ongoing contact.\footnote{42} A handful of other states have mandates that require the IV-D agency to make other efforts have contact with, or have visits with siblings). Wash. Rev. Code § 13.34.130(6)(b) (The court may also order placement, contact, or visitation of a child with a stepbrother or stepsister provided that in addition to the factors in (a) of this subsection, the child has a relationship and is comfortable with the stepsibling.).

38 Washington. Generally, the court must order the dept. to make RE to jointly place sibs, unless it is contrary to the safety and well-being of the children. If so, the court must order the dept. to make RE to facilitate sib visit’n or frequent and ongoing interaction, Wash. Rev. Code § 13.34.130(6) (Disposition Order) (If the court has ordered a child removed from his or her home pursuant to subsection (1)(b) of this section, the court shall consider whether it is in a child’s best interest to be placed with, have contact with, or have visits with siblings) Wash. Rev. Code § 13.34.130(6)(b) (The court may also order placement, contact, or visitation of a child with a stepbrother or stepsister provided that in addition to the factors in (a) of this subsection, the child has a relationship and is comfortable with the stepsibling.; and Wisconsin. Wis. Stat. § 48.357 (change in placement ) (In counties having a population of 500,000 or more, if the court finds that joint placement would be contrary to the safety or well-being of the child or any of those siblings, in which case the court shall order the county department, department or agency to make reasonable efforts to provide for frequent visitation or other ongoing interaction between the child and the siblings).

39 Washington. Generally, the court must order the dept. to make RE to jointly place sibs, unless it is contrary to the safety and well-being of the children. If so, the Court must order the dept to make RE to facilitate sib visit’n or frequent and ongoing interaction., Wash. Rev. Code § 13.34.130(6) (Disposition Order) (If the court has ordered a child removed from his or her home pursuant to subsection (1)(b) of this section, the court shall consider whether it is in a child’s best interest to be placed with, have contact with, or have visits with siblings). Wash. Rev. Code § 13.34.130(6)(b) (The court may also order placement, contact, or visitation of a child with a stepbrother or stepsister provided that in addition to the factors in (a) of this subsection, the child has a relationship and is comfortable with the stepsibling; and Wisconsin. Wis. Stat. § 48.357 (change in placement ) (In counties having a population of 500,000 or more, if the court finds that joint placement would be contrary to the safety or well-being of the child or any of those siblings, in which case the court shall order the county department, department or agency to make reasonable efforts to provide for frequent visitation or other ongoing interaction between the child and the siblings).


regarding joint placement\footnote{Arkansas. Ark. Code Ann. § 9-28-108(b)(2)(A) ("When it is in the best interest of each of the juveniles, the department shall attempt to place . . . [a] sibling group together while they are in foster care and adoptive placement"); Georgia. Ga. Code Ann. § 15-11-135(e) ("continuing efforts"); and Washington. Wash. Rev. Code §§ 13.34.260, 26.33.190, 74.13.065, 13.34.200 (Other statutory provisions require the court to order the department to jointly place siblings, but these provisions state that preferences such as sibling relationships shall be considered when matching children to foster homes).}, frequent visitation\footnote{Washington. O.C.C. § 39.1609(6) ("sibling group")} or ongoing contact\footnote{Mass. Gen. Laws Ann. ch. 119, § 269(b) (The court or the departamento shall, whenever reasonable and practical and based upon a determination of the best interests of the child, ensure that children placed in foster care shall have access to and visitation with siblings); Washington.* Wash. Rev. Code § 13.34.025(11)(a) (To the maximum extent possible under current funding levels, the department and supervising agencies must: Coordinate and integrate services to children and families, using service plans and activities that address the children’s and families’ multiple needs, including ensuring that children have regular visits with their sibling, as appropriate); Conditional other efforts to facilitate Ongoing Contact: Massachusetts. Mass. Gen. Laws Ann. ch. 119, § 268(b) (The court or the department shall, whenever reasonable and practical and based upon a determination of the best interests of the child, ensure that children placed in foster care shall have access to and visitation with siblings).}, and in other states efforts by the agency need only be made upon certain conditions\footnote{Oklahoma. Okla. Stat. tit. 10A, § 1-7-107 (sibling shall be allowed contact or visitation with one other); and Virginia. Va. Code Ann. § 63.2-900.2 (The department shall develop a plan to encourage frequent and regular visitation or communication between siblings).}

Only a small minority of states explicitly give Courts discretionary authority to order the agency to jointly place siblings\footnote{Nebraska. Neb. Rev. Stat. § 43-1311.02(6) (implied) (The dept. shall provide information regarding court-ordered or authorized joint-sib placement, visit’n, or ongoing interaction to the parent, custodian and child as soon as reasonably possible following the entry of the court order or authorization as necessary to facilitate siblings time (unless the court determines that doing so would be contrary to the safety or well-being of the child and to the foster parent, relative caretaker, guardian, prospective adoptive parent)); and New York. N.Y. Fam. Ct. Act § 1055 (Court may direct social services to place the child together with minor siblings or half-siblings).}, facilitate frequent visitation\footnote{Florida. Fla. Stat. §§ 39.402(8)(h)(6), (9)(b), 8.425(5)(D)(5), 409.1679(1)(c), 39.811(7)(a)-(b) (The court may enter orders regarding sibling visitation at the shelter hearing, permanency hearing, reviews of change of placements that separated siblings within 30 days of that separation, and in the termination of parental rights order); Hawaii. Haw. Rev. Stat. § 587A-3(b); Maine. Me. Rev. Stat. tit. 22, § 4068(1); New York. N.Y. Fam. Ct. Act § 1089(d)(viii)(F); Oregon. Or. Rev. Stat. § 419B.333.} or facilitate ongoing contact\footnote{Colorado. Colo. Rev. Stat. 19-7-101(1)(c) ("Children in foster care have the right to "live[e] with or be[] visited by his or her sibs."); Nevada. Nev. Rev. Stat. §§ 432.310.1, .4; 432.380. (Children placed in foster care have the right to joint placement with siblings, whenever possible. They also have the right to be informed of any plan to change the placement of a sibling); New Jersey. N.J. Stat. Ann. § 9:6B-4 (Children placed in foster care have the right to see and be visited by their siblings for regular visitation and other forms of communication when it is in the best interest of the sibling).}. Some states explicitly give children in foster care a bill of rights\footnote{For example, see the Massachusetts Department of Children and Families Sibling Bill of Rights, at http://www.mass.gov/eohhs/docs/dfcf/sibling-bill-of-rights.pdf.} which oftentimes includes the right to joint placement\footnote{Colorado. Colo. Rev. Stat. 19-7-101(1)(c) ("Children in foster care have the right to "live[e] with or be[] visited by his or her sibs."); Nevada. Nev. Rev. Stat. §§ 432.310.1, .4; 432.380. (Children placed in foster care have the right to joint placement with siblings, whenever possible. They also have the right to be informed of any plan to change the placement of a sibling); New Jersey. N.J. Stat. Ann. § 9:6B-4 (Children placed in foster care have the right to see and be visited by their siblings for regular visitation and other forms of communication when it is in the best interest of the sibling).}, frequent sibling visitation\footnote{Washington. O.C.C. § 39.1609(6) ("sibling group")} or ongoing contact\footnote{Mass. Gen. Laws Ann. ch. 119, § 269(b) (The court or the departamento shall, whenever reasonable and practical and based upon a determination of the best interests of the child, ensure that children placed in foster care shall have access to and visitation with siblings); Washington.* Wash. Rev. Code § 13.34.025(11)(a) (To the maximum extent possible under current funding levels, the department and supervising agencies must: Coordinate and integrate services to children and families, using service plans and activities that address the children’s and families’ multiple needs, including ensuring that children have regular visits with their sibling, as appropriate); Conditional other efforts to facilitate Ongoing Contact: Massachusetts. Mass. Gen. Laws Ann. ch. 119, § 268(b) (The court or the department shall, whenever reasonable and practical and based upon a determination of the best interests of the child, ensure that children placed in foster care shall have access to and visitation with siblings).} Some states require the Child in foster care to have access to and visitation with siblings when it is in the best interests of the siblings to be together; and (ii) placement of the siblings together does not conflict with a special health or safety regulation); Conditional other efforts to facilitate sibling Visitation: Massachusetts. Mass. Gen. Laws Ann. ch. 119, § 268(b) (The court or the department shall, whenever reasonable and practical and based upon a determination of the best interests of the child, ensure that children placed in foster care shall have access to and visitation with siblings); Washington.* Wash. Rev. Code § 13.34.025(11)(a) (To the maximum extent possible under current funding levels, the department and supervising agencies must: Coordinate and integrate services to children and families, using service plans and activities that address the children’s and families’ multiple needs, including ensuring that children have regular visits with their sibling, as appropriate); Conditional other efforts to facilitate Ongoing Contact: Massachusetts. Mass. Gen. Laws Ann. ch. 119, § 268(b) (The court or the department shall, whenever reasonable and practical and based upon a determination of the best interests of the child, ensure that children placed in foster care shall have access to and visitation with siblings).}
It is unclear where the final authority lay across states. Only a very small minority of states give a concrete answer. For example, regarding joint placement, Colorado statute provides that the department

outside of the home have the right to have the department make its best efforts to arrange joint placement of siblings; \( \text{North Carolina. N.C. Gen. Stat} \ § 131D-10.1(a)(2), (a)(10) \) (Children placed in foster care have the right to joint placement with siblings); \( \text{Pennsylvania. 11 Pa. Cons. Stat. } § 2633(18) \) (Children in foster care shall have preferred placement with kinship and siblings); and \( \text{Texas. } \text{Tex. Fam. Code Ann. } § 263.008(b)(5) \) (Foster children have the right to joint placement with siblings.).

\( \text{Colorado. Colo. Rev. Stat. } § 19-7-101(1)(cc) \) ("Children in foster care have the right to "liv[e] with or be[] visited by his or her sibs."); \( \text{Minnesota. Minn. Stat. } § 260B.04(2) \) (Children in voluntary foster care for treatment, if over age 12, shall be informed of the right to visit siblings); \( \text{Nevada. Nev. Rev. Stat. } § 432.525.12-13 \) (A child placed in foster care has the right to communicate, contact and visit siblings. Further, such a child has the right "[n]ot to have contact or visitation withheld as a form of punishment."); \( \text{New Jersey. N.J. Stat. Ann. } § 9:68-4 \) (Foster children, if not in joint placement, have the right to visit siblings if other than joint placement and to otherwise maintain contact with siblings, including the provision or arrangement of transportation).

\( \text{Nevada. Nev. Rev. Stat. } § 432.525.12-13 \) (A child placed in foster care has the right to communicate, contact and visit siblings. Further, such a child has the right "[n]ot to have contact or visitation withheld as a form of punishment."); \( \text{New Mexico. } \text{N.M. Stat. Ann. } § 19-1-128(1)-(3) \) (Children in foster care can "mutually request" visit’n with siblings).
can rebut the presumption for joint placement by a showing by preponderance of evidence that such placement is not in the best interest of the children and that a Judge shall review family services plan document in any proceedings involving a sibling group. A few other states provide that the final word is in the hands of the court regarding facilitation of sibling visitation and ongoing contact. An almost equal amount of states simply leave discretion in the hands of the IV-D agency, with a statutory mandate to document their reasons for not allowing joint placement, frequent visitation and ongoing contact.

58 Colorado. Colo. Rev. Stat. § 19-3-213(1)(c)(i), Dept shall make “thorough efforts” to place sib groups jointly. If a joint placement is available, presumption it is in BIOC. Presumption may be rebutted by showing by preponderance of evidence that such placement is not in BIOC. Colo. Rev. Stat. § 19-3-507(4) (Judge shall review family services plan document in any proceedings involving a sibling group.) Other similar states: Minnesota, Minn. Stat. § 260C.617(b) (The court shall review any proposal by the responsible social services agency to separate sibs for purposes of adoption.); and Wisconsin. Wis. Stat. §§ 938.335, 938.33, 48.38, 48.33 (The dept. must show that they have made RE to jointly place sibs, or provide specific evidence as to why it is contrary to safety or wellbeing of children. If so, the dept. must show what RE they have made to facilitate sib visit’n or frequent and ongoing interaction or provide specific evidence as to why that would be contrary to the safety or wellbeing of the child).

59 Minnesota. Minn. Stat. § 260C.607, subd 4(a)(2)(ii) (Court shall review child’s visit’n and contact with sibs in its review of progress toward adoption.); Minn. Stat. § 260C.201, Subd. 5. (If the court orders children into foster care and they are separated, it shall review and either modify or approve the agency plan for visit’n with sibs, if visit’n is in BIOC.). New York. N.Y. Soc. Serv. Law § 358-a. (An inquiry about sib contact and visit’n must be made upon review of the petition); N.Y. Soc. Serv. Law § 409-e(d) (The dept. shall include in the family service plan information regarding arrangements made for contact between separated sibs and reasons for the separation—including “identification of all available placement alternatives and the specific reasons why they were rejected, an estimate of the anticipated duration of placement, and plan for termination of services under appropriate circumstances, with specific explanation of the reasons for such termination plan.”); and Wisconsin. The dept. must show that they have made RE to jointly place sibs, or provide specific evidence as to why it is contrary to safety or wellbeing of children. If so, the dept. must show what RE they have made to facilitate sib visit’n or frequent and ongoing interaction, or provide specific evidence as to why that would be contrary to the safety or wellbeing of the child. Wis. Stat. § 938.335, Wis. Stat. § 938.33 (court reports), Wis. Stat. § 48.38 (permanency hearing), Wis. Stat. § 48.33 (court reports).

60 Minnesota. Minn. Stat. § 260C.201, Subd. 2 (The Court shall enter written findings of fact to support the order for disposition to support the disposition and case plan ordered. The court shall also set forth in writing and include the following information: whether the agency made RE to place children together and circumstances regarding visit’n if sibs are not jointly placed.); New York. N.Y. Soc. Serv. Law § 358-a. (An inquiry about sib contact and visit’n must be made upon review of the petition); N.Y. Soc. Serv. Law § 409-e(d) (The dept. shall include in the family service plan information regarding arrangements made for contact between separated sibs and reasons for the separation—including “identification of all available placement alternatives and the specific reasons why they were rejected, an estimate of the anticipated duration of placement, and plan for termination of services under appropriate circumstances, with specific explanation of the reasons for such termination plan.”); and Wisconsin. The dept. must show that they have made RE to jointly place sibs, or provide specific evidence as to why it is contrary to safety or wellbeing of children. If so, the dept. must show what RE they have made to facilitate sib visit’n or frequent and ongoing interaction, or provide specific evidence as to why that would be contrary to the safety or wellbeing of the child. Wis. Stat. § 938.335, Wis. Stat. § 938.33 (court reports), Wis. Stat. § 48.38 (permanency hearing), Wis. Stat. § 48.33 (court reports).

61 Alaska. Alaska Stat. Ann. § 47.14.100(c) (Duties of Dept. Plcmnt of sibs together: must make RE. If not, after RE, must document reason why and purpose in BIOC.); Arkansas. Ark. Code Ann. § 9-28-111(c)(10)(A) (Case plans must contain a description of the location of sibs, efforts made for joint plcmnt, documentation of efforts made to provide for frequent visit’n or other ongoing interaction. If joint plcmnt or visit’n/interaction is not achieved, dept. must document reasons why); Georgia. Ga. Code Ann. § 15-11-135(e) (The dept. must jointly place sibs, otherwise the report and case plan must document the continuing efforts being made toward joint placement. If the dept. does not think joint placement is in the BIOC, it must document the reasons for that determination.); Ga. Code Ann. §§ 15-11-201(b)(8), (b)(11)(A)-(B) (A case plan shall be developed by the dept. and other parties which must include a schedule of sib visit’n and an explanation if there is no visit’n. Within the case plan the dept. must provide a statement that RE have been made to jointly place sibs, and to provide frequent visit’n or other ongoing interaction with sibs (unless there is documentation that such contact would be contrary to the safety or wellbeing to any of the sibs)); and Michigan. Mich. Comp. Laws § 722.875a(5a)(b) (The Dept. must include the reason for any separation of sibs during placement in the child’s case plan.); but see Minn. Stat. § 260C.617(d)(1)-(2) (After a hearing, a court can determine that a child may be separated form sibs for adoption when: (1) dept has made RE to place sibs together, and that further efforts would significantly delay the adoption of the sibs and therefore not in the best interests of one or more of the sibs, or (2) it is not in BIOC to be placed together after RE have been made by dept to keep sibs together) and Minn. Stat. § 260C.613, subd 3. (Agency shall place sibs together, unless: (1) court makes findings required under 260C.617; and (2) court orders that the adoption or progress toward adoption of the child under the court’s jurisdiction may proceed notwithstanding that the adoption will result in sibs being separated.).

62 Arkansas. Ark. Code Ann. § 9-28-111(c)(10)(A) (Case plans must contain a description of the location of sibs, efforts made for joint plcmnt, documentation of efforts made to provide for frequent visit’n or other ongoing interaction. If joint plcmnt or visit’n/interaction is not achieved, dept. must document reasons why); Georgia. Ga. Code Ann. § 15-11-135(e). (If sibs are not jointly placed, the dept. must provide for frequent visit’n or contact unless there is a reason why such visit’n would not be in BIOC.); Ga. Code Ann. §§ 15-11-201(b)(8), (b)(11)(A)-(B) (A case plan shall be developed by the dept. and other parties which must include a schedule of sib visit’n and an explanation if there is no visit’n. Within the case plan the dept. must provide a statement that RE have been jointly placed sibs, and to provide frequent visit’n or other ongoing interaction with sibs (unless there is documentation that such contact would be contrary to the safety or wellbeing to any of the sibs)); and Minnesota. Minn. Stat. §§ 260C.212, sub div 2(d), 260C.212, subd.1(c)(5) (When sibs are not jointly placed, the Dept. is required to provide frequent visit’n or other ongoing interaction between sibs unless Dept. documents that the interaction would be contrary to the safety or wellbeing of any of the sibs.).
Of states that have statutes regarding preservation of sibling relationships, there are only two states that appear to leave discretion in the hands of the department temporarily.64

Another trend among state statutes is the existence of presumptions in favor of preserving sibling relationships. Although it is only a minority of states in each category, and states vary regarding the specifics and degree of protection the presumption affords the siblings, states provide presumptions regarding joint sibling placement65, frequent visitation66, and ongoing contact67. Some state statutes

63 Arkansas. ARK. CODE ANN. § 9-28-111(c)(10)(A) (Case plans must contain a description of the location of sibs, efforts made for joint placement, documentation of efforts made to provide for frequent visit’n or other ongoing interaction. If joint placement or visit’n/interaction is not achieved, dept. must document reasons why); Georgia. GA. CODE ANN. §§ 15-11-201(b)(8), (b)(11)(A)-(B) (A case plan shall be developed by the dept. and other parties which must include a schedule of sibling visit’n and an explanation if there is no visit’n. Within the case plan the dept. must provide a statement that RE have been made to jointly place sibs, and to provide frequent visit’n or other ongoing interaction with sibs (unless there is documentation that such contact would be contrary to the safety or wellbeing to any of the siblings)); and Louisiana. LA. CHILD. CODE ANN. art. § 675(S) (The case plan must assess the child’s relationships with sibs, and a plan for continuing contact while in foster care).

64 Regarding jointly placing siblings: New York. (temporary) Dept./Social Services shall jointly place sibs unless it determines that such placement is contrary to BIOC. Joint placement is presumptively in BIOC unless placement is contrary to child’s health, safety, or welfare. If such placement is not available at removal, it shall be provided within 30 days. N.Y. FAM. Ct. Act § 1055(c), 1027-a. These principles apply to transfer of placement. N.Y. SOC. SERV. LAW § 384-a. Note also that Court may order the department to jointly place siblings. N.Y. FAM. Ct. Act § 1055.

Regarding sibling visitation: Colorado. Colo. REV. STAT. § 19-1-128(1)-(3). (Children that are in foster care can “mutually request” visit’n with sibs (bio, half, or step sib, former step sib), but it is in the dept.’s discretion as to whether to grant or deny the requests. “mutually request” is not defined.); but see Colo. REV. STAT. §§ 19-3-213(1)(c)(III), 19-3-507(4) (Judge shall review family services plan document in any proceedings involving a sib group.); and Colo. REV. STAT. § 19-3-507(1)(b) (Prior to any dispositional hearing, if the child is not placed with sib group, the caseworker shall submit a statement to ct about whether it continues to be in BIOC to be placed separately.).

65 Alaska. The court shall recognize a presumption that maintenance of a sibling relationship, including with a sibling who is related by blood, marriage, or adoption through one parent, is in a child’s best interest. Alaska Stat. Ann. § 47.10.080(w); Colorado. (Conditional) Dept shall make “thorough efforts” to place sib groups jointly. If a joint plcmt is available, presumption it is in BIOC. Presumption may be rebutted by showing by preponderance of evidence that such plcmt is not in BIOC. Colo. REV. STAT. §§ 19-3-213(1)(c)(I), 19-3-402(2)(b), 19-3-403(6.6)(b), 19-3-507(4), 19-3-507(1)(b), 19-3-508(1)(c), 19-3-508(5)(b)(ii), 19-3-605(2), 19-3-104(2)(b) (relinquishment provision), 19-5-210(2)(e) (hearing on adoption pet’n), § 19-5-200.2(2)(a) (legislative declaration), 19-5-207.3(2)-(3) (legislative declaration); Georgia. Ga. Code Ann. § 15-11-135(e) (In any case in which a child is taken into protective custody of DCFS, such child shall be placed together with his or her siblings who are also in protective custody or DCFS shall include a statement in its report and case plan of continuing efforts to place the siblings together or document why such joint placement would be contrary to the safety or well-being of any of the siblings.); Maryland. Md. Code Ann., Fam. Law § 5-525.2(a)(1) (conditional) (a local department shall place together siblings who are in out of home placement if it is in the best interests of the siblings to be placed together and placement of the siblings together does not conflict with a specific health or safety regulation); Missouri. Mo. Rev. Stat. § 210.565 (Dept. shall make RE to jointly place sibs in the same foster care, kinship, guardianship, or adoptive placement, unless doing so would be contrary to the safety or well-being of any of the sibs); Nebraska. Neb. Rev. Stat. § 43-1311.02(1)(a) (Dept. shall make RE to jointly place sibs in the same foster care or adoptive home, unless such placement is contrary to the safety or well-being of any of the sibs. This requirement applies even if the custody orders of the sibs are made at separate times); Nevada. Nev. Rev. Stat. § 432.850(5)(a) (It must be presumed to be in the best interest of the child to be placed together with the siblings of the child.); New York. N.Y. Fam. Ct. Act § 1055(5) (Placement or regular visitation and communication with siblings or half-siblings shall be presumptively in the child’s best interests unless such placement or visitation or communication shall be contrary to the child’s health, safety or welfare, or the lack of geographic proximity precludes or prevents visitation.); Oklahoma. Okl. Stat. tit. 10A, § 1-4-707 (If the child is part of a sibling group, it shall be presumed that placement of the entire sibling group in the same placement is in the best interests of the child and siblings unless the presumption is rebutted by a preponderance of the evidence to the contrary.); Sibs should be jointly placed unless it would have a harmful physical, mental or psychological effect on one or more or the sib children or if the child has a physical or mental disability which the existing foster home can better accommodate. The dept. may pet’n the court for an order allowing separation of the sibs to continue. Such placement shall be based upon the BIOC. W. Va. Code § 49-2-14 (not exact language of statute, there are a lot of conditions); West Virginia. Sibs should be jointly placed unless it would have a harmful physical, mental or psychological effect on one or more of the sib children or if the child has a physical or mental disability which the existing foster home can better accommodate. The dept. may pet’n the court for an order allowing separation of the sibs to continue. Such placement shall be based upon the BIOC. W. Va. Code § 49-2-14 (not exact language of statute, there are a lot of conditions).

66 Iowa. The presumption for ongoing sib visit’n or other ongoing interaction may be overcome by a clear and convincing showing that it would be detrimental to the well-being of the child or a sib. Iowa Code § 232.108(4) (The order suspending or terminating such visit’n shall note reasons why. IOWA CODE § 232.108(4)); California. CAL. WELF. & INST. CODE § 362.1(a)(2) (Children placed out of the home shall be provided visit’n with any sibs, unless the court finds by clear and convincing evidence it would be contrary to the safety or well-being of either child.); Connecticut. CONN. GEN. STAT. § 17a-10a(a) (If child is placed out of home, child must be provided visit’n with sibs, unless otherwise ordered by the court.); Georgia. GA. CODE ANN. §§ 15-11-135(e) (If siblings are not placed together, DCFS shall provide for frequent visitation or other ongoing interaction between siblings unless DCFS documents that such frequent visitation or other ongoing interaction would be contrary to the safety or well-being of any of the siblings.); Hawaii. HAW. REV. STAT. § 587A-28(e)(5) (At the Return Hearing, if the court finds that the child’s physical or psychological health or welfare has been harmed or is subject to threatened harm by the acts or omissions of the child’s family, the court shall order reasonable supervised or unsupervised visits for the child’s sibs, unless such visits are determined to be unsafe or detrimental to, and not in the best interests of, the child.); Indiana. (conditional-a party must petition court) Ind. Code § 31-28-5-4(a)-(b) (If the department denies a request for sibling visitation under section 3 of this chapter, the child’s guardian ad litem or court appointed special advocate may
definite how many visits constitute “frequent” that is more than the once per month that the Federal guidelines require\(^6\) and at least one state, Florida, mandates more minimum visitations with siblings than with parents.\(^6\)

Another difference amongst states, which the Children’s Bureau discussed in its recent publication\(^7\) is how a state identifies siblings. As mentioned earlier, the Children’s Bureau gives the states discretion to define siblings. Although the Bureau hinted that it would be the IV-D agencies to define “sibling,” some states provide definitions in their child welfare statutes.\(^7\) Although the Children’s Bureau acknowledges that children are less formal in their definitions of siblings and that “fictive kin”\(^7\) may be important to children, there do not appear to be any states that have adopted fictive kin into their statutory schemes.
Social Science – Sibling Relationships

There is a great deal of evidence to show that in general children with siblings have certain advantages and are more resilient. Currently, an emerging body of research examines this connection for children within the foster care system and evaluates whether maintaining sibling relationships has an impact on both the child and the outcome of the case. There is no exact number, but it is estimated that 65% to 85% percent of children in foster care come from a sibling group. Another estimate shows that 50 percent are separated from their brothers and sisters (McCormick, 2011).

The Chapin Midwest Study stated that, “These young people were most likely to report feeling close to their siblings,” (13). In all areas of the study having to do with family relations, siblings rate the highest. For example, 55.5 percent of the respondents reported being “very close” to their siblings and 24.3 percent reported being somewhat close to their siblings (14). Likewise, respondents reported having the most amount of contact with siblings with 29.7 percent having contact everyday while another 31.3 percent had contact at least once a week (15). This supports another conclusion which McCormick quotes, “sibling relationships have the potential to ascend to primary importance in the context of maltreatment and placement in out-of-home care” (Shlonksy, 2005).

The Child Welfare Information Gateway provides a comprehensive overview of the challenges and opportunities for children in the foster care system called “Sibling Issues in Foster Care and Adoption: Bulletin for Professionals”. The bulletin begins with the definition of family and “siblings”, and discusses how a sibling can vary for different children and families. A sibling could be someone related biologically, but it could also mean someone not related by “blood”. The article also discusses the term Fictive Kin to describe a relationship with no “legal or blood tie, but where a “strong, enduring bond exists.”

Moreover, siblings contribute greatly to each other’s personal development. The bulletin describes how siblings are often a child’s first peer group where “social skills” such as “sharing”, “managing conflict” and “negotiation” are developed (4). McCormick also notes that “the sibling relationship serves as a way for a youth to maintain a sense of their history, as well as a way to better understand themselves and their experiences.” Other research shows that siblings “can serve as a protective factor,” (Wojciak, McWey & Helfrich, 2013).

Other research cited in the bulletin shows that sibling connections result in less feelings of loneliness, less behavior problems and a higher self-worth. Children that stay connected to their siblings are more resilient and do better dealing with the loss of parents. In addition, sibling relationships for children in foster care carry over into adulthood and create better outcomes for these children later in life. Lastly, keeping siblings together results in better outcomes for the case, such as higher rates of family reunification, greater chances for adoption and better stability.

73 Brian Brinkerhoff, M.P.A., Executive Director at Denver CASA
**Child Welfare – Sibling Relationship Preservation**

**Denver Department of Human Services (DDHS):** How professionals in Denver Department of Human Services' Child Welfare Division face challenges that they can influence in order to preserve sibling relationships:

As child welfare professionals, we always have to look at our current practices and assess that they continue to meet the needs of our clients and that we are strengthening our community through family connections, including ensuring we are doing our best to maintain sibling relationships and connections throughout the child(ren)’s involvement with the child welfare system. As an agency, we wanted to explore the way we provided services to our clients and how our internal functioning was having an impact on the children we serve. We will review our current organizational policies and procedures, adequacy of placement resources and supports, agency rules and regulations and professional attitudes and beliefs regarding maintaining sibling relationships from intake to permanency.

**Organizational policies and procedures:**
Denver Department of Human Services' Child Welfare Division is a team of 300 staff that is charged with federal and state child protection duties. This includes the investigation of intrafamilial abuse and neglect, providing prevention, intervention, and permanency services, and filing Dependency and Neglect actions on behalf of children whose caregivers won't or unable to provide them appropriate care and protection.

Although many sections in DDHS' CW Division are currently siloed much like many traditional CPS models ("intake", "youth services", "family meetings", "placement services", and "clinical services"), DDHS is in the process of moving towards a paired team approach (AKA "360"), which combines intake, child protection, and youth services in 20 child protection teams under one generalist Supervisor. This paired team approach will allow one family to have one team during their involvement with child welfare in the City and County of Denver in Colorado. As result, our teams will no longer be specialized in one direct services child welfare function, but will rather be well-rounded, nimble, and accountable for all aspects of child welfare and the needs of a particular family. This allows DDHS CW leadership to identify promising practices through outcomes; as an example, if one team manages a great number of sibling co-placement, we can identify the successfully strategies and build them a standard work for the entire division.

DDHS has also implemented the practice of using a team approach to assess and determine it responds to each allegation of abuse or neglect that comes through our Child Abuse and Neglect hotline. We participate in daily Review, Evaluate, Direct (RED) teams that are multi disciplined throughout the child welfare division in order to assess if DHS should assign the referral to a designated caseworker. The facilitator is required to create a family genogram, which allows the team to identify all siblings associated with the identified victim of child abuse and/or neglect providing the investigating caseworker to know before responding how many siblings are associated with the identified child victim in the referral.

DDHS values identifying “relatives and other supportive adults who may be disconnected or unknown to child(ren) and youth and engage them to support the family,” (DHS Family Finding-Child Welfare Division) including being a placement provider with out-of-home placement is necessary. Therefore, DDHS has created a Family Finding unit where they are responsible for assisting caseworkers in finding relative placement options and/or possible permanent connections. The Family Finders team has a

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79 Joseph Homlar, Child Welfare Division Director for the Denver Department of Human Services; Erin Stremming, Child Welfare Administrator for the Denver Department of Human Services
designated phone number (called the "Warm Line") that is the starting point of all out-of-home placements for child in need of this service. As a procedural rule, this allows for the Family Finders to explore family options before placing children in a home with a stranger and they have a two hour window to explore as many relative placement options before the agency has to explore traditional foster care placement. As discussed further on in this article, the perceptions by many professionals in the child welfare profession are that kinship/relative placement options are more willing to accept sibling groups and preserve the sibling relationship through the traumatic experience of being removed from parental care.

Adequacy of placement resources and supports:
In an effort to support family relationships including sibling connections, DDHS has developed teams dedicated to supporting the kin and relatives providing placement as an alternative to traditional foster care. DDHS values kinship providers and “identifying Kinship Placements is always the first priority to lessen the trauma and maintain community connections for the children involved.” (DHS Family Finder-Child Welfare Division, 2014). As well as to establish stable and caring environments for the child(ren)/youth until permanency can be achieved. The Kinship unit's “Primary responsibility is to engage and support kin caregivers at the onset of placement and to stabilize the placement to provide the best care for the child(ren).” (DHS Kinship Intervention and Support Services-Child Welfare Division, 2014) Our Kinship programs support efforts to adhere to Volume 7 rule 7.311.21 Placement with Siblings [Eff. 2/1/10] In addition to requirements in Section 7.301.24, the county department shall document: A. The efforts to place siblings together in the relative kinship family foster care home. B. The ongoing efforts to facilitate placement together, and the efforts to maintain frequent visitation and ongoing connections for siblings that live apart. 7.311.22 Inclusion of Siblings in a Relative Guardianship Assistance Agreement [Eff. 2/1/10] A. Sibling(s) of a youth or child who meet all other requirements identified in Section 7.311.1 except the Title IV-E eligibility may be included in the same relative guardianship assistance agreement when there is agreement by the sibling(s) of the youth or child, prospective relative guardian, and the county department that the arrangement is in the best interests of the sibling(s) of the youth or child. This may occur on or at a later date than the youth or child who is Title IV-E eligible, and B. Relative guardianship assistance payments may be made on behalf of each sibling in the same relative guardianship assistance agreement.

