



Child Law Practice

Vol. 29 No. 3

May 2010

Helping Lawyers Help Kids

POLICY TO PRACTICE

Federal Funding for Child Welfare: What You Should Know

by Zuzana Murarova and Elizabeth Thornton

As an attorney representing parents, children, or the agency in child welfare cases, you probably know a little about how federal funds are used to finance the child welfare system. You almost certainly know that federal funds are used to pay for some children's foster care placements, and that required findings must be made for a child to be eligible to receive those funds.

You might not realize just how big an impact federal financing for child welfare services has on child welfare decisions in your community. This article:

- explains how the current federal financing system works and how this financing structure may impact your practice;
- shares needed reforms to the current financing structure expressed through a recent ABA policy; and
- discusses how you can use your knowledge of the federal financing system to better advocate for your client's needs.

How Federal Funding for Child Welfare Works

Every year, billions of federal, state, and local dollars are used to finance child welfare services. In 2006, the cost for child welfare services nationwide was at least \$25.7 billion.¹ Almost half of that amount, \$12.4 billion, was funded by the federal government.² States contributed \$10.7 billion and local governments spent \$2.6 billion.³

States receive federal child welfare funds from a range of sources. Titles IV-B and IV-E of the Social Security Act authorize the largest federal programs/funding streams dedicated to child welfare services. Additional federal funding comes from programs designed for broader purposes that can be used for some child welfare services—including TANF (Temporary Assistance for Needy Families), the Social Services Block Grant, Medicaid, and Social Security Income/Benefits.⁴

Dedicated Child Welfare Funds—Title IV-E and Title IV-B

Title IV-E funds represent the largest source of federal funding to the states dedicated for child welfare services. Title IV-E guarantees federal reimbursement to states for a portion of foster care costs, the adoption assistance program, and the Chafee Foster Care Independence Program. These funds are used for:

- foster care maintenance payments for eligible children;
- adoption assistance payments;

- life skills training programs and education vouchers for older youth aging out of the foster care system; and
- administrative costs and training associated with the foster care and adoption assistance programs.

Title IV-E funds available for the foster care and adoption assistance programs are an open-ended entitlement to the states and are not subject to the yearly congressional appropriations process.⁵ These funds are used for specific purposes and are not available to states until after a child has been removed from his or her family and placed in foster care and/or for adoption. In 2006, Title IV-E funds accounted for 48% of federal spending for child welfare

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ABA Child Law Practice (CLP) provides lawyers, judges and other professionals current information to enhance their knowledge and skills, and improve the decisions they make on behalf of children and families. Topics include: abuse and neglect, adoption, foster care, termination of parental rights, juvenile justice, and tort actions involving children and families.

CLP is published monthly by the **ABA Center on Children and the Law**, a program of the ABA's Young Lawyers Division, 740 15th St., NW, 9th Fl., Washington, DC 20005-1022.

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Subscription Prices:

- \$184 individual rate (**payable by personal check only**)
- \$219 institutional, agency, library, and law firm subscribers

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CASE LAW UPDATE

District Attorney Properly Enjoined from Filing Criminal Charges in Student Sexting Case

Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010).

A district attorney who threatened students involved in a sexting incident at their school was properly enjoined from bringing criminal charges against the students when they refused to participate in an education and counseling program. Plaintiffs sufficiently established that they would be likely to succeed in showing the district attorney's actions were retaliatory and prevented them from exercising their constitutional rights.

School officials at a Pennsylvania school district discovered nude and semi-nude photos of teen girls on several students' cell phones. The officials turned the phones over to the district attorney's office, which began an investigation.

The district attorney made a public statement at a school assembly notifying students that if they possessed "inappropriate images of minors" they could be prosecuted under state law for possessing or distributing child pornography or criminal use of a communication device.

Several months later, the district attorney sent letters to parents of the students whose cell phones had stored the images and parents of the students depicted in the images. The letter advised that felony charges would be brought against those students who did not participate in an education and counseling program. The parents and children were warned again at a meeting that the children would face felony charges unless they submitted to probation, paid a fee, and completed the education program successfully.

A court date was set to finalize paperwork for the informal adjustment. Three parents and their

children (plaintiffs) did not attend, but the remaining parents and children attended and agreed to the conditions.

Plaintiffs filed suit in federal district court seeking a preliminary injunction enjoining the district attorney from bringing criminal charges against the children for the photos. The United States District Court for the Middle District of Pennsylvania granted plaintiffs relief. The district attorney appealed.

The United States Court of Appeals for the Third Circuit affirmed. On appeal, the district attorney agreed not to prosecute two of the three students involved in the suit, so the Third Circuit limited its review to whether the remaining student and her mother were appropriately granted a preliminary injunction.

When seeking a preliminary injunction, a party must satisfy a four-part test:

- 1) likelihood of success on the merits;
- 2) suffer irreparable harm if the injunction is denied;
- 3) granting relief will not cause greater harm to the nonmoving party; and
- 4) public interest favors relief.

The Third Circuit agreed with the district court's analysis regarding factors two to four. They therefore focused on the first factor—likelihood of success.

The plaintiffs based their claims on retaliation for exercising their constitutional rights. They claimed three causes of action: 1) retaliation for violating the children's First Amendment right to freedom of expression (appearing in photos); 2) retaliation for violating their First

Amendment right to free speech (the “speech” was the education program’s required essay explaining how their actions were wrong), and 3) retaliation for exercising their Fourteenth Amendment due process right to direct their children’s upbringing without state interference.

The Third Circuit considered only the second and third claims. It focused on two retaliation theories posed by the plaintiffs. The first theory was that the district attorney retaliated against plaintiffs by threatening prosecution when they refused to participate in the education program. However, the Third Circuit pointed out that because the district attorney threatened prosecution before the students refused to participate in the program that threat was not “in response to” the exercise of a right not to attend and the students had not yet asserted a right not to attend. It therefore denied the district court’s grant of injunctive relief on that basis.

The second theory was that any future prosecution would be an unconstitutional act of retaliation. The Third Circuit said that this theory did not suffer from the same timing defect since any prosecution would follow the students’ refusal to attend the education program.

The court next examined the elements of a retaliation claim, finding first that plaintiffs were likely to succeed in establishing that coercing the students’ participation in the education program violated the parents’ Fourteenth Amendment right to parental autonomy and the students’ First Amendment right against compelled speech. Second, it found the district attorney’s threat of prosecution was sufficient to deter the plaintiffs from exercising their constitutional rights.

Finally, the court found a causal link between the protected activity (freedom of expression and free speech) and the retaliatory act (prosecution) since the district attorney threatened prosecution if the stu-

dents failed to attend or complete the education program. The court noted that a lack of probable cause to charge the students with possession or distribution of child pornography supported the view that the district attorney’s motive in bringing

a prosecution was likely retaliatory, rather than a good faith effort to enforce the law.

The court therefore affirmed the district court’s grant of a preliminary injunction and remanded for further proceedings.

Preventing Unmarried Cohabitants from Fostering or Adopting Ruled Unconstitutional

Cole et al. v. Arkansas Dep’t of Human Servs., No. 60CV-08-14284 (Ark. Cir. Ct., 4/16/2010).

In 2008, Arkansas passed an Act preventing unmarried cohabitants from fostering or adopting children (see “A Step Back for Equal Rights” in the December 2008 *CLP*). The American Civil Liberties Union and the law firm of Sullivan and Cromwell recently challenged the constitutionality of this Act (known as Act 1).

Plaintiffs argued that because there are a limited number of foster and adoptive homes, barring unmarried cohabitants from fostering or adopting needlessly reduces the availability of homes for foster children. They said this violates the children’s due process rights.

Additionally, they argued that Act 1 violates the potential parents’ right to family integrity and the right to maintain intimate relationships.

