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ARTICLES

Protecting Mothers Against Gender-Plus Bias: Part 1

By Diane L. Redleaf — October 25, 2011

The Chicago, Illinois-based Family Defense Center is a public-interest legal advocacy center that serves families involved in the child-welfare system. The Family Defense Center focuses primarily on wrongly accused family members who have come to the attention of child-welfare authorities due to a recent hotline report of abuse and neglect. The Family Defense Center provides legal services on a self-referral, merits-screening basis (i.e., not as appointed counsel) to family members without regard to gender or family status. It represents caregivers who may be mothers, grandmothers, foster parents, child-care workers, fathers, intact married or unmarried couples, or even siblings or other household members of an alleged child victim. But while the Family Defense Center provides representation to family members generally, the substantial majority of the Family Defense Center's clients are mothers. The Family Defense Center's staff has found that much of the child-protection system's intervention concerning these mothers seems grossly inappropriate and unfair, leading to the extreme harm of family separation or threatened separation of children from their primary caregiver (their mother) and severely impacting mothers' abilities to support themselves and their children.

The Family Defense Center's observation that mothers are particularly at risk of losing custody and being mislabeled as child abusers or neglecters, through no genuine fault or action worthy of that label, led the Family Defense Center to develop the Mothers' Defense Education and Advocacy Project (Mothers' Defense Project).

The unfairness we have observed is not obvious simply from the disproportionate impact of child protection intervention on mothers. Mothers continue to be children's primary caregivers. It therefore stands to reason that genuine concerns about child safety would make mothers targets of child protection intervention more often than fathers or other male caregivers. At first, for this very reason, the Family Defense Center found it difficult to pinpoint gender bias when the Department of Children and Family Services (DCFS) intervened against mothers. As the project has unfolded, however, and as the categories of cases affecting mothers disproportionately have become better defined, a clearer case for genuine gender discrimination has emerged.

The discrimination we have observed can be fairly described as "gender-plus" discrimination. The mothers we represent are subjected to a high risk of losing custody of their children and suffering impairments to their career opportunities solely or principally because they are female parents (mothers) who fall into an additional highly gender-specific category, such as being a victim of domestic violence or having depression, including postpartum depression.

To see how gender discrimination operates in the Mothers' Defense Project cases at the Family Defense Center, consider the differences between a typical Family Defense Center's case that

involves allegations against an intact couple and a typical case involving allegations against a single mother in one of the four Mothers' Defense categories. (Part 2 of this article will discuss the four categories in detail, with case examples.) In the Family Defense Center's typical bone fracture/physical abuse allegation case, there is a clear-cut alleged harm (i.e., the fracture) brought to the attention of child-welfare authorities due to a call by a professional who lacks a bias against the parents, and the Hotline call was made because the injury requires explanation and accountability; and, often, a straightforward defense, such as an explanation that the injury was accidental, that there is an underlying medical condition that led to the injury, or that another person outside the family caused the injury to the child. The cases involving allegations of physical abuse that come to the Family Defense Center's attention tend not to be gender-specific; the client to be defended from an erroneous allegation may be a mother, a father, both parents, another household member or caregiver, or all of the above. In these cases, the Family Defense Center has worked with leading Chicago-area orthopedists to establish that assumptions that child abuse must have caused the injury are generally erroneous, and the Family Defense Center has often prevailed in exonerating a wrongly accused parent. See [Family Defender](#), Vol. 9 (Spring-Summer 2010).

A typical case against a mother in the Family Defense Center's caseload, by contrast, generally involves a vague allegation of neglect, such as an allegation that the mother caused a "substantial risk of harm—injurious environment." In these cases, which make up not only a sizeable percentage of our caseloads, but also a sizeable share of the child-welfare system in Illinois as a whole, 38 percent of allegations involve a claim of risk of harm in the future rather than any specific actual claim of harm. Commonly, hotline calls alleging these grounds often come from former or estranged spouses, combative family members, hostile neighbors, or anonymous callers who have a potential for bias or a personal agenda motivating the call.