In another effort to support sibling and family connections when out-of-home placement has to be considered, we have developed a comprehensive visitation program called Preparing for Reunification through Empowerment in Parenting Time (PREPT). This program “…provides parent and sibling visitation within hours of a child being removed, up through the child achieving permanency.” (DHS PREPT-Child Welfare Division, 2015). We provide 24-48 hour emergency visitation service, ongoing visitation services and therapeutic visitation services. The PREPT program allows siblings to maintain contact even if for other reasons they cannot be placed in the same home. This service supports the efforts of a caseworker in meeting the expectation of Volume 7 rule 7.304.64 Visitation and Supervision C. When a child in foster care and a sibling (defined in Section 7.000.5, Y) mutually request a visit or regular visits, or the guardian ad litem requests visits on behalf of a child, the county department shall perform and document the following activities in the visitation plan and contact notes: 1. That visits are scheduled in a reasonable amount of time and with sufficient frequency to promote continuity of the relationships. 2. That the county department has determined that it is not in the best interests of one or both of the children. 3. That there has been consultation with the District Attorney to determine whether a criminal action is pending in any jurisdiction where either sibling is a victim or witness, prior to arranging a visit. 4. That a visit is not required or permitted because it would violate a known existing protection
order pending in any state. 5. A child in foster care shall be informed of the right to sibling visits.

As well, the PREPT program provides DDHS the ability to adhere to Volume 7 rule 7.202.1, J. A description of the services provided to reunite the family, including the plan for visitation, or to accomplish another permanency goal. The visitation plan shall specify the frequency, type of contact, and the person(s) who will make the visit. At a minimum the visitation plan shall provide the methods to meet the following: 1. The growth and development of the child; 2. The child's adjustment to placement; 3. The ability of the provider to meet the child's needs; 4. The appropriateness of the parent and child visitation, including assessment of risk; 5. The child's contact with parents, siblings, and other family members; and, 6. Visitation between the child and his/her family shall increase in frequency and duration as the goal of reuniting the family is approached.

Furthermore, in an effort to increase our family engagement and to assess each family based on their individual needs, including on how to case plan to maintain sibling relationships we have developed our family engagement meetings known as VOICES (Value of Individual and Community Engagement Services) which focuses on “…engaging families, their supports and professionals in case planning decisions with an integrated process for service delivery. …designed to work with families facing challenges around child/abuse and delinquency; to ensure the children are safe, learn about the family’s issues, and identify both their strengths and needs.” (DHS VOICES-Child Welfare Division, 2014).

**Agency rules-Volume 7 rules and regulations**

**7.301.24** Family Service Plan Out-of-Home Placement Documentation [Rev. eff. 12/1/12] For child(ren) in out-of-home placement, the Family Services Plan documents:

A. That the child meets all of the out-of-home placement criteria listed in Section 7.304.3. B. That when the child is part of a sibling group and the sibling group is being placed out of the home, if the county department locates an appropriate, capable, willing, and available joint placement for all of the children in the sibling group, it shall be presumed that placement of the entire sibling group in the joint placement is in the best interests of the children. Such presumption may be rebutted by the county by a preponderance of the evidence that placement of the entire sibling group in the joint placement is not in the best interests of a child or of the children. At the dispositional hearing, if a child is part of a sibling group and was not placed with his/her siblings, documentation shall be submitted to the court about whether it continues to be in the best interest of the child(ren) to be placed separately.

**7.304.61** Pre-Placement Activities

C. When the child is part of a sibling group and the sibling group is being placed out of the home, if the county department locates an appropriate capable, willing, and available joint placement for all of the children in the sibling group, it shall be presumed that placement of the entire sibling group in the joint placement is in the best interests of the children. Such presumption may be rebutted by the county by a preponderance of evidence that placement of the entire sibling group in the joint placement is not in the best interests of a child or of the children. If the child is a part of a sibling group, the county shall make thorough efforts to locate a joint placement for all of the children in the sibling group unless it is not in the best interests of the children to be placed as a group and these efforts do not unreasonably delay permanency for any child. Efforts to place siblings as a group shall be documented in the child’s case record.
Beliefs associated with Placing Siblings Apart (Survey)
DDHS conducted an informal survey of Social Caseworkers to assess what their perceptions are regarding placing siblings together when out-of-home placement has been deemed necessary due to safety concerns. We gave the Social Casework staff less than a week to respond to our survey and we received 21 responses to our 5 question survey.

Results and Questions:

Question 1:
Is it challenging for you to find foster homes willing to accept sibling sets?

<table>
<thead>
<tr>
<th>Answer Options</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not at all Challenging</td>
<td>0.0%</td>
<td>0</td>
</tr>
<tr>
<td>Sometimes Challenging</td>
<td>57.1%</td>
<td>12</td>
</tr>
<tr>
<td>Always Challenging</td>
<td>42.9%</td>
<td>9</td>
</tr>
</tbody>
</table>

answered question: 21
skipped question: 0

From the responses, it appears that caseworkers that are responsible for placing children in out-of-home placement find it sometimes to always challenging to find homes that are willing to accept sibling sets. This information has provided DDHS an insight in the perceptions of staff placing children which needs to be explored in more depth on the exact challenges so we can address these concerns when recruiting for foster care homes.

Question 2:
How is the process of finding a home for sibling sets in kinship foster homes, if at all?

<table>
<thead>
<tr>
<th>Answer Options</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Much Easier</td>
<td>9.5%</td>
<td>2</td>
</tr>
<tr>
<td>Sometimes Easier</td>
<td>38.1%</td>
<td>8</td>
</tr>
<tr>
<td>Same as Stranger Foster Care</td>
<td>23.8%</td>
<td>5</td>
</tr>
<tr>
<td>Difficult</td>
<td>14.3%</td>
<td>3</td>
</tr>
<tr>
<td>Much More Difficult</td>
<td>14.3%</td>
<td>3</td>
</tr>
</tbody>
</table>

answered question: 21
skipped question: 0

In question 2, we wanted to explore if finding homes for sibling sets were easier to find when using kin/relative placements since DDHS values using kinship care when out-of-home placement is deemed necessary as evidenced by developing kinship support programming. However, only 52.40% of workers feel that finding a kinship home that is willing to take sibling sets are easier than traditional foster care. This feedback can be provided to our kinship support staff to explore how DDHS can improve our supportive services to promote siblings being placed together in Kinship/Relative homes.

Question 3:
It is important for children/youth separated from their siblings to visit those siblings who still reside with their biological parents.

<table>
<thead>
<tr>
<th>Answer Options</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly Agree</td>
<td>66.7%</td>
<td>14</td>
</tr>
<tr>
<td>Agree</td>
<td>28.6%</td>
<td>6</td>
</tr>
</tbody>
</table>
Question 4:

It is important for children/youth separated from their siblings to visit those siblings who have been placed in foster homes, group homes, and/or residential care.

<table>
<thead>
<tr>
<th>Answer Options</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly Agree</td>
<td>81.0%</td>
<td>17</td>
</tr>
<tr>
<td>Agree</td>
<td>19.0%</td>
<td>4</td>
</tr>
<tr>
<td>Not Sure</td>
<td>0.0%</td>
<td>0</td>
</tr>
<tr>
<td>Disagree</td>
<td>0.0%</td>
<td>0</td>
</tr>
<tr>
<td>Strongly Disagree</td>
<td>0.0%</td>
<td>0</td>
</tr>
</tbody>
</table>

answered question: 21
skipped question: 0

The results to question 3 and 4 are encouraging and are aligned with DDHS values of building stronger families and supporting our resource families. 95.3% of workers that responded believe that siblings who have been placed out-of-the home should continue to have a relationship with their siblings that may be still residing with their biological parents. 100% of those same workers believe that sibling visits are important if their siblings have been placed in out-of-home.

Question 5:

What are the most common challenges in keeping siblings placed together? (Please mark all that apply)

<table>
<thead>
<tr>
<th>Answer Options</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Placement Unavailable for Size of Sibling Group</td>
<td>71.4%</td>
<td>15</td>
</tr>
<tr>
<td>Age Gap Between Siblings</td>
<td>61.9%</td>
<td>13</td>
</tr>
<tr>
<td>Differences in Needs of Siblings</td>
<td>47.6%</td>
<td>10</td>
</tr>
<tr>
<td>Behavior Problems with a Particular Child</td>
<td>66.7%</td>
<td>14</td>
</tr>
<tr>
<td>Other (please specify)</td>
<td>38.1%</td>
<td>8</td>
</tr>
</tbody>
</table>

answered question: 21
skipped question: 0

The results of this question give DDHS more insight on how to recruit for foster homes that are willing to take sibling groups. As well, this is the beginning of a conversation with caseworkers to explore if some of these challenges are decided by the caseworker or the providers and how we can support traditional foster homes and/or kinship care providers when presenting them with sibling groups that have various needs to address while in out-of-home placement.

Furthermore, some issues that were brought up within the “other” category that gives DDHS more possible areas to explore in more depth are statements such as, “Paternal relatives not accepting half-siblings from another father;” “...help with child care and before and after school programs, so adults can work;” “...since foster homes are available an hour or so away, but refuse to transport for visits or state they will only keep kids until [an]other placement is located.
One of the challenges in a large agency such as Denver's is the need to continually integrate program (creating paired teams to reduce moving families through sections), best practice (VOICES, PREPT, RED), attitude and charge so that the synthesis of all of these pieces of practice is a driving force for maintaining all siblings with their birth parents when possible, and with family if birth parents are not able. In our work, we're able to justify exceptions to this on a case-by-case basis. This is not disingenuous; there are difficult calls made daily by teams of GALs, CPS staff, attorneys, and courts, and many pieces of children's lives otherwise intact are found missing when we're involved. Sibling connections is one of many crucial components of how a child sees him/herself in the world, and recognizing this and supporting this need is critical in the small window of time that we're involved in a child's life.

How Do Guardians ad Litem Preserve Sibling Relationships?80

The best interest of the child is the focus of a guardian ad litem’s (GAL) practice. Congress enacted the Fostering Connection’s Act of 2008 mandating agencies make dedicated efforts to preserve sibling relationships when a child is removed from the home.81 Locally, Colorado’s legislature has declared the best interest of a child who has been removed from home is to continue to stay in contact with his or her siblings.82 In light of this, GALs presume, based on statutory direction, that sibling groups should be initially placed together.83

Initial Joint Placement

Unless a joint placement is not in the best interest of the child or a finding that a joint placement would delay permanency, a GAL must vigorously advocate for joint placement at the outset. The department has an obligation to conduct a thorough search to locate a joint placement. A thorough search starts by identifying biological siblings, half-siblings, and even former step-siblings.84 GALs must ensure none of these sibling connections are overlooked. Where the department’s position is that a joint placement is impractical or impossible, a GAL must inquire as to whether the department has conducted an exhaustive search and whether that search has been properly documented in the child’s case record. Concerns regarding the department’s efforts to locate a joint placement must be discussed with the department and brought to the court’s attention.

The Colorado General Assembly’s dedication to keeping siblings in care together is clear. The Legislature has stated that when a department locates an appropriate, capable, willing, and available joint placement for all the children in a sibling group, there is a rebuttable presumption that joint placement is in the best interest of the children.85 Where it is alleged that the joint placement is not in the best interest of the children, the GAL must investigate to ensure that there is a preponderance of the evidence to rebut the presumption. Notably, joint placements are given preference even over kinship placements that are unwilling to take an entire sibling group.86 GALs should ensure children are not prematurely placed with a variety of different relatives if there is a joint placement that can take the entire sibling group.

Advocacy Tips:

- It should be highlighted that GALs may seek permission to exceed a foster home’s normal capacity if necessary to allow for joint placement of sibling groups.87

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80 Kristi Erickson, M.A., 2017 J.D. Candidate at DU Law School, Summer Intern at the Office of the Child’s Representative
82 Colo. Rev. Stat. § 19-3-500.2(1).
84 Colo. Rev. Stat. § 19-1-103(88.5).
85 Colo. Rev. Stat. § 19-3-500(c).
GALs should use “common sense advocacy” when relevant case law has not been established. For example, a GAL may need to make common sense arguments when a department’s search for joint placement has not met the standard of “thorough.”

Kinship Placement
Colorado’s legislature is intent on preserving and strengthening families ties whenever possible. To that end, kinship placements are preferable and far more successful for sibling groups than other placement types. Thus, a GAL must ensure the department has made thorough efforts to identify kinship options. Further, GALs should keep in mind adult siblings may be an appropriate kinship placement for children in need of out-of-home care. GALs must ensure this option is not overlooked.

Advocacy Tips:
- GALs may seek additional resources for relatives who express interest in keeping the siblings together but who may struggle with the financial and logistical burden of caring for the children.
- GALs may wish to request a Court Appointed Special Advocate (CASA) be assigned to the child to ensure the success of joint placement with relatives. As having multiple children of different ages in the home can be increasing difficult, CASAs can be extremely helpful in helping relatives transport the children to various therapy appointments, doctor visits, and even school.
- GALs should approach teachers, community groups, and other parents that can assist a relative with keeping the siblings together. It’s possible that carpool, afterschool programs, and bus schedules can be implemented or modified to assist relatives caring for sibling groups.

Connecting Separated Siblings
There are certainly challenges to finding initial placements for sibling groups: the size of the sibling group, behavioral problems when placed together, different biological fathers, and children being taken out of the home at different times, just to name a few. Given these difficulties, children might legitimately need different placements initially, but GALs must ensure there are continued efforts to find a placement willing to take the entire sibling group. Claims that placing siblings together would be detrimental must be independently investigated. Furthermore, GALs must assure detriment findings are revisited in the future.

If siblings are initially placed together, any proposals to separate the siblings must be carefully considered. The GAL must independently investigate whether any proposed change to separate the siblings is in the best interest of the child. The GAL may seek an emergency hearing if the GAL concludes the benefits of a different placement do not outweigh the value of preserving the joint placement.

Where siblings are separated either initially or subsequently, GALs have a duty to ensure children engage in meaningful contact with their siblings, especially when the children are separated. GALs must inform children of their right to communicate and visit with their siblings. GALs should make proactive efforts to inquire whether or not the child wants to be in contact with his or her sibling. When siblings have mutually requested contact and/or visits and visitation would be in the child’s best interest, a GAL must use the necessary advocacy and litigation processes to require visits within a reasonable amount of time—

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by court order if necessary. GALs should be conscious and attentive to the frequency and duration of sibling visits. Often transportation or other barriers arise, and GALs should be cognizant of making a judge aware of these issues, as it’s in the best interest of the child to have frequent and on-going contact his or her siblings.

Advocacy Tips:

- GAL’s may want to petition to have a CASA appointed for a child. CASAs can be an excellent resource for transporting and accommodating visitation between siblings.
- GAL’s may want to recommend siblings attend the same summer camps or activities. For example, Camp to Belong Colorado hosts a 6 day, 5 night camp dedicated to reuniting brothers and sisters who are in separate out-of-home placements.

How Do CASA Volunteers Preserve Sibling Relationships?  

CASA (Court Appointed Special Advocates) is a nationwide program of volunteers appointed to serve and speak on behalf of abused and neglected children involved in the child welfare and juvenile court system. The first CASA program was founded in 1977 by a judge in Seattle who felt he needed more information about the children appearing before him in court. Since then, the National CASA network has grown to 950 community-based programs serving over 220,000 children. In Colorado, the role of CASA programs and of the CASA volunteer is detailed in state law, where “the work of community volunteers has been proven to be effective in addressing the needs of children.”

Professionals involved in the lives of abused and neglected children have demanding caseloads that often limit deep and repeated contacts with the child. CASA Volunteers, on the other hand, serve one child/youth or sibling group at a time, allowing them to drill into the details of the child’s life, develop supportive relationships, and advocate for various needed services. CASA Volunteers are also a source of stability for the child because they stay involved for the duration of the case. Because of this level of contact, CASA Volunteers can assist with preserving sibling relationships through their unique role on the case. CASA Volunteers often understand family dynamics well, where the children are placed (especially when separated), and can help with keeping children connected throughout the duration of the case. By helping to keep children connected throughout the case, there is a hope that children stay connected into adulthood.

Understanding Family Dynamics

CASA Volunteers are able to develop a great deal of understanding about the family on a particular case. CASA Volunteers often speak with numerous people within the family. This could mean individuals involved in the case as well as family members not directly involved. Because of their focus, CASA Volunteers can take the time to understand relations involving half and step siblings, uncles and aunts and other extended family members, including both biological and fictive kin. In addition, some CASA programs utilize volunteers in collaboration with the local human services department to perform diligent search (family finding), which can result in identifying both family support and kinship placements. The CASA Volunteers’ level of understanding extends to the dynamics between siblings, and can be useful for arranging visits between them, or for decisions about temporary out-of-home placements and even permanent placements. Lastly, CASA Volunteers constantly strive to understand how the children feel within a case—from their own perspective—and can assist with advocating for supports based on the desires and needs of the children as it relates to siblings.

Children Placements

90 http://camptobelong.org/
91 Brian Brinkerhoff, M.P.A., Executive Director at Denver CASA
As mentioned in the social science section, 65% to 85% of children in foster care come from a sibling group, while 50 percent of sibling groups are separated. When sibling groups are separated, they can often be placed miles away in separate counties and placement settings. In addition to CASA Volunteers understanding the details of each placement, and how each placement impacts a sibling group, CASA Volunteers often spend a lot of time arranging visits between siblings. This can mean working with foster parents or staff within different facilities, to identify the best times and places convenient to the schedules of everyone involved. In addition to coordination, many CASA Volunteers provide transportation between visits, picking up the different siblings from their various placements and arranging for a common meeting space. CASA Volunteers often identify activities for the siblings to do together and help create a sense of normalcy by facilitating meetings to sports games, amusement parks or the library. CASA Volunteers often arrange these activities in the evenings and on weekends, when children are not at school, and when other professionals are not available. Due to their flexibility, CASA Volunteers can also be a resource for the case workers and guardians ad litem on a case by accepting special requests.

Case Outcomes
CASA Volunteers see the child (or children if they are assigned to a case with siblings) on their case at least twice a month and appear at each court hearing related to the case (average of four/year). At each hearing, they provide a written report to the court summarizing the child’s situation. This includes information about the child’s placement, visitation with their parents or other relatives, mental health issues, medical and dental issues, and education. If the child has needs in any of these areas that are not being addressed or addressed well, the CASA Volunteer makes a direct recommendation to the judge regarding what is needed. If a sibling group is separated, the CASA Volunteer will work towards a scenario in which they can be reunited as soon as appropriate and possible. Most importantly, the CASA Volunteer presents the child’s wishes and perspective to everyone involved with the case. CASA Volunteers, when possible, strongly advocate, to keep children together.

Through the support and advocacy provided by CASA Volunteers, there is more information and understanding about the details of the case and the needs of the children involved. This is especially important for cases in which siblings are separated and placed in different settings. Also, by helping to stabilize and normalize the out-of-home experience, CASA volunteers positively impact the children’s behavior while in care. This is done in many ways, but for siblings who are separated, CASA Volunteers can be instrumental in facilitating sibling visits and everyday experiences for them. Ideally these visits strengthen their connection to each other, which results in better overall behavior. The ideal outcome for all of this support is to have children reunited together with one family, rather it is reunification with a parent or adoption where all of the children are kept together. If children are separated as a final outcome, hopefully their ability to stay connected throughout the case continues after it is closed and into adulthood.
THE BODY AND BRAIN ON TRAUMA: HOW THE LONG-TERM EFFECTS OF TRAUMA ON THE BRAIN/BODY CONNECTION IMPACT BEHAVIOR

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I. Introduction

Long after they are over, traumatic experiences continue to take priority in the thoughts, emotions, and behavior of children and adolescents. The research is clear that the impact of trauma on children and adolescents is profound and pervasive. Because trauma can impact every aspect of an individual’s life, it must be considered when framing the behaviors and responses of our clients. Dr. Bruce Perry, one of the leading researchers in the areas of attachment and trauma, represents that, “Depending on the age, nature, and pattern of maltreatment a child may develop symptoms that mimic dozens of traditional DSM-IV diagnoses.” The mimicked symptomology can lead to our clients being inappropriately diagnosed or negatively characterized as oppositional, promiscuous, oversexualized, impulsive, and sometimes simply bad. In this paper, we are taking a deeper look into the impacts of trauma so that we can help reframe the lens through which professionals approach these cases – going from “What is wrong with this individual?” to “What happened to this individual?” Our research mainly focuses on impacts of trauma that occur earlier in life – infancy through adolescence.

In this paper, we will define trauma for the purpose of this discussion, highlight some of the most highly impacted parts of the developing brain, consider how compromised brain functioning impacts behavioral presentations, and conclude by briefly outlining areas that can be strongly impacted by a more informed view of an individual.

3 See id.
II. Trauma

Trauma can be defined as an event, either witnessed or experienced, representing a fundamental threat to one’s physical integrity or survival. The individual may experience intense fear, helplessness, or horror. The event may overwhelm an individual’s ability to cope with the stressor, leading to physical and psychological responses. Whether the event is perceived or actual harm, the meaning of the event may be just as important as the actual physical act or experience. Trauma can be experienced through a variety of events, including but not limited to, child abuse (physical, emotional, sexual), neglect, an accidental or violent death of a loved one, life-threatening accidents or illness, invasive medical procedures, refugee experiences, war, bullying, divorce, natural disasters, or ongoing exposure to family/community violence. These traumatic events can have a devastating impact on individuals, especially vulnerable children, and can directly affect their physical, emotional, cognitive, and social development. Experiences of trauma can lead to a variety of emotional responses, including depression, anxiety (including separation anxiety), helplessness/hopelessness, isolation/alienation, intense fear, rage, irritability, chronic pessimism, loss of hope/faith, increased suspicion, and vulnerability to subsequent trauma. When these emotional states shift internally, the external expression may look like withdrawal, hypervigilance, lack of interest in school, aggression, impulsivity, oppositional defiance, or risk taking. Major loss is often another residual impact of the trauma experience. For example, trauma survivors may feel a loss of boundaries, safety, trust, innocence, protection, consistency/predictability/normalcy, connection to loved ones, possessions, a sense of self, or a sense of control. These emotional shifts directly affect the individual’s capacity to maintain relationships and exist in the community.

While trauma is a broader umbrella category, there are other sub-categories of trauma that are important to consider, especially when working with children and adolescents. One of those categories is complex trauma. The National Traumatic Stress Network defines complex trauma as:

Complex trauma exposure refers to the simultaneous or sequential occurrence of child maltreatment – including emotional abuse and neglect, sexual abuse, physical abuse, and witnessing domestic violence – that are chronic and begin in early childhood. Moreover, the initial traumatic experiences (e.g., parental neglect and emotional abuse) and the resulting emotional dysregulation, loss of a safe base, loss of direction, and inability to detect or respond to danger cues, often lead to subsequent trauma exposure (e.g., physical and sexual abuse, or community violence).

The impacts of complex trauma affect the same developmental areas, belief systems, and physiology as single-episode trauma experiences. However, because of the chronicity of the trauma events, the impacts are even more pervasive and often far more difficult to address and heal. Children and adolescents who have experienced complex trauma are often those children that we see involved in multiple governmental systems, such as the child welfare and juvenile justice systems. They are also

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5 Id.
8 See generally Annette Greca et al., Children and Trauma: Update for Mental Health Professionals 2 (Am. Psychological Ass’n 2008).
9 See generally NAT’L CHILD TRAUMATIC STRESS NETWORK, COMPLEX TRAUMA IN CHILDREN AND ADOLESCENTS 30 (Alexandra Cook, Margaret Blaustein, Joseph Spinazzola & Bessel van der Kolk eds., 2003) available at http://www.nctsnet.org/nctsn_assets/pdfs/edu_materials/ComplexTrauma_All.pdf.
10 Id. at 5.
11 See id.
often the clients that we see with multiple diagnoses, such as bipolar disorder, conduct disorder, mood disorders, and/or attention deficit disorder/attention deficit hyperactivity disorder. When a child experiences traumatic stress, the brain activates a stress response system that alerts the body of an imminent threat. This response system releases hormones like cortisol and norepinephrine to prepare the body to respond. Other responses include rapid or irregular breathing, racing heart, panic, changes in perspiration, numbing, tingling sensations, confusion, and elevated blood pressure. In experiences of chronic trauma, the stress response system becomes overactive and can result in the body staying in a constant state of hyperarousal which can alter physiology and brain functioning.

While trauma has historically been researched in the context of the behavioral and emotional responses, the 1990’s and 2000’s saw a new focus on the intersection of trauma and neuroscience, looking at the dramatic impacts that trauma can have on the developing brain. Brain mapping and other neurological research now expose the changes in brain chemistry, size, and activity levels of certain parts of the brain when trauma is experienced. Several of the highly impacted areas include fear response, executive functioning, and hyperarousal. In the following sections of this paper, we will further discuss the neurobiological impacts of trauma.

As the body of research around the lasting effects of trauma grew in the 1990’s, research psychiatrists at West Haven Veteran Affairs, Yale University, Harvard University, University of California - Los Angeles, and Dartmouth College concluded that Post-Traumatic Stress Disorder (PTSD) can present as both the emotional response to a traumatic event as well as the expression of a persistent dysregulation of body and brain chemistry. In 2013, the Diagnostic and Statistical Manual of Mental Disorders (5th edition) created a new category of disorders called Trauma- and Stressor-Related Disorders and included PTSD in this category instead of its prior inclusion within anxiety disorders. Diagnostic criteria for PTSD requires the presence of one or more intrusive symptoms, beginning after the trauma, which can include intrusive and distressing memories of the event, recurrent distressing dreams related to the event, dissociative flashbacks of the event where the individual feels or acts as if the event is recurring, intense or prolonged psychological distress at exposure to internal or external reminders (triggers) associated with the event, or psychological reactions to internal or external reminders (triggers) associated with the event. Other categories of criteria include duration of symptoms – which must be more than one month – and intensity of reactivity associated with the event, such as exaggerated startle response or sleep disturbances. Additionally, the symptoms must cause impairment in at least one area of function.

III. Highly Impacted Parts of the Traumatized Developing Brain

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12 See id.
13 See generally BROHL, supra note 6.
14 See id.
15 See id.
16 See id.
19 Id. at 8.
22 Id. at 271–274.
23 Id.
24 Id.
The brain is the most complex organ in the human body – it produces every thought, action, feeling, memory, and experience. It is the main part of human biology that allows us to have powerful and flexible adaptive capacities and its core mission is to “sense, perceive, process, store, and act on information from the external and internal environment to promote survival.”\(^{25}\) A full structural outline and details of the parts and components of the brain are too numerous to describe in-depth here, but the following parts are important to our discussion of trauma and its impacts.

\[\text{Brain Structures Involved in Dealing with Fear and Stress}\] \(^{26}\)


Brain Stem

Cerebral Cortex
The cerebral cortex is the extensive outer layer of gray matter of the cerebral hemispheres. It contains the higher-order systems of the brain and is largely responsible for higher brain functions, including voluntary muscle activity, learning, language, and memory. Within the cerebral cortex is the prefrontal cortex and the sensory cortex.

Temporal Lobes
The temporal lobes of the brains are one of the four main lobes or regions of the cerebral cortex. Specifically, they are the paired lobes of the brain that lie beneath the temples. Structures of the limbic system, including the amygdala, are located within these lobes. The temporal lobes play an important role in organizing sensory input, auditory perception, memory association and formation, and language and speech production (i.e., the areas of the brain concerned with understanding speech). As such, the temporal lobes are involved in several functions of the body, including auditory perception, memory, visual perception, speech, and emotional responses.

Prefrontal Cortex
The prefrontal cortex is commonly described as the executive control center of the brain (the “air traffic control” system). It is responsible for holding information in consciousness, which is particularly important to remember in our discussion of trauma and survival circuits to follow. This area of the brain is remodeled during adolescence through the mid-20’s. It coordinates the brain, body, and interpersonal world as a whole.

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Other significant functions of the prefrontal cortex include modulating emotional reactions, making judgments, controlling impulses, complex reasoning, long-term planning, and threat identification. The prefrontal cortex also allows for delayed gratification, concentration, and shifting from one focus to another.

**Sensory Cortex**
This term describes the region of the cerebral cortex concerned with receiving and interpreting sensory information from various parts of the body. It is often used as an umbrella term for the cerebral cortices of the different senses, including, but not limited to, the visual cortex on the occipital lobes (vision), the auditory cortex on the temporal lobes (hearing), and the olfactory cortex (smell).\(^3^2\)

**Sensory Thalamus**
The sensory thalamus contains components for processing stimuli from all five senses. This structure of the brain processes any and all stimuli an individual may confront.

**Medial Temporal Lobe Memory System**
The medial temporal lobe contains structures of the brain that are critical for long-term memory and are essential for declarative memory (the conscious memory for facts and events). In the context of trauma and survival circuits (discussed in detail below), the medial temporal lobe memory system places stimuli in the proper context of time and place.\(^3^3\)

**Limbic System**
The limbic system is a complex system of nerves and networks in the brain, involving several areas near the edge of the cortex concerned with instinct and mood. It controls the basic emotions (fear, pleasure, anger) and drives (hunger, sex, dominance, care of offspring). The hypothalamus and the amygdala are both part of the limbic system.

**Hypothalamus**
Part of the limbic system includes the hypothalamus, which is responsible for maintaining the body’s internal balance (homeostasis) and the regulation of stress hormones. The hypothalamus helps stimulate or inhibit many of the body’s key processes, including, but not limited to, heart rate and blood pressure, body temperature, appetite and body weight, and sleep cycles.\(^3^4\) The stress hormones that come from the hypothalamus are required for flight or fight responses.

**Amygdala**
The amygdala is the integrative center of the brain for emotions, emotional behavior, and motivation; it is involved in the processing and expression of emotions, especially anger and fear.\(^3^5\) It combines external and internal stimuli and is where we get the commonly referred to “gut reaction.”\(^3^6\) Significantly, it is also where memory and emotions are combined and determines what and where those memories are stored – behavior and its associations may last a lifetime, whether good or traumatic. The amygdala activates the survival responses and triggers

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physical responses, such as an increase in heart rate and breathing. It also sends the signal out for stress hormones, such as adrenaline, to be released.\textsuperscript{37}

IV. Intersection of Rewired Brain and Behavioral Presentation

\textit{Survival Circuits}

As previously discussed, traumatic stress activates the body’s stress response system. This stress response system is reflective of the brain’s entry into survival mode, or survival-in-the-moment processing.\textsuperscript{38} The survival-in-the-moment response is controlled by systems of the brain and body commonly referred to as the survival circuits.\textsuperscript{39} These survival circuits control the way an individual processes traumatic events and the effect those events may have on that individual for the rest of his/her life.\textsuperscript{40} They are the means by which the brain processes a stimulus that is potentially life-threatening and interprets the perception into a life-sustaining response.\textsuperscript{41}

Survival circuits are made up of the two emotional processing systems in the brain – one of these systems supports conscious memory (i.e., explicit memory systems) and the other system stores information unconsciously (i.e., implicit memory systems).\textsuperscript{42} Memories about emotional situations are commonly stored in both of these systems. Oftentimes, these two emotional processing systems in the brain work together so that we are usually unaware that there are two discrete systems.\textsuperscript{43} The two systems roughly correspond to the higher-order and lower-order systems of the brain, and in this context, are commonly referred to as the high road and the low road.\textsuperscript{44} When an individual encounters a stimulus, the information travels along the high road or the low road. The road on which that stimulus information travels affects an individual’s emotional and behavioral reactions. The higher-order system or high road is made up of the sensory cortex, the prefrontal cortex, the medial temporal lobe memory system, and the amygdala.\textsuperscript{45} It involves parts of the brain that concern conscious perception and adaptive capacities like attention, memory, learning, executive functions, and language.\textsuperscript{46} The lower-order system or low road, however, is made up of the sensory thalamus and the amygdala (i.e., the part of the brain that controls basic emotionality, physiology, and survival-motivated behavior).\textsuperscript{47} Thus, this is essentially the system responsible for maintaining survival.\textsuperscript{48}

When an encountered stimulus enters the emotional processing systems, it first passes through the sensory thalamus, then heads along one of the two separate paths. If traveling along the high road, after passing through the sensory thalamus, the sensory information travels to the sensory cortex, the prefrontal cortex, and the medial temporal lobe, before sending signals and information to the amygdala.\textsuperscript{49} Because the information has first traveled through the sensory cortex, prefrontal cortex, and medial temporal lobe, the brain has been able to process the stimulus/sensory information. Therefore, those parts of the brain have processed the danger signal and assessed its degree of threat.