The Pulaski County Circuit Court found

...the Act significantly burdens non-marital relationships and acts of sexual intimacy between adults because it forces them to choose between becoming a parent and having any meaningful type of intimate relationship outside of marriage. This infringes upon the fundamental right to privacy guaranteed to all citizens of Arkansas.

To overcome an infringement on a fundamental right, the state must provide a compelling reason for doing so and it must be narrowly tailored to meet that interest. The court found that when viewed under this strict scrutiny, Act 1 is

...facially invalid because it casts an unreasonably broad net over more people than is needed to serve the State’s compelling interest. It is not narrowly tailored to the least restrictive means necessary to serve the State’s interest in determining what is in the best interests of the child.

The Court went on to say that although the Act survives the rational basis examination, the Court was troubled “that one politically unpopular group has been specifically targeted for exclusion by the act” (referring to homosexual couples that are prohibited by law from marrying). The state is planning on appealing this decision.

The Arkansas Department of Human Services has begun accepting applications from cohabitating unmarried couples but will not approve those applications and will not place children with the applicants pending appeal of the court’s decision.

STATE COURTS**Arizona**

Aksamit v. Krahn, 2010 WL 986633 (Ariz. Ct. App.). CUSTODY, PREJUDICIAL REPORTS

Trial court erred in relying on statements of best interests attorney made in custody case; best interests attorneys may participate as a party by submitting evidence and eliciting testimony, but their arguments should not be taken as substantive evidence.

Arizona Dep't of Econ. Sec. v. Matthew L., 225 P.3d 604 (Ariz. Ct. App. 2010).

TERMINATION OF PARENTAL RIGHTS, INCARCERATION

At termination hearing, evidence established that father's jail sentence would not deprive child of home for period of years; child, who was born four months after father was incarcerated, would be almost three when father's maximum sentence expired, agency was slow in completing court-ordered paternity testing and failed to contact father during the proceedings, and father had completed parenting class, participated in drug rehabilitation, completed a GED program, and tried to contact child.

California

In re Christopher C., 105 Cal. Rptr. 3d 645 (Ct. App. 2010). DEPENDENCY, EMOTIONAL HARM

Evidence was sufficient to sustain dependency petition based on risk of emotional harm seven children faced as a result of parents' conduct; children were coached to make abuse allegations against father, were questioned continually about sensitive subjects, endured physical exams, provided inconsistent statements about the events, and one child became withdrawn and refused to answer questions during interview.

In re S.A., 2010 WL 892089 (Cal. Ct. App.). DEPENDENCY, PRIVILEGE

Trial court did not abuse discretion in excluding testimony and statements of child's therapist when child's attorney invoked the client-therapist privilege; privilege was timely invoked, though it was three days after trial began, because the attorney raised the issue at the first hearing, putting the father's counsel on

notice, and then expressly objected to the proffered evidence at the second hearing.

Colorado

A.L.L. v. C.Z., 2010 WL 1006612 (Colo.). TERMINATION OF PARENTAL RIGHTS, APPEALS

Appointed attorneys could not withdraw solely because they deemed parents' appeal of termination meritless; allowing appeal, even when there are no persuasive arguments, ensures indigent parents' right to equal protection even if the chance of success is negligible, and it is not frivolous unless done primarily to harass or maliciously injure another party.

Connecticut

Fennelly v. Norton, 985 A.2d 1026 (Conn. 2010). VISITATION, ATTORNEY'S FEES

Where grandparents filed for visitation, trial court abused its discretion in appointing attorney for children and awarding fees since attorney was appointed solely for the fee dispute; a child's attorney should be appointed to ensure independent representation of a child's interests and fee dispute only tangentially related to children's interests in case.

District of Columbia

In re S.M., 985 A.2d 413 (D.C. 2010). ADOPTION, UNFITNESS

Trial court failed to make required findings in terminating father's parental rights; court only made best interests findings and although it noted that father had been convicted of sexual abuse, the court did not find father was unfit by clear and convincing evidence.

Florida

A.H. v. Dep't of Children & Families, 2009 WL 4059232 (Fla. Dist. Ct. App.).

TERMINATION OF PARENTAL RIGHTS, FAILURE TO APPEAR

Father's failure to appear at adjudicatory hearing was not a ground to terminate his parental rights, even though he was warned that not appearing would be construed as consent to termination; father told trial court he could not attend hearing and was informed his attorney could appear for him, and attorney failed to request continuance or strongly object when agency sought consent to termination based on nonappearance.

J.G. v. Dep't of Children & Families, 22 So. 3d 774 (Fla. Dist. Ct. App. 2009). TERMINATION OF PARENTAL RIGHTS, ABANDONMENT

Trial court properly found by clear and convincing evidence that parents had legally abandoned their child in foster care in termination hearing; parents were unavailable to parent over six years due to being repeatedly incarcerated, abusing substances, and because of domestic violence.

Idaho

In re Doe, 2010 WL 918943 (Idaho). TERMINATION OF PARENTAL RIGHTS, ABANDONMENT

Trial court properly found no clear and convincing evidence to terminate father's parental rights for abandonment; father could not be shown to have willfully failed to visit his children where he was forbidden by the terms of his treatment program and court order to have contact and denied telephone contact by the mother.

Kansas

In re B.B.M., 224 P.3d 1168 (Kan. 2010). TERMINATION OF PARENTAL RIGHTS, FAILURE TO SUPPORT

Trial court erred in terminating parental rights because father did not provide support through last six months of mother's pregnancy; though prospective adoptive parents had burden to prove father unjustifiably failed to support his child, the court improperly required father to prove he was financially able to pay in discussion of whether mother interfered with his paying support.

New York

Lane v. Lane, 2009 WL 4855377 (N.Y. App. Div.). VISITATION, SUPERVISED

Family court properly determined that mother's visitation with son should be supervised; supervised visits were in child's best interests given mother's history of absconding with son, and her evasive testimony and disruptive behavior at the fact-finding hearing.

In re Monique S., 891 N.Y.S.2d 354 (App. Div.). TERMINATION OF PARENTAL RIGHTS, MOTION TO VACATE

Trial court properly denied father's motion to vacate order terminating his parental rights and committing his child

to foster home with goal of adoption; although child was removed from foster home based on abuse allegation based on corporal punishment by foster mother, father did not show punishment was excessive or could have been discovered earlier, and record did not show he could care for child or made progress since termination.

In re Richelis S., 2009 WL 5126363 (N.Y. App. Div.). TERMINATION OF PARENTAL RIGHTS, SUSPENDED JUDGMENT
Child welfare agency established by a preponderance of the evidence that father failed to satisfy terms of suspended judgment in dependency proceedings and that termination of his parental rights and freeing child for adoption was in child's best interests; father failed to contact psychologist for three months, secure safe and appropriate housing, or become knowledgeable about child's disability and special education needs and treatment.

North Carolina

In re A.C.V., 2010 WL 1541761 (N.C. Ct. App.). TERMINATION OF PARENTAL RIGHTS, FATHERS
Trial court properly terminated teenaged father's parental rights to newborn child based on his failure to provide substantial financial support or consistent care during mother's pregnancy and determination that termination was in child's best interests, even though court failed to find father was unfit to parent or that he neglected child.

Oregon

State v. L.S., 2009 WL 3837542 (Or. Ct. App.). TERMINATION OF PARENTAL RIGHTS, FITNESS
Evidence did not support finding that mother was unfit as ground to terminate parental rights; although mother's cardiac incident affected her physical and mental health and had prevented her from being a fit parent, she demonstrated significant improvement at recent hearing and her psychological evaluations showed she could recognize child's basic needs and make decisions about his best interests.

In re K.A.C., 2010 WL 935682 (Or. Ct. App.). TERMINATION OF PARENTAL RIGHTS, PERMANENCY PLAN
Trial court erred by ordering child welfare

agency to file termination of parental rights petition where there was little likelihood that children would be adopted, finding another placement was highly unlikely because children had been previously adopted and apparently made false allegations against adoptive parents to be reunited with their biological mother.