The defense to these allegations can be difficult to formulate precisely because the allegation against the mother is so open-ended. The legal defense generally requires demonstrating that the mother is a good parent. As feminist child-welfare scholar Professor Annette Appell has observed regarding poor and minority female-headed families, "Removing children from their families runs counter to what the dominant culture knows about its own families, which despite their failings are viable and worthy of respect." A possible explanation is that:

other families are not viewed as "real families" . . . particularly when they are of color. . . . Just as these families are not families, these mothers are not really mothers. They deviate from the normative notions of mother and womanhood and are defined as bad. The result is an often punitive, rather than empowering, system focused more on mothers than on their children . . . and expand[ing] the scope of state intervention beyond child protection into every realm of mothers' lives in the name of making them good mothers.

A. Appell, "Protecting Children or Punishing Mother: Gender, Race and Class in the Child Protection System (An Essay)," 48 *S.C.L.Rev.* 578 (1997).



Because of the already-heightened scrutiny applied to mothers in the child-welfare system, mothers who cannot prove they are a supermom will often find that the nebulous charge of causing “risk” sticks.

These very amorphous cases, in which real evidence that the mother has harmed the child is lacking and yet the case is remarkably hard to defend against, are almost exclusively brought against mothers only. Indeed, in many cases we have handled, when “environmental injurious” allegations have been made against fathers or male partners, it is because the male has acted in some concrete fashion to cause a harm, such as beating the mother. When the mother is beaten herself and did nothing obvious to “cause” that harm, she nevertheless is often viewed by the child-welfare system as a perpetrator of child neglect purely because of her status as a victim and not because of any actions she took in directly harming a child. The Family Defense Center has had numerous cases in which mothers have been labeled “neglectful” for causing “risk” when they have been the sole victim in the home, including when their infants have been asleep in another room through the entire domestic-violence incident.

Clearly, there is something grossly unfair about any system that arbitrarily or discriminatorily impairs the rights of large classes of parents, or forces them without good cause to defend their parental rights and their rights to pursue careers (because being labeled a child abuser or neglector even for a vaguely defined allegation can blacklist mothers from working with children. *See* D. Redleaf and S. Pick, “Challenging a Listing in a Child Abuse Registry,” *Children’s Rights*, Vol. 12, Issue 4 (Summer 2010) and Vol. 13 Issue 1 (Fall 2010)). Pinpointing the causes of that unfairness, however, requires closer analysis of the cases, the allegations, and the defenses available to mothers who find themselves the target of a hotline call that seems peculiarly gender-specific.

Framing the Mothers’ Defense Project

The Family Defense Center decided to enlist Northwestern University Law School Professor Dorothy Roberts, one of our own national advisors who has written extensively about gender and race bias in the child-welfare system, to help us explain the treatment of the mothers we observed in our caseloads. Professor Roberts noted pervasive differences, especially in criminal law, in holding mothers accountable for the acts of others, while fathers and males are generally held accountable only for their own actions. Professor Roberts also found that there are often much sharper penalties for mothers than for fathers for “failure to act” when it comes to their children. Indeed, as Professor Roberts has written, there were no examples in the law she could locate in which fathers are criminally charged for failing to protect their children from the actions of others, while such cases involving mothers were commonplace. D. Roberts, “Motherhood and Crime,” 79 *Iowa L. Rev.* 95(1993)).

The bias of criminal law against mothers is of grave concern, of course, but it is not our agency’s focus; the child-welfare system is. And, unlike in the criminal system, our own clients face allegations even if there is no actual child victim and only an allegation of future “risk.” Given the very low burden of proof in the child-welfare system (i.e., in juvenile court and in

administrative registry determinations), clients who have several demographic strikes against them (race, class, and gender) are at especially high risk of losing their children to the child-welfare system and being labeled child abusers or neglectors (with severe consequences for their own careers as well as their family lives) without strong evidence of wrongdoing. Indeed, we have found that when mothers fall into multiple intersecting categories, they are treated with reduced deference by authorities. In these cases, given the high degree of discretion given to child-welfare authorities to determine “risk” to the child, simply being the female parent and being in a further highly gendered category, such as being a domestic violence victim or in a relationship with a “risky partner,” can lead to mothers’ loss of custody, absent actual wrongdoing toward a child. *See* Kimberle Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” *University of Chicago Legal Forum* 1989, 139–67). In these cases, being a member of a disfavored subclass of caregivers effectively substitutes for any requirement of specific evidence of committing child abuse or child neglect.