\textsuperscript{37} See generally \textit{Brohl}, supra note 6.
\textsuperscript{38} See \textit{Saxe}, supra note 33, at 24.
\textsuperscript{39} See id. at 23.
\textsuperscript{40} Id.
\textsuperscript{41} See id. at 25.
\textsuperscript{43} See \textit{Saxe}, supra note 33, at 29.
\textsuperscript{44} See id. at 29, 31. See generally Joseph LeDoux, \textit{The Emotional Brain: The Mysterious Underpinnings of Emotional Life} (Simon & Schuster 1998).
\textsuperscript{45} See \textit{Saxe}, supra note 33, at 30.
\textsuperscript{46} See id. at 31.
\textsuperscript{48} See \textit{Saxe}, supra note 33, at 24.
\textsuperscript{49} See id. at 30.
using contextual information to help determine whether the stimulus signals safety or danger.\textsuperscript{50} This additional information processing that happens along the high road is pivotal to the brain’s determination of an accurate perception of the stimulus/sensory information and the adaptive response that follows. These areas of the brain help obtain the details of the stimulus/sensory information so that the most adaptive response/behavior is possible. In order for this to occur, the sensory cortex engages long-term memory storage that includes experiences with similar stimuli/sensory information, the medial temporal lobe memory system places the stimulus in the proper context of place and time, and the prefrontal cortex places all of this additional information into the individual’s direct awareness.\textsuperscript{51} Information about safety traveling from the high road to the amygdala diminishes the amygdala response and regulates emotion. Information that signals danger also travels along the high road; however, if it is real danger, that is signaled to the amygdala and it maintains the low-road, survival-in-the-moment response.\textsuperscript{52} It is important to note that the amygdala is also able to communicate directly back to the high road, which is significant in the production of traumatic memories.\textsuperscript{53}

If traveling along the low road, the sensory information passes through the sensory thalamus, and then travels very quickly directly to the amygdala, which prepares for and initiates emergency responses.\textsuperscript{54} Most significantly, because the low road path is unconscious, it does not hold contextual information.\textsuperscript{55} Therefore, it sacrifices details for speed in order to survive. The low road system responds rapidly to incomplete bits of information and facilitates memory storage incompletely, which is damaging because this memory system is critical for survival.\textsuperscript{56} It stores the memory of threatening stimuli so that when such a stimulus is encountered again, survival responses can be extremely quick. This storage of memory is done incompletely and without the contextual information provided while traveling on the high road, which leads to the misperception of threatening stimuli in the future.\textsuperscript{57} The practical implication of this connection is that survival-related emotions relayed while traveling on the low road cause survival-related responses and behaviors.\textsuperscript{58} When an individual has experienced traumatic stress, there are fundamental problems with their survival circuit processing. An individual who has experienced trauma will go from the stimulus (a traumatic reminder) to the response (an extreme emotional state) which is not based on what is actually occurring.\textsuperscript{59}

\textsuperscript{50} Id.
\textsuperscript{51} See id. at 32.
\textsuperscript{52} See id. at 30.
\textsuperscript{53} See id.
\textsuperscript{54} See id. at 30, 31, 34.
\textsuperscript{55} See id. at 31.
\textsuperscript{56} See id. at 32.
\textsuperscript{57} See id.
\textsuperscript{58} See id. at 35.
\textsuperscript{59} See id. at 25, 26, 34.
The Two Pathways of Fear

Fight, Flight, Freeze and Triggers

As referenced previously, sensory information traveling along the low road activates the emergency response system and leads to survival-related responses and behaviors without taking into consideration the context of the stimulus. These responses are often classified as either fight, flight, or freeze responses. For children with traumatic stress, a present reminder of a past threat may cause the child’s brain and body to respond to the past threat in the present when there is no current or immediate life threat. These reminders are called triggers. Children with traumatic stress often enter the abovementioned state of fight, flight, or freeze in such instances.

When the child’s brain and body enter a state of fight, the body prepares to defend itself, and the child experiences increased muscle tension, endorphins, blood pressure, pulse, and breathing. If the child has lacked a protective and safe environment, then he or she may want to aggressively engage. Because triggers are often based on only a perceived threat, children in the fight mode are often perceived as unprovoked. Similar to the fight response, a child’s body may rev up, but the brain may assess that fleeing is the safest option. In that case, the brain prepares the body to escape. A child whose brain often defaults to flight mode may be a child labeled as a runner. This child may flee the situation or environment even when others do not perceive a threat. Finally, a child who feels as though he or she cannot fight or flee may freeze instead. While in this state, the child may experience a state of shock.

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"The Brain from Top to Bottom: The Amygdala and its Allies, THEBRAIN.MCGILL.CA, http://thebrain.mcgill.ca/flash/a/a_04/a_04_cr/a_04_cr_peu/a_04_cr_peu.html (last visited June 30, 2015)."


"See Saxe, supra note 33, at 25. See generally LEVY & ORLANS, supra note 61."

"See Levy & Orlans, supra note 61 at 120. See generally Margaret E. Blaustein & Kristine M. Kinniburgh, Treating Traumatic Stress in Children and Adolescents: How to Foster Resilience through Attachment, Self-Regulation, and Competency (Guilford Press 2010)."

"See generally Margaret E. Blaustein & Kristine M. Kinniburgh, Treating Traumatic Stress in Children and Adolescents: How to Foster Resilience through Attachment, Self-Regulation, and Competency (Guilford Press 2010)."

"See generally id."
numbness, depersonalization, or disassociation.\textsuperscript{66} All of these physical and emotional states are ways the brain and body brace for the perceived and imminent threat. Although many children with traumatic stress enter this state, they may also face shame when questioned why they did not do more in the face of an actual threat. This may be the child who appears “zoned out” in the classroom or who professionals describe as “checking out” of the conversation. When a child’s brain goes as far as dissociating, the child is likely to report truthfully that they do not remember the details of what happened because the brain has created separation from reality as a way to protect the child.

\textit{Regulation and Dysregulation}

Regulation and dysregulation serve as another critical area of biological response that warrants attention for our clients. Regulation is the emotional, physical, and/or psychological state of calmness.\textsuperscript{67} Regulation is learned and reinforced by a secure primary caregiver who serves as a stable attachment figure, is regulated, and demonstrates regulation.\textsuperscript{68} The emotional regulatory system is the mind/body system that is responsible for managing the social and emotional experiences of an individual. It is through and with this system that an individual is able to manage his/her emotions and behavior to allow for appropriate social interactions and adaptive functioning in the world. It provides an individual with the ability to control his/her emotions and to keep the “highs” and “lows” of life in check. Children who are traumatized by and/or removed from their primary attachment figures often do not develop or sustain the ability to reregulate themselves.

There are two distinctive classifications of regulation/dysregulation – emotional and behavioral.\textsuperscript{69} A child who is emotionally regulated is generally able to control his or her emotional states.\textsuperscript{70} The child may experience negative emotions (i.e., sadness, anger, guilt, shame) when he or she becomes upset, but the child is able to self-soothe and return to a state of calm.\textsuperscript{71} The emotionally regulated child almost never engages in dangerous acts when he or she is stressed. Thus, the emotionally regulated child does not tend to engage in self-destructive or aggressive behaviors. A child who is emotionally dysregulated also rarely engages in such behavior, but this child struggles to control his or her emotional states and has problems functioning.\textsuperscript{72} The child who is emotionally dysregulated has a limited ability to self-soothe when he or she experiences negative emotions. This child typically dysregulates at least once per month, and such episodes have a negative impact on the child as well as his or her school, home, and relationships.\textsuperscript{73}

Similar to the emotionally dysregulated child, a child who is behaviorally dysregulated also struggles to control his or her emotional states and also has problems at home, school, and in his or her relationships.\textsuperscript{74} By contrast, the behaviorally dysregulated child expresses such difficulty in potentially dangerous behaviors, including self-destructive and aggressive behaviors.\textsuperscript{75} The child may also engage in substance abuse, extreme eating, and/or sexual behavior. The behaviorally dysregulated child experiences an episode of dysregulation at least once per month and engages in dangerous behavior at least once every three months.\textsuperscript{76}

\textsuperscript{66} See generally id.
\textsuperscript{67} See \textit{Saxe}, supra note 33, at 53.
\textsuperscript{68} See \textit{Saxe}, supra note 33, at 48.
\textsuperscript{69} See generally \textit{Saxe}, supra note 33, at 112–116.
\textsuperscript{70} See \textit{Saxe}, supra note 33, at 113.
\textsuperscript{71} Id.
\textsuperscript{72} See id.
\textsuperscript{73} Id.
\textsuperscript{74} See \textit{id} at 114.
\textsuperscript{75} Id.
\textsuperscript{76} Id at 115.
V. Conclusion

Both single-episode traumatic experiences and chronic traumatic stress can have dramatic impacts on the cognitive, emotional, and physical functioning of a child. Over the last twenty years, child and adolescent trauma research has expanded greatly in the area of the intersection between trauma and neuroscience. What we now know is that, although the brain is very malleable in development, the effects of “disruptions” in normal development can have a dramatic impact on neurodevelopment. We can no longer assume or expect children to just “get over it” or that removing them from the traumatic situation/environment will simply resolve the impacts. As described above, the brain, when exposed to trauma, develops mechanisms to protect the individual, such as the survival circuits and the selection of the fight, flight, or freeze responses. Because the trauma-impacted brain cannot always differentiate between the real or perceived threats (triggers), the brain may develop and consistently activate these protective mechanisms and strategies. When working with our clients, we must start to consider the possibility that the maladaptive behaviors that we see in them are possibly more closely related to the unconscious release of physical and emotional safety valves that are activated as a result of past traumatic experiences. As professionals, we must start to reframe our assessment of what we are seeing, what our clients need, and more generally what is going to be in their best interests for healing.

Many who serve youth in the child welfare or juvenile justice systems are conditioned to view the negative behaviors of our clients from the perspective of “What is wrong with you?” In Dr. Glenn Saxe’s Trauma Systems Therapy Approach, he suggests that professionals must reframe and rephrase the question as “What happened to you?” By adjusting the lens through which we approach our clients, we will be better equipped to see our clients. If we are curious about a client’s trauma history and his or her exposure, then it will help us to reconceptualize behaviors from being “bad” to being the communication of a need. It is important for those working with children and families in these systems to seek a more complete trauma narrative of the child/children. This more informed awareness will help professionals have an appreciation of the seriousness of the child’s experiences, gain an understanding of the context of the full range of traumatic experiences, and be more supportive of the child’s recovery.

We must encourage ourselves and our colleagues to move away from addressing the surface behavior and to start looking at the underlying – often unmet – need. For example, with the typical oppositional teen, it may be easier to approach from a behavior modification perspective and focus on the oppositional behaviors. We may identify interventions such as more consequences for bad behavior and greater rewards for good behavior. Youth who are oppositional may be looking instead for love, attention, and acceptance, which in a healthy environment are rooted in stable attachments to healthy caregivers. However, youth with a history of poor attachments and trauma may be fearful of an intimate relationship with a caregiver. When we ask the oppositional teen what happened to him or her, we may discover that there is a more pervasive history of early disrupted attachments, the loss of a sense of safety, and the need for a strong stable attachment figure to provide safety, security and a nurturing environment. If the client’s team focuses on the need for the attachment figure as well as a sense of safety and belonging, the team will be able to support the youth in an opportunity to participate in new physical, neurological, and emotional experiences. This can have a direct impact on increasing the youth’s usage of the high road.

80 See generally Saxe, supra note 33.
and decreasing the youth’s trauma responses. These neurological adjustments can directly support the dissipation of maladaptive behaviors and the development of new coping strategies that lead to more positive choices.

Child welfare and juvenile justice professionals should be recalibrating the calculus around conversations of placement (both short-term and long-term), clinical and community-based services, educational placements, general interventions, and permanency. When teaming with our clients and their service providers, we can supportively ask questions such as:

- Are my client’s behaviors connected to their trauma history?
- What is my client trying to communicate through his/her behaviors?
- What are the unmet needs of my client?
- Is my client inappropriately diagnosed, and if so, how can I ensure my client is reassessed?
- Are the services trauma-informed and appropriate for my client?
- Does my client have a stable, healthy caregiver to support trauma healing?
- Are there creative services or creative community interventions appropriate for my client?

Although this list is non-exhaustive, it is important to note that it does not include direct questions regarding a client’s trauma narrative. Unless done in a therapeutic environment with trained clinicians, it can be retraumatizing for a trauma survivor to feel pressured to tell their “trauma story.” However, it is also important to note that we may be the only ones asking questions or just listening to our clients. As a result, we must be open to the client who begins to spontaneously share their trauma narrative and do our best to identify appropriate supports and services that are in the client’s best interests.

Even though trauma is not a new concept in the mental health field, research into trauma-informed care of children is still relatively new. Although it may be difficult to adjust from behavioral-based treatment models to a trauma-informed treatment model, we believe it is vitally important to recognize that a trauma-informed approach will ultimately lead to better service to our clients and the potential for more pervasive opportunities for their healing.
In 2013 when the United States Supreme Court issued *Adoptive Couple v. Baby Girl*, it radically narrowed the scope of the Indian Child Welfare Act (ICWA). In reaction, the Department of Justice (DOJ) and the Department of Interior, through its Bureau of Indian Affairs (BIA), have taken extraordinary steps to attempt an administrative override of the decision. Despite these heroic efforts, the bright lines drawn by the *Baby Girl* case remain in effect and are likely to continue to do so.

This paper explores the power and persistence of the *Baby Girl* case despite administrative attempts to override it by considering (1) the facts and history behind the case; (2) the three bright lines drawn by the Supreme Court; (3) state law expansion of the *Baby Girl* holding; (4) the DOJ’s new role as an ICWA-advocate as it attempts to counter the effect of *Baby Girl*; (5) the BIA’s new claims of constitutional authority as it likewise attempts to counter *Baby Girl*; and (6) the *Baby Girl*-caused reversal of *Native Village of Tununak v. Alaska*; and the governor’s administrative reversal of the reversal. This paper concludes that, despite DOJ and BIA efforts to the contrary, the bright lines of *Baby Girl* will remain bright.

1. *Baby Girl*: The Facts

Justice Alito, writing for the majority, recited the facts by focusing on race and family dynamics at the expense of tribal sovereignty:

In this case, Birth Mother (who is predominantly Hispanic) and Biological Father (who is a member of the Cherokee Nation) became engaged in December 2008. One month later, Birth Mother informed Biological Father, . . . that she was pregnant. After learning of the pregnancy, Biological Father asked Birth Mother to move up the date of the wedding. He also refused to provide any financial support until after the two had married. The couple’s relationship deteriorated, and Birth Mother broke off the engagement in May 2009. In June, Birth Mother sent Biological Father a text message asking if he would rather pay child support or relinquish his parental rights. Biological Father responded via text message that he relinquished his rights.

Birth Mother then decided to put Baby Girl up for adoption. Because Birth Mother believed that Biological Father had Cherokee Indian heritage, her attorney contacted the Cherokee Nation to determine whether Biological Father was formally enrolled. The inquiry letter misspelled Biological Father’s first name and incorrectly stated his birthday, and the Cherokee Nation responded that, based on the information provided, it could not verify Biological Father’s membership in the tribal records.

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1 133 S. Ct. 2552 (2013).
2 25 U.S.C. §§ 1901-1963. ICWA establishes federal standards for state-court child custody proceedings involving Indian children. It was enacted to address “the consequences ... of abusive child welfare practices that [separated] Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). ICWA in part grants tribal court exclusive jurisdiction over a reservation-domiciled ICWA child, grants tribal standing in state court, requires higher evidentiary and procedural standards for foster care placement or termination of parental rights, and requires that placement be according to a hierarchy of preferred placements favoring family and tribe.
Working through a private adoption agency, Birth Mother selected Adoptive Couple, non-Indians living in South Carolina, to adopt Baby Girl. Adoptive Couple supported Birth Mother both emotionally and financially throughout her pregnancy. Adoptive Couple was present at Baby Girl’s birth in Oklahoma on September 15, 2009, and Adoptive Father even cut the umbilical cord. The next morning, Birth Mother signed forms relinquishing her parental rights and consenting to the adoption. Adoptive Couple initiated adoption proceedings in South Carolina a few days later, and returned there with Baby Girl. After returning to South Carolina, Adoptive Couple allowed Birth Mother to visit and communicate with Baby Girl.

It is undisputed that, for the duration of the pregnancy and the first four months after Baby Girl’s birth, Biological Father provided no financial assistance to Birth Mother or Baby Girl, even though he had the ability to do so. Indeed, Biological Father made no meaningful attempts to assume his responsibility of parenthood during this period.

Approximately four months after Baby Girl’s birth, Adoptive Couple served Biological Father with notice of the pending adoption. (This was the first notification that they had provided to Biological Father regarding the adoption proceeding.) Biological Father signed papers stating that he accepted service and that he was not contesting the adoption. But Biological Father later testified that, at the time he signed the papers, he thought that he was relinquishing his rights to Birth Mother, not to Adoptive Couple.

Biological Father contacted a lawyer the day after signing the papers, and subsequently requested a stay of the adoption proceedings. In the adoption proceedings, Biological Father sought custody and stated that he did not consent to Baby Girl’s adoption.4

The South Carolina trial court determined that under state law, Biological Father would have no standing to object to an adoption.5 However, because he fell within the ICWA definition of parent,6 and because he did not receive protections due him under ICWA, he was entitled to custody and the adoption could not proceed.7 The twenty-seven month old Baby Girl was then transferred to the custody of a man she had never met.8 The South Carolina Supreme Court affirmed.9 The United States Supreme Court granted certiorari.10

2. Baby Girl’s Three Bright Lines

The majority opinion, written by Justice Alito and joined by Chief Justice Roberts and Justices Kennedy, Thomas and Breyer, punted one of the certified questions when it declined to determine whether Biological Father was a parent as defined by ICWA.11 Even so, the majority effectively restricted the definition of Indian parent and Indian family by limiting ICWA protections to only those parents whose continued custody was at stake and whose Indian families were broken up by the child welfare action

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4 133 S. Ct. at 2558-59 (citations and quotations omitted).
7 133 S. Ct. at 2559.
8 Id.
9 731 S.E.2d at 657-58.
11 133 S. Ct. at 2560.
The case limited preferred placement candidates to those who had the means and legal sophistication to timely petition for adoption. Finally, by focusing on blood quantum and racial identity of all the parties, the Court de-emphasized the concept tribal sovereignty, conflating it with race. The majority reduced three key ICWA provisions to three bright-line tests. Those provisions are:

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. [hereinafter “active efforts provision”]

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. [hereinafter “continued custody provision”].

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families. [hereinafter “preferred placement provision”].

The Baby Girl case interpreted these three provisions as follows: (1) the active efforts provision did not apply when the custody action itself did not break up the Indian family; (2) the continued custody provision did not apply to a non-custodial parent; and (3) the preferred placement provision did not apply when no other qualified candidate had petitioned to adopt. Justice Thomas concurred, opining that the Indian Commerce Clause did not authorize ICWA’s reach. Justice Sotomayor, joined by Justices Ginsburg, Kagan and Scalia, dissented, decrying the majority’s “hollow literalism [that] distorts the statute and ignores Congress’ purpose.” Justice Scalia wrote separately to argue that “continued custody” could include prospective custody. Justice Breyer, whose vote was needed for the majority,

12 Id. at 2562 (“we hold that § 1912(d) applies only in cases where an Indian family’s “breakup” would be precipitated by the termination of the parent’s rights.”); and at 2564 (the placements preferences “are inapplicable in cases where no alternative party has formally sought to adopt the child.”).
13 Id. at 2556 (“This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee.”).
15 Id. § 1912(f).
16 Id. § 1915(a).
17 Id. at 2568 (“Contrary to the State Supreme Court’s ruling, we hold that 25 U.S.C. § 1912(f)—which bars involuntary termination of a parent’s rights in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent’s “continued custody” of the child—does not apply when, as here, the relevant parent never had custody of the child.”).
18 Id. at 2565 n.12 (testimony that 100 Cherokee families were available to provide a home “did not demonstrate that a specific Indian family was willing to adopt Baby Girl, let alone that such a family formally sought such adoption in the South Carolina courts.”).
19 2025 U.S.C. § 1901(1) (“that clause 3, section 8, article I of the United States Constitution provides that “The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes” and, through this and other constitutional authority, Congress has plenary power over Indian affairs.”).
20 133 S. Ct. at 2571 (“Because adoption proceedings like this one involve neither “commerce” nor “Indian tribes,” there is simply no constitutional basis for Congress’ assertion of authority over such proceedings. Also, the notion that Congress can direct state courts to apply different rules of evidence and procedure merely because a person of Indian descent is involved raises absurd possibilities.”).
21 Id. at 2576.
22 Id. at 2571-72.
attempted to limit the reach of Baby Girl by cautioning that “we should decide here no more than is necessary.”


Despite Justice Breyer’s attempt to limit Baby Girl, state case law extended its holding to other proceedings. First, the South Carolina court, considering Baby Girl on remand, used state law to fill the vacuum created by the High Court’s punting of the parent question. Under state law, Biological Father’s consent was not necessary for the adoption to proceed. The state supreme court ordered “the prompt entry of an order approving and finalizing Adoptive Couple’s adoption of Baby Girl, and thereby terminating Birth Father’s parental rights.” Soon after, Montana, in In re J.S., extended Baby Girl to a state foster-care proceeding. Minnesota followed, in In re Welfare of Children of J.J., by extending Baby Girl to a state termination proceeding.

A California appellate court in In re Elise W. restricted ICWA protections to the Indian parent’s relationship with the child based on Baby Girl’s “implicit rationale” that an Indian family does not exist “unless the Indian parent has had custody of the child.” (emphasis in original). A Wyoming appellate court, in In re ARW, followed suit holding that father could not claim to be part of an Indian family where the potentially-Indian mother had earlier relinquished her parental rights.

As fast as state courts were applying and expanding the Baby Girl holding, the DOJ and the BIA were each making heroic efforts to contain Baby Girl. In order to do so, the DOJ had to retreat from its earlier assertion that ICWA was unconstitutional. In like manner, the BIA had to retreat from its earlier stance that the constitution forbade it from asserting authority over state courts and state agencies.

4. The DOJ: Then And Now.

Virtually every ICWA case begins with the historical backdrop of ICWA and the resulting congressional findings. Missing from these historical recitations are the DOJ warnings that the proposed law ran afoul of the constitution. Patricia Wald, then Assistant Attorney General for Legislative Affairs, wrote to Morris Udall, of the House Committee on Interior and Insular Affairs, relating her concerns that the proposed legislation was unconstitutional. Wald foreshadowed Justice Thomas’s concurrence when she asserted that the Indian Commerce Clause was not broad enough to justify ICWA’s “detailed set of procedures and substantive standards.” Wald believed Congress had no authority to “control . . . litigation involving nonreservation Indian children and parents.” She believed that Congress could not

24 Id. at 2571.
25 Perhaps the most unexpected application of Baby Girl was the Connecticut case of In re Payton V., No. K09CP12013239A, 2014 WL 6462019, at *3 (Conn. Super. Ct. Oct. 14, 2014) aff’d, No. 37294, 2015 WL 3634462 (Conn. App. Ct. June 10, 2015). There, an Indian mother brought a private petition to terminate the non-Indian father’s parental rights. She knew ICWA and she followed it. Not only did her tribe intervene, but she produced a qualified expert witness to testify that continued custody with the child’s non-Indian father would likely result in serious emotional or physical damage. The trial court found it “anomalous that an action brought by a remarried Indian mother against a remarried non-Indian father in the interest of their Indian children would provide father with ICWA protection.”
30 Id.
34 Id. at 40.
35 Id.
interfere when state courts are “exercising State jurisdiction over what is a traditionally State matter.”

She argued that “federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power contemplated by [the Act].” Udall tried to assuage Wald’s concerns by underplaying the reach of the act: “[T]he committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits.” Wald’s concerns and Udall’s responses would be echoed throughout thirty-plus years of ICWA litigation.

In contrast to the DOJ of 1978, the current DOJ sees no constitutional concern in advocating a broad interpretation of ICWA. In 2012, the DOJ sought and received amicus standing as well as oral argument time before the Supreme Court in the Baby Girl case. In its Baby Girl advocacy, the DOJ argued that Congress intended that ICWA impose a broad, federal definition of “parent.” At oral argument, the deputy solicitor general conceded that, even though Biological Father was not covered by the continued custody clause, he was protected by the active efforts clause because he was part of an Indian Family.

Even those justices most sympathetic to ICWA disagreed with his arguments. Justice Ginsburg argued that “it makes no sense to talk about remedial services for someone who has never had custody.” Justice Kagan remarked that the DOJ’s argument made “a mess of the statute.” As discussed earlier, the majority either dodged or rejected the DOJ’s arguments. Despite that, the DOJ would continue its amicus ICWA advocacy.

In August 2014, the DOJ sought and received amicus standing in Oglala Sioux Tribe v. Van Hunnik. The Van Hunnik case sought declaratory judgment against a state judge for denying due process and ICWA rights to Native American parents in removal hearings. The federal court found that in nearly 100 removal hearings, the state judge had not informed Indian parents of their rights under ICWA, including their right to present evidence, to testify; or to review the evidence or pleadings. The state judge informed the parents of a right to counsel, but warned that this “right” would be accompanied by a bill for services or a property lien. Despite the lack of due process and ICWA protections, each hearing resulted in a standardized temporary custody order with checkmarks placed next to appropriate ICWA findings, thus creating “the appearance of regularity in a highly irregular process.”

36 Id.
37 Id.
38 Id. at 17, 40.
41 Id. at 55:5-10.
42 Id. at 58:22-25.
43 Id. at 59:7-13.
44 Id. at 58:10-21.
45 See supra text accompanying notes 11-24.
48 Id.
49 Id. at *8.
50 Id.
51 Id. at 6.
52 Id. at ** 8, 12. On May 21, 2015, the Chief Justice removed Judge Jeff Davis, a defendant in the Oglala Sioux Tribe v. Van Hunnik, law suit, as presiding judge of the 7th Circuit. Judge Davis denied it had anything to do with the law suit. http://rapidcityjournal.com/news/local/davis-dispute-with-sd-chief-justice-prompted-loss-of-th/article_03fbd1a6-76e4-55ff-8787-0a676ff42e6f.html
5. The BIA: Then And Now

The *Baby Girl* case must have held particular sting for the BIA when the majority quoted liberally from the BIA’s 1979 guidelines to nullify those very guidelines. To wit: “The BIA envisioned that [the continued custody provision] would apply only to termination of a custodial parent’s rights.” 52 “The BIA’s Guidelines confirm that remedial services under [the active efforts provision] are intended ‘to alleviate the need to remove the Indian child from his or her parents or Indian custodians,’ not to facilitate a transfer of the child to an Indian parent.”53

The BIA of 1979 asserted that “concepts of federalism and separation of powers” prevented it from regulating state court custody matters.54 The BIA asserted that nothing in the language or history of the act indicated that Congress intended the BIA to take “the extraordinary step” of supervising state family courts.55 To do so would be “to assert authority that it concludes it does not have.”56

That was then. In February and April 2014, the BIA sent “Dear Tribal Leader” letters referencing “recent developments,” to solicit comment about revising the guidelines and expanding the regulations.57 The result was the February 25, 2015 release of revised guidelines, effective that day.58 Given that guidelines are not binding,59 the BIA likely intended the 2015 guidelines to presage expanded, binding regulations. Thus, it was no surprise when, on March 20, 2015, the BIA repackaged the substance of the 2015 guidelines into proposed regulations.60 Both sets of provisions charge state courts and agencies with locating preferred placements. Both prohibit considering a child’s best interest, bonding or attachment when applying ICWA.61 The BIA of 1979 would have described the 2015 proposed regulations as an extraordinary step, at odds with concepts of federalism and separation of powers, unsupported by the language and history of ICWA, and exercising power it does not have.62 In contrast, the BIA of 2015 claims that its proposed regulations would have no “substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”63

6. Baby Girl, The Village Of Tununak And An Administrative Override

*Baby Girl* case law, as well as the DOJ’s mission to counter the case law, played out in the case of *Native Village of Tununak v. Alaska.*64 The Alaska Supreme Court responded to the *Baby Girl* case by issuing a sua sponte suspension of its opinion in *Village of Tununak,*65 issued just four days before the Supreme Court released the *Baby Girl* decision. The *Village of Tununak* case involved an Alaskan Native child who came into foster care at four months of age.66 Her Native Village intervened, submitting a list of

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52 133 S. Ct. at 2561-62 (citing 1979 guidelines).
53 Id. at 2561-62 (citing 1979 guidelines).
54 1979 guidelines introduction.
55 Id.
56 Id.
59 1979 guidelines introduction.
61 2015 guidelines, 2015 proposed regulations.
62 See notes 64-67 and accompanying text.
63 BIA proposed regulations.
preferred placements including maternal grandmother. During the reunification portion of the case, the Native Village stipulated to the child remaining in a non-preferred placement so mother and child could participate in reunification efforts. After the termination trial, foster parents petitioned to adopt the child over the Native Village’s objections. The trial court found good cause to deviate from the preferred placements and granted the foster parents’ adoption petition. The Native Village appealed. The Tununak I case held that the trial court erred when it found good cause to deviate from the placement preferences based on a preponderance of evidence, when it should have required the higher, clear-and-convincing standard. Four days later, the Alaska Supreme Court rescinded the opinion.

After considering the implications of the Baby Girl case, the Alaska Supreme Court determined it was required “to apply the Supreme Court’s bright-line interpretation of ICWA . . . placement preferences,” which precluded it from considering any placement that had not petitioned to adopt the child. Thus, a tribe’s production of contact information “is neither equivalent nor analogous to a formal adoption petition.” The dissent argued that the majority’s decision would “place a difficult burden on Native families, which have the fewest legal and financial resources.” The Native Village petitioned for rehearing.

The DOJ sought and received amicus standing to argue that ICWA did not require a relative to file a formal adoption petition to be considered as a placement preference. The DOJ’s efforts notwithstanding, the Alaska Supreme Court denied rehearing. What the DOJ could not do via amicus briefing, the Alaska Governor did with a stroke of the pen. On April 15, 2015, after Tununak II was issued, but before rehearing was denied, the Alaskan governor effected an override of both Tununak II and Baby Girl case law by signing emergency regulations to establish easier processes for Native Families to assert standing as preferred adoptive placements.

Conclusion: Baby Girl Bright Lines Remain Brighter Than Ever

The Baby Girl case has radically narrowed ICWA’s application. Meanwhile, the DOJ has abandoned its earlier position that ICWA was unconstitutional to urge a broad reading of ICWA. Likewise, the BIA is now producing guidelines and proposed regulations asserting authority it once claimed it did not have. Child welfare attorneys are litigating these constitutional issues in state and federal courts. Those courts will likely consider Baby Girl as a cautionary tale. South Carolina’s embrace of the more conservative 1979 guidelines resulted in reversal. Why would a court risk reversal by applying the broader 2015 guidelines? Ultimately, the 2015 guidelines and resulting regulations will likely be reframed as aspirational best-practice advice. Meanwhile the likely constitutional litigators will be Child Welfare Law Certified NACC members. Ask for help. Proceed with caution.

67 Id.
68 Id.
69 Id.
70 Id. at 435.
71 Tununak II, 334 P.3d at 172.
72 Tununak II, 334 P.3d at 172.
73 Id. at 177.
74 Id.
77 http://www.courts.alaska.gov/rules/adop.htm. That same day, the state attorney general, whose office had helped draft the emergency bill, filed a brief supporting the Alaska Supreme Court’s ruling and arguing against rehearing.
THE TANGLED WEB OF CUSTODY OF CHILDREN OF SAME-SEX PARENTS

Ann M. Haralambie, JD, CWLS

The United States Supreme Court has decided Obergefell v. Hodges, 2015 WL 2473451 (U.S. 2015), making same-sex marriage legal nationally and requiring all states to recognize lawful same-sex marriages performed in other states. Does that resolve everything for children of same-sex parents? Unfortunately not. While it may make things easier for children born during their same-sex parents’ marriage, it is not clear to what extent Obergefell will apply to the parent-child relationship. To the extent that a person is recognized as a legal parent to the child, aside from issues of full faith and credit, custody law should work the same whether the parents are the same or opposite sex.

Creation of the Parent-Child Relationship

The parent-child relationship can be created in a number of ways. A woman giving birth to a child is generally, but not always,¹ considered to be the child’s mother. If the woman is married, her husband is generally, but not always,² considered to be the child’s father. For married lesbians, the spouse of a mother giving birth should now, under the Obergefell decision, be recognized as the child’s parent. For lesbians married in a state which allowed same-sex marriage, children born or conceived during their marriage should both be recognized as parents, even if the child was born in a state which did not permit or recognize same-sex marriages at the time of the child’s birth. Paternity is generally determined either by application of the presumption that a mother’s husband is the father of a child conceived or born during the marriage or by proof of genetic paternity. Where one man is the genetic father of the child, the spousal presumption should apply to his same-sex spouse if the child was conceived or born during the marriage. If the genetic father’s male spouse has complied with relevant surrogacy or artificial insemination statutes, he should also be recognized as the child’s father. But what about children born during relationships solemnized by legal marriages only after the children were born? That situation may now be analyzed in the same way as children born out of wedlock to opposite-sex parents who later marry; although, one could argue that more liberal parentage rules should apply for people who did not have the legal option to marry at the time the child was born.

In some cases, the parent not giving birth or not genetically related to the child may have adopted the child. Some states permitted or recognized these so-called “second parent” adoptions,³ but others did not, holding that the second parent was not a stepparent; therefore, the second parent could not adopt the child without terminating the biological parent’s parental rights.⁴ Obergefell should result in same-sex stepparents being considered the same as opposite-sex stepparents for purposes of applying the stepparent rules in adoption, which permit adoption by the stepparent without terminating the existing parent’s parental rights. If the adoption was valid in the state which granted it, all other states should give full faith and credit to the decrees. However, some states with DOMAs (Defense of Marriage Acts or state constitutional amendments prohibiting the state from recognizing marriage except between one man and

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¹ In some states in surrogacy cases, the “intended parent” may be considered the mother of the child born, and the surrogate may have no legal relationship with the child.

² Some states have irrebuttable presumptions of a husband’s paternity. However, with the advent of DNA testing, many states allow a genetic father to rebut the presumption and assert his own paternity, whether or not the mother is married. For children conceived through assisted reproduction different rules may apply based on whether the husband consented to the procedure, whether the insemination was performed by a doctor and otherwise complied with artificial insemination or surrogacy statutes.


one woman) have, pre-\textit{Obergefell}, refused to recognize them. That resulted in the child being the legal child of two parents in some states but not in others, jeopardizing the child’s legal relationship with one parent if the legally recognized parent moved to another state. However, state DOMAs talk about marriage, not parentage. Therefore, as discussed further below, the constitutional requirement to recognize and give full faith and credit to the orders of sister states should apply. Further, in light of \textit{Obergefell}, the DOMAs themselves should be considered unconstitutional in all of their applications and should not be used to refuse to recognize adoption decrees conferring parental rights on same-sex partners of parents.