Pennsylvania

F.V.C. v. Dep't of Public Welf., 987 A.2d 223 (Pa. Commw. Ct.). ABUSE, REGISTRIES
In case in which mother sought review of child welfare agency's order granting grandfather's request to expunge name from child abuse registry, mother was a "party" with standing to challenge order since she had a direct interest in accurate reporting of child abuse involving child.

In re R.J.T., 2010 WL 572524 (Pa. Super. Ct. 2010). DEPENDENCY, PERMANENCY PLAN
Trial court abused its discretion when it failed to change permanency goal from reunification to adoption where child had been in foster placement for 24 months, parents failed to satisfy case plan goals, and domestic violence concerns were still present.

South Carolina

In re M.B.H., 2010 WL 1540954 (S.C. 2010). DELINQUENCY, REGISTRIES
Judge had good cause to order 14-year-old juvenile to register as a sex offender on private sex offender registry after juvenile's guilty plea to assault and battery of a high and aggravated nature of two younger boys; professionals' recommendations and evaluation report supported judge's finding that juvenile was likely to reoffend.

Washington

In re E.A.T.W., 2010 WL 653866 (Wash.). CUSTODY, THIRD PARTIES
In grandparents' action seeking permanent custody of grandchildren who had been in their custody for several years, remand was required to allow trial court to determine if adequate cause existed under proper legal standard; state statute requires trial court to deny hearing on motion for third party custody unless third party submits an affidavit stating child is

not in custody of parent(s) and neither parent is a suitable custodian, and sets forth facts supporting requested custody.

Wyoming

In re JW, 226 P.3d 873 (Wyo. 2010). TERMINATION OF PARENTAL RIGHTS, RELATIVE PLACEMENT
Trial court improperly ordered continued placement of children with foster parents after terminating parental rights since a relative placement was available; statutory and constitutional rules require relative placement preference where a fit and willing relative is available and fact that relatives lived far away was not decisive where they had an approved home study and positive bonding assessment and had held themselves out as a resource during pendency of the case.

FEDERAL COURTS

District of Massachusetts

Hootstein v. Collins, 2010 WL 143753 (D. Mass.). DEPENDENCY, CONSTITUTIONAL RIGHTS
In case where child welfare agency filed emergency protection petition while grandparents' emergency guardianship petition was pending, and grandparents claimed child welfare agency staff violated their constitutional rights to familial association, search and seizure, and procedural due process, summary judgment in favor of child welfare staff was properly granted because they were acting within their discretion to investigate and respond to abuse allegations and by placing children with grandparents.

Second Circuit

V.S. v. Muhammad, 595 F.3d 426 (2^d Cir.). LIABILITY, CHILD WELFARE AGENCIES
Caseworkers were entitled to qualified immunity on claim that they violated mother's constitutional rights to be free of unreasonable search and seizure because they could reasonably rely on doctor's statement indicating suspected shaken baby syndrome; though later evaluations indicated child's injuries could have been caused by birth complications and that initial physician had a history of over-diagnosing child abuse, it would be unreasonable to require child welfare staff to second-guess diagnoses under the circumstances.

(Continued from front page)

services.⁶ States spent approximately:

- \$4 billion in Title IV-E funds on the foster care program;
- \$1.8 billion on the adoption assistance program; and
- \$166 million on the Chafee Foster Care Independence Program.⁷

States receive Title IV-E funds based on the number of eligible children in foster care or who have been adopted from the child welfare system.

Title IV-B funds are available for a broad range of child welfare services, including prevention and family preservation, reunification, and postpermanency services. There are two parts of Title IV-B:

- Subpart 1 (Child Welfare Services), which is a discretionary grant program; and
- Subpart 2 (Promoting Safe and Stable Families), which has a capped entitlement and discretionary grant component.

Title IV-B expenditures comprise a very small percentage of federal child welfare spending. In 2006, states spent \$637 million of Title IV-B funds, approximately 5% of all federal spending for child welfare services.⁸ In contrast, states spent over \$5.8 billion of Title IV-E funds.

Nondedicated Child Welfare Funds

The main federal sources of nondedicated child welfare funding are:

- Temporary Assistance for Needy Families (TANF)
- Social Services Block Grant
- Medicaid
- Social Security Income/Benefits.

Nondedicated child welfare funding accounted for approximately 44% of federal funds spent on child welfare services.⁹ Usually,

these funds can be used with little restriction. However, this funding is often not used to fund services that prevent child maltreatment and reduce foster care placement. For example, in 2006, Arizona appropriated \$89,048,400 of TANF funds for child welfare services. Of those funds, approximately \$37,000,000 funded out-of-home placement services and costs associated with adoption.¹⁰ An additional \$27,000,000 funded child protective services staff.¹¹ Funding was clearly directed toward child welfare, but not necessarily focused on prevention or reunification services. Also, the availability of these funding sources is not guaranteed because child welfare programs have to compete with other budget priorities for access to these funds.

Federal Funding and Foster Care

By far, most federal dollars are spent on foster care maintenance payments for eligible children, administrative costs associated with the Title IV-E foster care program, training of staff and foster care providers, and recruitment of foster parents. The federal government reimburses states for a portion of the foster care maintenance costs for all eligible children in foster care, ranging from 50% to 83% of the costs.¹² The federal government reimbursement rate is based on the state's per capita income—states with a lower per capita income have a higher federal reimbursement rate and vice versa. To be eligible for Title IV-E foster care funds, certain requirements must be met:

- the child must have been removed from his or her home by court order or pursuant to a voluntary placement agreement;
- the child's care and placement must be the responsibility of the state or other public agency;
- the child must be placed by the state or public agency in a

licensed foster home (which can include a licensed relative placement);

- there must be a court finding that continuing the child in his or her home would be contrary to the welfare of the child;
- there must be a court finding that reasonable efforts were made to prevent the removal of the child from his or her family (as the case progresses there must be a finding that reasonable efforts were made to finalize the child's permanency plan); and
- the child must be eligible for Aid to Families with Dependent Children (AFDC) benefits based on AFDC eligibility standards in place in 1996.¹³ Income eligibility requirements for AFDC are set by the states and vary significantly from state to state. In 1996, the national average income limit for eligibility was approximately \$1,270 per month for a family of three.¹⁴

States receive Title IV-E funds for foster care-related expenses by submitting yearly estimates of expenditures and quarterly reports of estimated and actual expenditures in support of the awarded funds.¹⁵

The federal government conducts periodic reviews to determine if states are meeting the Title IV-E eligibility requirements for children receiving federal foster care funding. If a state is not in substantial compliance, it must develop and implement a Program Improvement Plan (PIP) and participate in a heightened review process.¹⁶ States that are noncompliant with federal eligibility requirements must reimburse the federal government for overpayments.¹⁷

How Federal Funding Affects Child Welfare Decisions in Your Community

Federal financing impacts child welfare decisions in several ways.

Most obviously, the eligibility requirements drive court findings—for the child to be eligible for Title IV-E foster care funding the court must find that continuing the child in her home is contrary to her welfare and that reasonable efforts were made to prevent removal or finalize the permanency plan. This is not to say that courts automatically make the findings because they are funding eligibility requirements. But, the requirement that these findings be made clarifies for the child welfare agency, attorneys, and the court what circumstances are necessary to remove a child from her home.

Federal funding for child welfare affects child welfare decisions in less obvious ways, as well. Many child welfare experts believe the current federal financing structure encourages overuse of foster care at the expense of providing services that can keep children and families safely together.¹⁸ Most federal funding for child welfare is not available to states until after a child enters foster care. States do not make money by placing children in foster care. However, states receive federal funding to support foster care placements, but receive little money to provide services to keep children out of foster care or safely reunify their families after a removal to foster care. Thus, placing children in foster care costs states less than providing services to prevent state placements or maintain families.