After meeting with Professor Roberts in the spring of 2009, the Family Defense Center staff examined its own caseloads more carefully. We began to define, identify, and categorize cases that appeared to single out mothers. We formulated four categories of cases in which we believed mothers were subjected to unfair, gender-biased assumptions:

- mothers who are domestic violence victims;
- mothers who have mental-health conditions, especially depression, including postpartum depression;
- mothers who are non-offending parents and/or in relationships with offending or “risky” partners; and
- mothers in extreme poverty due to the feminization of poverty.

We also began to collect gender-related statistics for the child-welfare system as a whole through Freedom of Information Act requests and other research, looking to see if the patterns in our own cases were mirrored in reported statistics.

While governmental statistics are not generally kept in exactly the same categories as our Mothers’ Defense cases and reported categories of abuse and neglect allegations are not always teased out by gender and parenting status, we found some confirming data as to the prevalence of cases against mothers. In Illinois in 2010, parents were overwhelming indicated as abuse or neglect perpetrators. (Seventy-six percent of alleged reported harms involve parents and guardians, not other caregivers.) However, of these parental cases, 60.5 percent of reports were made against mothers compared to just 27 percent of reports being made against fathers. DCFS statistics also showed that in Illinois in 2010, sexual abuse, physical abuse, and child death made up 16.5 percent of the harms against children. The remaining 83.5 percent of harms against children are identified as “injurious environment” or other forms of neglect (in the categories of “blatant disregard,” environmental neglect, lack of health care, lack of supervision, and other risk of harm). *Child Abuse and Neglect Statistics, 2010*, Illinois Department of Children and Family



Services, January 2011 and responses to Freedom of Information Act requests. These neglect categories are the amorphous ones that allow substantial discretion in investigators to determine culpability. Mothers are indicated as perpetrators in sexual abuse, physical abuse, or death significantly less often than fathers, while in the amorphous categories of risk and environmental neglect, mothers are indicated more frequently than fathers.

The disparities we see in our own caseloads and in state and national statistics suggest that “gender-plus” discrimination against mothers is occurring. *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S.636 (1975)(holding that a statute treating widowers less favorably than widows (sex plus marital status discrimination) violates the Equal Protection Clause of the 14th Amendment); *Bach v Hastings-on-Hudson Union School Dist*, 365 F.3d 107 (2d Cir. 2004). (discussing “gender-plus” description as an alternative manner of describing impermissible sex stereotypes such as assumptions that mothers with young children will be less committed to the workplace). Mothers who fall within one of the specialized Mothers’ Defense subcategories appear to be at significantly heightened risk for facing restrictions on their custodial rights and being pejoratively labeled as a child neglecter based on membership in the gender-plus category alone, regardless of the facts of their own particular care and their actual care of their child. That is a form of gender discrimination.

Legal Strategies for System Reform

The Mothers’ Defense Project’s case analysis and overarching approach was only very recently developed, and it is still an ongoing process. The gender-plus discrimination analysis is our current theory that best accounts for the treatment of the Mothers’ Defense Project clients. If applied to child-welfare cases more generally, this analysis of the operation of gender-plus bias in the child-welfare system may provide a new and potentially powerful tool informing the understanding of the unfairness of the child-welfare system. This understanding could change the way many child and family advocates and service providers, along with decision-makers and the general public, see mothers who are brought into the child-welfare system.

As we know from years of efforts to gain support for our work in the larger community, many people shy away from providing assistance to families in the system due to concerns that proffered help—including grant support, pro bono legal services, and other very tangible forms of aid—is going to “bad” parents who “deserve” to lose their children. But through the revelation that the system operates with unacceptable gender biases, incorrect stereotypes, and gender-plus discrimination, mothers who are caught up in the system through no fault of their own may gain new supporters. This may help advocates in turn to develop new, effective strategies to reform policies and practices that disadvantage mothers and harm the mother-child bond.