An early effort to give legal recognition to children of same-sex parents is the District of Columbia’s Domestic Partnership Judicial Determination Parentage Act of 2009.\footnote{See 2009 District of Columbia Laws 18-33 (Act 18-84); D.C. Code §§ 7-201, 7-205, 16-308, 16-907 to 909.04, 16-2342 to 16-2349.01.} The Act permits the domestic partner of a mother to be included on a birth certificate as a parent to the child, so long as the partner has consented to parent through artificial insemination. It also provides that a child born to parents in a domestic partnership is to be treated for all legal purposes as a child born in wedlock, clarifies that a child’s legitimate relationship to the parents is not dependent upon the parents being married or in a domestic partnership, specifies the means for establishing a father-child relationship and the means for establishing a father-child relationship, and provides a presumption that the domestic partner of a woman who bears a child is a parent of the child. In the absence of such specific language, it is unclear how other states will apply such policies.

For unmarried parents, in the absence of adoption decrees, various presumptions may apply, including proof of genetic parentage, filing an acknowledgment of parentage, consent to be parent to a child conceived through artificial insemination, and the “holding out” presumption of parentage.\footnote{See generally \textsc{Joslin and Minter, Lesbian, Gay, Bisexual and Transgender Family Law} § 5:25 (2012 ed.); Polikoff, \textit{Response: And Baby Makes … How Many?} Using in Re M.C. to Consider Parentage of a Child Conceived Through Sexual Intercourse and Born to a Lesbian Couple, 100 GEO. L.J. 2015 (2012); Joslin, Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines, 4 HARV. L. & POLY REV. 31 (2010).} Some lesbian couples sought to secure legal recognition by having one woman donate the egg and the other woman gestate the embryo and give birth. The latter would be a presumed mother because she gave birth to the child, while the former would be a presumed mother because she was the genetic mother. However, the Uniform Parentage Act (UPA) also provides that where two or more presumptions conflict, the presumption which on the facts is founded on the weightier considerations of policy and logic controls,\footnote{Uniform Parentage Act (1973) § 4(b).} which means that there would not be two parents based on two competing presumptions, but rather, that the court should weigh the competing presumptions and determine which one should be applied. The Colorado Supreme Court has held that in adjudicating between competing presumptions, the best interests of the child must also be considered.\footnote{See N.A.H. v. S.L.S., 9 P.3d 354 (Colo. 2000). But see, e.g., Spaeth v. Warren, 478 N.W.2d 319 (Minn. Ct. App. 1991) (refusing to require a preliminary showing of best interests where the mother had married, and the child was being treated as the child of her new husband; the court pointed out that Minnesota had excised the statement about the child’s best interests from its version of the UPA).} The issue may be whether it is better for a child to have two parents of the same sex rather than only parent, and therefore allow both presumptions to apply, or whether the court must choose which presumption should apply, excluding the other presumption. In states hostile to same-sex marriage, there will be a question as to whether \textit{Obergefell}’s holding expresses a controlling “policy and logic” in favor of children having two parents or whether the state is free to apply its own “policy and logic” objecting to children being raised by two same-sex parents.

neutral way. For example, the California Supreme Court has explicitly held that the UPA must be read in a gender-neutral way, and therefore, may be used to establish a “second parent” relationship.\textsuperscript{10} The New Hampshire Supreme Court held that the statutory paternity presumptions must be read in a gender-neutral way and that the policy goals of ensuring legitimacy and support would be thwarted if the statutory interpretation failed to recognize that a child’s second parent can also be a woman.\textsuperscript{11} The New Mexico Supreme Court has held that the presumption of paternity provisions of the 1973 UPA apply as far as practicable to establish natural motherhood; therefore, a mother’s former lesbian partner could use the UPA “holding out” presumption to establish parenthood.\textsuperscript{12} The Kansas Supreme Court construed the Kansas Parentage Act as permitting two parents of the same sex and allowing them to enter into an enforceable coparenting agreement.\textsuperscript{13} The Colorado Court of Appeals has also construed the UPA in a gender neutral way to allow two mothers or two fathers. The Court explained:

This interpretation is supported not just by the language of the UPA, but also by the compelling interest children have in the love, care, and support of two parents, rather than one, whenever possible. The prerogative of a child to claim the love and support of two parents does not evaporate simply because the parents are the same sex. It applies to all children, regardless of whether they were conceived during a heterosexual or same-sex relationship. Thus, we conclude that a child who is born during a same-sex relationship can have two legal parents of the same sex, if the nonbiological parent can demonstrate presumptive parenthood under the UPA.\textsuperscript{14}

The California Court of Appeals has allowed use of the presumption to apply to an adoptive mother's former lesbian partner as a second parent.\textsuperscript{15} The California Court of Appeals has also indicated in another case that in applying the holding out presumption, the trial court should look at the relationship between the presumed parent and the child, not the relationship between the presumed parent and the biological parent, which need not be a sexual one.\textsuperscript{16} The Oregon Court of Appeals has extended the presumption that a husband who consented to conception of a child through artificial insemination is the child’s father to include situations where a same-sex domestic partner consented to conception through artificial insemination.\textsuperscript{17} The Massachusetts Court of Appeals has held that a mother’s same-sex spouse is a legal parent to a child born during their marriage pursuant to the artificial insemination statute, which provided that “[a]ny child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.”\textsuperscript{18}

\textsuperscript{10} See Elisa B. v. Superior Court, 37 Cal. 4th 108, 33 Cal. Rptr. 3d 46, 117 P.3d 660 (2005) (the court held that the mother’s former lesbian partner may be a presumed parent under the UPA where she received the children into her home and openly held them out as her natural children; the court stated that “this is not an appropriate action in which to rebut the presumption that Elisa is the twins’ parent with proof that she is not the children’s biological mother because she actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother, she voluntarily accepted the rights and obligations of parenthood after the children were born, and there are no competing claims to her being the children’s second parent”).


\textsuperscript{13} See Frazier v. Goudschaal, 296 Kan. 730, 755, 295 P.3d 542, 558 (2013) (“[T]he constitutional rights of the children, as well as those of the parents, must inform our determination of the validity of a coparenting agreement. Here, the agreement effects equality by giving the children two parents. Moreover, the UPA and, in turn, the KPA are gender-neutral, so as to permit both parents to be of the same sex ... the [coparenting] agreement is not injurious to the public because it provides the children with the resources of two persons, rather than leaving them as the fatherless children of an artificially inseminated mother.”).


\textsuperscript{15} See L.M. v. M.G., 208 Cal. App. 4th 133, 145 Cal. Rptr. 3d 97 (4th Dist. 2012) (the adoption decree established that the adoptive mother is the child’s mother, but it did not preclude a determination under the UPA that the former partner is the child’s second mother).

\textsuperscript{16} See E.C. v. J.V., 202 Cal. App. 4th 1076, 136 Cal. Rptr. 3d 339 (3d Dist. 2012) (mother’s former partner received the child into her home; whether the mother and girlfriend had a sexual relationship or whether the girlfriend had been involved with the impregnation were not relevant considerations in determining whether the girlfriend was a presumed parent). See Shineovich and Kemp, 229 Or. App. 670, 686, 214 P.3d 29, 40 (2009) (“We can see no justification for denying that privilege on the basis of sexual orientation, particularly given that same-sex couples may become legal coparents by other means—namely, adoption. There appears to be no reason for permitting heterosexual couples to bypass adoption proceedings by conceiving a child through mutually consensual artificial insemination, but not permitting same-sex couples to do so. Thus, we conclude that ORS 109.243 violates Article I, section 20”; the court remedied the constitutional infirmity by extending the presumption.).

\textsuperscript{17} See Della Corte v. Ramirez, 81 Mass. App. Ct. 906, 907, 961 N.E.2d 601, 603 (2012) (construing Mass. Gen. Laws Ann. ch. 46, § 48 and stating that “when there is a marriage between same-sex couples, the need for that second-parent adoption to, at the very least, confer legal parentage on the nonbiological parent is eliminated when the child is born of the marriage”).

\textsuperscript{18} See Della Corte v. Ramirez, 81 Mass. App. Ct. 906, 907, 961 N.E.2d 601, 603 (2012) (construing Mass. Gen. Laws Ann. ch. 46, § 48 and stating that “when there is a marriage between same-sex couples, the need for that second-parent adoption to, at the very least, confer legal parentage on the nonbiological parent is eliminated when the child is born of the marriage”).
The Delaware General Assembly enlarged the categories of statutorily-recognized parent-child relationships by including a de facto parent of the child.\(^{19}\) The statute provides that a person is a de facto parent if the person:

(1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent;

(2) Has exercised parental responsibility for the child as that term is defined in § 1101 of this title; and

(3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature. Del. Code Ann. tit. 13, § 8-201(c) (2011).

Therefore, the Delaware Supreme Court has held that a mother's same-sex partner who is determined to be a de facto parent is considered a legal parent with parental rights co-equal to that of the biological mother in seeking custody of the child.\(^{20}\)

New Jersey provides that “[t]he rights of civil union couples with respect to a child of whom either becomes the parent during the term of the civil union, shall be the same as those of a married couple with respect to a child of whom either spouse or partner in a civil union couple becomes the parent during the marriage.”\(^{21}\) Therefore, the presumption of parentage for a child born during the civil union should attach to the non-biological parent.

The arguments made in these various cases provide a legal and policy framework which can be used by attorneys in other states to advocate for the security of children’s relationships with the people they consider to be their parents.

**Recognition of Parentage Determined by a Foreign State**

Prior to *Obergefell* states took different positions on whether they would recognize the parentage of both same-sex parents established in another state.\(^{22}\) Ordinarily, the final judgments of sister states are entitled to recognition under the Full Faith and Credit Clause of the United States Constitution.\(^{23}\) Parentage orders and adoption orders legally change the status of the parent-child relationship. The Restatement (Second) of Judgments addresses judgments which change status,\(^{24}\) providing that:

(1) A judgment in an action whose purpose is to determine or change a person's status is conclusive upon the parties to the action:

(a) With respect to the existence of the status, and rights and obligations incident to the status which under the procedures governing the action are ordinarily determined therein, in accordance

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\(^{19}\) See Del. Code Ann. tit. 13, § 8-201(a)(4) and (b)(6) (2011).


\(^{23}\) U.S. Const. Art. IV §1. ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.")

\(^{24}\) See Restatement (Second) of Judgments § 31, comment a (1982) ("Proceedings for the determination of status include divorce and annulment actions, filiation proceedings, proceedings for termination of a parent-child relationship (sometimes referred to as termination of parental rights), adoption proceedings. . . .").
with the rules of claim preclusion stated in §§ 18-26 and subject to the qualifications stated in §13 concerning judgments granting or denying continuing relief;
(b) With respect to issues determined in the action, in accordance with the rules of issue preclusion stated in §§ 27-28.

(2) A judgment in an action whose purpose is to determine or change a person's status is conclusive with respect to that status upon all other persons, with the following qualifications:
(a) If a person has, under applicable law, an interest in such status such that he is entitled to contest its existence, the judgment is not conclusive upon him unless he was afforded an opportunity to be a party to the action;
(b) When a statute, rule of court, or provision of the judgment itself limits the effect of the judgment with respect to other persons, the effect of the judgment is limited accordingly;
(c) As against a person who is not entitled to contest the existence of the status, the judgment is not accorded effect to the extent it would result in unjust effect on that person's own status, rights, or obligations.

(3) The determination of a person's status in an action other than one whose purpose is to determine or change that status is conclusive upon the parties to the action, in accordance with the rules of issue preclusion, except in a subsequent action whose purpose is to determine or change the status in question.25

The District of Columbia’s Domestic Partnership Judicial Determination Parentage Act of 2009,26 expresses that relationships established in other jurisdictions that are substantially similar to domestic partnerships established under D.C. law shall be recognized as domestic partnerships in the District and that the mayor shall broadly construe the term “substantially similar” to maximize the recognition of relationships from other jurisdictions as domestic partnerships in the District.27 Pursuant to this Act, a birth parent's same-sex partner would not need to adopt the child in order to be listed on the birth certificate and to otherwise be considered a legally equal parent of the child.

Similarly, New York's highest court recognized as a parent the mother's partner, with whom she had entered into a civil union in Vermont shortly before the birth of a child conceived through artificial insemination, even though the parties had been New York residents at the time they entered into the civil union, stating that “New York will accord comity to recognize parentage created by an adoption in a foreign nation…. We see no reason to withhold equivalent recognition where someone is a parent under a sister state's law.”28 The Court noted that “entering into the civil union at a time when both partners know that one of them is pregnant by artificial insemination might well be viewed as presenting an even stronger case than Miller-Jenkins to support the nonbiological partner's parentage. There is certainly no potential for misunderstanding, ignorance or deceit under such circumstance.”29 Therefore, the Court held that the mother's former partner had standing to seek custody of and visitation with the child born during the civil union. The Court of Appeals of New York gave comity to a Vermont law providing that a child born by artificial insemination to one partner of a civil union should be deemed the other partner's child for purposes of determining custodial rights following the civil union's dissolution.30

In addition to the Full Faith and Credit Clause and the Restatement (Second) of Judgments, custody determinations made by courts in one state are enforceable in every other state if they comply with the

25 Restatement (Second) of Judgments § 31 (1982).
29 14 N.Y.3d at 599.
Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the federal Parental Kidnapping Prevention Act (PKPA).\textsuperscript{31}

Probably the most high-profile and egregious series of cases highlighting the potential problems with the failure to provide full faith and credit to custody orders involving same-sex parents is the Miller-Jenkins family, who litigated for years in Vermont and Virginia the status and rights of the biological mother’s former same-sex civil union partner. Lisa Miller and Janet Jenkins lived in Virginia but entered into a civil union in Vermont. Each changed her surname to Miller-Jenkins. Lisa underwent artificial insemination and bore a child in April 2002. The child was named Isabella Miller-Jenkins. In July 2002 the three moved to Vermont, where they lived together as a family. In September 2003 Lisa took the child and moved to Virginia, while Janet remained in Vermont. The parties informally agreed on liberal visitation for Janet, who voluntarily paid child support to Lisa. In November 2003 Lisa filed to dissolve the civil union in Vermont, listing the child as the biological or adoptive child of the civil union, and the civil union was dissolved in 2004. Lisa was awarded temporary custody, with Janet having visitation rights. However, Lisa, who stated that she had become a Christian and renounced her lesbianism as a sin, refused to allow the visitation and alleged that Janet had abused Isabella. Both women filed multiple actions, eventually ending up in the Supreme Courts of Virginia and Vermont, with the United States Supreme Court declining certiorari in all cases. Lisa filed a petition to establish parentage in Virginia. Because of Virginia’s DOMA, the trial court ruled that it did not have to recognize the Vermont civil union, which it found to be void. Therefore, the trial court ruled that Lisa was the child’s sole parent and that Janet had no rights with respect to the child. Based on that trial court order, Lisa argued to the Vermont court that under DOMA Vermont was now required to give full faith and credit to the Virginia order, rather than to enforce its own temporary visitation order, as Janet had sought. The Vermont Supreme Court rejected that argument:

Whether or not a Virginia court may be permitted under DOMA to decline to give effect to the judicial proceedings in Vermont in a Virginia court is not relevant to the essential question before this court, or before the court of Virginia as a prerequisite for exercising its jurisdiction, of whether this Vermont court had jurisdiction under Vermont law over this dispute before it was filed in Virginia. Clearly Vermont has jurisdiction and therefore the Commonwealth of Virginia’s judgment is not entitled to full faith and credit. . . . [the first two sentences quoting from the Vermont trial court’s ruling]. This case is about whether the Vermont court must give full faith and credit to the decision of the Virginia court, and not the reverse. Unlike the PKPA, in no instance does DOMA require a court in one state to give full faith and credit to the decision of a court in another state. Its sole purpose is to provide an authorization not to give full faith and credit in the circumstances covered by the statute. . . . Under Lisa’s interpretation, we would be required to give full faith and credit to the Virginia court’s decision not to give effect to the fully valid order of the Vermont court. Indeed, if we were to accept that argument, the Vermont biological parent of a child born to a civil union could always move to another state to make a visitation order unenforceable in every state, including Vermont.\textsuperscript{32}

The Virginia Court of Appeals, considering the parties’ dispute, held that Virginia lacked jurisdiction under the PKPA to consider Lisa’s parentage action.\textsuperscript{33} The Vermont order was then registered in the Virginia court, and Lisa appealed to the circuit court, which reversed the order mandating registration. Janet appealed, and the Virginia Court of Appeals reversed in an unpublished ruling.\textsuperscript{34} The Virginia Supreme Court affirmed without ruling on the underlying issue, basing its decision on the law of the case.

of the Virginia Marriage Amendment on the arguments presented in the appeal, the Virginia Supreme Court did not consider those arguments.36 Lisa continued to refuse to honor Janet’s visitation rights, and in November 2008 a Vermont trial court held her in contempt and issued a specific schedule of visitation, which Janet sought to register and enforce in Virginia. Lisa again appealed, raising three arguments on appeal, “all of which relate to the degree to which the Commonwealth owes recognition to the Vermont orders under the Full Faith and Credit Clause, U.S. Const., art. IV, § 1, the PKPA, or the Defense of Marriage Act, 28 U.S.C. § 1738C (“DOMA”).”37 The Virginia Court of Appeals ruled that “Miller is not without an adequate remedy at law. She can and is defending against Jenkins’ motion to register and enforce the custody orders. All of the claims that Miller raises in this case are available in the case filed by Jenkins. Thus, the trial court properly dismissed Miller's claim for an injunction as well.”38 Therefore, the Court of Appeals again held that Lisa was barred by the doctrine of the law of the case, affirming the trial court order to register and enforce the Vermont order. In another appeal, the Virginia Court of Appeals again rejected Lisa’s argument that the result should be different because Janet was seeking to register and enforce the Vermont order, not just register it.39 In November 2009 a Vermont trial court changed custody of the child to Janet, with the child to be transferred to Janet on January 1, 2010. Neither Lisa nor the child appeared for the transfer, and Lisa petitioned the United States for a writ of certiorari, which was denied.40 Apparently Lisa took the child out of the country to avoid enforcement of the Vermont orders, and several people associated with the Amish-Mennonite church were arrested for assisting her in the international abduction. At least one person has been convicted for aiding Lisa.41 Janet has filed a federal civil suit against various people she believes conspired to assist in the abduction, but in April 2015 the federal district judge continued the trial pending resolution of criminal charges against one of the defendants.42

Of course, in the midst of all of this litigation is Isabella, who was 17 months old at the time the parties amicably separated, and is now 13 years old. Her mother Janet has a legal custody order, but she has not seen Isabella since she was a preschooler. Isabella has lost one of her two mothers, despite the agreement of the appellate courts of both Virginia and Vermont that she should have a relationship with both mothers. While the Miller-Jenkins family represents an extreme case, it illustrates the havoc that can be wreaked on children whose parents seek to forum shop to deprive the child of one of his or her parents. Virginia was willing to enforce the Vermont orders, but only after the initial trial court had ruled that Janet was not a parent, starting the chain of trial and appellate litigation.

Most states do recognize judgments of parentage, including adoption decrees, for same-sex parents, even if such parent-child relationships could not be created in that state.43 The Tenth Circuit Court of Appeals struck down as unconstitutional an Oklahoma statute which prevented recognition of adoptions by same-sex couples.44 Because Obergefell mandates recognition of same-sex marriages, it is highly likely that courts will require at the very least that the children of same-sex married couples be considered the same as children of opposite-sex married couples. But there is likely to be continued litigation over whether

36 276 Va. at 27, 661 S.E.2d at 872.
42 See Associated Press, “US Judge Delays Civil Suit in Same-Sex Union Custody Case” (April 7, 2015).
44 See Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007).
Obergefell mandates recognition of same-sex parentage if such parentage was not based on the parties’ marriage.

In the first reported case on parentage to be decided after Obergefell, the United States District Court for the Eastern District of Louisiana ordered that for a couple validly married in another state, Louisiana’s State Registrar must issue a birth certificate identifying the mother’s same-sex spouse as one of their child’s parents.45

A dissenting opinion in a Louisiana Supreme Court case involving an adoption of a boy by the female spouse of the child’s mother questioned whether Obergefell legalized adoption by a same-sex couple, stating:

Marriage is not only for the parties. Its purpose is to provide children with a safe and stable environment in which to grow. It is the epitome of civilization. Its definition cannot be changed by legalisms.

This case involves an adoption. The most troubling prospect of same sex marriage is the adoption by same sex partners of a young child of the same sex. Does the 5–4 decision of the United States Supreme Court automatically legalize this type of adoption? While the majority opinion of Justice Kennedy leaves it to the various courts and agencies to hash out these issues, I do not concede the reinterpretation of every statute premised upon traditional marriage.46

Obergefell dealt with marriage, not parentage, so in states hostile to same-sex relationships, we can expect to see litigation over whether states must recognize unmarried same-sex partners as parents.47 This is especially likely to occur in states which have declined to read the UPA in a gender-neutral way.48 The children in those states, or who are relocated to such states, will continue to have their parental relationships be less secure than those of children of opposite-sex parents.

Children’s Relationships with Parental Figures Not Recognized as Legal Parents

In some states people who have acted in a parental capacity may have standing to seek custodial or visitation rights. Such persons might be called “de facto parents,” “equitable parents,” “psychological parents,” or persons standing “in loco parentis.” Until recently, such same-sex parental figures were unable to marry the child’s parent even if the child was conceived and born during the relationship and intended to be reared as the child of both parties. While some states permitted second parent adoptions, others did not. Therefore, for same-sex couples, they were precluded in many states from ever acquiring the legal status as parent, something that opposite-sex parents could achieve by paternity actions or stepparent adoption. Nevertheless, the families they formed were still their children’s families, but without the legal protection that recognition as a legal parent affords. Some states considered such persons as having full parental rights.49 However, in most states, the most such persons might have is standing to seek some custody or visitation rights. For children who have come to view a non-legal parent as a parent, the loss of that relationship may be a devastating loss.

The Washington Supreme Court has stated:

47 Many of the briefs in state and federal cases opposing recognition of same-sex marriage, including those in Obergefell, argued that children should be reared in homes with opposite sex parents. Therefore, it is likely that those arguments will continue to be made in an effort to prevent the state from recognizing that a child can have two mothers or two fathers.
48 See, e.g., Dubose v. North, 2014 OK CIV APP 68, 332 P.3d 311, 314 (Div. 1 2014) (dismissing for lack of standing a woman’s petition for custody, visitation, and support for child born through artificial insemination to her former partner, indicating that a presumed father must be a male person according to the clear statutory language).
Our state's current statutory scheme reflects the unsurprising fact that statutes often fail to contemplate all potential scenarios which may arise in the ever changing and evolving notion of familial relations. Yet, simply because a statute fails to speak to a specific situation should not, and does not in our common law system, operate to preclude the availability of potential redress. This is especially true when the rights and interests of those least able to speak for themselves are concerned.50

The Court found that the state common law recognized de facto parentage and adopted the following criteria to establish such parentage:

(1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature. In addition, recognition of a de facto parent is “limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life.”51

Upon establishing a party as a de facto parent, the court may then consider an award of parental rights and responsibilities using the best interest of the child standard.52

The Colorado Court of Appeals held that based on statutory authority granting certain nonparents standing to seek custody,53 a mother's former lesbian partner had standing to seek equal custody where the former partner was clearly a psychological parent to the child almost since birth, lived together with her in the same household for seven and one-half years, and took significant responsibility for her development and support sufficient to create a bonded, dependent relationship parental in nature.54 The court found that the mother's proposal to curtail and then terminate the former partner's court-ordered parenting time threatened emotional harm to the child, which “both rebutted the Troxel presumption in favor of [the mother] and constituted a compelling state interest justifying court modification of her parenting plan.”55

The Washington Supreme Court has held that while the 2000 version of the UPA does not provide a method for determining parentage of the same sex domestic partner of a biological parent of a child conceived by artificial insemination, Washington recognized a common law status of de facto parent which allows such a person to petition for determination of rights and responsibilities that accompany legal parentage.56

The Pennsylvania Superior Court held that once it is established that someone who is not the biological parent is in loco parentis, that person does not need to establish that the biological parent is unfit, but instead must establish by clear and convincing evidence that it is in the best interests of the children to maintain that relationship or be with that person.57

In a case involving former lesbian partners who planned to each bear a child conceived through the donation of sperm from the same donor and to raise the children jointly as their own, the Supreme Judicial Court of Massachusetts looked to the American Law Institute Principles of the Law of Family Dissolution to address whether an adult who is neither the biological nor the adoptive parent may assert custody and support rights as a “de facto parent,” and, whether and to what extent to recognize estoppel principles as creating parental rights where the adult does not meet the criteria of a de facto parent.58 By

51 155 Wash. 2d at 708, 122 P.3d at 176–77 (citations omitted).
52 Id.
55 Id.
the time of their separation, only one woman had borne a child, and she was the primary caretaker while her partner had been the primary breadwinner. Although Massachusetts allows second parent (same-sex) adoptions, the partners had not followed through with an adoption of the child in question. The Court noted:

The ALI Principles define a “de facto parent” as “an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (i) lived with the child, and (ii) for reasons other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions, (A) regularly performed a majority of the caretaking functions for the child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.” ALI Principles, supra at § 2.03(1)(c).

Without denigrating the importance of financial contribution to the household, the Court noted that the ALI Principles distinguish caretaking functions as those that “‘involve the direct delivery of day-to-day care and supervision of the child,’ including grooming, feeding, medical care, and physical supervision. Id. at § 2.03(5) & comment g.” Therefore, “the distinction proceeds from the presumption that the parent-child bond grows from the myriad hands-on activities of an adult in tending to a child's needs.” Because the former partner had not performed the majority of the caretaking functions, she did not qualify as a “de facto parent” entitled to seek joint custody or visitation. The Court stated that the ALI Principles also recognize “parent by estoppel.”

Into this category of parents falls an individual who, in relevant part, although not a legal parent, “(i) is obligated to pay child support … or … (iii) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior coparenting agreement with the child's legal parent … to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests.” ALI Principles, supra at § 2.03(1)(b).

Further, “[t]he ALI Principles make clear that it is not the third party's reliance on the words or deeds of the legal parent but the best interests of the child that is the paramount consideration in the parent by estoppel analysis. Id. at § 2.03 & comment b(iii), at 115. Unlike a de facto parent, a parent by estoppel ‘is afforded all of the privileges of a legal parent.’ Id. at § 2.03 comment b.” The Court declined to adopt for this case the theory of parenthood by estoppel, holding that even though the parties had agreed to have and raise a child together, a private agreement cannot be dispositive of legal parentage.

The Maryland Court of Appeals has ruled that a de facto parent status is not recognized as a legal status in Maryland and that before the trial court could grant even visitation to the former partner, it was required to find either that mother was an unfit parent or that sufficient exceptional circumstances existed to overcome the mother's due process liberty interest in the care, custody, and control of her child.

The Utah Supreme Court denied standing to seek visitation for the mother's former lesbian partner, with whom she had entered into a civil union in Vermont and who had been named co-guardian of the child born during their relationship, declining to judicially create the “psychological parent” or “de facto parent” doctrine that other courts have used to create rights in a third party and noting that “a legal parent

447 Mass. at 839, 857 N.E.2d at 1071.
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References:

may freely terminate the in loco parentis status by removing her child from the relationship, thereby extinguishing all parent-like rights and responsibilities vested in the former surrogate parent.”

The Illinois Court of Appeals has ruled that where the mother consented to her same-sex partner’s guardianship of her children, the former partner had standing to object to termination of the guardianship. The court held that the guardian initially has the burden of overcoming the presumption in favor of the parent’s superior right to care and custody of the child, and if overcome, the burden shifts to the parent to proving a significant change of circumstances. If the parent meets this burden, the burden shifts back to the guardian, who must then show that continuing the guardianship is necessary to protect the best interest of the child.

These are just a sampling of cases which deal with parent-child relationships. But the differences and ambiguities in how different courts view the relationships place children of same-sex parents in jeopardy of losing important connections in their lives. Now that same-sex couples are free to marry in every state, courts may even give unmarried same-sex couples less protection than they might otherwise have done when they were precluded from marrying.

Conclusion

All children deserve to have secure, legally recognized relationships with their parents, whether opposite-sex or same-sex. It is certainly true that all children born out of wedlock may lack the same security as those born in wedlock, but the children of same-sex parents face additional obstacles based on continued disapproval by some of same-sex relationships. Whatever one may feel about homosexuality, the children are part of their parents’ sexual relationship and should not be penalized. Advocates for children should aggressively seek to protect children’s relationships with the people they view as parents. Where there is no legally-recognized parental relationship, statutory procedures for obtaining third-party custody or rights should be employed. Advocates should also lobby their legislatures to enact statutory protections for children’s relationships with their parents. Appellate advocacy should emphasize the public policy in favor of children having two parents who are consistently involved in the child’s life, even after the parents may end their relationship. Divorced fathers have successfully moved the law in the direction of greater rights to greater involvement with their children post-divorce. Unmarried fathers who express and act on their interest in having rich and meaningful relationships with their children have obtained greater legal protections for those relationships. With the Obergefell decision recognizing the dignity of same-sex marriage, the time has come for recognition of the children’s dignity to legally-protected relationships with both of their same-sex parents.


See generally Ann M. Haralambie, Handling Child Custody, Abuse & Adoption Cases 3d chapter 10 (Thomson West 2009, 2015).
THE VANISHING OF THE AFRICAN-AMERICAN FAMILY: “REASONABLE EFFORTS” AND ITS CONNECTION TO THE DISPROPORTIONALITY OF THE CHILD WELFARE SYSTEM

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Introduction

There can be no keener revelation of a society's soul than the way in which it treats its children.1

In the United States, approximately three million cases of child abuse and neglect involving more than six million children are reported annually to child protective service agencies.2 The United States has one of the worst records among industrialized nations – losing on average between four to seven children every day to child abuse and neglect.3 4 Our children are in need of protection. But what or who are they in need of protection from? This article

suggests that until children are protected from the “master narrative” of child welfare that plays out in hundreds of courtrooms across this nation on a daily basis through the inconsistent application of “reasonable efforts”, our children stand desperately in need of protection from the very child protective service agencies that are charged with protecting them.

Child welfare is characterized by a single, “master narrative,” or overarching description of conditions and phenomena that explains, or purports to explain, the field.5 In short, one of the “master narratives” of child welfare depicts foster care as a haven for “child-victims” savagely brutalized by “deviant, monstrous parents. The societally shared perspective created by this child welfare “master narrative” is that the majority of children who are subjects of child welfare law suits are victims of heinous physical and/or sexual abuse at the hands of, or at minimum, under the failed protection of biological parents. The second “master narrative” of child welfare law is that indigent parents are not deserving of the right to raise their children and these indigent children are thus, in need of being saved from poverty. However, while the media focuses attention on sensational cases of severe physical child abuse6, and legislation treats abuse and neglect identically, thereby providing support and confirmation of these flawed “master narratives”, data shows that seventy-one percent of children who were victims of maltreatment suffered neglect; with only sixteen percent suffering physical abuse.7 Furthermore, the import of the abundance of neglect cases becomes clear when we accept that most removals involve allegations of neglect,8 and these removals are from indigent parents, and the majority of these removals involve African-American children. The vast majority of parents who come into contact with the child welfare system are not reported for abuse; the report is for neglect;9 and neglect charges are typically related to poverty with issues such as homelessness, single parenting, addiction, mental illness, and domestic violence, frequently associated.10 Although there is a strong association between poverty and child maltreatment, poverty does not cause maltreatment.11

When investigating allegations of abuse and neglect, current federal legislation requires state actors to exercise “reasonable efforts” before removing children from their parents. However, the specific definition and expectations of “reasonable efforts” are left by the Federal Government to be defined by the State’s. With this latitude given to each state to define what is and what is not a reasonable effort,
coupled with the internal biases created and supported by the “master narrative”, what defines reasonable efforts to one tribunal may be very different to another tribunal. The result has lead our nation to a child welfare system that is thwart with racial and ethnic disproportionality, thereby resulting in generations of children who find themselves in need of protection from child protective service agencies.

From this shared but limited and flawed perspective created by the “master narrative” and supported by classism, racism and other internal biases, along with media focus and legislative action and/or inaction, trier of facts in child welfare cases apply the “reasonable efforts” requirements initially intended to keep children in their homes in ways that ignore reality and cause more harm to children and their families than protective good.

The first part of this article presents an overview of the problem of racial disproportionality in the child welfare system and its connection to the vanishing of the African American family within the United States. Part I of the article compares the status of the current plight of the African-American family to that of the Indian family prior to the enactment of the Indian Child Welfare Act in 1978. Part I also introduces comparative state statistics offering support to the premise that African American children are over-represented in the child welfare system; and this over representation leads to the diminishing existence of the African-American family unit. Part I engages the reader in a discussion of why we as a society should be concerned with the overrepresentation of African-American children in the child welfare system and the dissolution of the African-American family; and concludes with an examination of the effect that state agency removals has on children; the families of those children; and the communities from which these children are removed.