ABA Calls for Federal Financing Reforms

At its February 2010 midyear meeting, the ABA House of Delegates passed a policy recommendation urging Congress, the states, tribes, counties and territories to reform the child welfare financing structure to end the current fiscal incentives to place children in foster care at the expense of providing services to keep children and families safely together.

The policy recommendation calls for increasing the amount of funding available for prevention, reunification, and postpermanency services for children and families, including access to affordable housing, transportation, anti-poverty supports, substance abuse, mental health treatment, domestic violence services, parenting programs, and quality parent representation.

The policy recommendation includes proposals for achieving increased funding for a range of child welfare services, including:

- allowing states, if they safely reduce the number of children in foster care, to reinvest the federal funds that would have been spent on foster care into other child welfare services aimed at further reducing the need for foster care;
- reauthorizing and expanding the child welfare waiver program, which authorizes the Secretary of Health and Human Services to approve state demonstration projects waiving certain Title IV-E and Title IV-B funding requirements and allowing states to use federal child welfare funds flexibly;
- evaluating policies and formulas for funding distribution to ensure adequate federal and state support for services to children and families so services are available in neighborhoods with high rates of poverty, abuse and neglect, and foster care placements; and
- creating an enhanced federal permanency encouragement initiative that rewards states for increasing their rates of safe and stable family reunifications and guardianships, as well as for adoptions.

Additional information about the ABA policy recommendation and accompanying report is available at: www.abanet.org/leadership/2010/midyear/daily_journal/110.pdf.

The ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases highlight the importance of working collaboratively with child welfare stakeholders to bring about system reform and improve child welfare practice. The policy recommendation and report can provide useful information to you if you are an attorney, judge, or child welfare professional interested in enhancing the available services in your community through system change. To see how child welfare is financed in your state, visit:

www.childwelfarepolicy.org/pages/map.cfm. This Web site provides a state-by-state survey of child welfare spending.

Improving Your Advocacy

Reasonable Efforts. How can knowledge about federal financing for child welfare services help you advocate on behalf of your clients? If you are an attorney representing the child welfare agency, children, or parents in abuse and neglect proceedings, be aware of the required court findings for a child to be eligible for federal foster care maintenance payments. If you are an attorney for the child welfare agency, make sure these findings are made at the appropriate hearing—an oversight could mean a loss of federal funding.

If you represent parents or children, be aware of the impact federal financing or misunderstandings about federal financing may have on decision making. Judges may be reluctant to find the child welfare agency did not make reasonable efforts if they know the needed services are not available in the community. They may also know that a no reasonable efforts finding could mean a loss of funds for the already cash-strapped child welfare agency.¹⁹ If you represent children or parents, it is important to create a clear record around reasonable efforts—unavailability of needed

The Child Welfare Waiver Program: A Model for Flexible Federal Funding

In 1994, Congress gave the Secretary of Health and Human Services authority to approve state demonstration projects that make Title IV-B and IV-E funds more flexible. Under this program, states could apply to waive certain requirements of Title IV-B and IV-E and thus reinvest the funds into alternative services that promote safety, permanency, and well-being for children and families. The program has now expired, although some states are still in the midst of their projects.

The following review highlights successful state strategies that serve as models for flexible use of federal funding. Information for each of these programs and links to program evaluations are available at:

www.acf.hhs.gov/programs/cb/programs_fund/cwwaiver/2008/profiles_demo2008.htm.

Prevention

Several states focused their demonstration projects on preventative services. Under these projects, states have reinvested the Title IV-E funds for use in early intervention, crisis intervention, and intensive child welfare services.

California

- Alameda County expanded its alternative response program, offering upfront community services to families at risk of entering the child welfare system. The county also implemented a family-finding program to locate extended family members as placement resources for children removed from their parents' homes.
- Los Angeles County invested in upfront community-based assessments and services for families at risk. This included a special youth permanency unit focused on finding family members for children in the system.

Florida shifted use of its Title IV-E funds from foster care to providing in-home counseling, therapy for children, and cash aid to help families stay intact. Data from 2008 shows a reduction of children in foster care by almost 20 percent.

Oregon's project focused on foster care prevention by allowing Title IV-E funds to be used for matters like deposits for adequate housing and buying groceries and heating fuel. They also expanded existing services like family decision meetings and implemented new innovative plans, such as housing assistance. Access to flexible funds increased the likelihood that a child would remain in his home.

Subsidized Guardianships

Other states used their demonstration projects to shift Title IV-E funds to subsidized guardianships. Under this system, caretakers, most often relatives, received a monthly financial subsidy equal to foster care costs. This project promotes permanency for children for whom reunification is not an option.

Illinois pioneered this program, and was able to boost net permanency by 6.1 percent. The Illinois demonstration also decreased the number of children in long-term foster care.

While implementation in **Tennessee** is not yet complete, the state's subsidized guardianship program has increased the net permanency rate by almost 13 percent.

In **Wisconsin**, which is still implementing its project, children who took advantage of Title IV-E funds shifted to subsidized guardianships were less likely to remain in long-term foster care, stayed in foster care for shorter periods, and were more likely to exit foster care to a permanent home.

Substance Abuse Services

These demonstration projects focused on parents who had drug or alcohol abuse problems and whose children were removed from the home.

In **Illinois**, parents received Title IV-E funded services for substance abuse services and received multiple other services from outreach workers or "recovery coaches." This resulted in a decrease in subsequent allegations of maltreatment, an increase in permanency rates, and a decrease in out-of-home placement duration.

services should not be considered reasonable.

Judges and attorneys must be aware that the reasonable efforts requirement is one tool they have to bring about systemic change, largely because the finding is required for federal funding. For example, if frequent and meaningful visitation is consistently not happening because the child welfare agency does not have the staff or space for visits, advocacy around reasonable efforts can help bring positive change. Consistent findings that lack of visitation resources is not reasonable would

provide a strong impetus for the child welfare agency to increase visitation resources. One judge noted that a letter from the court to legislators about the financial impact of failing to provide reasonable efforts may be key in freeing state money for child welfare resources.²⁰

Services for Your Client. Knowing about child welfare funding can also help you advocate for services for your client. In 1994, Congress passed Public Law 103-432, which gave the Secretary of Health and Human

Services authority to approve state demonstration projects involving the waiver of certain requirements of Title IV-E and IV-B.²¹ The waiver program gives states flexibility to use federal child welfare funds (particularly, Title IV-E foster care funds) for alternative services and supports that promote safety, permanency, and well-being for children and families.²² The Adoption and Safe Families Act expanded the program, authorizing the Secretary of Health and Human Services to grant waivers to up to 10 states per year.²³ Although the program expired as of March 31, 2006,²⁴ the ABA, in its policy recommendation, encourages reauthorizing and expanding the child welfare waiver program.

Some states and counties are still operating under a waiver. For example, Los Angeles County is using flexible funds available through the waiver program to invest in upfront community-based assessments and services for families at risk of entering the child welfare system, and by creating a special youth permanency unit focused on finding family members to support youth who have been in the foster care system for years.²⁵ Being aware of a waiver program in your jurisdiction can help you be sure that your client has access to all available services. For a summary of how some states have used the flexible funding available through the waiver program, see the sidebar on page 40. Descriptions of current and past child welfare waivers can be found at:

www.acf.hhs.gov/programs/cb/programs_fund/cwwaiver/2008/summary_table2008.htm.

Clarifying Misunderstandings and Building Trust. Understanding how federal funding for child welfare services works can help clarify misunderstandings and mistrust among child welfare professionals. An example is a juvenile court hearing officer who is quick to place

children in foster care against the agency's recommendation because he believes the agency wants to keep children at home because it costs less than foster care. In reality, it typically costs more for child welfare agencies to keep children at home with services in place because there is not the same amount of federal money available to share in those costs. Had the hearing officer known more about how child welfare services are financed, he might have been more comfortable with the agency's placement decisions.