To make the system fairer to all parents and all children, policies that seem neutral must be reexamined in light of their primary use against mothers based on their status and not based on their actions as parents. Only if cases against mothers are fairly judged on the facts and not based on stereotypes and presumptions will children be protected from the loss of their closest familial bond—the mother-child bond.

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Contrary to much of the accepted juvenile court lore, actual neglect and actual abuse can be defined with greater specificity than many state statutes provide, and the failure to define “neglect” carefully so as to focus on parental conduct or omissions rather than the parent’s status operates to mothers’ and children’s detriment. *See Slater v. Dep’t of Children and Family Servs.*, 2011 Ill. App. LEXIS 642 (June 17, 2011) (finding that a momentary lapse of attention by a mother did not meet the statutory neglect definition). By contrast, child-welfare systems’ reliance on vague “risk” language and other proxies for adjudication of actual harm to children, like describing the mother as a “domestic-violence victim” or a “depressed mother,” does not establish the level of harm that a fair adjudication requires. When mothers who have done nothing wrong are labeled as neglecters due to “risk” based on gender classifications alone, tolerance for imprecision in the legal definition encourages a serious form of gender discrimination that allows mother-child bonds to be shattered with impunity.

Challenges to this form of overreaching by the child welfare system are already underway in recent litigation in Illinois. Indeed, the ground of “substantial risk—environment injurious” is being challenged in a recent Family Defense Center pro bono case argued by Jenner and Block attorney Michael Otto. In *Quinn v. IDCFS*, No. 2-10-0643, we are arguing that DCFS’s continued use of the “substantial risk—environment injurious” allegation violates the Illinois child-abuse-reporting law, insofar as the Illinois General Assembly already recognized the vagueness of this ground and removed it from the statute. While gender-plus-discrimination arguments were not raised in the *Quinn* case, the lack of legal authority for DCFS to operate under the sweeping category of “environment injurious” has been argued in this case and several others, each of which has involved mothers (most of whom were domestic-violence victims).

Policies and practices separating mothers and children due to domestic violence against mothers and the labeling of mothers as neglectful solely because they are victims have also been successfully challenged in the class action *Nicholson v. Scopetta*, 344 F.3d 154 (2nd Cir. 2003). In Chicago and elsewhere, arguments based on *Nicholson*’s holding that being a victim of domestic violence is not per se neglect and that it is unconstitutional to remove a child from a mother/victim without additional grounds of harm specific to her own conduct are actively being pressed by mothers’ defenders.

Head-on challenges to the discriminatory treatment of mothers in the child-welfare system may be difficult, especially given recent decisions that limit the availability of class-action remedies in circumstances where individual discretionary judgments are permitted or required. *See Wal-Mart Stores v. Dukes*, 180 L. Ed. 2d 374 (March 29, 2011). Moreover, there is no statutory provision akin to Title VII that mothers can invoke to challenge the application of the gendered categories and stereotypes at work in the child-welfare system.

Nevertheless, by understanding that there is real gender discrimination at work in the child-welfare system’s treatment of mothers, much stronger links between the issues affecting mothers in the child-welfare system and the treatment of poor, single-headed households, primarily headed by women, can lead to vastly more effective advocacy for child-welfare reform. Once the



operation of gender-plus discrimination in the child-welfare system is better understood, the status quo acceptance of misplaced accusations and the continued assault on mothers will simply have to end. Depriving children of the care of their mothers is an extremely harmful practice, and if the deprivation rests on bias and not evidence, it should not and cannot be tolerated.

Keywords: litigation, children's rights, gender-plus bias, Family Defense Center, Mother's Defense Project, child welfare

Diane L. Redleaf is the executive director and founder of the Family Defense Center. She would like to thank Melissa Staas and Allegra Cira Fischer, staff attorneys of the Family Defense Center, who have handled the majority of cases and project development of the Mothers' Defense Project and have administered the program described in this article. In addition to contributions by staff attorneys, law clerks Gillian Satterfield Barjon in 2010, Jessica Maas and Kennedy Cabell in 2011, and social work intern/intake coordinator Sarah Gatti (winter 2010–July 2011), as well as Oberlin College intern Truc Lyn Nyugen, all contributed significantly to the research, analysis, and presentation of the Mothers' Defense Project activities.