Section II of this article introduces two systemic causes of the over-representation of African-American children in the child welfare system: 1) poverty; and 2) classism. Part II discusses the reality faced by many parents; once a parent enters the child welfare system often times because of a lack of resources, they are deemed a “bad” parent. As a “bad” parent, they alone are culpable for child maltreatment, and it is presumed that their children would be better off with a new, usually more affluent adoptive family. The fact that a parent needs state support to raise their children causes her parenting to be subjected to excessive judgment and her constitutional right to up bring her children is ignored and the value of their relationship with their children is necessarily devalued.

Section III of this article concludes with the belief that both states and the federal government want to protect all children. However, in order to protect all children, more federal legislation is required. Specifically, this article proposes the enactment of the Federal American Child Welfare Act, calling for a federal definition of “reasonable efforts” with suggested guidelines for courts to use to ensure fair and equitable application of the doctrine.

This article acknowledges that simply defining the term “reasonable efforts” consistently for all states, will not completely resolve the subjective application of the child welfare laws, nor will it instantaneously reverse the disproportionality of child welfare removals, but it will decrease the increasing numbers of impoverished children, in general and impoverished African-American children specifically that enter into the foster care system, especially when any deficits in the care of the majority of these children can be addressed with the children in their natural homes.

I. The Problem:
African-American children are disproportionately overrepresented in the child welfare and foster care system.\textsuperscript{21} While this disproportionately has a direct impact on the health and welfare of African-American children, it also necessarily has a grave impact on the existence and state of African-American families.\textsuperscript{22} Similar to the state of Indian children and Indian families prior to the passage of the Indian Child Welfare Act where the rate of outplacements for Native American children far outpaced the number of Native American children in the general population,\textsuperscript{23} currently, African-American children comprise less than one-fifth of the nation’s children, yet they represent nearly half of the national foster care population.\textsuperscript{24}

The current overrepresentation of African American children in the child welfare system is an example of how state interference, when left unchallenged has led to the dissolution of the African American family.\textsuperscript{25} The overrepresentation of African American children in the child welfare system, especially foster care, represents massive state supervision and dissolution of families.\textsuperscript{26}

This state sponsored dissolution of the African-American family is reminiscent of the “cultural genocide” spoken of by Congress when it said that ‘an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”\textsuperscript{27} In addition, this state interference of African American families via the child protection system helps to maintain the disadvantaged status of African-American people in the United States.\textsuperscript{28} As such, the child welfare system not only inflicts general harms disproportionately on African-American children and families, it also inflicts a particular harm—a racial harm—on African-American people as a group.\textsuperscript{29}

The child welfare system is plagued by alarming racial disparity, with African American children especially representing a disproportionate share of the foster care population.\textsuperscript{30} In addition to being overrepresented in the child welfare system, minority children are more likely to be removed from their families than white children.\textsuperscript{31} While the history of child welfare services prior to the passage of the Social Security Act in 1935 was essentially a history of services for white children;\textsuperscript{32} a recent national study of children protective services conducted by the United States Department of Health and Human Services reported that “minority children, and in particular African-American children, are more likely to be in foster care placement than to receive in home services, even when they have the same problems and characteristics as white children.\textsuperscript{33}

On September 30, 2011 there were 400,540 children under the age of 18 in foster care in America.\textsuperscript{34} Twenty-seven percent of the 400,540 children under the age of 18 in foster care were African American\textsuperscript{35}; however, African American children only made up 14% of the entire child population for this same time period.\textsuperscript{36}

In Texas, as of 2011 there were a total of 6,663,942 children in the State. In the foster care system in Texas, African American children made up 26.2 %, of the children in the care of the Texas Department of Family and Protective Services, but they are only 12.1%, of the general child population of Texas.\textsuperscript{37} In Texas, as of 2013 there were a total of 7,159,172 children in the State.\textsuperscript{38} In the foster care system in Texas, African-American children made up 23.1% of the children in the care of the Texas Department of Family and Protective Services, but they are only 11.6 percent of the general population of Texas.\textsuperscript{39}
In Florida in 2010 there were a total of 4,057,773 children in the state. In the Florida foster care system African American children make up 33% percent of the children in the care of the Department of Children and Families, but they are only 16% percent of the general population of Florida.\(^{40}\)

In California, as of 2013 there were a total of 55,218 children in foster care\(^{41}\). African American children makeup 25% of the children in the foster care in California, but are only 6% percent of the general population\(^{42}\). Similar disparate rates across the nation have led critics to charge that the child welfare system in action is racial and cultural genocide at worst and at best is the personification of cultural bias and ignorance.\(^{43}\)

The numbers of removed African-American children are almost as high as those figures reported for Native American Children in the 1970’s, \(^{44}\) prior to the enactment of ICWA. As a response to this ‘Cultural genocide,” of the Indian culture, Congress passed the Indian Child Welfare Act of 1978.\(^{45}\) The stated purpose for the ICWA was to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. \(^{46}\) The goals of stability and preservation of Indian families and Indian culture was to be achieved by making sure that Indian child welfare determinations were not based on a ‘white, middle-class standard.\(^{47}\)

Is the epidemic caused to the African-American community by the disproportionality of its children in the child welfare system equivalent to that of “cultural genocide”? Yes.

**B. Why Should We be Concerned with the Disproportionality of African-American children in the Child Welfare System? Because the United States Supreme Says that Biological Parents Have a Fundamental Right to Raise Their Children.**

The United States Supreme Court has recognized the importance of parental interest in their child and has granted this interest a “distinguishable legal pedigree,”\(^{48}\) labeling this interest a fundamental right.\(^{49}\) The bundle of parental rights encompasses “the custody and companionship of the child, opportunities to influence the child’s values and moral development through religious training, and important education and health care decisions.”\(^{50}\) Since 1923, the United States Supreme Court has said that family privacy and parental rights are guaranteed by the Fourteenth Amendment and subject to substantive\(^{51}\) and procedural protections of due process; \(^{52}\) “the family is our society’s most fundamental… institution”;\(^{53}\) the family’s inviolable place in society “stems from the emotional attachments that derive from the intimacy of daily association with our children”\(^{54}\) \(^{55}\), and from the role it plays in ‘promoting a way of life’ through the instruction our children.”\(^{56}\)

More recently in 1977, Smith v. Organization of Foster Families for Equality and Reform, \(^{57}\) the United States Supreme Court reiterated the constitutional protection of parental rights under the Fourteenth Amendment to conceive and raise one’s children and found said right to be essential. \(^{58}\) In 1981 in Santosky v. Kramer \(^{59}\) the United States Supreme Court held that the fundamental liberty interest\(^{60}\) of natural parents in the care custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. \(^{61}\) Additionally, in Troxel v. Granville, \(^{62}\) 2000, the Court affirmed the fundamental right of parents in the “care, custody and control” of their
children, announcing that when the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.  

The United States Supreme Court has explained that it is necessary to ‘protect the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition,’” and that “it was through the family that we inculcate and pass down may of our most cherished values, moral and cultural.” Understanding that the United States Supreme Court has ruled that the family unit has the substantive right to maintain its integrity, why is such principal not applied to impoverished African-American families?

When we look at the values that we as a nation profess, there does not appear to be a more protected and cherished social institution than the family; the family is our society’s most fundamental… institution.” The family’s inviolable place in society ‘stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘prompting a way of life’ through the instruction of children.  

The worst part of the child welfare system’s treatment of African-American children is that it unnecessarily separates them from their parents; from their families; from their communities. Child protective service agencies are far more likely to place black children in foster care instead of offering their families less traumatic alternatives, such as in home assistance. White children who are abused or neglected are twice as likely as black children to receive services in their own homes, avoiding the emotional damage and physical risks of foster care placement. According to federal statistics, fifty-six percent of black children in the child welfare system have been placed in foster care, twice the percentage for white children.

Removing African-American children from their homes is perhaps the most severe government intrusion into the lives of individual citizens.

The Effects of Removals on Children.

Children are strongly bonded to their parent, even “bad” parents. Intervention that disrupts the parent-child relationship can be extremely damaging to the child; even when necessary to protect the child from harm, removal is traumatic to the child. As Professor Brooks notes, “A considerable body of theoretical and empirical literature indicates that children benefit from maintaining important family attachments in their lives, even if those attachments are faulty or if the family members have significant defects.” In fact, in some instances disruption of the parent-child relationship through removal may inflict worse psychological harm than the removal was intended to prevent. While intervention is needed in some situations, we can protect children best by defining in advance those harms justifying intervention and the steps that may be taken to alleviate the harm, rather than by allowing courts such broad discretion to decide matters of removal. We must demand the examination of the outdated and short-sighted standards, used by nearly every state currently to justify initially removing children.

In addition to psychological issues that may arise in children removed from their families, upon removal from their cultural communicates, children are likely to suffer identity issues relating to their heritage and cultural belonging. Recognition of one’s cultural membership affects their “very sense of self and personal identity.” Social science scholars have recognized that “cutting people off from
their cultures and histories has a devastating impact upon the self, dividing peoples from ‘the wealth of experience and reflection that constitutes the language in which we understand ourselves in the world.’ A recent study of ninety inner-city children between the ages of eight and fourteen who had been removed from their birth families revealed that they referred to their experiences as been ‘tooken;’ they thought police had targeted them rather than having been rescued from unfit parents. Removal of children from their cultural communities may likely “cut off an important source of personal development and of intellectual, imaginative and social enrichment.”

Removal of a child from their cultural community through removal from their parent’s care can also have ruinous effects on the community as well as the child. The organization and institution of the cultural community depends heavily on its role in the lives and the development of its youngest members. Child welfare measures that remove children from their cultural communities act as a direct attack on the “tenets, teaching, authority, and even viability” of these communities. Thus, removal of a community’s children inhibits the ability of the community to pass its cultural beliefs, practices, and identity to the next generation of individuals. Removal of the next generation of individuals in a cultural community threatens the future existence of that community. The cultural community’s loss of its children “is akin to the loss of freedom and even of life.”

History has shown that removal of children from cultural communities often reflects more than a state interest in protecting the best interests and welfare of the child. As Van Praagh states, society’s attitude toward “any given community may well be expressed through its approach to the children in that community. Poverty, cultural difference, and subjective and potentially biased decision-making by those in positions of power often propel African-American families into the child welfare system and affect their ability to utilize and maneuver through the system.

The American regime of slavery reveals better than any other example the political function of repressing family autonomy. Family integrity is crucial to group welfare because of the role parents and other relatives play in transmitting survival skills, values, and self-esteem to the next generation. Placing large numbers of children in state custody interferes with the group’s ability to form healthy connections among its members. Families are a principal form of ‘oppositional enclaves’ that are essential to democracy.

Excessive state interference in black family life damages black people’s sense of personal and community identity. Family and community disintegration weakens black’s collective ability to overcome institutionalized discrimination and work toward greater political and economic strength. The system’s racial disparity also reinforces negative stereotypes about black people’s incapacity to govern themselves and their need for state supervision.

Disproportionate state intervention in black families reinforces the continued political subordination of African-Americans as a group. This claim does not seek to enforce a particular set of African-American cultural values. It seeks to liberate African-American families from state control so they may be free to form and pass on their own values. This after all, is the role of families in a free society.

The child welfare system in the nation’s largest cities is basically an apartheid system. If you watched a child welfare court, having no preconceptions about the purpose of this system, you would have to conclude that it is an institution designed primarily to monitor, regulate, and punish poor black families.
Family disruption has historically served as a chief tool of group oppression.\textsuperscript{105} Parents’ freedom to raise their children is important not only to individuals but also to the welfare or even survival of ethnic, cultural, and religious groups.\textsuperscript{106} Weakening the parent-child bond and disintegrating families within a group is a means of subordinating the entire group.\textsuperscript{107} Without taking race into account, we do not capture the full scope of the harm caused by taking large numbers of black children from their families.\textsuperscript{108}

Acknowledging that removals may have been exercised based on a long standing legal position that was developed without the benefit of research and data that identified the inherent risks of removals, now knowing the unintended consequences and harm caused to children when they are removed from their homes, we must ensure at a minimum that all “reasonable efforts”, under the circumstances, are made to prevent the removal of the child when possible; and the only way to make this assurance is to have a federal definition of “reasonable efforts”.

Noting the potential for extreme damage that removal can have on the child, the family, and the community at large strengthens the argument that “reasonable efforts” requires a federally consistent, bright-line definition, along with guidelines to help support and guide judicial tribunals as they ask the questions to remove or not to remove, literally hundreds of times a day.

II. Cause of Minority Disproportionality in the Child Welfare System.

A. Poverty

The link between poverty and child welfare in the United States can be traced back to English law,\textsuperscript{109} which allowed the government to separate poor children from their families because they were poor.\textsuperscript{110 111} For poor families, the \textit{parenst patriae} doctrine led to the passage of the Poor Laws\textsuperscript{112}, which authorized a highly intrusive level of state intervention into poor families\textsuperscript{113}. Among the state’s powers was the ability to remove children\textsuperscript{114} from poor families\textsuperscript{115} and place them in other homes for apprenticeships, without the consent of the parents or the child, and for no reason other than the family’s economic status.\textsuperscript{116}

More recent studies show that poverty is inextricably linked to the child welfare system and that poverty is one of the most important predictors of negative child outcomes.\textsuperscript{117} Circumstances of poor families often lead to involvement of state child welfare agencies.\textsuperscript{118} Poor families are “less likely to have adequate back-up arrangements or private support systems in times of emergency…are more likely to have trouble acquiring safe housing (or any housing); they are less likely to have adequate nutrition, medical care, child care and education, and…are more likely to suffer emotional harms from the stress of their situations.\textsuperscript{119} Additionally, poor families; utilization of public programs increases their contact with public officials, heightening the possibility that these families will be subject to scrutiny in their child-rearing practices.\textsuperscript{120}

Empirical data repeatedly shows that children born into poor families suffer a lifetime of negative consequences and children of color are more than twice as likely to be impoverished as their white counterparts.\textsuperscript{121} In addition, race is a significant factor that determines what happens to children and families of color who encounter child protection services.\textsuperscript{122} The foster care

program has thus been referred to as a “de facto poverty program,” with critics alleging that the government has taken over child rearing responsibilities from poor families.\textsuperscript{123} Given that the population of African-Americans is expected to “collectively outpace” the number of Caucasian
children in the United States by 2024, the population of African-American children living in poverty will continue to grow, as will the expected number of African-American children who are removed by state protective service agencies.

Once a parent enters the child welfare system often times because of a lack of resources, they are deemed a “bad” parent. As a “bad” parent, they alone are culpable for child maltreatment, and it is presumed that their children would be better off with a new, usually more affluent adoptive family. The fact that a parent needs state support to raise their children causes her parenting to be subjected to excessive judgment and her constitutional right to up bring her children is ignored and the value of their relationship with their children is necessarily devalued. Those who implement the current laws on the termination of parental rights often presupposes that impoverished parents are inferior to other caregivers. This flawed public policy story governs at every point of state intervention, from investigations to removals. This story governs hundreds of thousands of families at any one time.

Already, African-American families have been disproportionately impacted by both 1961 and 1996 welfare legislation because they comprise a disproportionate amount of the impoverished families in the United States. Five years after the implementation of Temporary Assistance to Needy Families (TANF), African-Americans had the largest proportion of families and children on TANF rolls. The disproportionate number of African American children in the child welfare system is staggering.

Although there is a strong association between poverty and child maltreatment, poverty does not cause maltreatment.

### A. Classism: Welfare Worker and Judicial Decision-Making

Classism and racism are not identical; however, they are intimately comingled and cannot be fully disentangled. A classist society will inevitably be a racist society because classist practices contribute to racial distinctions. Conversely, a racist society produces classism.

In a society where all people have an incentive to protect themselves from falling to the bottom of the class hierarchy, where the impoverished and racial minority languish, it is the affluent and non-racial minority that benefit legally, economically, politically, socially and psychologically when the impoverished and racial minority are forced to remain at their societally imposed caste level.

Class and societal economics are interrelated. At the bottom of the class hierarchy, from an economic perspective, lays a substantial segment of the population, among whom African Americans and Hispanics are disproportionately represented. In 2010, 15.1 percent of all persons living in the United States lived in poverty; this is the highest poverty rate for the United States since 1993. According to the United States Census Bureau’s data for the same year, the family poverty rate and the number of families in poverty were 11.7 percent, roughly 9.2 million people. Approximately 27.4 % African-American and 26.6 % Hispanic. Thus, children from some ethnic minority families, specifically African-Americans and Hispanics, are three times more likely to be poor; hence more likely to be the subjects of child protective service inquires, simply because they are poor; which results in a disparate impact on impoverished families that are racial and ethnic minorities.
Poverty is the key to explaining why almost any child gets into the child welfare system; and racism is the key to explaining why African-American children have been disproportionately represented in the child welfare system for decades, the solution is not merely more money. Henry Louise Gates, Jr. sets forth the ‘Poverty Perplex’ of the black poor, asserting that the root cause of poverty is neither a lack of money nor a failure of analysis of the poverty issue, but a failure of national will. As to the national will, Gates argues that there are essentially two reasons that our country will not make a commitment to federal expenditures so that all poor families with children will be raised above the poverty line. First, there is an enduring ideology of the ‘undeserving poor,’ feeding into the historic roots of classism. Second, poverty in the U.S. is mostly associated with blacks.

Parenthood is a socio-legal construct created based on cultural norms. Even though it can be said that the national will is expressed in current federal laws that are written so as to provide for equal access to the law and allow for integration of the races, there is still an ongoing struggle to battle stereotypes, assumptions, and ignorance that impoverished families face in general and that African Americans face in particular. Child welfare cases are judged using assumptions; parents are presumed to be “bad”, “undeserving”, “monsters” who brutalize their children.

Subjectivity by state actors in decisions of child welfare matters often allows for individual biases and personal values to serve as a standard for measuring parental compliance and fitness. Law professor Amy Sinden notes that disparity in culture, class, and education between state actors in child welfare proceedings and the families they are enlisted to work with and help. The majority of state actors represent the dominant culture, therefore it stands to reason that many of the professionals in the system are by and large well-educated, middle class, and predominately white. Meanwhile, many of the accused parents and their children are members of racial minority groups and virtually all are extremely poor with little formal education. Social workers are responsible for making highly subjective decisions about intervention, removal, and services in child welfare cases. Similarly, in child welfare proceedings, the presiding judge must make decisions about the ability and fitness of a parent. This power to make highly subjective decisions in child welfare cases and the possibility that personal biases and values of state actors will influence these decisions is especially threatening to minority families because the majority of state actors represent the dominate culture. Law professor Amy Sinden notes the disparity in culture, class and education between state actors in child welfare proceedings and the families they are enlisted to work with and help. The professionals in the system are by and large well educated, middle class, and predominately white. Meanwhile, many of the accused parents and their children are members of racial minority groups and virtually all indigent with little formal education. “[W]hen you have [workers] who are disconnected from the cultural dynamic of a community that is poor and minority and send them into the community with the force of law to remove children…[t]hey’ll determine the environment to be unsafe. Often times in the child welfare system, the “white middle-class family” is the “norm to which all families are compared.” The system does not have controls to limit the subjectivity of the worker, or of the presiding judge.

It is this subjectivity in the hands of child welfare agencies and presiding courts, when it comes to decisions regarding removal of children that serves as an additional explanation for disparate overrepresentation of African-American children in the child welfare system.
If judicial officers have no objective guidelines to follow when determining if the efforts of the child protective services agency are in fact “reasonable” or not; and reasonable minds can often disagree,\(^\text{166}\) similarly situated people are treated unequally by different by judges.\(^\text{167}\) One judge may remove a child from a home situation that another judge finds perfectly adequate.\(^\text{168}\)

Of special concern is the fact that neglect laws appear to be applied more stringently in cases involving poor parents.\(^\text{169}\) Coupled with the undeniable trends stated in the 2010 Census that children from ethnic minority families, specifically African-Americans and Hispanics, are three times more likely to be poor, it is reasonable to infer that disproportionate of the child welfare system will continue to increase making impoverished, African- American families the targeted subjects of even more child protective service investigations and making the children of the these families the targeted subjects of even more child protective services removals, simply because they are impoverished and African- American.\(^\text{170}\)

The United States Supreme Court case of Wyman v. James\(^\text{171}\) illustrates the lingering assumptions present in the minds of many mid twentieth century people about how people who receive state assistant, as a class of people are presumed to be bad parents, unworthy of the presumption that they will act in the best interest of their children.\(^\text{172}\) Wyman held that the Fourth Amendment’s prohibition of unreasonable searches and seizures was not violated by the termination of a welfare recipient’s benefits because she refused to permit her caseworker to make a home visit, even though she was willing to meet with the caseworker outside her home. The majority said a welfare recipient could refuse entry with no risk of criminal penalty, just a termination of welfare benefits, and that there were important reasons for such home visits, including detection of child abuse.\(^\text{173}\) Justice Thurgood Marshall dissented stating:

Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children? Such a categorical approach to an entire class of citizens would be dangerously at odds with the tenets of our democracy.\(^\text{174}\)

The bias against poor mothers has increased as the emphasis in child welfare proceedings has shifted from preservation of the birth family to swifter termination of parental rights and adoption.\(^\text{175}\) At one time, federal and state policies were designed to limit state intervention and reunify mothers and children; but the political policies shifted to instead respond to the child welfare system’s failure by limiting rather than expanding the obligation to provide services to needy families.

The shift from policies favoring reunification to policies encouraging quicker termination of parental (maternal) rights and adoption culminated with the enactment of the Adoption and Safe Families Act of 1997 (AFSA).\(^\text{176}\) Poor women, particularly African American women, have a history of losing their children in juvenile court child protection proceedings.\(^\text{177}\)

From their inception, child welfare programs focused on poor children. The children of single mothers (particularly women of color) are Particularly at risk of removal. Living in a single-parent household Increases the risk that a child will live in poverty. Many commenters have suggested, that intervention results, at least in part from the child welfare system’s adherence to the traditional idealized definition of the ‘good mother’ rather than from thorough investigations and documentation of child abuse and neglect.\(^\text{178}\)
For example, Bernardine Dohrn has explained:

*From the beginning, the juvenile courts and the broader social welfare system intervened in the lives of destitute women to regulate and monitor their behavior, punish them for ‘deviant’ mothering practice, and police the undeserving poor. Women were locked at the private sphere of the family; their sole responsibility was to produce health offspring and provide for the well-being of men. Poor women, single women, and women who worked outside the home failed, by definition, to meet this responsibility. The legal and social welfare apparatus developed to regulate and punish these ‘bad’ mothers by ‘saving’ their children.*

Another example of how subjectivity and internal biases yield different results can be seen with issues of addiction and alcohol abuse. These issues are spread across the socioeconomic spectrum of our society. A poor woman with addiction problems comes to the attention of State Child Protection Services after delivering a baby at a public hospital who tests positive for drugs is more likely to have her child removed from her care than then a wealthy or middle class alcoholic or drug-addicted parent. In addition, the wealth or middle class alcoholic or drug-addicted parent is less likely to be drug tested in a hospital and more likely to have treatment options that prevent removal of their children. While studies show that addiction can be treated without removing children from their mothers, poor women with minimal support are likely to be faced with removal of their children and then told to find treatment to get them back. Domestic violence, also present across the racial and socioeconomic spectrum, has different outcomes for poor women of color. Impoverished women involved in relationships where they are victims of domestic violence are more likely to be trapped by their poverty and more likely to lose custody of their children through findings of neglect for “failing to protect their children from domestic violence.” From this, it can be reasonably inferred that the system is removing children because they are poor not because they are abused.

**III. The Solution: The American Child Welfare Act**

Why another Federal Statute now? Until 1973, policies regarding child welfare were exclusively a matter of state concern. States had the freedom and responsibility to enact child welfare statutes, such as reporting laws for medical and educational professionals, and laws establishing parental rehabilitation programs. However, after the introduction of the Battered Child Syndrome article, authored by Dr. Henry Kempe, Congress passed the Child Abuse Prevention and Treatment Act, (CAPTA). With these humble beginnings there is now a complex relationship between the states and the federal government. Cash-starved states desperate to receive funding for child protective services systems have abdicated their authority to develop their own child welfare policies and instead have yielded to increasingly specific mandates made by the federal government.

**A. Why aren’t two federal laws that require “reasonable efforts” enough? Because the two federal laws that speak to “reasonable efforts”, do not define “reasonable efforts”**.

In cases where there have been allegations of abuse and or neglect of a child, the federal Adoption Assistance and Child Welfare Act, (AACWA) enacted in 1980 requires that “reasonable efforts” be
made to prevent the removal of a child from their parents. \textsuperscript{193} The Adoption Safe Families Act, (AFSA) \textsuperscript{194} of 1997, Public Law 105-89 (ASFA), modified “reasonable efforts” by stating that the ‘paramount consideration’ for child welfare programs must be the ‘health and safety of the child’. \textsuperscript{195}

Since its introduction via the AACWA\textsuperscript{196} the term, “reasonable efforts” has been a core concept in American child welfare practice; however, neither the AACWA nor the AFSA provide a “bright line” definition of what is and what is not a “reasonable effort” by a state agency seeking to remove a child from alleged abuse and/or neglect. Without a “bright line” definition of “reasonable efforts”, how each state defines and applies “reasonable efforts” is based on subjective criteria; and it is this subjective application that leads to racial and ethnic disproportionality.

With a federally mandated application of “reasonable efforts” but no federal definition, fundamental liberty interests of impoverished families in general and specifically impoverished, African-American families are in jeopardy; thus leaving these children unprotected.

The United States Supreme Court in Santosky v. Kramer\textsuperscript{197} acknowledged, albeit on a basic level that, “...even when a natural home is imperfect, permanent removal from that home will not necessarily improve the child’s welfare...nor does termination of parental rights necessarily ensure adoption.\textsuperscript{198} However, even with this general recognition of the potentially harmful effects of removing children from their parents, even temporarily, rarely is a consideration of this harm taken into account during the removal proceedings. When termination is the issue, courts readily balance the interests of the state to provide permanence for a child with the additional state’s interest of avoiding erroneous destruction of families.\textsuperscript{199} However, in removal cases, no parallel state interest is balanced with the trauma to a child who is unnecessarily removed.\textsuperscript{200}

Ultimately, poverty, cultural differences, and subjective decision-making that can embody biases, lead to the disproportionate removal of African-American children.

\textbf{B. The American Child Welfare Act.}

Due to variability across states as they applied “reasonable efforts”, effective child welfare programs existed in only some communities and some state programs completely failed in their protection of children and families in crisis.\textsuperscript{201} As the status of our child welfare system exits today, the absence of a bright line federal definition of “reasonable efforts” coupled with the absence of uniform guidelines for judges to follow when applying “reasonable efforts” has resulted in ineffective child welfare programs; unwarranted removals of children from their families; overrepresentation of African-American children; and the inadvertent dissolution of the African American family. With the tremendous role currently played by the federal government in the arena of child welfare, the federal legislation proposed by this article will serve to reconcile previous federal legislation and add protection for all children that is currently lacking.

The American Child Welfare Act (ACWA) as proposed in this article follows the model provided in the Indian Child Welfare Act. The American Child Welfare Act is federal legislation that addresses the issue of disproportionality of impoverished children in general and specifically, impoverished African-American children in the child welfare system, by prescribing a bright line definition of “reasonable efforts” accompanied by guidelines to help navigate a Court’s decision on whether or not to remove a child.
The Indian Child Welfare Act of 1978, (ICWA) 202 is an example of how federal law can be used to resolve racial, ethnic and sociological inequities. ICWA was specifically enacted to address disproportionality for Native Americans within the child welfare system. In order to restore the Indian family, ICWA provides a due process procedure by which American Indian tribes have exclusive authority to make the decisions concerning abused or neglected Native American children.203 There is a higher burden of proof for Native American children to be removed from their parents requiring clear and convincing evidence and testimony from an expert witness for a court to make any findings of abuse or neglect.204 If a Native American child is removed from his parents, efforts must be made to place the child with relatives or a foster family from the child’s specific American Indian tribe.205

The American Child Welfare Act (ACWA) is comprised of three sections. This article focuses only on the first section of the proposed Act; a federal definition of “reasonable efforts” with judicial guidelines intended to yield a more consistent application of reasonable efforts. The other two sections of the ACWA will be addressed in subsequent articles.

i. The American Child Welfare Act: Federal definition of “reasonable efforts”.

The long-standing problem of racial inequities in the child welfare system are said to be “of such urgency that no lasting improvements are possible in child welfare services unless these inequities are reduced and eventually eliminated.”206 The Pew Commission on Children in Foster Care recognized the problem 2004, and the United States Government Accountability Office (GAO) reported on this issue in July, 2007.207 The GAO was asked to analyze: (1) the major factors influencing the proportion of African-American children in foster care, (2) the extent that states and localities have implemented promising strategies, and (3) ways in which federal policies may have influenced African-American representation in foster care.208 The Casey Alliance for Racial Equity which consist of the five Casey sister organizations has developed and implemented a multi-year, national campaign to reduce the disproportionate number of youth of color in foster care and improve their outcomes. 209 While the Pew Commission, the GAO, Casey’s sister organizations and many others have recognized and tried un-triumphantly to tackle the problem of the vanishing African-American family as the result of racial disproportionality in the child-welfare system, this article submits that there can be no reduction, elimination and/or resolution of African-American overrepresentation in the child welfare system unless and until there is a recognized federal definition of “reasonable efforts”, with accompanying guidelines for tribunals to apply.

When defining reasonable efforts, the American Child Welfare Act begins by analyzing the statutory language of AFSA, “assuming that the ordinary meaning of that language accurately expresses the legislative purpose.” Gross v. FBL Financial Services, Inc., 557 U.S. 167, — , 129 S.Ct. 2343, 2350, 174 L.Ed.2d 119 (2009). Accepting that court’s must enforce plain and unambiguous statutory language according to its terms; Carcieri v. Salazar, 555 U.S. 379, — , 129 S.Ct. 1058, 1063–1064, 172 L.Ed.2d 791 (2009); Jimenez v. Quarterman, 555 U.S. 113, —, 129 S.Ct. 681, 684–685, 172 L.Ed.2d 475 (2009); and understanding that “…where language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final impression of the meaning intended” 210
To understand the plain language of “reasonable efforts” as used in the AACWA and ASFA, one might first define the term “reasonable”, which means “Agreeable to reason or sound judgment; logical…Not exceeding the limit prescribed by reason; not excessive…” 211 “Effort” means “1) Exertion of physical or mental power…2) an earnest or strenuous attempt…3) Something done by exertion or hard work. 212 Thus “reasonable efforts to prevent the removal of a child” would rationally mean a sound, logical, strenuous, or earnest attempt to keep the child at home with his or her parents. 213 Hence, “reasonable efforts”, should be defined as all acts and actions taken by the child protective services agency that reflect a good faith effort on the agency’s part; are within sound judgment; and that are done to actively prevent the removal of the child.


While the media focuses attention on sensational cases of severe physical child abuse 214, and legislation treats abuse and neglect identically, data shows that seventy-one percent of children who were victims of mal treatment suffered neglect; with only sixteen percent suffering physical abuse. 215 The import of the abundance of neglect cases becomes clear when we accept

that most removals involve allegations of neglect, 216 and these removals are from indigent, African-American parents. The vast majority of parents who come into contact with the child welfare system are not referred for abuse; the referral is for neglect; 217 and neglect charges are typically related to poverty with issues such as homelessness, single parenting, addiction, mental illness, and domestic violence, frequently associated. 218

It is important to note here that this article is not a proponent of children remaining in environments that are reasonably seen to be a specific threat to their safety and/or welfare. This article is suggesting however, that removal as a first option is not necessarily in the best interest of the child 219.

Historically 220 and currently, when addressing removals, there are two presumptions at work that are worthy of rebutting: 1) the presumption that the removal is for a short period of time 221; and 2) the presumption that the removal for a short period of time will have little to no effect on the child. 222 223 There is ostensibly, no acknowledgement that the very action of removal and placement (not to mention the inevitable psychological and emotional harm associated with a prolonged foster care placement) of a child is, in and of itself, extremely harmful 224 to that child. 225 Often the child who is removed from her parents not only loses her parents, extended family members, and friends, but also their siblings. 226 To suddenly uproot a child and separate her from everything she has ever known or loved is severely and profoundly traumatizing. 227 To the child, it is much like suffering the death of multiple loved-ones, simultaneously. 228 The damaging effects are irreparable; the child never truly recovers from them. 229 This is even so where the placement of a child is in a loving and nurturing home; and this is so even where the home from where she has been removed is a bad one. 230

The current state of the child welfare system leads to the inexorable conclusion that the families of children who enter the child welfare system are not typically strengthened, and in contrast, the bonds of children with their families are frequently broken. 231

When considering removal, this article suggests that the judicial officer should be mandated to adhere to certain minimum guidelines when applying the “reasonable efforts” analysis; with the goal being a
consistent, nationwide, jurisdiction to jurisdiction application of “reasonable efforts”. For the purpose of this article, four guidelines will be discussed.

The first guideline when considering the removal of children would require judicial officers to hold evidence-based removal hearings. The second guideline requires the court to receive into evidence, along with accompanying testimony the actual needs assessment of the family and of the child subject to removal, conducted by the child services agency. The third guideline requires the judicial officer to hear on the record, through testimony subject to cross-examination, all efforts made by the State agency to place the child with relatives or fictive kin232 of the child; and if these placements cannot be made, there must be further evidentiary support as to why such placements are not appropriate. The fourth guideline requires the court to apply the clear and convincing standard to all removal hearings.