Conclusion

Chances are you did not go into child welfare law because you were interested in funding streams and financial incentives. However, understanding how federal funds are used to finance child welfare services can help you better understand what forces impact child welfare decisions in your community. This information can inform your advocacy for your clients—both in court and out of court—as you advocate for appropriate preventive, reunification, and postpermanency services, or as you seek systemic reforms.

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Endnotes

¹ This article references funding data from 2006. This is the most recent data collected and

analyzed by Child Trends in their comprehensive report on funding. DeVooght, Kerry, Tiffany Allen and Rob Geen. *Federal, State and Local Spending to Address Child Abuse and Neglect in SFY 2006*. Washington DC: Child Trends, December 2008, 2.

² *Ibid.*, 3.

³ *Ibid.*

⁴ For detailed definitions of federal funding sources, see: Casey Family Programs. "2007 Casey Child Welfare Financing Survey, Glossary." Available at: www.childwelfarepolicy.org/pages/page.cfm?page=glossary.

⁵ Title IV-E funds available under the Chafee Foster Care Independence Program are a capped entitlement to the states.

⁶ DeVooght et al., 2008, 8.

⁷ *Ibid.*, 11, 13, 15.

⁸ *Ibid.*, 8.

⁹ *Ibid.*

¹⁰ Christian, Steve. "The Changing Landscape of Federal Child Welfare Financing." Washington, DC: National Conference of State Legislatures, December 2006, 13.

¹¹ *Ibid.*

¹² 45 C.F.R. § 1356.60; 42 U.S.C. 1396d (2010).

¹³ 45 C.F.R. § 1356.71(d)(1).

¹⁴ U.S. Department of Health and Human Services. "Aid to Families With Dependent Children: The Baseline," June 1998, 72. Available at <http://aspe.hhs.gov/HSP/AFDC/afdcbase98.htm#intro>

¹⁵ 42 U.S.C. § 674(b)(1).

¹⁶ 45 C.F.R. § 1356.71(i).

¹⁷ 45 C.F.R. § 1356.71(j).

¹⁸ Casey Family Programs. "Ending Our Nation's Overreliance on Foster Care: Executive Summary." October 2009; Pew Commission on Children in Foster Care. *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care*, 2004.

¹⁹ Judge Edwards, Leonard. "Reasonable Efforts: A Judicial Perspective." *The Judges' Page Newsletter*, October 2007, 5-6.

²⁰ *Ibid.*, 6.

²¹ Pub. L. No. 103-432 §. 208.

²² 42 U.S.C. § 1320a-9 (2009).

²³ Pub. L. No. 105-89 §. 301.

²⁴ Federal legislative authority to approve new Title IV-E waivers expired on March 31, 2006. However, states with projects approved before that date may continue to implement them, and requests to extend demonstrations beyond their original period of approval may also be considered and approved at the Secretary's discretion.

²⁵ Casey Family Programs. "Stories of Practice Change: What Flexible Funding Means to the Children and Families of Los Angeles County." February 2009, 4-29. Available at www.casey.org/Resources/Publications/pdf/WhatFlexibleFundingMeans.pdf.

How Health Care Reform Helps Children in or at Risk of Entering the Child Welfare System

by Eva J. Klain, Jessica R. Kendall & Lisa Pilnik

The Patient Protection and Affordable Care Act,¹ signed by President Obama on March 23, 2010, contains many health reforms that apply to children and youth in foster care or those at risk of entering care. Some sections focus on delivering services to parents to prevent abuse or neglect and potential removal of their children from their care. Others provide funding to improve health care services that benefit children and families. Advocates for children and youth in care, their parents, or pregnant and parenting teens and young women should determine whether their clients can benefit from the new law. Read on for highlights of key provisions.

Including Health Information in Foster Youth Transition Plans

Child welfare agencies must now include several health-related issues in transition plans for youth aging out of foster care. These include: information about health insurance options and the importance of designating a health care power of attorney or health care proxy when treatment decisions must be made but the child cannot participate.²

Extending Health Coverage for Former Foster Youth to Age 26

States were not previously required to offer extended Medicaid coverage to youth who exited foster care. Under the new law, beginning in 2014, states must provide Medicaid coverage to all former foster youth who have aged out as of 2014 up to the young person's 26th birthday. To be eligible, the youth needs to have been in foster care at least at their 18th birthday (or at a higher age). If eligible, they receive all Medicaid

benefits, including Early and Periodic Screening, Diagnosis, and Treatment (EPSDT).³ In a similar provision that may benefit youth adopted from the child welfare system, the Act also extends coverage under a parent's private health insurance for unmarried children up to age 26.⁴

Child welfare agencies must now include several health-related issues in transition plans for youth aging out of foster care.

Expanding Medicaid

In addition to expanding coverage for former foster youth to age 26, the Act expands Medicaid eligibility beginning in 2014 for people at or below 133% of the federal poverty level (FPL).⁵ Prescription drugs and mental health services will be included in the services covered. For the first three years, the federal government will pay the full cost of covering newly-eligible individuals. The Act increases the Medicaid payment rate so that beneficiaries have greater access to health care services, and all evidence-informed preventive health services and screenings for infants, children, and adolescents, including oral and vision care, must be covered starting this year.⁶

Expanding the Children's Health Insurance Program

Building on the reauthorization of CHIP in 2009,⁷ the Act fully funds the Children's Health Insurance Program (CHIP) through 2015 and

requires states to maintain income eligibility levels for CHIP through September 30, 2019. The Act also continues the dental coverage established in 2009 as part of CHIP reauthorization. Starting in 2014, states will be able to start determining whether the state insurance exchanges can provide pediatric coverage, benefits, and cost protections comparable to those that exist under CHIP. The law also includes a 23% increase in the CHIP match rate from 2014 to 2019 with a cap of 100% and a tax credit in the state exchange for CHIP-eligible children who cannot enroll due to federal allotment caps.⁸

Extending the Adoption Tax Credit

With thousands of children awaiting adoption in the foster care system, the Act extends the adoption credit which would have otherwise "sunset" in 2010. The bill also increases the credit by \$1,000 to \$13,170 for adoptions occurring after January 2010. To be eligible the adopted child must be under age 18 or have physical or mental health needs that make it difficult for him to care for himself. The tax credit is also refundable and will cover adoption-related expenses, like court costs and travel expenses.⁹

Preventing Denial of Coverage to Children with Preexisting Conditions

The Act prohibits insurance companies from denying coverage to children under age 19 with preexisting conditions or discriminating against them based on their health status.¹⁰ Children with special medical needs adopted from foster care may benefit from this provision

when they are covered by their adoptive parents' private health insurance. However, insurance providers' interpretation of the statutory language requires them to cover preexisting conditions for any child they cover, but not to offer new coverage until 2014. The administration is working to reconcile this conflicting interpretation.

Supporting School-based Health Clinics

The Act authorizes the U.S. Department of Health and Human Services to establish a grant program to support school-based health clinics that provide health services to underserved children and teens. These programs will provide accessible and comprehensive primary and preventative physical and mental health services to children, with a preference for awarding grants to programs that serve a large population of Medicaid-eligible children.¹¹

Benefiting Domestic Violence Victims

The new law makes it illegal for health insurers to deny coverage to domestic violence victims because the companies consider the medical condition resulting from the abuse a preexisting condition.¹² It also establishes new grant programs to provide intervention and supportive services for pregnant and parenting women and teens who are domestic violence victims, offering supportive services that benefit women and their children, such as transitional and permanent housing, vocational counseling, and individual and group therapy.¹³

Funding Community Health Centers

A fund was established to help expand and support community health centers (CHCs), which provide comprehensive health care to low-income people throughout

the country.¹⁴ From 2011 to 2015, \$11 billion will be added to the Public Health Services Act to support CHCs, allowing them to serve more patients and provide more services.¹⁵ \$1.5 billion of these funds must be used to build and renovate CHCs.¹⁶