The Changing Landscape of Second-Parent Adoptions

By Leslie M. Fenton and Ann Fenton — October 25, 2011

Despite recent legal victories for same-sex couples, many are stymied when they try to seek legal protection for their relationships with their children. The failure of states to recognize “second-parent” adoption, a process whereby a child obtains two legal parents of the same biological sex, is one of the largest remaining barriers to legal equality for many Americans. While lesbian, gay, bisexual, and transgender (LGBT) parents have convinced courts in a significant minority of states to recognize such adoptions, the results of such litigation vary widely—and children are caught in the crossfire.

New Families, Old Laws

The census data that is currently available indicates that the family structure is in flux. Of the 5.5 million unmarried couples living together in 2000 (up from 3.5 million in 1990), approximately 1 in 9 had partners of the same sex and represented 1 percent of all couples households in the United States. *See* Tavia Simmons & Martin O'Connell, U.S. Census Bureau, *Census 2000 Special Reports, Married-Couple and Unmarried-Partner Households: 2000* (February 2003). While the official 2010 census data is not yet complete, recently released numbers indicate that approximately one quarter of same-sex couples are raising children together. Susan Donaldson James, [Census 2010: One-Quarter of Gay Couples Raising Children](#), ABC News, June 23, 2011.

Traditional adoption law, however, never contemplated adoptive households headed by same-sex couples. Historically, children were allowed just one legal parent of each sex at a time, which meant that an existing legal parent would have to terminate his or her own parental rights before her same-sex partner could adopt the child. But this old model of adoption fails as attorneys and family courts grapple with the reality that the modern family is increasingly headed by same-sex

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couples and other nontraditional family arrangements. Unmarried biological parents, transgender parents, grandparent caretakers, stepparents, and single parents have all encountered some degree of difficulty where their family structure does not fit neatly into that which is contemplated by family codes.

Past Prohibitions

In the past, some states expressly prohibited gays and lesbians from adopting children at all, but, in recent years, these anti-gay adoption bans have gone all but extinct. Florida, the last state to retain an explicit ban on adoptions by gays and lesbians, saw it struck down in 2010 by a state appellate court decision. *See Fla. Dept. of Children & Families v. X.X.G.*, 45 So.3d 79 (Fla. Dist. Ct. App. 2010). A 2008 voter-initiated Arkansas ban on adoptions by any “unmarried persons cohabitating with a sexual partner” was struck down by the Arkansas Supreme Court in 2011. *Cole v. Arkansas*, No. 10-840 (Ark. Apr. 7, 2011). Utah still has a similar ban. Utah Code 78B-6-117 (2008). Gays and lesbians as single individuals can now adopt children in most (if not all) states, but significant hurdles remain for same-sex couples who are parenting together. While adoption regulations expressly targeting LGBT families may have dissipated, outright and unspoken restrictions on adoptions by unmarried, cohabitating sexual partners create a de facto ban on adoptions by either member of a same-sex couple in states where they are not allowed to marry.

Benefits of Adoption

Opponents have long claimed that restricting second-parent adoptions protects children, but the reality is that children lose out on significant benefits when their parents are not legally recognized as such. Adopted children are entitled to all of the same benefits that usually flow to children from their biological parents as a matter of law. These benefits include the right to receive Social Security Survivor benefits on the death of the parent, eligibility for Social Security disability and Medicaid programs, and inheritance rights. In addition to these tangible benefits, once children are adopted by a nonbiological parent, that parent obtains standing (in many jurisdictions) to seek custody and visitation rights in the event of a separation or divorce. Additionally, children benefit enormously from simply having a legally recognized relationship with a nonbiological parent. “Kids know whether their relationship to their parents is secure,” says Beth Allen, a family-law practitioner in Oregon who helps more than 50 clients a year obtain adoptions of their same-sex partners’ biological children. “It is meaningful to them.”