Children should be raised in a safe environment, which sometimes warrants the removal of the child from the parent. However, it must be acknowledged that often times it is in a child’s best interest not to disrupt the strong parent-child emotional bond by unnecessarily removing the child from the home, especially in many unfortunate cases where poverty has been mistaken for child neglect.233

In the absence of an emergency or aggravated circumstance as allowed by ASFA, the inquiry of “reasonable efforts”, using the definition as provided above, would require the judicial officer to make findings of fact based on evidence given in open court; subject to cross examination, supported by written conclusions of law. For example, removal could not be based on a positive drug test at birth alone, spoken of in a submitted affidavit234, executed by a caseworker, or collateral witness that is not present in court to give sworn testimony, subject to cross examination.

In general, the concept of the African-American family is similar to that of the Native American family; neither being “Western” nuclear families consisting of two parents and their children. Both African-American children and Indian children may have many relatives who are counted as close, responsible members of the family, who may not be “blood relatives”. The concept of the extended family maintains its vitality and strength in both the African-American and Indian community. By custom and tradition, if not necessity, extended members of African-American and Indian families (be they aunts, uncles, cousins, or grandparents—both fictive and real) have responsibilities and duties relating to familial childrearing235 and living in general.236 Precisely for these reasons, removals should not be based on a ‘white, middle-class nuclear family standard,237 implicit with biases, which in many cases, forecloses placement with a relative or fictive kin238.

The removal hearing should mandate adequate evidentiary foundations that while the showing of the specific harm would not require the testimony of a “qualified expert witness”, the under oath examination of the investigative worker seeking the removal, specifically inquiring as to what specific harms are alleged suffered by the child and what specific actions the child protection services agency has taken to prevent the removal239 of the child, would be required.

Needlessly removing children from the custody of their parents violates parents’ due process rights to liberty.240 The removal hearing, for procedural due process241 reasons, must give sufficient notice to the responding parents; and this notice of the removal proceedings should include in plain language that there is a possibility that the rights of the parent may be terminated. For substantive
due process reasons, the evidentiary hearing must provide responding parents with a reasonable opportunity to have their interest represented. This substantive due process opportunity requires that the responding parent has an opportunity to present evidence that they are able and willing to provide the child with a safe and stable home environment. Any evidence entered at the removal hearing must adhere to published rules of evidence. The premise behind requiring the additional evidence at the evidentiary removal hearing is to change the focus of the child welfare system away from punishment of “bad parents” to prevention.


The second guideline directs the court to require, prior to the removal hearing, a completed needs assessment of the family and of the child subject to removal. The needs assessment would be a mandate for states to receive federal assistance. The needs assessment should be completed by either a child protective services licensed social worker who is specifically trained in the field of family needs assessments and child trauma; or a service provider who is comparably trained in gathering, administrating and assessing family needs assessment tools and child trauma indexes. The needs assessment would be offered into evidence at the “removal hearing” and the author of the assessment shall be present at the hearing and subject to cross examination.

Currently, when removing children from allegedly neglectful homes, there is no analysis of the emotional effect the removal will have on the child, or what practical effect removal will have on the issues such as a child maintain ties with her school, community, family, and friends. Across the board, removal standards whether if based on a reasonable person standard or a preponderance of the evidence standard, fail to acknowledge or incorporate into the analysis the poor outcomes for many foster children. They fail to acknowledge that removal from a parent carries proven risk of mental, emotional, and physical harm, including the development of separation anxiety, depression and other mental health problems. Currently, the decision to remove a child is made in a vacuum utterly devoid of these very real facts. Children in foster care are abused and neglected at a greater rate than other children, and have an increased risk of delinquency and other behavioral problems.

The Family Needs Assessment and the Child’s Needs Assessment are important tools to ensure that children in need of protection are truly protected. If the Family Needs Assessments, (FNA), shows that the condition that resulted in the referral is either the result of poverty and/or can be alleviated by concrete financial services; home maker services; in home parenting classes; nutritional services; visiting nursing services; mandatory day care services, or something short of removal, than the child protective services agency’s request for removal should be denied and instead the court should enter an order directing the agency to convene a meeting that qualifies as a “family group decision making” meeting to develop a safety plan of service to ensure the safety of the child and the stability of the family unit. In addition, if services are identified through this family group decision making process that can support the family while keeping the child safe within the family home, the court should order the child protective services agency to identify; refer; and pay for any services that the family needs to alleviate the poverty induced condition that is the root of the concern of abuse or neglect.

If the Child Needs Assessment, (CNA), shows that the removal is more harmful on the child than remaining in their current home, the request for removal should be denied, and again, the child protective services agency should be ordered to convene a meeting that qualifies as a “family group decision making.”

The third guideline must inquire as to the specific efforts made by the State agency to place the child with relatives or fictive kin254 of the child; and if these placements cannot be made, there must be further evidentiary support as to why such placements are not appropriate. Ultimately, it would be in the court’s discretion to appoint a relative as temporary joint custodian until it could be determined if the child could be left permanently in the mother’s care.


The legal burden of proof needed for the state to secure the removal of a child in a child welfare case is initially fairly easy to satisfy. Throughout the fifty states, there is no consistent burden of proof standard for removal of a child from a parent’s care; it varies from preponderance of the evidence to clear and convincing evidence.255 Though this legal burden sets up a standard by which attorneys must present evidence, it does not take into account any implicit biases or underlying assumption made on the basis of race, ethnicity or socio-economic status of the family accused or the agency representative and/or the presiding judicial officer.256

The court was designed to be the objective eyes of the state with regard to removal of children.257 Children are not removed from their parents without a judicial order; children are not placed in foster care without a judicial order; children’s placements are changed from one foster home to another foster home without either a court order, or a court’s knowledge of the change; children’s rights to their parents are not dissolved without a court’s order; and a parents rights to their children are not terminated without a court’s order. It makes sense for the presiding judicial officer hearing the case to share the lion share of the responsibility of assessing whether the parents were dealt with by the state agency in a fair and equitable manner.258

While for an indigent parent, an initial removal hearing may only be temporary, this temporary separation could last for weeks or even months. While temporary, the removal hearing is the precursor to the very real possibility that eventually that same parent may be subjected to the unjust termination of their parental rights.259

Under ICWA, the standard for removal is clear and convincing. This standard was selected after the 1978 House Report on the Indian Child Welfare Act noted that the vast majority of the removals of Indian children were based on vague grounds such as “neglect,” “social deprivation,” or unsupported allegations of “emotional damage” from living with their natural or biological parents.260

In addition, for termination of parental rights proceedings in non-ICWA child welfare cases, the Supreme Court in Santosky established that standard of proof must be that of clear and convincing evidence.261 The clear and convincing standard emphasizes the Court’s strong belief and adherence to the fundamental right of a parent to raise his or her child.262 The Court further articulated that the standard of proof of clear and convincing reflects the degree of importance which society places on the interest at stake.263 Further, the Court stated that a clear and convincing evidence standard reflects interests that are both ‘particularly important’ and ‘more substantial than mere loss of
money,’ whereas a preponderance of the evidence standard suggests society’s ‘minimal concern with the outcome.’”

Currently, the AACWA and ASFA are silent as to the standard of proof at the stage of removal. However, similar to the Indian Child Welfare Act (ICWA), the burden of proof for removal of all children should be clear and convincing, that continued custody of the child by the parent or Indian custodian is likely to result in “serious emotional or physical damage to the child. Professor Theo Liebman argues that initial removal standards should be so as to protect the child from greater risks of harm from the removal.” Professor Cassandra Bullock also argues for a clear and convincing standard at the initial removal hearing in order to protect indigent parents’ rights to raise their children.

Applying the legal analysis utilized by the United States Supreme Court in Santosky, the clear and convincing standard emphasizes the Court’s strong belief and adherence to the fundamental right of a parent to raise his or her child, again, further articulating that the standard of proof of clear and convincing reflects the degree of importance which society places on the fundamental liberty interest at stake.

The theory behind changing the removal requirements is that if it becomes more difficult for the state agency to remove an African American child, there will be more thorough investigations and subsequently more thorough investigations and subsequently more thorough risk assessments and ultimately more systemic protection of African-American children through the decrease in unnecessary removals of African-American children.

**Conclusion**

“CHILDREN DO NOT CONSTITUTE ANYONE’S PROPERTY; THEY ARE NEITHER THE PROPERTY OF THEIR PARENTS NOR EVEN SOCIETY. THEY BELONG TO THEIR OWN FUTURE FREEDOM.”

Child welfare cases seeking the removal of African-American children from their biological parents continue to raise difficult issues related to children’s physical well-being; their psychological well-being; their cultural identity; and the survivability of the African-American family. The introduction of the American Child Welfare Act is intended to make the very difficult task of deciding to remove or not to remove a child consistent across the nation; removing the impact of implicit biases and reinforcing the ideals of procedural and substantive due process.

As stated in the introduction, this article acknowledges that simply defining the term “reasonable efforts” consistently for all states, will not completely resolve the subjective application of the child welfare laws, nor will it instantaneously reverse the disproportionality of child welfare removals, but it will decrease the increasing numbers of impoverished children, in general and impoverished African-American children specifically that enter into the foster care system. This author submits that this is progress.
* Director, Experiential Learning Programs, Thurgood Marshall School of Law. I would like to acknowledgment that this article was made possible by the 2014 summer research stipends provided by Thurgood Marshall School of Law, Texas Southern University. I would also like to thank my Research Assistant, Brandon Davenport.

1. Nelson Mandela.


7. Id. referencing Joel Best, Threatened Children: Rhetoric and Concern About Child-Victims 4-6 (University of Chicago Press, 1993).


10. The case of Eric Forbes, 12 years old child from Georgia who died after being allegedly beat to death by his father. Records show that the Division of Family and Children Services, (the child protective services agency in Georgia) investigated several reports from Cobb County school officials that Forbes was being abused in 2012. Police said the boy had multiple bruises, bite marks, lacerations and other marks that are consistent with a history of abuse when they discovered his body. Investigators communicated that corporal punishment was a “regular part of the disciplinary process” for the boy.


14. Id.


16. For the purposes of this article disproportionality is defined as the overrepresentation of children of color in the child welfare system, compared to their numbers in the population.


19. Id.


22. “Overrepresentation” refers to a situation in which a particular racial/ethnic group of children are represented in foster care at a higher percentage than they are represented in the general population. Ruth McRoy, The Color of Child Welfare, in the Color of Social Policy 37 (King E. Davis & Tricia B. Bent-Goodley eds., 2004).


Id. at 172
28 Id.
29 Id.
30 Id. at 171
35 Id.
39 Id. Noting that “As recommended by the Health and Human Services Commission (HHSC) to ensure consistency across all HHSC agencies, in 2012, the Department of Family and Protective Services (DFPS) adopted the HHSC methodology on how to categorize race and ethnicity. As a result, data broken down by race/ethnicity in 2012 and after is not directly comparable to race/ethnicity data in 2011 and before.
In *Meyer v. Nebraska*, 262 U.S. 390, 399, (1923), the United States Supreme Court recognized as a constitutionally protected liberty interest, a parent’s right to bring up their children that. The Court went on to hold that the rights to conceive and to raise one’s children have been deemed ‘essential’. Justice Letton, using the language of State v. Ferguson, a New York Supreme Court case, stated “parents have a “fundamental’God-given and constitutional right to have some voice in the bringing up and education of his children.” The Court determined that the term “liberty” referred to in the Fourteenth Amendment included a parent’s right to raise his or her child. Justice McReynolds penned: “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the duty, to recognize and prepare him for additional obligations.” *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), holding that the liberty of parents to direct the upbringing and education of the children under their control was fundamental.

In *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) the United States Supreme Court found that a child was not a “mere creature of the State” but that there was a constitutional dimension to the right of parents to be free from state intrusion into their upbringing for their children. Current standards for the temporary removal of children from their parents must therefore account for the substantive and procedural due process rights of parents’ rights to custody and control of their children. The Prince court went on to hold that “it is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”

Clement, *supra*, at 401.


In *Stanley v. Illinois*, 405 U.S. 645 (1972) the United States Supreme Court opined that the family unit has the substantive right to maintain its integrity, explaining that it is necessary to ‘protect the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition,” and that “it was through the family that we inculcate and pass down may of our most cherished values, moral and cultural.”


*Ibid.* The Court held that the biological parent’s essential right does not apply to foster parents, and thus, a foster parent’s rights to her foster child are not subject to substantive and procedural protection of due process.


*Ibid.* A parental rights termination proceeding interferes with that fundamental liberty interest; and as such demands that constitutional protections afforded to parents are safeguarded.

*Traxel v. Granville*, 530 U.S. 57, 66 (2000) (holding that the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children, which cannot be limited by statutes that are too broad).


Roberts, *supra*, at 172.

id.
74 Roberts, supra, at 173.
76 id.
79 Ward, supra, at 639-640.
82 id. (quoting Will Kymlicka, Liberalism, Community, and Culture 165 (Oxford University Press 1989) (citations omitted).
85 Clement, supra, at 421.
86 Van Praagh, supra, at 179-85.
87 id at 186.
88 Clement, supra, at 421.
89 id.
90 Van Praagh, supra, at 179-85.
91 Clement, supra, at 421.
93 Clement, supra, at 422.
94 Roberts, supra, at 179.
95 id.
96 id.
97 id. referencing Jane Mansbridge, Using Power/Fighting Power: The Polity, in Democracy and Difference: Contesting the Boundaries of the Political 46, 58 (Seyla Benhabib ed., 1996); see also Sara Evans & Harry C. Boyte, Free Spaces: The Sources of Democratic Change in America (Harper & Row, 1986).
98 Roberts, supra, at 179.
99 id.
100 id.
101 id. at 180.
102 id.
103 id.
104 id. at 172.
105 id.
The legal authority of the state to interfere with parent’s rights to care, custody and control of their children originally stems from the state’s parents patriae role. Liebman, supra, at 149. In the New World, because such high value was placed on work and self-sufficiency, “society” was concerned that without intervention, children of paupers would acquire the ‘bad habits’ of their parents and the children would become paupers as well. Clement, supra, at 400-01. The families that failed to reflect desired American values were often the focus of child welfare inquiries.

As such, children of paupers were presumed to require attention from public authorities, which authorized state intervention. Parents who could not provide adequately for their children were deprived by the State of their right to maintain custody of their children and in turn, were socially condemned by members of the upper class. Parents who were unable to provide care for their children on a level that was accepted by upper “society” were thought to have abrogated their parental rights, and the children were subsequently removed and placed most time in apprenticeships for the benefit of other families.

Id.


Clement, supra, at 413.


Clement, supra, at 413.


Godsoe, supra, at 121.

Id.


Godsoe, supra, at 122.

McRoy, supra, at 478.

Id.

Roberts, supra, at 172.

Dixon, supra, at 115.

Classism is defined as unfair treatment of people because of their social or economic class. Merriam Webster, available at http://www.merriam-webster.com/dictionary/classism (last visited April 10, 2014).

Racism is the socially organized set of attitudes, ideas, and practices that deny African Americans and other people of


138 Classism is the systemic oppression of subordinated class groups to advantage and strengthen the dominant class groups. It is the system assignment of characteristics of worth and ability based on social class. Available at http://www.classism.org/about-class/what-is-classism (last visited April 10, 2014).

139 Kleven, supra.

140 Id.

141 Id.


146 Dixon, supra, at 134.


148 Dixon, supra, at 136.

149 Id.

150 Id. referencing Henry Louise Gates, Jr. & Cornell West, the Futures of the Race 28 (Alfred A. Knopf.Inc. 1996).

151 Godsoe, supra, at 118.

152 Id.

153 Id. Fraidin, supra, at 2-3.

154 Clement, supra, at 416-17.


156 Clement, supra, at 416-17.

157 Id.

158 Id.

159 Id. at 416, citing statistics showing the numbers and ethnicities of children in the California child welfare system in and out of home placements reflects an overrepresentation of children of color.

160 Id.

161 Id.

162 Id. Amy Sinden, supra, 352.

163 Id.


166 Clement, supra, at 416.

167 Texas Family Code Section 262.1015 allows the Texas Department of Protective and Regulatory Services, after investigation and determination that a child abuse has occurred, to file a Petition for the removal of an alleged perpetrator of the abuse rather than remove the child. One court may find that removal of the alleged perpetrator is reasonable, while another court, under the same facts and circumstances may find that removal of the alleged perpetrator is not reasonable, even if the home would then be safe for the child, and order the child removed instead.
The Child Abuse Prevention and Treatment Act (Public Law 93-247) (United States Code Title 42, Section 67) provides federal funding to States in support of prevention, assessment, investigation, prosecution, and treatment activities related to child abuse and neglect. Additionally, CAPTA identifies the Federal role in supporting research, evaluation, technical assistance, and data collection activities; establishes the Office on Child Abuse and Neglect; and mandates the National Clearinghouse on Child Abuse and Neglect Information. CAPTA also sets forth a minimum definition of child abuse and neglect. The key Federal legislation addressing child abuse and neglect is the Child Abuse Prevention and Treatment Act (CAPTA), originally enacted in 1974 (Public Law 93-247). This Act was amended several times and was most recently amended and reauthorized on June 25, 2003, by the Keeping Children and Families Safe Act of 2003 (P.L. 108-36).


The Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272, 94 Stat 500 (1980). "Reasonable efforts" requirements were introduced into child welfare proceedings by the Federal Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272 (AACWA). Since the enactment of AACWA, the term "reasonable efforts" has been a core concept in American child welfare and practice. "Reasonable efforts" speak to the actions initiated and or taken by the child protection...
agency to prevent the removal of the child. The AACWA Section 470. USC 671 (a)(15) provides that: “... in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home…”

194 Clement, supra, at 403-04. Congress supported compliance with the ASFA’s promotion of adoption over family preservation through financial incentives that pays states $4,000- $6,000.00 for each adoption consummated over an established minimum base number. The payments for adoptions are not contingent upon whether or not reasonable efforts were or were not made in the underlying cause.

195 The Federal Adoption and Safe Families Act of 1997, Pub. L. 105-89 (ASFA); reaffirmed in 2003, 42 USC Section 670 (2003), amended AACWA by maintaining but clarifying the concept of “reasonable efforts” by stating that the ‘paramount consideration’ for child welfare programs must be the ‘health and safety of the child’, thereby relegating to second place the presumption that family preservation was in the child’s best interest.


198 Santosky, 455 U.S. at 766

199 id.

200 Id. Liebman, supra, at 158, referencing Lassiter, 452 U.S. at 27; Santosky, 455 U.S. 745 at 766.

201 Liebman, supra, at 160.

202 Hillary Baldwin, Legislative Reform: Termination of Parental Rights: Statistical Study and Proposed Solutions, 28 J. Legis. 239, 244-45 (2002).


204 25 U.S.C. § 1911

205 25 U.S.C. § 1912, 1921


208 GAO 07-816, supra note 12, at 1.

209 Dixon, supra, at 116.


212 Id.

213 Id.

214 The case of Eric Forbes, 12 years old child from Georgia who died after being allegedly beat to death by his father. Records show that the Division of Family and Children Services, (the child protective services agency in Georgia) investigated several reports from Cobb County school officials that Forbes was being abused in 2012. Police said the boy had multiple bruises, bite marks, lacerations and other marks that are consistent with a history of abuse when they discovered his body. Investigators communicated that corporal punishment was a “regular part of the disciplinary process” for the boy.


216 Uma A. Segal and Sanford Schwartz, Factors Affecting Placement Decisions of Children Following Short-Term Emergency Care, 9 Child Abuse & Neglect 543, 547-48 (1985).


218 id.

The dependent child. New York: Columbia University Press (1930), Historically, children that had been removed by the state as a measure to “protect” them, often times found themselves in deplorable, unsafe and unhealthy situations. For instance, the 1821 Report of the Massachusetts Committee on Pauper Laws concluded that ‘outdoor relief was the worst method of caring for removed children.’ In addition, the Yates Report of 1824, concluded: 1) Removal of human beings like felons for no other fault than poverty seems inconsistent with the spirit of a system professing to be founded on principles of pure benevolence and humanity; and 2) the poor, when farmed out, or sold, are frequently treated with barbarity and neglect by their keepers.

Jane Waldfogel, The Future of Child Protection 12 (1988) (pointing out that in the United States, poverty is strongly related to the likelihood of reports of child neglect). Such a strong link between poverty and reported child neglect suggests that the standard of proof articulated by Santosky fails to serve as sufficient protection against the erroneous termination of parental rights. (Once removed, also referred to as “put out”, from their biological families, children of paupers and dependent adults were treated alike and were generally handled in one of four ways:

1. Outdoor relief, a public assistance program for poor families and children consisting of a meager dole paid by the local community to maintain families in their own homes;
2. Farming-out, a system whereby individuals or groups of paupers were auctioned off to citizens who agreed to maintain the paupers in their homes for a contracted fee;
3. Almshouses or poorhouses, institutions established and administered by public authorities in large urban areas for the care of destitute children and adults; and
4. Indenture, a plan for apprenticing children to households where they would be cared for and tough at trade, in return for which they owed loyalty, obedience, and labor until the costs of their rearing had been worked off.)

If a child is removed, the removal could last for days, weeks or months; hence “short” and “temporary” are relative terms.

Liebmans, supra, at 161.

Removal is based on the premise that children are “protected” and their “welfare” is promoted by governmental removal from their own families and placement with strangers. Tracy Green, Parent Representation in Child Welfare: A Child Advocate’s Journey, 13 Michigan Child Welfare L.J. 16, 16-17 (Fall 2009).

Robert H. Bremner, Children and Youth in America: A Documentary History, vol. 1-3 (Cambridge: Harvard University Press, 1970-1974). “The great discovery of the early twentieth century was that the best place for normal children was in their own homes. Home life is the highest and finest product of civilization...Children should not be deprived of it except for urgent and compelling reasons. Children of parents of working character, suffering from temporary misfortune, and children of reasonably efficient and deserving mothers who are without the support of the normal breadwinners should as a rule be kept with their parents, such aid being given as may be necessary to maintain suitable homes for the rearing of the children. The most important and valuable philanthropic work is not curative, but the preventative...”


Id.

Id.

Id.

Id.

Id.

Id.

Peggy Cooper Davis, Neglected Stories: the Constitution and Family Values 112 (New York: Hill & Wang, 1997). Fictive kin is defined for the purpose of this article as a term used by anthropologists and ethnographers to describe forms of kinship or social ties that are based on neither consanguinal (blood ties) nor affinal (‘by marriage’) ties, in contrast to true kinship ties.

Candra Bullock, Low-Income Parents Victimized By Child Protective Services, 11 Am. U. J. Gender Soc. Pol’y & L. 1023, 1025 (2003), referencing Naomi R. Chan, Children’s Interest in a Familial Context: Poverty, Foster Care, and Adoption, 60 Ohio St. L.J. 1189, 1191 (1999) (arguing that child welfare reforms should focus on children’s rights to group in a safe environment, but that this focus must be placed in the context of children’s interests in maintaining relationships with their parents because disrupting the parent-child bond has a severe impact on children.

Generally, once a child welfare agency concludes their investigation of alleged abuse and or neglect; and once
the child welfare agency, with advice of counsel makes the decision to seek removal of a child, the agency representative executes an affidavit and tenders said to their legal representative, (County Attorney; Regional Attorney; District Attorney, or whatever legal entity charged with the responsibility of representing the state child welfare agency). The worker who executed the affidavit and/or their supervisor appears with their legal representative before a Judge, ex parte and requests removal of the child. The parents are not present; legal counsel for parents are not present; children are not present; legal counsel for children are not present; guardian ad items are not present, etc. The only perspective that the judge hears at this critical juncture, deciding whether or not to remove a child, is that of a potentially subjectively biased case worker, whose position is supported only on an affidavit that is often times replete with unsubstantiated hearsay, which subject to an exception is not admissible in any court of law in the United States.


236 Id at 1653 n.35. Examples of shared living arrangements among African American extended families are the general pooling of financial resources, shared responsibility of caring for the elderly, joint living arrangements, and arranged employment opportunities.


238 For the purposes of this article, fictive kin is defined as a term used by anthropologists and ethnographers to describe forms of kinship or social ties that are based on neither consanguinal (blood ties) nor affinal ('by marriage') ties, in contrast to true kinship ties.

239 Brenda G. McGowan, Historical Evolution of Child Welfare Services, Child Welfare for the Twenty-First Century: A Handbook of Practices, Policies, and Programs 23 (G. Mallon and P. Hess, ed. 2005), referencing Thurston, H.W., The dependent child. New York: Columbia University Press, 1930. In 1923 the New York Children’s Aid Society further conveyed the consensus of the time: “There is a well-established conviction on the part of social workers that no child should be taken from his natural parents until everything is done to build up the home into what an American home should be. Even after the child has been removed, every effort should be continued to rehabilitate the home and when success crown’s one’s efforts, the child should be returned. In other words, every social agency should be a ‘home builder’ and not a ‘home breaker.’”


241 To satisfy procedural due process, three distinct factors are considered: the private interest that is affected by the state action; the risk that the procedures used will lead to an erroneous deprivation of that private interest; and, the state’s interest in support the use of the challenged procedure, including any interest in minimizing financial and administrative burdens.

242 Using a traditional three-part analysis to determine whether a substantive due process right is at stake; the first step a court takes is to determine if the interest of the parent is so fundamental in nature that it is protected by the Fourteenth Amendment; the second step is for the court to determine if the State has infringed upon this fundamental right; and the third step is for the court to determine if the State has any State interest that justifies the intrusion.

243 Dixon, supra, at 116.

244 Monetary incentives are used as a way to encourage states to implement AACWA and AFSA.

245 Currently, there is no federal minimum requirement when it comes to caseworker standards; hence, all case workers that work with families are not required to be licensed social workers.

246 Liebman, supra, at 148.

247 Id.

248 Id.

249 Id. referencing generally Jong G. Orme & Cheryl Buehler, Foster Family Characteristics and Behavioral and Emotional Problems of Foster Children: A Narrative Review, 50 Family Relations 3 (2001); Betty Fish & Bette Chapman, Mental Health Risks to Infants and Toddlers in Foster Care, 32 Clinical Soc. Work J. 121 (2004).

250 Family Group Decision Making, brings together a child’s wider family group, who—in partnership with child welfare professional—lead decision-making about how to best care for and protect their children. Family group decision making has been proven to safely reduce the number of children in foster care, decrease the recurrence of child abuse and neglect and keep children connected to their roots and culture, which provides stability and helps them reach their full potential. Available at http://www.americanhumane.org/children/programs/family-group-decision-making/ (last visited April 10, 2014).

251 Family group decision making recognizes the power imbalances between child welfare workers and their clients, and seeks to alleviate these imbalances by deliberately promoting the voice of the family group in the development of a plan to resolve child welfare concerns.

252 Cheryl Waites, et al., Increasing the Cultural Responsiveness of Family Group Counseling, 49 Social Work 291,
293 (2004).
253 The Family Group Counseling Service Model is one such model that requires service providers to directly recognize and address the unique culture of the families with whom they work. This model reflects a partnership between the service provider and the child’s “family,” defined to include the child’s immediate family, relatives, and cultural community.
254 Fictive kin is defined for the purposes of this article as a term used by anthropologists and ethnographers to describe forms of kinship or social ties that are based on neither consanguinal (blood ties) nor affinal ('by marriage') ties, in contrast to true kinship ties.
256 Dixon, supra, at 116.
257 Id.
258 Id.
259 Jane Waldfogel, The Future of Child Protection 8-9 (Harvard University Press 2001) dreaming (pointing out that in the United States, poverty is strongly related to the likelihood of reports of child neglect). Such a strong link between poverty and reported child neglect suggests that the standard of proof articulated by Santosky fails to serve as sufficient protection against the erroneous termination of parental rights.
262 Candra Bullock, Low-Income Parents Victimized By Child Protective Services, 11 Am. U. J. Gender Soc. Pol’y & L. 1023, 1034 (2003), referencing Santosky, 455 U.S. at 745, 755 (1982) stating that the standard of proof represents societal judgment regarding the manner in which the 'risk of error should be distributed between the parties').
263 Id.
264 Liebman, supra, at 148.
268 Mikhail Bakunin
TOTTALLY CROSSED OUT: A ROUNDTABLE DISCUSSION ON PRACTICE STRATEGIES TO ADVOCATE ON BEHALF OF CROSSOVER/DUALLY-INVOLVED YOUTH

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I. INTRODUCTION
Crossover Youth, also referred to as Dual Status youth, are children and youth who have involvement in both child welfare and juvenile justice systems. In touching both systems, this population presents unique opportunities and challenges to attorneys in our identification and advocacy of each youth’s legal and clinical needs. Moreover, as jurisdictions differ in resources and demographics, a comparative approach reveals both gaps and commonalities in trauma-informed services offered to these youth. However, most critical is addressing the apparent and undeniable disproportionate representation of children of color and girls across all systems and jurisdictions.

This paper will provide perspectives developed from practicing in jurisdictions both big and small, as well as urban and rural. While the nature of a jurisdiction will impact some aspects of advocacy with this population, some commonalities exist. First, we will explore the importance of taking a trauma-informed approach in working with our youth as well as our juvenile justice partners. Each youth’s trauma history, the driving factors underlying a youth’s shift into delinquent behaviors, and the importance of receiving trauma-informed services in both systems all must be considered. Second, we will identify key stages for advocacy before, during, and after a foster youth makes contact with the juvenile justice system. Additionally, for Minor’s Counsel, a significant consideration is a client’s best interest versus stated interest in advocating for a legal outcome, while still accounting for a youth’s criminal behavior. Finally, we will discuss other intended consequences of implementing a Dual Status Model.

II. WHO ARE CROSSOVER/DUALLY-INVOLVED YOUTH?
The term “Crossover youth” refers to minors who are simultaneous involved or known to both the child welfare and juvenile justice systems. For current foster youth, who are victims of abuse and neglect, committing an offense can bring them into the delinquency system. Similarly, at times, a youth is arrested for a crime, but after investigation, it appears that the child and family would be better served by the dependency system.

In California, the term “Dual Status” developed after the passage of Assembly Bill 129 in 2004. This bill allowed California counties to develop local dual-jurisdiction protocols that would permit child who meet certain criteria to be designated as both a dependent child and a ward of the juvenile court. Since then, some counties have elected to use the “on-hold” model where a child’s dependency status is suspended until the delinquency jurisdiction has terminated. Other counties utilize the “Lead Court/Lead Agency” model which designates whether the probation department or child welfare agency will take the lead in case management, court hearings, and other duties as delineated by their local protocols.

Additionally, the Guidebook for Juvenile Justice and Child Welfare System Coordination and Integration, published by the Robert F. Kennedy Children’s Action Corps, makes further distinction among Dual Status youth based on a child’s prior history and involvement:

- **Dually-Identified Youth**: currently involved with the juvenile justice system and have a history of child welfare system but no current involvement;
- **Dually-Involved Youth**: concurrent involvement (diversionary, formal, or a combination of the two) with both the child welfare and juvenile justice systems;
- **Dually-Adjudicated Youth**: concurrently adjudicated in both child welfare and juvenile justice systems (i.e. both dependent and delinquent).¹

In fact, the prevalence of crossover youth/dually-involved youth is not surprising and is well-documented in research literature. The landmark study by C.S Widon and M.G. Maxfield (2001) found that childhood abuse and neglect increased the odds of future delinquency and adult criminality over all by 29%². More specifically, being abused and neglected as a child increased the likelihood of arrest as a juvenile by 59%, as an adult by 28%, and for a violent crime by 30%. Even more concerning is that maltreated children were younger at the time of the first, committed nearly twice as many offenses, and were arrested more frequently. Moreover, this study also noted that neglected children were nearly as likely as physically abused children to be arrested later for a violent crime. More recently, a 2011 study from King County, Washington, also demonstrated that youth with a history of formal child welfare involvement enter into, are detained, have more frequent contact, and are involved for longer periods of time in the juvenile justice system than children with no prior child welfare involvement.³

Furthermore, crossover youth also present unique challenges once they do enter the juvenile justice system in several ways:
- Lack of placement options and, thus, longer periods of detention in Juvenile Hall
- Lack of parental involvement and advocacy
- Educational instability
- High rates of running away (aka “AWOL”, absence without leave, status)
- Lack of any adult ties to the community
- More mental health issues
- Vulnerability to commercial sexual exploitation and human trafficking
- Trauma behaviors attributed to delinquency

Knowing the prevalence of crossover youth, there is an increased awareness among professionals in both systems to identify prevention strategies and improve outcomes for these youth. For children in the foster care system, it is imperative to identify which children are at higher risk of future delinquency and how to implement services and support systems to reduce those risk factors. For example, the type of placement can increase a foster youth’s chances of crossing over into delinquency. On study from Los Angeles County found that 63% of offenses committed by dependents occurred at a group home.⁴ Another study found that child welfare group homes were associated with a significantly higher risk of delinquency as compared to family foster home placements.⁵

While the prevention of crossover youth is of utmost priority and urgency, the remainder of this paper will focus on assisting and intervening on behalf of youth who have already found themselves in the juvenile justice system.

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⁴ CFCC Research Update: Crossover Youth in Los Angeles County, (2008).
III. THE IMPORTANCE OF TAKING A TRAUMA-INFORMED APPROACH

As mentioned above, crossover/dually-involved youth have experienced significant traumatic events and situations which have impacted their emotional and physical well-being and overwhelmed their ability to cope. In fact, exposure to trauma causes the brain to “re-wire” and develop itself in a way that will allow the child to adapt and survive in a dangerous world. The stress hormones produced during traumatic events also interfere with the development of higher brain functions and can cause children to always be on “constant alert” for danger. Some other common results are:

- The inability to regulate and manage emotions,
- The inability to navigate and adjust to life’s changes,
- The inability to assess and interpret the emotions and cues of another individual,
- Quick reaction to perceived threats, which result in a “fight, flight, or freeze” mode
- Disassociation
- Difficulties in concentrating or learning.