The National Health Services Corps will also receive \$1.5 billion over five years, which could result in an additional 15,000 primary care providers serving communities who do not have enough health care providers.¹⁷ CHCs will also benefit from some of the changes the Act makes to Medicaid and Medicare, as well as the added funding to develop the health care workforce.¹⁸

Promoting Personal Responsibility Education

States (and groups in nonparticipating states) may apply for funding for "personal responsibility education programs," which include (a) pregnancy and sexually transmitted infection prevention education for adolescents *and* (b) at least three topics specified in the statute that will prepare youth for adulthood¹⁹ (healthy relationships, adolescent development, financial literacy, parent-child communication, educational and career success, and healthy life skills).²⁰ Programs must be age-appropriate, medically accurate, include abstinence *and* contraception, and be culturally appropriate.²¹ They must also be evidence-based or incorporate elements of programs that have been proven effective.²²

At least \$10 million of the grants must be used for innovative pregnancy prevention programs for "high-risk, vulnerable, and culturally underrepresented youth," including adolescents in foster care.²³ Other funds are set aside to evaluate programs and activities, and for grants to Indian tribes or tribal organizations.²⁴

Resources

- The text of the The Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 are available online at: http://dpc.senate.gov/dpcdocsen_health_care_bill.cfm
- To monitor how the health care reform legislation is being implemented, visit www.healthreformgps.org/

Improving Indian Health Care

The Act also enacts into law a 2009 Senate bill to modify and extend the Indian Health Care Improvement Act.²⁵ As a result, additional funding will now be available for youth suicide prevention, behavioral health care, preventative care and increased access to health services among Indian populations, as well developing the Indian health care workforce and improving Indian health facilities.²⁶

Promoting Oral Health

The Act supports a five-year public education campaign about oral health care with a focus on children, pregnant women, parents, ethnic and racial minorities, people with disabilities, and the elderly.²⁷ The campaign must be culturally and linguistically appropriate and use science-based strategies. Grants will also be awarded to community-based dental providers for research-based activities to manage dental caries (tooth decay).²⁸

Funds also support school-based dental sealant programs, federal agreements with states, territories and tribes to support specific oral health activities, and oral health-related improvements to certain health surveillance measures, including the Pregnancy Risk Assessment and Monitoring System.²⁹ Oral health is also a focus in the Act's workforce development and training provi-

sions, and a demonstration project on alternative oral health care providers will increase access among rural and underserved communities.³⁰

Supporting Postpartum Depression Services, Research and Support

Maternal depression is a risk factor for child abuse and neglect.³¹ The Act encourages continued research about postpartum depression and psychosis and provides grants for organizations to provide services to individuals and families impacted by these conditions.³² The Secretary of the U.S. Department of Health and Human Services is also directed to conduct a study on the benefits of screening for postpartum conditions and report to Congress.³³

Funding Maternal, Infant, and Early Childhood Home Visitation Programs

Evidence-based home visiting programs can improve outcomes for very young children and families. The Act boosts funding to states, tribes, and territories to develop and implement home visiting programs in high risk communities to reduce infant and maternal mortality, decrease crime and juvenile delinquency, and improve prenatal, maternal, and newborn health, child health and development, parenting skills, school readiness, and family economic self-sufficiency. Home visiting programs must establish measurable progress in these areas and efforts to prevent child injuries and maltreatment.³⁴

Supporting Pregnant and Parenting Teens and Women

The Act establishes a pregnancy assistance fund to award grants to states that can be used to support services for pregnant and parenting teens, such as child care, alternative class schedules, parenting education, maternity clothing, and food,

clothing, and other material needs of the child.³⁵ Higher education institutions may also use the funds for these purposes, and to provide services to, or technical assistance and training for pregnant women who are victims of relationship violence, sexual assault, or stalking.³⁶ States may also use the funds to educate or raise public awareness about services or resources covered by the fund.³⁷

Requiring Mental Health and Substance Use Disorder Services

As part of the essential health services they provide, qualified health plans must include access to mental health and substance abuse treatment services, including behavioral health treatment.³⁸ This provision may apply to children adopted from foster care who are now covered under their adoptive parents' private insurance plans.

Conclusion

These provisions have the potential to significantly improve access and services for children, youth, and their families to receive the health care they need and prevent abuse and neglect. Advocates are key to ensuring eligible children and families benefit from these provisions. Learning about the provisions is the first step. Monitoring how they are implemented at the state and local levels is also important.

Funding for programs authorized under the legislation differs and will affect whether and how quickly programs are implemented. Some provisions, like home visiting and community health center expansion have mandatory appropriations, while others like pregnancy assistance and oral health programs require Congress to appropriate funds if they are to be implemented. Advocates can influence how the funding is applied at the local level

Ensuring that clients obtain any newly available services and benefits, such as enrollment in Medic-

aid or CHIP, is also essential to effective advocacy.

ABA Center on Children and the Law attorneys *Eva J Klain*, *Jessica R. Kendall*, and *Lisa Pilnik* authored this summary. Their work at the Center includes a focus on the legal and health needs of adolescents and very young children.

Endnotes

¹ Pub.L. No. 111-148 (2010); Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (2010).

² Pub. L. No. 111-148, § 2955.

³ Id. at § 10201; "The Patient Protection and Affordable Care Act, Section by Section Analysis" <<http://dpc.senate.gov/healthreformbill/healthbill96.pdf>> (retrieved on April 8, 2010).

⁴ Pub. L. No. 111-148, § 2714.

⁵ Id. at § 2001.

⁶ See the American Academy of Pediatrics' Bright Futures guidelines (<http://brightfutures.aap.org/>), generally regarded to be the standard for evidence-based pediatric services.

⁷ Children's Health Insurance Program Reauthorization Act (CHIPRA) of 2009, Pub. L. No. 111-3.

⁸ Pub. L. No. 111-148, § 10203; Pub. L. No. 111-152, § 1004.

⁹ Id. at § 10909; Erb, Kelly. "Health Care Reform Includes Tax Credit for Adoption," March 2010. <<http://news.adoption.com/uni/frame.php?url=http%3A%2F%2Fwww.walletpop.com%2Fblog%2F2010%2F03%2F29%2Fhealth-care-reform-includes-tax-credit-for-adoption%2F&name=Health+care+reform+includes+tax+credit+for+adoption>>

¹⁰ Pub. L. No. 111-148, § 1101 and § 1201.

¹¹ Id. at 111-148, § 4101; Association of Maternal and Child Health Programs. "The Patient Protection and Affordable Care Act Maternal and Child Health Related Highlights." <www.amchp.org/Advocacy/health-reform/Documents/Senate%20Bill%20-%20MCH%20Highlights%203%2022%2010.pdf> (retrieved on April 9, 2010).

¹² Pub. L. No. 111-148, § 2705.

¹³ Id. at §§ 10211, 10212, 10213; Family Violence Prevention Fund. "Good News for Domestic Violence Victims in Health Reform." Speak Up16(4), Washington, DC: PR Solutions, March 2010.

¹⁴ Pub. L. No. 111-148 § 10503; National Association of Community Health Centers. "About Our Health Centers." <www.nachc.com/about-our-health-centers.cfm> retrieved on April 9, 2010.

¹⁵ Pub. L. No. 111-148 §10503; Pub. L. No. 111-152 § 2303; National Association of Community Health Centers. "Community Health Centers and Health Reform." <www.nachc.com/client/Summary%20of%20Final%20Health%20Reform%20Package.pdf> retrieved on April 9, 2010.

¹⁶ Pub. L. No. 111-148 §10503.

¹⁷ *Id.* at § 0503 at 886; National Association of Community Health Centers, April 9, 2010.

¹⁸ National Association of Community Health Centers, April 9, 2010.

¹⁹ Pub. L. No. 111-148 § 2953.

²⁰ *Id.* at § 2953.

²¹ *Id.* at § 2953.

²² *Id.* at § 2953.

²³ *Id.* at § 2953.

²⁴ *Id.* at § 2953.

²⁵ *Id.* at § 10221.

²⁶ S. 1790 (2009); Senate Democratic Policy Committee. "Patient Protection and Affordable Care Act." <<http://dpc.senate.gov/healthreformbill/healthbill96.pdf>> retrieved on April 9, 2010.

²⁷ Pub. L. No. 111-148, § 4102.

²⁸ *Id.* at § 4102.

²⁹ *Id.* at § 4102.

³⁰ *Id.* at §§ 5101, 5303, 5304.

³¹ Administration for Children and Families. "Depression Among Caregivers of Young Children Reported for Child Maltreatment." *National Survey of Child and Adolescent Well-Being: Research Brief*

13, undated. <www.acf.hhs.gov/programs/opr/abuse_neglect/nscaw/reports/depression_caregivers/depression_caregivers.pdf>

³² Pub. L. No. 111-148, § 2952.

³³ *Id.* at § 2952.

³⁴ *Id.* at § 2951.

³⁵ *Id.* at § 10212.

³⁶ *Id.* at § 10212.

³⁷ *Id.* at § 10212.

³⁸ *Id.* at § 1302, amending 42 U.S.C. § 18022.

IN PRACTICE

Child Abuse and Neglect Registries: Protecting Due Process Rights

by Andrew Smith

In California, a child falsely accused her father and stepmother of abusing her. Both a criminal and a juvenile dependency court found the allegations untrue. However, the father and stepmother were still placed on the state child abuse and neglect registry. Unable to get themselves removed, they were branded child abusers for an act they did not commit.¹

Such cases occur across the country. However, in the last few years courts have started increasingly finding that aspects of these registries violate the Due Process Clause of the U.S. Constitution. Since 2007, the Ninth Circuit and state courts in Missouri and North Carolina have found significant due process violations in state registry procedures.² Additionally, in February 2010, plaintiffs in New York reached a settlement with the state child welfare agency in which the agency agreed to give hearings to 25,000 people on the registry who had not yet been granted their right to be heard regarding placement on the registry.³

These recent cases show more courts are finding problems in states' registry schemes that have led to due process violations. They could signal a trend toward courts being more willing to find problems with registry statutes.⁴ This means people who believe they have been inaccurately placed on a registry may be more likely to succeed with a due process challenge to their state's registry system.

People left on a registry will be blocked from pursuing employment in a child care field or fostering or adopting a child, so it is important to avoid mistaken registry listings. This article discusses precedents from

state and federal courts across the country dealing with due process rights and state registries. It helps attorneys representing alleged perpetrators identify any potential due process violations if their client is placed on such a registry. However, the Supreme Court has not ruled on the issue, so there is no uniform national precedent. Thus, interpreting people's due process rights still varies across jurisdictions.

Fundamental Interest

Before a court will decide whether a state's registry procedures afford the affected person due process, it determines whether placing the person's name on the registry deprived him of a constitutional interest, i.e. a fundamental interest.⁵ In the context of child abuse registries, courts have generally found a fundamental interest if one of these two tests is satisfied:

- **"Stigma plus" test**—The affected person must show stigma, as well as some sort of injury from being placed on the registry, beyond simply harm to his reputation. Usually this means that he worked or wants to work in the child care profession but cannot get a job in the field because placement on the registry is an effective (or actual) bar to employment in a child care position.⁶
- **Property test**—The affected person must show that placement on the registry led to losing something he was legally entitled to. The most common example is in the employment context. If the person was fired from a job because he was placed on the registry, there is only a fundamental interest if the person had a

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contractual right to that job. If the person had an employment contract, there is a fundamental right, but if the employee was working at-will, then there is not.⁷

Thus, an attorney representing a client placed on a child abuse registry must determine which of these arguments to make for a successful due process challenge. If the client is merely angry that he now has a bad reputation as a child abuser, the challenge has little chance of success. If the client was fired because of the registry, however, the attorney could use either test, depending on the circumstances. If the client had an employment contract when he was fired, there is a protected property interest. If the client was an at-will employee, the attorney could still argue that placement on the registry effectively precludes the client from getting a job in the child care field, satisfying the “stigma plus” test.

For years these tests were construed strictly, making it hard for a plaintiff to get past the fundamental interest test.⁸ However, courts in recent cases have taken a much more lenient approach. In *Humphries*, the court held the plaintiff losing the ability to occasionally volunteer with child care organizations rose to the level of infringing on a fundamental interest.⁹ In *W.B.M.*, the court went further, holding the plaintiff had a fundamental interest because of a general potential to be precluded from adopting a child or working in the child care field, without discussing whether the plaintiff himself was even trying to find a job in the field or adopt.¹⁰

Due Process Problems in the Registry Procedures

Once the attorney establishes that the client’s fundamental interest has been affected by placement on the registry, she should argue that some part of the procedures that led to the client being placed on the registry

violated the client’s due process rights. Below is a list of various procedures and what to watch for.

Notice

The first thing to ask the client about is the notice the state agency gave about her placement on the registry. The agency must give an alleged perpetrator adequate notice that she has or will be placed on the child abuse registry.

Question 1: When did the client receive the notice, if at all? Was it before or after she was actually placed on the registry? Recent court decisions have required state agencies to give notice to the person of their intention to place her on the registry before doing so.¹¹ If the client never received notice at all, this is likely a due process violation. However, some courts have held that inadvertent mistakes by the agency do not give rise to a due process claim, even if the mistake led to the client never receiving the notice.¹²

Question 2: What information about the abuse or neglect allegations was contained in the notice? Courts have said that the notice does not necessarily have to be formal (for instance, a redacted case file about the individual was adequate), but it must notify the individual of all allegations that the agency is making against her.¹³

Right to Challenge One’s Placement on the Registry

Due process requires that every person placed on a registry receive an opportunity to challenge the placement. Courts have required different things from these challenge processes, so an attorney should figure out all relevant information about the challenge that was or will be given.

Question 1: Did the client receive an opportunity to challenge before

placement on the registry? Some courts have held it does not violate due process to refuse the alleged perpetrator a chance to be heard on the abuse allegations until after he was placed on the registry.¹⁴ However, recent cases departed from this, mandating that the person be given some sort of preliminary hearing before listing his name on the registry, although this right may be limited to those who work or want to work in a child welfare field.¹⁵

Question 2: Did the client receive an opportunity to challenge before an impartial factfinder after placement on the registry? Child abuse registry schemes need some way for an alleged perpetrator to challenge his placement in front of an impartial factfinder.¹⁶ The attorney should determine whether the person presiding over the hearing was actually impartial. Courts have said that a factfinder can be part of the investigating agency, as long as he was not a part of the underlying investigation.¹⁷ Courts have also held that there is a presumption that the decision maker is honest and impartial absent a contrary showing, so the burden is on the plaintiff to show that the factfinder is incapable of deciding the issue fairly.¹⁸

Question 3: How much time elapsed between the client’s placement on the registry and his challenge hearing? An attorney must also pay attention to the amount of time after placement before the client was able to be heard and how long the entire challenge process will take. Courts have often held that excessive delay in the challenge process violates due process, and they have come up with different standards for what constitutes delay.

For example, the Seventh Circuit in *Dupuy* mandated that hearings must be given within 35 days of placement for child care workers, and the Southern District Court of New York held that hearings be

given within six months from the date of request, with decisions issued 30 days from the end of the hearing.¹⁹

Burden of Proof

States use different burdens of proof to determine whether someone should be put on the child abuse registry and whether she should be kept there despite her request for expungement. Courts have frequently addressed the issue of whether the standards of proof used at various points throughout the registry process satisfy due process requirements. Attorneys should figure out what these standards of proof are to ensure they are constitutionally adequate.