Recognizing trauma and its effect on youth development is significant because “trauma is directly relevant to understanding the driving factors underlying a youth’s delinquent behaviors and the driving factors that are likely to contribute to desistance or recidivism.” Even more so, “the failure to understand behavior through the lens of trauma leads to flawed interventions that most often miss the central issues facing the young person.” Indeed, child welfare and juvenile justice systems need to work together because children entering delinquency from a foster care background have “challenges that cannot be adequately addressed solely though punitive measures.”

There are several views, with shared values, of the elements that constitute “trauma-informed” care for children and youth involved across systems. The Safe Start Initiative, funded by the U.S. Department of Justice’s Office of Juvenile Justice and Delinquency Prevention, adapted the following Core Components of Trauma Informed Care. It recognizes that a system of care that is responsive to trauma-related needs should consider the following core principles:

- At any age, trauma is a central life event with a complex course that can profoundly share a person’s sense of self and others;
- The symptoms, complaints, and behaviors, of a young person who has been exposed to violence may be coping mechanisms that are not effective anymore;
- Interventions require the use of relational – rather than confrontational – approaches to behavior change;
- Services should be culturally responsive to immediate mental health issues presented.

Similarly, the National Child Traumatic Stress Network (NCTSN) Trauma-Informed Services Systems Work Group also developed a definition of a trauma-informed child and family serving system to include the following elements:

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6 Defining Trauma and Child Traumatic Stress, National Child Traumatic Stress Network.
A service system with a trauma-informed perspective is one in which programs, agencies and services providers: 1) routinely screen for trauma exposure and related symptoms; 2) use culturally appropriate evidence-based assessment and treatment for traumatic stress and associated mental health symptoms; 3) make resources available to children, families, and service providers on trauma exposure, its impact, and treatment; 4) engage in efforts to strengthen the resilience and protective factors of children and families impacted by and vulnerable to trauma; 5) address the parent and caregiver trauma and its impact on the family system; 6) emphasize continuity of care and collaboration across child-service symptoms; 7) maintain an environment of care for staff that addresses, minimizes, and treats secondary traumatic stress, and that increases staff resilience.  

Additionally, a trauma-informed community of child welfare, juvenile justice, and school professionals can make a huge difference in diverting and preventing youth from entering the juvenile justice system in three ways:

1) Youth whose offenses arise out of trauma symptoms can be handled informally outside of the juvenile justice system;
2) Youth who may be particularly vulnerable to trauma from juvenile justice processes can be assisted through voluntary services outside of court;
3) Diversion services can be designed to address youth trauma issues, which, in turn, make it easier to comply with the terms and conditions of any contract.

In sum, a key goal of any jurisdiction working with crossover/dually-involved youth is ensuring that its professionals and systems establish a trauma-informed culture and practices that recognize the unique challenges and histories of these youth.

IV. IDENTIFYING THE KEY STAGES OF ADVOCACY WHEN A FOSTER CHILD MAKES CONTACT WITH THE JUVENILE JUSTICE SYSTEM

Collaboration among system partners is essential in ensuring the best legal and clinical outcomes for foster youth making contact with the juvenile justice system. The Crossover Youth Practice Model (CYPM), established by Georgetown University’s Public Policy Institutes Center for Juvenile Justice Reform, has identified that a successful, strong collaborative jurisdiction includes the active participation of child welfare, juvenile justice, family court, education/school, and behavioral health systems. Although historically each of these systems has operated in silos, it also is “eye-opening” for these agencies to see the overlap in youth touching multiple systems. Thus, it is critical that these partners: 1) acknowledge their inherent connectivity to each other; 2) cultivate relationships in order to best serve these youth; and 3) make a commitment through formalized agreements to partner and collaborate.

Furthermore, for youth advocates, it is critical to promote and ensure a collaborative model in our jurisdictions because it is in our client’s best interest that our advocacy efforts are not unnecessarily duplicated, appropriate case plans are implemented, quality of services are monitored, among many other beneficial outcomes. Furthermore, close monitoring and active advocacy efforts are necessary because research has confirmed that foster youth receive harsher outcomes in the juvenile justice system when

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14 Feierman, J. & Fine, L., Trauma and Resilience, supra, at 19.
15 Stewart, Cross-System Collaboration, supra, at 2.
16 Id.
compared to other youth who have no child welfare history.\textsuperscript{17} The discussion below identifies key critical stages of the juvenile justice system along with practical advocacy tips.

**At The Time Of Arrest/ Pre-Hearing**

- **Identification:** Dually involved youth may be detained more often and for longer periods than youths without a child welfare cases.\textsuperscript{18} Ensure that your jurisdiction has a policy or process at time of arrest or intake to identify foster youth. Early identification allows for an assessment of the youth’s needs, understand why an arrest occurred, and divert the youth from formal entry into the juvenile justice system.\textsuperscript{19} For Minor’s Counsel, teach your clients that if they make contact with the police, and/or have an incident at school or in the community where law enforcement is present, that they tell the officer that he/she is a current foster youth and the name of his/her social worker. The Crossover Youth Practice Model also recommends that the social worker should be required to attend the minor’s court hearings for the duration of the period of detention.\textsuperscript{20}

- **Request a pre-filing diversion:** if a less serious incident occurs at school, ask if it can be handled through the school system, especially if the student has known or likely special education needs. Similarly, for first time incidents that pose low-risk safety risks the community or to the youth, ask for diversion services. In fact, in studies have identified a “foster care bias” where jurisdictions have limited the opportunity for foster youth to be offered diversion because it was assumed that no one would ensure that the youth would comply with services.\textsuperscript{21}

- **Engage Foster Parents:** Ensure that the foster parent is notified immediately and engaged in a conversation about the incident. This is important because when foster parents are not notified in a timely manner, they are less likely to take the youth back into their home due to fear, anger, frustration, or lack of information.\textsuperscript{22} However, by engaging them and encouraging communication, it is possible to influence them to allow the youth back into their home, and possibly to assist and support any diversionary case plans. For youth living in group homes, ask if a staff member or a member of the child’s service team will pick the youth up if released so that the youth’s bed is not “closed” or reassigned.

**Detention/Initial Hearing**

- **Communication:** Ensure that a juvenile justice probation officer or intake worker has communicated with the child’s assigned child welfare social worker so that the initial or subsequent report will taken into consideration a child’s psychosocial history, trauma history, and how the current arrest could be connected to any internal triggers.

- **Inform the Juvenile Justice partners of any current services being provided:** if not communicated above from the social worker, inform the public defender and/or the court of services already in place through dependency to support the child’s social and emotional well being as well as ensure the community’s safety.

- **Identify placement to which minor can be released:** this can be a current/former foster home, group home if bed is still available, and/or relative. Bonus: if that person can be present at hearing and indicates a willingness to have the minor in his/her home.

- **Request an assessment of which system should supervise and best meet the minor’s needs:** The most effective and accurate assessments utilize and include the input of the youth, his/her family,


\textsuperscript{18} Id. at 38.

\textsuperscript{19} Id. at 36.

\textsuperscript{20} Id. at 37.

\textsuperscript{21} Stewart, supra, at 2-3.

\textsuperscript{22} Herz et al., supra, at 37.
social worker, minor’s attorneys, school staff, and other clinical service professionals who have worked closely with the youth. Additionally, the assessment should take a holistic approach at the nature of the offense, the situational context in which the incident occurred, the youth’s emotional status and attitude toward the offense, educational status, and current clinical services in place.

**Jurisdiction And Disposition**
- *Identify factors in mitigation of the offense, including trauma issues*: Assist the juvenile court in understanding the youth’s behavior by placing it in “the context of his/her current and past life experiences.” This is critical because it can “prevent exaggerated perceptions of risk,” especially as seen through the eyes of the district attorney.
- *Work with the Public Defender (or juvenile criminal attorney) to identify competency issues*: It is well document that because of abuse, neglect, and trauma – especially in utero and during early childhood years - foster youth have higher mental health needs, developmental delays, emotional immaturity, special education needs, processing deficits, and other issues when compared to youth without child welfare histories. These special needs may impact a youth’s ability to comprehend the nature of the criminal proceedings and the consequences of their actions.
- *Help form a practical rehabilitation plan*: Utilizing the previous and ongoing assessment from the social worker and juvenile justice professional, case plans should be “focused, time limited, behaviorally specific, attainable, relevant, understandable to all,” and help the youth to change their risk-taking behaviors. It should also identify the interventions and services that will be implemented, especially integrating the failure and/or success of previous interventions tried in the dependency system.

**Additional Ongoing Efforts**
- *Coordinate with child welfare worker and other service providers*: To reduce the likelihood of the youth re-offending or exhibiting more delinquent behaviors, it is important that the child’s team of providers and workers are clear in who will serve as lead and have primary responsibility in implementing each component of the case plan. Furthermore, it is important to maintain routine communication and conduct an ongoing assessment of the youth’s needs and the quality of the service providers.
- *Collaborate with delinquency attorney to provide competent representation*: Unfortunately, with high caseloads in our public defender systems, it is easy for our foster youth, who have little or no healthy adult connections, to receive inadequate time, attention, or resources to their case. By creating a partnership and being visible in the criminal proceedings, we ensure that our foster youth’s case is being appropriately handled to both ethical and legal standards.
- *Visit and check-in with the youth client*: Unfortunately, a foster youth’s dependency attorney might be the only one truly asking the youth for his/her perspective on how things are going, input on the quality of services provided, and listening to his/her concerns and questions. In particular, foster youth incarcerated at juvenile hall or camps/ranches often do not have families or friends visiting them, and feel especially alone and isolated, which can contribute to a decline in their mental health.

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23 Id. at 38.
24 Id.
25 Id. at 39.
26 Ibid.
27 Id. at 40-41.
28 Id. at 42.
29 Ibid.
• Advocate for the youth to have meaningful social connections in the community: Research clearly shows that the positive relationships that youths have is a deterrent. (Department of justice, office of justice programs; office of juvenile justice and delinquency prevention launches national mentoring resource center. (2015). Politics & Government Business, , 40 Dependent youth have fewer social connections that youth that are not in care. http://www.childtrends.org/the-importance-of-permanent-connections-for-youth-in-foster-care/ Actively work to promote mentors and other in the youth’s life.

Addressing Best Interests V Stated Interests
An additional outcome of foster youth crossing over into the juvenile justice system is that they are now represented by two attorneys with very different ethical roles. A delinquency attorney’s ethical duty is to zealously advocate for the youth’s stated wishes, much as the attorney would in an adult criminal proceeding. Thus, the attorney takes the direction and strategy of their criminal case from the expressed wishes of the youth. In contrast, a minor’s dependency attorney has dual roles – not only to advocate for the child’s wishes, but to also to guard and advocate for the child’s best interests. In particular, this dual role is reinforced as the court appoints the dependency attorney to serve as both the child’s legal counsel and the child’s guardian ad litem. However, in acting as a parental substitute and recognizing the both the short-term and long-term needs of a youth, it is possible and likely the dependency attorney may have a different opinion or perspective on a child’s new or ongoing involvement in the juvenile justice system. Nonetheless, if this occurs, there are still important an advocacy role that can be taken.

• Help the youth client understand the stakes of having a probation case: Explain the differences between the two systems, such as the roles of social workers and probation officers, the consequences of not complying with probation terms, the collateral consequences of having a juvenile record, etc.
• Do not advocate for sole delinquency status and take a strength-based approach: Especially in jurisdictions that allow for dually-involved youth, where both systems can be actively open, help the court to see the value in maintaining the child’s connection to the social worker, dependency attorney, CASA, and other child welfare professionals. Additionally, if the child is a younger teenager, this will greatly assist the youth in transitioning back to dependency after the probation goals have been reached. Highlight for the court the child’s prior successes in school, placement, and services, which demonstrate this child’s future potential.
• Assist the Juvenile Justice Court and partners in taking a holistic approach to the child’s needs: This includes informing and reminding the court and public defender of the child’s treatment needs, existing court orders (including visitation with siblings and parents), Educational Rights Holders, psychotropic medications, special education and/or Individualized Education Plans, and family reunification orders.

V. THE UNINTENDED CONSEQUENCES OF A DUAL STATUS MODEL
Even as jurisdictions make progress in serving crossover youth with trauma-informed professionals and competent legal representation, we will see other unintended consequences and outcomes arising from implementing new policies, procedures, and practices. While not comprehensive, the factors below are a few that should be taken into consideration and evaluated periodically.

31 Id.
• “Net-widening:” The juvenile justice system should be used for its intended goals of rehabilitation, accountability, and prevention of future criminality. It should involve youth who require and would benefit from a level of intervention and supervision by juvenile probation. One major concern with dual status collaboration is that it will lead to “dumping” by child welfare professionals of foster youth who are more challenging than typical foster youth, exhibiting severe trauma history, committing mostly status offenses, or experiencing “normal” teenage behaviors but under the watchful eyes of more than just two parents. Thus, it is important that foster youth be offered diversion services as well as other voluntary services.

• Racial and Gender Disparities: Research has shown that youth and families of color are more likely to be brought into the juvenile justice and child welfare systems, even when accounting for other factors. Similarly, girls who enter the juvenile justice system have experienced higher rates of neglect, and physical, sexual, and emotional abuse than boys. In particular, girls are victims of sexual abuse at higher rates, and have witnessed higher incidents of domestic violence. More recently, there also has been a rise in youth with nonconforming sexual orientation and gender Identification, who often are truant, running away from placement, engage in other “survival crimes,” and are at high risk of victimization. Once again, as advocates, we can ensure that the juvenile justice system is taking a trauma-informed approach and implementing services that are unique to a child’s gender, sexual identity, and/or provided by culturally competent professionals who understand a child’s family background.

• Self-incrimination: In representing youth who have significant trauma histories and may act out as a result of it, attorneys must be careful not to disclose any information that could be used against their clients, especially when speaking to child welfare professional or service providers. Additionally, attorneys should seek permission from their clients first and explain to the youth how and why they plan to use certain information about their childhoods and past. Similarly, some dual status jurisdictions include the youth in team meetings when assessing appropriate needs and services. This may require a youth to share behaviors or feelings previously unknown, and a provision in protocols should ensure that information gained in treatment meetings is inadmissible in future proceedings.

• Privacy Issues: Although “information-sharing” across systems and providers is critical in addressing and ensuring the proper services for foster youth, it is important that jurisdictions create and implement a protocol that protects a child and family’s right to privacy and confidentiality. In particular, this can include guidelines to information sharing among service providers and professionals, and inter-agency agreements between child welfare and juvenile justice.

VI. CONCLUSION
Although our foster youth who become involved with the juvenile justice can be our most challenging clients, because of their high-risk behaviors and high-needs of services, they are also the population on our caseloads who require and greatly benefit from initial and ongoing advocacy, both within and outside of the courtroom. In assisting our system partners to take a trauma-informed approach and perspective in evaluating the behaviors and needs of our youth, we ensure that our foster youth only enter the juvenile

33 Herz, et al., supra, at 71.
34 Feierman, J. & Fine, L., supra, at 17.
35 Id. at 11.
36 Id. at 13.
37 Ibid.
38 Id. at 14.
39 Id. at 16.
40 Id.
justice system when truly appropriate, and when they do crossover, that the services put into place are individualized and work towards a goal of returning the youth to the dependency system.
USING DATA TO INFORM MULTIDISCIPLINARY SYSTEMS CHANGE: THE ILLINOIS CHILD PROTECTION DATA COURTS PROJECT

Heather Dorsey
Kristie Osborn

The Child Protection Data Courts (CPDC) Project involves a partnership with the Administrative Office of the Illinois Courts (AOIC), the National Center for State Courts (NCSC), Systems Change Solutions, Inc. and the counties participating in the Project. The CPDC Project establishes a court performance measurement and reporting process that allows project sites to report and share findings on the nationally recognized dependency court performance measures. Those findings are then used by local multidisciplinary collaborative stakeholder teams to evaluate performance against best practice standards and to design interventions to improve their child protection court process and outcomes. At its inception, in 2009, there were five counties participating in the CPDC Project, representing a mix of urban, suburban and rural jurisdictions. By 2014, the number has increased to nine counties. Counties participating in the Project include: Jefferson, Kane, Kankakee, Madison, McDonough, McHenry, McLean, Peoria and Winnebago.

The CPDC Project Method
The CPDC Project data collection and analysis method examines the process and outcomes for children who have exited each project site’s juvenile child abuse and neglect court system. Local data coders review the courts’ case files and code, into an excel spreadsheet, information from child protection cases that closed within the calendar year. Information coded includes case demographics and national child protection court performance measures. Completed spreadsheets are uploaded to the AOIC and cleaned datasets are then analyzed by independent researchers at the NCSC who, in collaboration with a project consultant from Systems Change Solutions, Inc., generate county-specific reports summarizing that county’s performance on the child protection court performance measures. Once the reports have been finalized, multidisciplinary teams from each CPDC Project site attend an annual networking meeting. This meeting, facilitated by the AOIC, provides sites with an opportunity to review their county-specific data reports, discuss the findings, share and compare findings to the other project sites and the state as a whole, and use data to develop local action plans to improve court practice.

After initially beginning the project using solely manual data collection, Winnebago County began implementing an automated performance measurement process in 2011 with the help of expert consultants from the NCSC. This automated process was modeled from the CPDC Project manual data collection instrument. In 2012, McHenry County also began an automated measurement process using the program developed in Winnebago County.

Winnebago County has conceptualized and developed real-time child protection interfaces (referred to as "CPDC Data Dashboards"). The collection tool, including a data harvester, is designed to pull selected...
data from a configured court and case management system. Using a web-enabled interface, the end product user is able to select cases of interest based on a chosen timeframe of when cases were closed. After completing the file selection process, with a single click of a button all available data from the selected cases is harvested from the court and case management system. The CPDC Application was designed to be database agnostic—meaning that the application can be configured to work with any court and case management system.

Winnebago County has further developed three functional dashboards as add-on tools within the web-based CPDC Application. These dashboards function by pulling information from a configured court and case management system in the same fashion as the CPDC Application itself. Two of the developed dashboards operate on a "Macro-Level" to provide real-time information on aggregate juvenile abuse and neglect case data and a third, “Micro-Level” dashboard real-time case information on individual cases.

Data Reports and Data Sharing

Data reports include demographic data, case processing timeliness, and safety, due process and permanency outcomes for each project site. Reports also include measures of court workload and delay, such as the number of hearings per case and the percentage of specific hearings resulting in a continuance by continuance reason. Case processing timeliness and permanency outcomes are analyzed by age cohort and demographic and case characteristics.

In addition to data reports summarizing findings for the latest year of data collection, sites are given a trend analysis which compares data across project years. The trend analysis allows sites to examine changes over time in outcomes such as time to major court events, time to permanent placement, permanency outcomes (e.g., reunification rates and adoption rates), continuity of judges and attorneys, continuances, and frequency of post-dispositional reviews.

Highlights of Key Findings

Permanency and timeliness outcomes are analyzed by case demographics and case processing variables to determine if specific features of cases and/or specific case processes were more likely to result in different outcomes. Samples of key findings are found below.

Timeliness of Court Hearings

- **Adjudication:** From 2011 to 2013, just under half of CPDC cases achieved adjudication within the best practice standard of no more than 90 days from original petition filing.
- **First Permanency Hearing:** For every year analyzed, the majority of CPDC cases were able to complete the first permanency hearing within 12 months of temporary custody or removal of the child.
- **Termination of Parental Rights:** From 2011 to 2013, completion of the termination of parental rights in CPDC cases has taken approximately 30 months from the original petition filing.

Due Process/Fairness

- Judicial changes in the life of a case were significantly associated with case processing and permanency timeliness. A change in judge before adjudication was associated with longer times to adjudication (p<.05). More than two changes in judge were associated with longer times to the first permanency hearing (p<.01), termination of parental rights (p<.01), and longer times to achieve permanency overall (p<.01).
- Changes in counsel for the child in a case were found to be significantly associated with longer times to achieve the first permanency hearing (p<.05) and longer times to achieve permanency overall (p<.05).
- Changes in counsel for the mother (p<.05) and for the father (p<.05) were found to be significantly associated with longer times to achieve the termination of parental rights.
Delay and Workload

- The more continuances in a case, the longer the time to achieve the first permanency hearing (p<.05), the termination of parental rights (p<.01), and to achieve permanency overall (p<.0001, p<.001).
- Frequent post-dispositional review of cases was found to have a positive influence on timely case processing. Cases with more post-dispositional reviews were significantly associated with shorter times to achieve the termination of parental rights (p<.001) and shorter times to achieve permanency overall (p<.001).

Permanency

- In 2012, CPDC Project sites had a median of 933 days to permanent placement. The median days for the state of Illinois were 1,050 with a difference of 117 days.
- Most of the CPDC caseload each year has closed within 12 months of original petition filing.
- In addition, cases with multiple changes in judge (p<.01, p<.05), counsel for the child (p<.05), and counsel for the mother (p<.05) took longer to achieve permanency.
- Cases that appointed counsel for the mother (p<.05) and counsel for the father (p<.05) at later stages in the case took longer to achieve permanency.
- Cases with a CASA had shorter times to permanency (p<.05).
- Cases with more continuances (p<.01) and fewer post-dispositional review hearings (p<.001) took longer to achieve permanency.

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WHAT DOES FERGUSON HAVE TO DO WITH JUVENILE JUSTICE AND CHILD WELFARE?

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Editorial Assistance by and Special Thanks to Robin Ruhe Murray

Introduction

“Hands up, don’t shoot” became the battle cry following the shooting death of Michael Brown, an 18 year old unarmed black male, by a white police officer, in Ferguson, Missouri. Focused on the issue of excessive use of police force against black males, local, national and international media descended upon Ferguson, making it the number one news story nationally, and arguably, internationally. As inaccurate and speculative reporting on social media fanned the flames, and events continued to unfold, inquiries involving Michael Brown’s past life and juvenile records became of interest to the press. Rumors bred unrest and demonstrations in St. Louis County and in other U.S. cities. The August 9, 2014 event ignited a racial movement across this country as additional police-involved shootings received significant media coverage. Not since the 1960s has there been such widespread civil racial unrest and all unfolding on the heels of the 50th anniversary of the march on Selma.

One may ask, how did Ferguson and such a pivotal event involve juvenile justice and child welfare? As the chief juvenile prosecutor for St. Louis County, Missouri, let me explain.

St. Louis County, Missouri Demographics

St. Louis County, Missouri is a total of 507.80 square miles. The population in 2013 was approximately 1,001,491 for all of St. Louis County; 70.3% white and 23.7% black. Ferguson is one of the 97 municipalities that make up St. Louis County. The North County area where Ferguson is located does not reflect the overall racial demographics of the County. In fact, North County numbers indicate a reversal in racial composition.

Ferguson, Missouri Demographics

Ferguson is 6.20 square miles located in the northern area of St. Louis County, Missouri. According to the United States Census Bureau in 2010, the population of the municipality was 21,203. The ethnic composition of the area has shifted in the last 45 years. In 1970, 99% of the population of Ferguson was Caucasian and 1% African American. By the 2000 census, 44.7% were White and 52.4% were Black. As of the 2010 census, the racial makeup of the city was 67.4% African American, 29.3% Caucasian, with the remainder being other ethnicities.

However, as the population shifted, the racial makeup of the local government and law enforcement agencies continued to be predominantly white.

**Juvenile records and confidentiality**

It has long been believed that preserving the privacy of juveniles adjudicated in the juvenile court is a critical component of a youth’s rehabilitation. These values and beliefs have been set by state laws and judicial norms. The first juvenile court began in 1899 in Chicago, IL. This specialized court was formed to shield children from the scrutiny that an adult might suffer after committing a criminal act and to allow youthful offenders to be rehabilitated and take their place as law-abiding adults unfettered by their childhood mistakes. See generally Juvenile Records, A National Review of States Laws on Confidentiality, Sealing and Expungement. A publication by Juvenile Law Center, with contribution from Community Legal Services of Philadelphia, 2014.

*Application of Gault*, 387 U.S. 1, 87 S. Ct. 1428 (1967) and *Kent v. United States*, 383 U.S. 541, 86 S. Ct. 1045 (1966) set out the theories of *parens patriae* (the state acting in a “parental” capacity over a juvenile) and firmly established the policy of this country’s juvenile justice system by reinforcing the need to protect individuals from youthful transgressions until they can be productive adults. The construct of the juvenile court was to keep the mistakes of poor childhood decision making from having severe, long term, detrimental consequences and to allow our youth to become rehabilitated and ultimately a value to society in their adult capacities.

The Missouri juvenile court system was established in 1957. The issue of confidential records for juvenile court proceedings under Missouri’s approach takes the middle ground recommended by the National Association of Counsel for Children by balancing the interests of rehabilitation and the potential for public stigmatization of the child and family against the need for community knowledge and system accountability.\(^6\)

**Missouri Law on Juvenile Records**

Section 211.321 RSMo. addresses the confidentiality of juvenile delinquency and status offender records maintained by the Family Court. Juvenile records may be open to inspection or their contents disclosed only pursuant to two exceptions, both created by the legislature: 1) by “order of the court” to “persons having a legitimate interest” and 2) “without court order” for the “records of dispositional hearing and proceedings related thereto” if the juvenile has been adjudicated to have committed an offense that would be a felony if committed by an adult. Section 211.321.2(2).

Juvenile records have generally been closed by the legislature. *In re Transit Casualty Co.*, 43 S.W 3d 293, 302 (Mo. 2001), citing Section 211.321 RSMo. “The general policy of the juvenile code is to hold the records of juvenile proceedings inviolate.” *State ex rel. S.M.H. v. Goldman*, 140 S.W.3d 280, 282 (Mo. App. 2004). To lessen the “potential for abuse of juvenile records,” the purpose of Section 211.321, addressing the confidentiality and dissemination of juvenile delinquency and status offense records “is to prevent a broad, unrestricted use of juvenile records by the general public.” *S.M.H.*, 140 S.W.3d at 282. This has been the policy of the State of Missouri for nearly sixty years, when Section 211.310, the predecessor to Section 211.321, was first enacted in 1957.

Even when juvenile records are ordered to be disclosed, they cannot be “disseminated generally.” *State ex rel. Arbeiter v Reagan*, 427 S.W.2d 371, 378 (Mo. banc 1968). They must be “restricted to a narrow use,” rather than a “general public use.” *State v. Scott*, 651 S.W.2d 199, 202 (Mo. App. 1983); *State v. Connor*, 607 S.W.2d 784, 786-87 (Mo. App. 1980).

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Over time the privacies afforded juveniles have eroded by allowing public access to and victim participation in juvenile proceedings. Records have been opened further due to safety concerns in schools and the advancement of the theory of the “juvenile predator” that formed in the 1990s. In spite of more liberal access to juvenile records by such statutory changes, the media requests for the release of Michael Brown’s juvenile records were denied due to the failure of the media to overcome the statutory hurdles.

Media and Michael Brown
In an attempt to justify and make sense of the shooting and amid rumors that Michael Brown had a record of serious juvenile delinquency, including the possibility of murder, media requests for his records began to flow into the Family Court under the Sunshine Act. Since the Sunshine Act applies to public/open records of the government and juvenile records are not public records by legislative and judicial actions, the Court denied the media’s requests. The media’s next step was to pursue release of Brown’s juvenile records under Missouri statute.

In a hearing held with the public and media present, the issue of the confidentiality of juvenile records involving Michael Brown was initiated by separate motions for release of records filed by Petitioners Jeremy Kohler of the St. Louis Post Dispatch and Charles C. Johnson of Got News LLC d/b/a GotNews.Com.

Statutory Exception #1: Release of Juvenile Court Records by Court Order
As cited above, the Juvenile Court could have ordered the release of Brown’s records, if any, to persons having a legitimate interest. The media’s argument was that they did not need to have any particular interest, let alone a legitimate interest, and that the state had no interest in keeping Brown’s records confidential after his death. The Court denied their request because their arguments were not convincing as their position and the case law cited were based upon a different statute (Section 211.271.3 RSMo.) which establishes an evidentiary privilege against using a child’s custodial statements and juvenile court and social records against the child in any non-juvenile court civil or criminal proceedings. Case law has held that the privilege is exclusive to the child and expires upon the child’s death. See generally State v. Mahurin, 799 S.W.2d 840 (Mo. 1990); State v. Russell, 625 S.W.2d 138 (Mo. 1981); State ex rel. Rowland v. O'Toole, 884 S.W.2d 100 (Mo. App. 1994) and Smith v. Harold’s Supermarket, 685 S.W.2d 859 (Mo. App. 1984).

Opening Brown’s juvenile records to news organizations for distribution to the public is precisely the general dissemination of juvenile records that is prohibited under the Arbeiter decision. Such distribution would weaken the shield of all children under juvenile court authority from potential adverse effects that community-wide or public scrutiny would have on their rehabilitation and would signal to them and the community that their rehabilitation would not be zealously guarded and pursued. See Jamison, 218 S.W.3d 399, 402, 410 (Mo. 2007). Using Brown’s records in that manner would undermine confidence in the juvenile court system as well as impact the child and parents’ reputational interests. Furthermore, opening Brown’s records would do nothing to promote the traditional function of open records, i.e., to ensure confidence in the impartiality and fairness of the juvenile court system and to discourage bias and corruption in its service. Transit Casualty Co., 43 S.W.3d at 301.

Statutory Exception #2: Release of Juvenile Court Records without Court Order
Under the second exception to confidentiality of juvenile records, the Court could have released Brown’s juvenile court records of dispositional hearings and related proceedings if Michael Brown had ever been adjudicated of any serious delinquent acts “which would be a felony if committed by an adult.” If there had been such felony delinquency adjudications, the records of related dispositional hearing and proceedings would have been *open to the public* to the same extent that records of criminal proceedings

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7 [www.ojjdp.gov/PUBS/reform/ch.2_i.html](www.ojjdp.gov/PUBS/reform/ch.2_i.html)
are open to the public.” Section 211.321.2(2) RSMo. (emphasis added.) No such public records as either a juvenile or adult ever existed with regard to Michael Brown.

THE BIGGER PICTURE
Michael Brown and Ferguson have come to symbolize the much larger issue in the African-American community of disproportionate contact with and dissimilar treatment of African-Americans by law enforcement and the justice systems. The familiar “hands up” and Ferguson appear in the lyrics of the Academy Award winning song “Glory” by John Legend and the rapper, Common. Black celebrities invoked Michael Brown’s name on the red carpet at awards shows. Marches of solidarity occurred across this country following the shooting, and the burning issues of the Ferguson event have been repeated as similar police shootings of unarmed, black males continue to occur. Racism is as evident as 50 years ago in Selma and the days of Martin Luther King, Jr. While the issue of juvenile records confidentiality, a small piece of the puzzle, played out in the Family Court of St. Louis County, the much larger issue of African-American and minority contact within the adult and juvenile justice systems continues to receive attention within this country. A review of the national literature and statistics and the local statistics of the Family Court of St. Louis County support the claims and concerns of disproportionate minority contact in the juvenile justice and child welfare systems, warranting a closer look at this issue and a call for action.

Disproportionate Minority Contact (DMC)
DMC in Juvenile Justice and Delinquency Matters
The Office of Juvenile Justice and Delinquency Prevention (OJJDP) under the Juvenile Justice and Delinquency Prevention Act (JJDP Act) addresses the issue of disproportionate minority contact (DMC) through the administration of grants. These programs require participating states to develop and implement plans to reduce the disproportionate numbers of youth confined in secure juvenile detention facilities. Missouri is one such state that has been working on the DMC issue in conjunction with the Annie E. Casey Foundation. St. Louis County Family Court has been addressing this issue for over a decade in this state-wide initiative.

DMC is defined in the JJDP Act as existing when “the proportion of juveniles detained or confined in secure detention facilities, secure correctional facilities, jails, and lockups who are members of minority groups . . . exceeds the proportion such groups represented in the general population.” Through the years of dealing with and defining the best methods to improve DMC, significant research has been devoted to the topic and many lessons have been learned. Two of those lessons are: 1) DMC representation is not limited to secure detention confinement and is evident in most jurisdictions at nearly all contact points in the juvenile justice system; and 2) factors contributing to DMC are complex and multiple, and reducing DMC requires comprehensive and multi-faceted strategies that require programmatic and systems change efforts. “The purpose of the core requirement [of DMC] remains the same: to ensure equal and fair treatment for every youth in the juvenile justice system, regardless of race and ethnicity.” Research has also shown that using secure detention “as the primary response to youth’s delinquent behavior generally produces poor outcomes at high costs.”

Explanations often provided for DMC involving the factors that impact police involvement and court referrals are: 1) offending behavior rates are greater and/or more serious in nature in minority communities than in non-minority communities; and 2) risk factors are more prevalent in minority communities.

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8 Juvenile Justice and Delinquency Prevention Act Section 223(a)(23).
9 In Focus, November 2012, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention.
10 Id.
communities than in non-minority communities. An examination of the statistics and national research on the topic does not support the rationalizations and conclusions involving prevalence of delinquent behavior among minorities. While those of us who work at family courts say that “we deal with what is presented to us,” further examination and efforts are needed to address the underlying causes and determine methods to deal with the problems and issues involved.

Among the risk factors considered in the report submitted by the U.S. Department of Justice entitled “Disproportionate Minority Contact in the Juvenile Justice System: A Study of Differential Minority Arrest/Referral to Court in Three Cities, A Report to the Office of Juvenile Justice and Delinquency Prevention” by Huizinga, Thornberry, Knight, Lovegrove, Loeber, Hill and Farrington (2007) were “neighborhood, family economic status, family structure (single parents), age of mother at first birth (teen mom), and youth educational problems”. The conclusions reached in this three-city study were: 1) minority youth are more likely to have contact with the juvenile justice system and to penetrate further into it than non-minority youth; and 2) when variables measuring individual characteristics, offending patterns, and offense characteristics are held constant, the effect of race still remains statistically significant, but smaller in size. In other words, offending behavior rates and prevalence of risk factors in minority communities cannot alone fully explain the disproportionate numbers of minority youth in contact with the juvenile justice system.

Research shows that 7 out of 10 youth in secure detention nationwide are minority juveniles. That rate is more than double the percentage of the minority youth population. Efforts made in St. Louis County to reduce the minority population within our secure detention facility have reduced the total average daily population of the detention center and the number of days or average length of stay that a youth remains detained, but the overall population remains overwhelmingly African-American males. In 2013 the detention population was 80% black, 17% white and 3% other. In 2014 it was 87% black and 13% white, and in the first quarter of 2015, 92% black and 8% white. With the overall population of St. Louis County being 23.7% African-American, those numbers clearly reflect the over-representation of minority youth in spite of all of our efforts. A state-wide risk instrument was adopted to standardize decisions regarding the detention of juveniles. The instrument is completed for every juvenile who is brought to the detention center. The result has been more uniformity in decision making and a reduction in the actual number of detained youth. Those youth being held beyond a 24-hour period of time are mainly individuals accused of committing felony sex offenses, felony crimes against persons or property, felony weapons offenses, or youth who violated their court order or probation.

DMC in Child Welfare Matters
In January 2011, Harvard Law School and the University of Chicago co-sponsored a conference addressing “racial disproportionality” in child welfare. The National Council of Juvenile and Family Court Judges and the National Court Appointed Special Advocates participated in the conference. The goal of the conference was to examine the “best available evidence comparing actual to official maltreatment rates for black and white children and assessing the degree to which removal to foster care reflects actual maltreatment rates” and to explore appropriate policy options based upon what the evidence suggests.

Sessions focused on: 1) the historical and social context of racial discrimination and economic injustice that place African-American families at significant disadvantage and as explanation for the high rate of black children in the child welfare system; 2) the empirical evidence that supports black maltreatment

14 Id at 424.
rates are higher and possibly more severe than white children; 3) policy and programmatic options to address the issues; and 4) general reflections of the panel and methods of approaching the future on this issue. The conference presentation by Brett Drake included evidence from Missouri comparing risks to a child versus official child welfare reports. This information showed:

Black/White racial disproportionality among child abuse reports in Missouri is somewhat lower than a range of other (unbiased) measures, including infant mortality, low birth weight and prematurity. Given these findings, it appears that in Missouri, black children are, if anything, somewhat underreported compared to Whites.

Taken together [with the NIS data], these data speak strongly against the presence of large scale overreporting of Blacks in the public child reporting system.

In light of the information from that conference, it is not surprising that the statistics for abused and neglected children for the Family Court of St. Louis County, Missouri show the following:

<table>
<thead>
<tr>
<th>Year</th>
<th>Black</th>
<th>White</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>62.8%</td>
<td>33.2%</td>
</tr>
<tr>
<td>2012</td>
<td>69%</td>
<td>28%</td>
</tr>
<tr>
<td>2014</td>
<td>68%</td>
<td>29%</td>
</tr>
</tbody>
</table>

While the disproportionality of race in child welfare cases is not as alarming as that in the detained delinquency population, the fact is that it is twice as high as that reflected in the general population of this County. Given that fact, more needs to be done within the community to address and ameliorate the underlying issues and concerns in order to provide a brighter future for our African-American communities, and ultimately, our Nation.

Conclusion

Whether the blame is placed on racial profiling by law enforcement; a school to prison pipeline that can leave minority children inadequately educated with fewer options; a lack of financial resources to address underlying issues associated with poverty; shrinking government budgets and public outcry for tax cuts that often fall disproportionately on the social services and public assistance provided in impoverished, minority communities; a lack of adult African-American male role models in poorer neighborhoods due to high rates of incarceration, early death, drug addiction, mental health issues or educated black males leaving their neighborhoods of origin due to their own success of avoiding the negatives associated with poverty in the locations they once lived; or other issues that have not been adequately identified; no matter what your personal views may be on the root causes, Ferguson has become synonymous with the need to address issues of race and class and make change. As the future of our children goes, so goes the nation.

15 Id. (Generally)
16 Id at 427.
Each of us has the potential to make changes within the community. We can all benefit by remembering and implementing the following words of wisdom of the late Robert “Bobby” Kennedy: “Few will have the greatness to bend history itself; but each of us can work to change a small portion of events, and in the total of all those acts will be written the history of this generation.”
I. Introduction

There is an ongoing debate about the efficacy of residential mental health treatment for youth, exacerbated by some of the very public scandals that have erupted around certain facilities. However, attorneys and advocates working with court-involved youth are likely to encounter youth in long-term psychiatric inpatient treatment, even if those attorneys and advocates do not philosophically agree with the concept of inpatient treatment. This paper will provide tools needed to effectively advocate for these youth while they are in psychiatric residential treatment.

To give an example of the desperate need for this advocacy, consider the example of a young, mentally ill client, J.B. At 14 and in the 9th grade, J.B. was arrested for a minor offense in the community, but was repeatedly not compliant with his probation (including the specific directive that he attend school). J.B.’s parent retained an educational attorney, who discovered that J.B. had significant unmet speech needs and was not receiving appropriate instruction. J.B.’s educational attorney worked with J.B. and his mother to obtain appropriate services for J.B., but J.B. was ultimately committed to the local juvenile services agency for continued problems in the community. He was sent to a Psychiatric Residential Treatment Facility (“PRTF”) across the country in the summer of his 9th grade year and remained there for almost two years. There was no communication protocol established between J.B.’s sending school and the new school he attended at the PRTF, so he was enrolled in classes that did not count towards his high school diploma – and took and passed the same elective class three times. The PRTF’s school program also did not understand their obligations to J.B. under the Individuals with Disabilities Education Improvement Act (“IDEIA”), and failed to provide him with speech services for his first year. Because of the lack of communication between the PRTF and J.B.’s “home” treatment team (including J.B.’s social worker, educational attorney, mentor and family members), the PRTF also failed to realize how close J.B. was to his mother and siblings, and no arrangements were made for visitation.

When J.B. was discharged, he had completed the 11th grade, and was returned his home jurisdiction without any clinical services in place (and no referrals made), with no school placement, and with no

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general plan for how J.B. could successfully reintegrate into the community where he had previously struggled. In fact, J.B. had been so poorly monitored while in PRTF (despite constant advocacy from his caregiver and attorneys), that when he returned to his community, he was informed that he would be considered a 9th grader instead of a 12th grader because he had not taken the correct classes while in PRTF. Within weeks of J.B.’s return home, he violated the terms of his probation, was rearrested, and moved to an adult detention facility until his 18th birthday.

J.B.’s story, of almost two years of therapeutic work lost to poor monitoring and poor planning for treatment, is not an unusual one – but strong attorneys and advocates can work to prevent it from occurring in their own cases. The authors’ collective experience on these cases has been that, regardless of the quality of the PRTF or the reason for placement, youth placed in these facilities often fall behind academically, struggle to have their clinical needs met, and are vulnerable to falling into monitoring gaps that leave them ill-prepared to return to the community, even when they have completed their treatment goals. However, many of these problems can be avoided if attorneys and advocates are working at all stages of a child’s stay in PRTF to ensure that the child receives what he needs to successfully return to the community. This paper and accompanying presentation will provide advocates and attorneys with multi-disciplinary advocacy strategies to address these barriers to successful residential treatment, from before admission through discharge. This paper will first provide an overview of PRTFs and their uses; and discuss advocacy strategies to ensure youths’ needs are met and that they receive the greatest, lasting benefit they can from residential treatment.

This paper and presentation will not discuss in depth the potential consequences of PRTFs or the philosophies around whether or not a PRTF is ever appropriate for a given youth, but will focus on providing tools for what attorneys and advocates can do if a youth is placed in PRTF.

II. Abstract

This paper and accompanying presentation provide advocacy tools for issue spotting a child’s educational, clinical and legal needs during psychiatric residential treatment, and provide the audience with concrete, multidisciplinary advocacy strategies from the perspectives of a best interests Guardian Ad Litem, Special Education Attorney and Clinical Social Worker to address these needs.

III. Psychiatric Residential Treatment Facilities (“PRTFs”): An Overview

The first section of this paper provides a basic overview of the nuts and bolts of PRTFs, including key terms, brief statistics and an outline of the process of how youth may be placed in a PRTF through their local government agencies. While many of the features of PRTF placement differ among jurisdictions, this overview should provide attorneys and advocates with a framework of the PRTF process in which they may root their advocacy.

a. What is a PRTF?

A PRTF is defined as any non-hospital facility that has a provider agreement with a state Medicaid agency to provide inpatient services benefits to Medicaid-eligible individuals under the age of 21.3 The facility must be accredited by the Joint Commission on Accreditation of Healthcare Organizations (“JCAHO”) or any other comparable accreditation agency.4

More generally, a PRTF is an out-of-home, non-hospital facility providing a range of comprehensive services to treat the psychiatric condition of residents on an inpatient basis under the direction of a

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3 See 42 C.F.R. § 441.151 (listing the requirements for inpatient psychiatric services for individuals under the age of 21).
4 Id.
A PRTF generally entails a secure, often locked, facility with a strictly controlled environment. The PRTF provides comprehensive around-the-clock care, including medical care, mental health treatment, education, recreation opportunities, and spiritual opportunities. In general, treatment at PRTF focuses on a specific concern, such as behavioral health or substance abuse, which cannot be addressed in a less restrictive environment. A youth’s treatment in PRTF includes numerous clinical components, including individual therapy, family therapy, medication management, group therapy, social skills development, and milieu management.

A PRTF is distinct from a residential treatment center (“RTC”). PRTFs are licensed by the Medicaid authority in their respective states, and meet federal Medicaid criteria for reimbursement to the state’s Medicaid agency by the federal government. PRTFs are always the second-most restrictive treatment setting, with inpatient psychiatric hospitalization being the only more restrictive setting. Residential treatment centers are not subject to the same accreditation requirements as PRTFs, so RTC are more loosely defined than PRTFs. RTCs may not receive any public funds and may be called “boarding schools” or “outdoor programs.” Like PRTFs, residential treatment centers will provide twenty-four hour care and may provide mental health treatment and social services. Residential treatment centers may be less restrictive than PRTFs and may not be locked. Accordingly, children placed at RTCs may not require the intensity of services provided by PRTFs.

b. How Many Youth are Placed in PRTFs?
Placement in PRTFs is monitored at the state level, which makes it difficult to get an accurate estimation of the number of children currently placed in PRTFs. In general, residential treatment programs (including both PRTFs and RTCs) admit approximately 50,000 children per year in the United States. As was alluded to earlier, sixty-nine percent of youth admitted to residential treatment facilities are involved in the child welfare or juvenile justice systems; attorneys, advocates, and professionals working with court-involved youth are likely to encounter PRTF placement on some of their cases.

c. Why are Youth Placed in PRTFs?
Simply put, youth are recommended for placement in PRTFs when their behavioral problems or other needs have risen to such a level that the youth cannot have their needs met in the community. Still, depending on which agency is funding a youth’s placement in PRTF, there are different standards for when PRTF placement is appropriate. By example, and as is further discussed below, for PRTF funding through the District of Columbia’s Department of Behavioral Health, a youth must meet Medical Necessity Criteria for PRTF, which requires that (1) community-based services in the District do not meet the treatment needs of the youth, (2) proper treatment of the youth’s psychiatric condition requires services on an inpatient basis under the direction of a physician, and (3) services in a PRTF can reasonably be expected to improve the youth’s condition, or prevent further regression so that PRTF services will no longer be needed.

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8 Id. at 700.
IDEIA, the youth’s school team must determine that the youth cannot access their education in a less restrictive environment than a residential treatment facility.10

What does this level of need look like “on the ground”? This next section will explore the PRTF placement process by using a case example where PRTF funding was first obtained under IDEIA, and then through DBH.

d. What Does the Placement Process for PRTF Look Like? The Case of P.R. (Placement through School and through DBH)

P.R. is an 11 year old District of Columbia resident, with learning and cognitive impairments. At the beginning of his sixth grade year, P.R. began displaying extreme behavioral problems in school—including being physically aggressive with peers and teachers, running out of the school building and into the street, destroying property (including urinating on his desk on multiple occasions). At the time of his deterioration, P.R was a public school student with an Individualized Education Program (“IEP”) that provided him with specialized instruction and behavioral support services in a day school setting. However, as the school year went on, P.R’s teachers and other service providers determined they could not meet his needs, even when P.R. was receiving all of the specialized services that could be provided in a day school program. P.R.’s school team met, and referred him for treatment at a PRTF. P.R.’s case was reviewed by the public school system at the administrative level, and he was approved for PRTF placement. P.R. spent a year in residential treatment before being returned to the District. Because P.R. was placed and funded through the public school system, he was placed in a PRTF that was accredited by the public school system, in addition to accreditation by the state Medicaid agency.

Unfortunately, six months after P.R. returned the District, he began having behavioral problems in the community. He would run away from home, engage in high risk behaviors including illegal drugs, and was physically aggressive with his caregivers. However, when J.B. was able to attend school, his school was able to manage his behaviors. After multiple short-term psychiatric hospitalizations, P.R. was recommended for another PRTF placement by the Department of Behavioral Health (“DBH”). Instead of using the standard of whether or not P.R. was able to access his education without PRTF placement, DBH utilized the Medical Necessity Standard to determine that P.R. needed to return to a PRTF.11

This example illustrates how youth may be placed and funded in a PRTF through local or state agencies (which both fund and monitor the youth’s placement). While there are similarities in the referral process for PRTFs across state agencies, each funding agency may have a different set of criteria for what constellation of needs mandates PRTF placement. As we will discuss further in the companion training to this article, the funding source for the PRTF is often important in determining who, and what level of monitoring the youth is receiving at PRTF, and to whom to address complaints and concerns if the youth is not being appropriately monitored.

e. What are the Possible Benefits and Consequences of PRTF Treatment?

This final section of the overview of PRTFs explores some of the benefits and possible problems youth may encounter in PRTFs, before delving into advocacy solutions to address these issues. This section focuses on educational and clinical benefits and consequences.

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10 See 34 C.F.R. § 300.104 (“If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.”)
11 See DBH Transmittal Letter, supra note 9, at 5.
i. Educational Benefits

A youth’s education, specifically their progress in a specific curriculum and their access to appropriate services, may be impacted by a youth’s placement in a PRTF. PRTFs are often located outside of the youth’s home jurisdiction. The IDEIA applies to all public agencies that receive federal funding through Part B of IDEIA, including agencies that have been given authority to provide special education services to a youth by a public agency that receives funding. This means that any child who has a disability, or is suspected of having a disability should receive the same special education protections in a PRTF, even if it is outside their home school district (although advocacy is often required to ensure youth receive appropriate services). Outside of the realm of special education, jurisdictions often have different requirements for high school diploma and GED eligibility.

In theory, the variation of educational regulations between jurisdictions should not pose a problem to youth placed in PRTFs outside of their home jurisdiction because under IDEIA and local regulations regarding youth placement out of state, the youth retains the rights they had (and the program requirements they had) in the sending state. In practice, receiving states are not always aware of the educational standards of the sending state when the youth arrives at PRTF, and advocacy is needed to ensure the youth is in the right classes.

To give an example, A.B., a fifteen and a half year old youth with Post-Traumatic Stress Disorder, who frequently absconded from home and engaged in high risk behavior, was placed by a District of Columbia agency in a PRTF in the Mid-West. Her expected stay was nine months. In the state where the PRTF was located, youth were required to attend school until sixteen, and could take the GED at sixteen. However, in the District of Columbia, the mandatory attendance age is eighteen, and with a few limited exceptions, youth are not eligible to take the GED until they are eighteen years old. Without intervention, this youth would have prepared for the GED during her time in PRTF and not worked towards her high school diploma. If A.B. had been discharged after nine-months as expected, she would have had to return to high school, having missed almost a year of it due to her misplaced focus on earning her GED.

ii. Clinical Benefits

PRTFs are intended to treat maladaptive behaviors that cannot be addressed in less restrictive settings. Youths placed in PRTF often exhibit a range of these maladaptive behaviors, including aggression, threatening actions, peer antagonism, self-harm, and substance abuse. Treatment teams at PRTFs identify these maladaptive behaviors and closely track them using various interventions, including the commonly used points and level system. In this system, youth are awarded points (or deducted points) based on the behavior displayed by the youth. Once youth have been awarded a certain number of points, they become eligible to move up a level. Levels, in this system, correlate with the privileges a youth has in the facility. Privileges can include anything from being allowed a later bed time to being allowed to go home for a weekend. By targeting a youth’s behaviors through this concrete behavioral system, PRTFs are generally effective at identifying and helping youths work through the identified behavioral manifestations that led

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13 See 34 C.F.R. 300.101 (emphasizing “residence” is what determines the obligation of a state to a youth); U.S. DEP’T OF EDUC., OFFICE OF SPECIAL EDUCATION PROGRAMS, LETTER TO MCAULIFFE, 21 IDELR 81, AT 2 (JUNE 9, 1994) (“UNDER PART B, WHEN A CHILD WITH A DISABILITY IS PLACED OR REFERRED BY A STATE SOCIAL SERVICE, SOCIAL WELFARE, OR SIMILAR STATE AGENCY, WHETHER FOR EDUCATION OR TREATMENT REASONS, AT A PRIVATE SCHOOL OR FACILITY, WHETHER WITHIN THE STATE OR OUTSIDE OF THE STATE, THE SEA IN THE STATE IN WHICH THE CHILD RESIDES IS RESPONSIBLE FOR ENSURING THAT FAPE IS MADE AVAILABLE TO THE CHILD DURING THE COURSE OF THE CHILD’S PLACEMENT AT THE OUT-OF-STATE FACILITY.”).
to their placement in PRTF. However, there are also some negative consequences associated with PRTFs that advocates and attorneys should familiarize themselves with.

First, PRTFs focus on behavior modification, but do not always address the reasons why the youth is having behavioral problems in the first place. Many of the behaviors exhibited by youths placed at PRTFs result from exposure to trauma, depression, or another mental illness. Treating the deeper socioemotional needs of youth is critical to helping youth successfully return to and remain in the community when they are discharged from residential.

Second, PRTFs provide interventions to address a youth’s behavior, but while in treatment the youth’s primary focus is controlling their behavior in the highly structured environment of the PRTF – and youth may quickly revert to old behaviors when they are returned to the community. In fact, some studies indicate fifty percent of youths who receive PRTF treatment return to PRTFs. As will be discussed further below, individuals working with youth placed in PRTFs must advocate for the youth to have many opportunities to practice the skills they are learning in PRTF in “real world” environments, through home visits and weekend passes. Individuals working with the youth may also want to advocate to ensure the underlying triggers for a youth’s behavior are identified and addressed as part of the youth’s treatment plan.

Finally, youth who are placed in PRTFs may be vulnerable to iatrogenic effects. Iatrogenic effects are unforeseen and problematic side effects of treatment and are actually problems that are caused by the treatment itself. As with adverse side effects of medical treatment, mental health treatment can have damaging side effects which compound the behavioral and emotional problems of youth who are meant to be receiving help. For example, a youth may experience their admission to PRTF as their caregiver “giving up” on them, which can lead to compounded feelings of rejection and loss and can then require therapy to address. Being aware of and avoiding, or at least minimizing, iatrogenic effects is critical to ensuring that a PRTF effectively treats the clients entrusted to their care.

IV. Proposed Solutions

This next section of the paper focuses on advocacy strategies to address the potential negative consequences of PRTF placement outlined above. While there are many potential negative consequences to PRTF placement, thoughtful advocacy at each stage of a youth’s PRTF process may address many of these potential pitfalls and assist the youth with a successful return to the community. In fact, studies have shown that youth are more likely to experience positive changes after PRTF if there is family involvement during treatment, community supports in place after treatment, and appropriate aftercare services. Child advocates have a critical role to play in ensuring that youths receive appropriate treatment while at PRTF so that they can experience a positive outcome after discharge. Here, we propose how to effectively advocate for youth placed in PRTF.

a. Pre-Admission Advocacy

14 See Jenell Holstead, Jim Dalton, Anita Horne & Diane Lamond, Modernizing Residential Treatment Centers for Children and Youth – An Informed Approach to Improve Long-Term Outcomes: The Damar Pilot, 89 CHILD WELFARE 115, 116 (2010) (“Typically, the consistent expectation often found in residential programs help to shape desirable behaviors and emotional responses.”) (internal citation omitted).
15 See Kathryn Whitehead, Mor Keshet, Brian Lombrowski, Andy Domenico, and Donna Green, Definition and Accountability: A Youth Perspective, 77 AM. J. OF ORTHOPSYCHIATRY 348, 348-49 (2007).
16 See Hair, supra note 5, at 570.
Advocacy should begin as soon as a team member proposes that a youth be placed in a PRTF. PRTF should not be considered until less restrictive, community-based resources have been exhausted and appear unable to help the youth in question. As an advocate, it is important to ensure that PRTF is in fact necessary for one’s client. If PRTF is deemed to be the last available option for a client short of inpatient treatment, the team should work to identify and advocate for the youth’s placement in a clinically appropriate program, with the understanding that PRTFs vary greatly in the quality of services provided and sometimes in the specific presenting problems that they address. For example, certain PRTFs may specialize in the treatment of trauma or in the treatment of youths with developmental disabilities, while other PRTFs may take a more generalized approach to treatment or may not tailor treatment to specific presenting problems. The second approach can lead to groups of youth living together that have divergent needs and levels of functioning, which can make it challenging for PRTFs to meet the individual needs of each youth.

An additional clinical consideration when evaluating the fit of a PRTF for a given client is the facility’s approach to milieu management. While a youth’s stay at PRTF will include numerous, explicitly clinical components such as individual, family, and group therapy, the vast majority of a youth’s time in PRTF is spent interacting with a limited peer group, which is composed of peers who have their own sets of severe emotional and behavioral problems. That group of clients is collectively managed by a group of caregiving staff whose primary task is to safely manage the residents in the context of a greater milieu. When milieu management is at its best, staff work proactively to help residents process their behavioral symptoms, apply coping skills, and practice the clinical progress made in therapy in their daily lives. Because of the amount of time youth sent to PRTF spend in the milieu, it is critical that the facility provide high quality milieu management in order to effectively reinforce therapeutic progress, but do so in a manner that is individually tailored to the needs for each youth pursuing treatment. Evaluating a PRTFs approach to milieu management and their ability to meet the specific needs of a given client is an important consideration when matching youth with an appropriate facility.

A critical part of assessing the appropriateness of PRTF treatment overall will include clear and candid counseling with a youth’s family and caregivers about what to expect from PRTF and what changes can realistically be pursued. This is especially important with families who are prone to believing that PRTF is a sort of panacea for their child, when the child is invariably a product of the environment created by their caregivers, meaning that the caregivers and home environment must be prepared to change along with the youth client.17

i. Investigate!

The most important element of pre-admission advocacy is learning everything you can about a proposed PRTF and its ability to serve the youth, before the youth is placed there. If possible, someone on the team should contact the proposed PRTF and speak with a therapist at the PRTF about the program’s approach to treatment. The team should probe how the PRTF will meet the youth’s unique needs and engage the youth’s family, as well as what licenses and accreditations the program has received. Most PRTFs employ admissions staff who are prepared to answer questions, but in the experience of this team, it can be useful to speak directly to clinical staff in order to get a clear picture of how the program operates and whether it is a good fit for a particular youth. In some cases, where geographically practicable, the authors have been able to tour a proposed PRTF facility prior to placement, which also can yield helpful information about what a facility looks like “on the ground.” If unable to speak directly with clinicians or tour a proposed PRTF, the authors have also benefited from polling other child advocates about their experiences with a certain PRTF through stakeholders meetings or listserves. Finally, in investigating the proposed PRTF, the team should assess how the PRTF will address the youth’s educational needs,

especially if the youth is of high school age. Even if a PRTF does not offer certain classes that a youth needs to graduate, many are able to access additional classes through computer programs—but it is much better to plan for how a youth will complete their education in PRTF before they are placed, as opposed to during the placement. Even if the team, or an individual advocate, has limited input in which PRTF the youth attends, knowing as much as possible about a particular program will help advocates plan for the youth’s PRTF placement.

ii. Plan Ahead

After selecting an appropriate PRTF for a youth, the team should advocate for a robust, written treatment plan prior to the youth’s placement in the PRTF. The treatment plan should reflect all of the therapeutic components necessary for the youth’s treatment, including individual, family, and group therapy. For each type of therapy, the treatment plan should include clear goals. In particular, the treatment plan should outline how the youth’s family will be incorporated into treatment. Research indicates that maintaining a connection to a family member or adult caregiver is an important source of strength for youths in PRTF. Accordingly, the treatment plan should include the frequency of family visits.

b. Advocacy During Treatment

Effective advocacy for youth in a PRTF requires frequent and consistent communication between the youth’s community-based team and the PRTF treatment team.

i. Advocate for Meaningful Team Meetings

Once a youth is placed in PRTF, the PRTF should arrange regular team meetings. To ensure that the all of the youth’s needs are met, all team members should participate in the team meetings and the team meetings should be held at least once a month. Treatment team meetings should include a discussion of the youth’s progress in treatment, including any incidents of aggression or restraints; the status of the youth’s treatment, including medication and therapy; and the youth’s overall adjustment and well-being. Family members and caregivers should participate in these meetings, as should the youth. If it appears that treatment meetings are being rushed, failing to address key items, or are missing important team members, advocacy efforts should include requests for additional information and planning in order to ensure that treatment is as robust as possible. During the treatment team meetings, the team can evaluate the youth’s progress towards the treatment goals and make adjustments to the treatment plan if necessary.

ii. Maintain Consistent Communication with the Youth

In addition to treatment team meetings, the youth’s legal advocate should maintain regular contact with the youth. PRTFs should make the youth available for regular phone calls. Additionally, the community-based team should work to keep the youth’s family engaged in the youth’s treatment. Family members or non-family caregivers should be encouraged to visit the youth as often as clinically appropriate. The child’s legal advocate may need to seek relief from the court to ensure that family visits are occurring and that the youth has the services and supports (e.g., clothing, access to family, etc.) necessary for success.

iii. Monitor the Youth’s Educational Progress

During treatment, the community-based team should closely monitor the youth’s educational progress, and ensure that the PRTF’s educational program has all the information they need to ensure the

18 See Amanda B. Nickerson, Sarah A. Colby, Jennifer L. Brooks, Jennifer M. Rickert & Frank J. Salamone, Transitioning Youth from Residential Treatment to the Community: A Preliminary Investigation, 35 CHILD YOUTH CARE FORUM 73, 81-82 (2007) (“[T]he presence of a strong, positive relationship with at least one adult caregiver, role model, or relative was the most common strength for adolescents in treatment. This is extremely important, as this type of relationship is related to resilience in children. In addition involving families through activities, therapy, and education has also been shown to improve post-discharge outcomes.”) (internal citations omitted).
appropriate people are contacted regarding the youth’s educational needs, and that the youth receives appropriate services.¹⁹ When the youth is placed in PRTF, the youth’s educational attorney or other advocate should request a copy of the youth’s schedule to ensure the youth is enrolled in the right classes. If the youth receives special education services, the team should request a Multi-Disciplinary Team meeting be scheduled within thirty days of the youth’s placement so that the youth’s IEP can be revised if necessary. The youth’s teacher or another educator working with the youth should also participate in the monthly team meetings and provide updates on the youth’s progress.

c. Advocacy During Discharge Planning

Effective discharge planning should also begin as soon as a youth is placed in PRTF. At admission, the PRTF should be informed of the discharge plan for the youth, including the planned placement (e.g., foster home, group home, or home) for the youth. The treatment team should then help prepare the youth to transition to the next placement, including coordinating visits for the youth to spend time at the next placement. Additionally, prior to discharge, the community-based team should ensure that the youth is connected to wraparound community-based services, which may include medication management, therapy, and mentoring. The community-based service providers should communicate with the PRTF to ensure a continuity of treatment.

Discharge planning should also include developing a specific plan for the youth’s education. Factors that should be considered include: when in the school year would be best for the youth to be discharged (for example: if the youth is scheduled to be discharged a week before the end of the school year, can discharge be pushed out); what services is the youth receiving at PRTF that cannot be provided in a less restrictive program, and what additional services may the youth need in a day school placement; and whom from the PRTF will serve as the point of contact with the youth’s current school. Ideally, a school should be selected prior to the youth’s discharge. The authors have had success advocating for youth to use home passes to interview at potential school placements prior to discharge, so that the youth is accepted and familiar with their next school program before they return to the community. Advance planning is also critical to ensure that, if there are disagreements regarding the services a youth needs, the parent or caregiver has access to legal recourse before the youth is discharged. For example, if two months prior to discharge, the parent and school district disagree regarding the level of service a youth will need following discharge, the parent will have the opportunity to have the proposal reviewed through an administrative due process hearing before the youth returns to the community, but if the disagreement does not come to light until days before discharge the youth may be forced to attend an inappropriate educational placement.

Unfortunately, in some cases, a PRTF may attempt to discharge a youth before it is clinically appropriate. A youth is more likely to experience success after discharge if the youth has experienced academic success and successfully completed the treatment program at the PRTF.²⁰ The youth’s advocate should ensure that the youth has met the objectives of the treatment plan before supporting the youth’s discharge.

d. Systemic Recommendations

¹⁹ In the authors’ experience, PRTFs may not always understand who has educational rights for a given youth, and sometimes this information may not be immediately or correctly provided to the PRTF. The educational decision maker, and their attorney if they have one, should introduce themselves to the PRTF, and link the PRTF with any local monitors for the sending jurisdiction as soon as possible after the youth’s placement in PRTF to ensure the youth receives appropriate educational services.

²⁰ See Hair, supra note 5, at 570 (explaining that “[s]horter lengths of stay, academic success, and successful program completion before discharge also appear to be important factors” in a youth maintaining emotional and behavioral improvement after discharge).
Based on their collective experience across cases, the authors have additional suggestions for how advocates and attorneys can advocate for better overall policies for ensuring youth placed in PRTF receive appropriate services and monitoring throughout their treatment process.

i. **Interagency Communication Plans Should Be Developed to Address Responsibilities for Monitoring and Treatment of Youth Placed in PRTFs**

Many of the advocacy strategies outlined above boil down to a single issue: communication. While individuals working with youth may troubleshoot if a PRTF does not receive appropriate information about a youth they are admitting, collaborative mechanisms for monitoring and planning for treatment can provide systems to ensure that this communication happens (and that certain individuals are responsible for making it happen). For example, in the District of Columbia, the State Education Agency, Local Education Agency, and Juvenile Services Agency recently entered into a Memorandum of Agreement that assigns each agency specific monitoring tasks while a youth is placed in PRTF, including credit monitoring and discharge planning within a set period of time before discharge. While this MOA is not always followed to the letter, it is a helpful advocacy document to point to when agencies are not communicating with each other or the PRTF.

ii. **States Should Expand Mental Health Resources (and the Capacity of Existing Resources) for Youth Discharging from PRTFs**

The quality of mental health services varies greatly from state to state, and even from county to county. This is especially true for mental health services that are available to low income individuals and families. While the Affordable Care Act (ACA) might expand the capacity and quality of mental health service provision, the full impact of the ACA is not yet clear. In general, expanding and improving the quality of mental health services for children and youth will support youth who discharge from PRTF will help those youth maintain emotional and behavioral gains made during treatment. Because the population of PRTF-involved youth is relatively small and suffers from highly acute mental health problems, the expansion and improvements in services should include intensive, community-based services that cater to the specific and demanding needs of youth who are discharging from PRTF. Furthermore, the expansion of intensive, community-based mental health services and wrap-around support services will likely help a number of youth who are on the brink of PRTF-level acuity to receive sufficient community- and home-based support, this avoiding PRTF admission altogether for a subset of these youth.

iii. **PRTFs Should Revise Programming to Ensure They Mandate Active Involvement of Youth’s Family and Community through Team Meetings, Visits at the PRTF, and Home Passes**

Family involvement in treatment is the single most important variable in the success of PRTF services. While most PRTFs incorporate some level of family involvement into treatment, the level of family involvement varies. In order to ensure the highest level of family involvement, advocates should press PRTF providers and PRTF funding sources to provide as many opportunities for family engagement as possible. Examples may include advocating for a child welfare agency to fund and facilitate additional visits between a youth and their caregiver, when reunification is the desired goal in the neglect case or pressuring a juvenile justice agency to provide additional monitoring during home passes to ensure safety and support a parent or caregiver in managing their child’s challenging behavior.

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V. Conclusion

Despite the problems inherent in Psychiatric Residential Treatment, even when it is necessary, attorneys, advocates and other professionals working with youth who are admitted to, en route to, or discharging from PRTFs can make a significant difference in a youth’s PRTF experience by advocating for appropriate services and monitoring throughout the youth’s treatment. These concepts will be further expanded on in the presentation that will follow this paper.