Question 1: What is the burden of proof on the agency when it determines whether to place someone on the registry? At the investigation stage, most states have a very low standard of proof that has to be met before an individual can be placed on the registry. Many states put someone on the registry as long as there is “some credible evidence” or “probable cause” that the abuse or neglect allegations are true. Courts have said that such a low standard is permissible at this early stage, but only if *all* evidence is considered, not merely evidence that shows the allegations are true without considering evidence that shows the allegations are false.²⁰ However, courts in recent cases have disagreed with this trend and have held the burden on the agency at the investigation stage must be higher. These courts have said the agency must decide that a “preponderance of the evidence” indicates the abuse allegations are true before the agency may disseminate the individual’s information to other agencies and employers.²¹

Question 2: What is the burden of proof on the agency if a person challenges her placement on the

Tips for Agency Attorneys

Although most states have child abuse and neglect registry procedures that are codified in statutes and regulations, many child welfare agencies also have had to adopt policies to put these broad statutory mandates into effect. Agency attorneys do not have much control over these legislative mandates, but they do have a say in developing agency policies relating to registry schemes. With the recent federal and state cases challenging registry processes, best practice suggests agency attorneys:

- Check local precedents to determine whether notice must be given to an alleged perpetrator before placing his or her name on the registry, or whether notice does not have to be sent until after the person is placed on the registry. Make sure the notice contains all allegations the agency is making against the alleged perpetrator. Also ensure the notice contains at least some details concerning the evidence against the alleged perpetrator.
- At the investigation stage, if the state uses a “some credible evidence” standard, make sure the investigators are considering *all* evidence, not just the evidence that tends to support the child abuse or neglect allegations against the individual. Both inculpatory and exculpatory evidence must be considered when deciding whether to place someone on the registry.
- Ensure the burden of proof at the challenge stage of the registry process meets due process requirements. This usually means that at some point in the challenge process, though not necessarily at the first stage, the agency must prove the abuse allegations against the alleged perpetrator by at least a “preponderance of the evidence.”
- Make sure the alleged perpetrator is given an opportunity to be heard promptly after first being placed on the registry.

registry? After the person has been placed on the registry and chooses to challenge her placement, courts have held that the burden of proof on the agency to prove the abuse allegations are true must be higher than at the investigation stage. Case law shows that a “preponderance of the evidence” standard must be imposed on the agency at some point during the challenge proceedings, though not necessarily in the first stage of the challenge process.²²

Due Process Test

When determining whether a certain procedure in the registry process satisfies someone’s due process rights, courts always use the three-part test laid out by the Supreme Court in *Mathews v. Eldridge*.²³ Under this test, the court will balance three factors when looking

at aspects of the registry process:

- alleged perpetrator’s interest in avoiding the stigma of mistaken placement on the registry;
- state’s interest in maintaining the existing procedures;
- risk of mistakenly listing someone on the registry under the current procedures and the probable value of added substitute safeguards.²⁴

For an attorney to succeed in a due process challenge to a registry, she must argue that the factors considered in the *Mathews* test favor the plaintiff. Since almost every court finds that the individual has a significant interest in avoiding erroneous stigma and the state has an interest in protecting children from child abuse, usually the analysis comes down to how likely it is that

the current procedures will lead to a lot of mistakes when placing people on the registry.²⁵ As a result, an attorney should focus primarily on establishing that whatever aspect of the registry procedure she is challenging will lead to too many people being mistakenly placed on the registry and that different procedures would lead to fewer mistakes.

Conclusion

Today, many state child abuse and neglect registry systems run the risk of mistakenly placing people on a registry. Incorrect placement leads to innocent people being branded child abusers, a charge that will not only harm their reputations, but could prevent them from finding a job in their field or adopting a child. Effective advocacy for these people involves determining whether the state registry system violated their due process rights, and if so, successfully arguing this point within the context of established due process jurisprudence.

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Endnotes

¹ *Humphries v. County of Los Angeles*, 554 F.3d 1170, 1180-84 (9th Cir. 2009), cert. granted on separate grounds, 2010 WL 596529 (S. Ct. Feb. 22, 2010).

² *In re W.B.M.*, 690 S.E.2d 41 (N.C. Ct. App. 2010); *Humphries*, 554 F.3d 1170; *Jamison v. Mo.*; Dep't of Soc. Servs., 218 S.W.3d 399 (Mo. 2007).

³ Preliminary Settlement Agreement, *Finch v. N.Y. State Office of Children & Fam. Servs.*, 04 CV 1668 (S.D.N.Y. Jan. 15, 2010).

⁴ *Compare Humphries*, 554 F.3d 1170; *W.B.M.*, 690 S.E.2d 41; *Jamison*, 218 S.W.3d 399, to *Behrens v. Regier*, 422 F.3d 1255 (11th Cir. 2005) (rejecting plaintiff's due process claim when plaintiff was mistakenly put on the Florida registry and subsequently could not adopt a child because he did not argue that a fundamental right was affected); *Hodge v. Jones*, 31 F.3d 157 (4th Cir. 1994) (rejecting plaintiffs' due process claim when they were left on the registry even though the investigation proved that the abuse claim was "unsubstantiated").

⁵ See *Humphries*, 554 F.3d at 1184; *Dupuy v. Samuels*, 397 F.3d 493, 503 (7th Cir. 2005); *Valmonte v. Bane*, 18 F.3d 992, 998 (2d Cir. 1994).

⁶ See *Humphries*, 554 F.3d at 1185; *Jamison*, 218 S.W.3d at 406.

⁷ See *Angrisani v. City of New York*, 639 F. Supp. 1326, 1333-34 (E.D.N.Y. 1986).

⁸ See *Behrens*, 422 F.3d at 1259-64; *Smith ex rel. Smith v. Siegelman*, 322 F.3d 1290 (11th Cir. 2003); *Hodge*, 31 F.3d at 165-67.

⁹ *Humphries*, 554 F.3d at 1185-92.

¹⁰ *W.B.M.*, 690 S.E.2d at 49 (N.C. Ct. App. 2010).

¹¹ *Jamison*, 218 S.W.3d at 408-09; *W.B.M.*, 690 S.E.2d at 50.

¹² *Perry v. City of Norfolk*, 1999 WL 731100 (4th Cir. Sept. 20, 1999).

¹³ *Doyle v. Camelot Care Centers, Inc.*, 305 F.3d 603, 623 (7th Cir. 2003); *Vigil v. Div. of Child & Fam. Servs.*, 107 P.3d 716, 719 (Utah Ct. App. 2005).

¹⁴ See *Red Willow v. Ellenbecker*, Civ. 94-5088 (D.S.D. 1995).

¹⁵ *Jamison*, 218 S.W.3d at 409-10.

¹⁶ *Humphries*, 554 F.3d at 1200-01.

¹⁷ *C.C.B. v. Ark. Dep't of Health & Hum. Servs.*, 247 S.W.3d 870, 872-74 (Ark. 2007).

¹⁸ *Jamison*, 218 S.W.3d at 413.

¹⁹ *Dupuy v. Samuels*, 397 F.3d 493, 509 (7th Cir. 2005); *Finch v. N.Y. State Office of Children & Fam. Servs.*, 2008 WL 5330616, at **2-3 (S.D.N.Y. Dec. 18, 2008).

²⁰ *Dupuy*, 397 F.3d at 505-06.

²¹ *Jamison*, 218 S.W.3d at 412; *W.B.M.*, 690 S.E.2d at 52.

²² See *Lyon v. Dep't of Children & Fam. Servs.*, 807 N.E.2d 423, 436 (Ill. 2004) (holding that a "credible evidence" standard at the first-stage appeal satisfies due process requirements because the second-stage appeal uses the "preponderance of the evidence" standard).

²³ 424 U.S. 319 (1976); see *Humphries*, 554 F.3d at 1193; *Jamison*, 218 S.W.3d at 405; *Valmonte v. Bane*, 18 F.3d 992, 1003 (2d Cir. 1994).

²⁴ See *Humphries*, 554 F.3d at 1193-96.

²⁵ See *Valmonte*, 18 F.3d at 1003 (calling this prong of the test the "deciding factor in [the] case").

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