In the case of same-sex couples, courts and attorneys have created the concept of second-parent adoption to address the lack of guidance in traditional adoption law. Second-parent adoptions are frequently seen where two women agree to raise a child together and the child is conceived by one of them via anonymous sperm donation. In most states, the nonbiological parent must adopt to establish a legal relationship to the child. Second-parent adoption is also used in some states when a same-sex couple adopts a child jointly or where an opposite-sex biological parent has died or has otherwise terminated parental rights. Often, second-parent adoption is not enshrined



in the law itself. Instead, it has been created through custom or case law as a way to deal with the reality of the modern American family, and it is constantly being reshaped by litigation.

Current State of Second-Parent Adoption

Adoption law is generally a province of the state, and same-sex families have varying degrees of legal protection depending on where they live. Traditional havens for LGBT families such as California and Massachusetts predictably provide strong protections, while some states that are generally hostile to LGBT rights offer no legal protections for nonbiological parents in same-sex couples. Most states fall somewhere in between and are often guided by decisions of state trial and appellate courts, even if there is no binding precedent.

It is important to note that the following information tends to change quickly as an increasing number of second-parent adoption cases are litigated. For the most up-to-date information about second-parent adoption in a particular state, it is always advisable to consult an experienced local family-law practitioner.

Explicitly Allowed

In a significant minority of states, the right to second-parent adoption is enshrined either by statute or appellate case law. California, Delaware, Indiana, Illinois, Iowa, Maine, Massachusetts, New Jersey, New York, Pennsylvania, Vermont, and the District of Columbia have all recognized some form of second-parent adoption via precedent-setting, state-court rulings. Connecticut, Colorado, and Vermont authorize second-parent adoption by statute. *See [In Your State](#)*, Lambda Legal (last visited September 4, 2011). Further, in states where same-sex relationships receive some type of formal recognition (usually marriage, domestic partnership, or civil union), same-sex couples may take advantage of laws designed to protect married spouses. In these relationship-recognition states such as California, stepparent adoption statutes can be applied to create an avenue to second-parent adoption.

In states where a husband is presumed to be the legal father of a child born to his wife during their marriage, a presumption of maternity for a child born during a marriage between two women may also apply. A presumption of maternity allows the nonbiological mother's name to appear on the original birth certificate. For example, California recognizes a presumption of maternity for registered domestic partners, and Illinois practitioners predict that the state's new civil-union law will give rise to the presumption. Practitioners are divided as to whether a presumption of maternity negates the need for formal second-parent adoption in states where such a presumption is recognized, but they generally agree that second-parent adoption is the safest legal option for preserving family ties, especially in the event of an out-of-state move.

Openly Recognized, Not Formalized

In some states, second-parent adoption is openly recognized but not explicitly provided for in statute or case law. In Oregon, for example, it appears that attorneys have cobbled together a viable second-parent adoption theory based on several other areas of family law. According to Oregon attorney Beth Allen, second-parent adoption is now so routine that it is universally



recognized even by the Oregon Department of Human Services. Oregon also recognizes a presumption of maternity for the nonbiological parent where a child is born during a same-sex domestic partnership. Likewise, Washington has no precedential case law or statute, but practitioners widely report that courts will grant second-parent adoptions. In states like Washington, second-parent adoption is almost completely invisible in the law, making it difficult for families to determine their legal rights. Similar states, where numerous trial courts have approved second-parent adoptions but no binding precedent exists, also include Alaska, Georgia, Maryland, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, Rhode Island, and Texas. *See Lambda Legal, supra*. For states in this category, LGBT families experience the highest level of uncertainty and confusion about their legal status as parents, in part because the successful second-parent adoptions are often limited to politically liberal jurisdictions within the state.

Outright and De Facto Prohibitions

Finally, many states prohibit second-parent adoption either by default or by case law. Utah and Louisiana bar unmarried couples from jointly adopting and do not recognize legal relationships between same-sex couples. Other states with no existing legal avenues for second-parent adoption include Florida, Idaho, Kansas, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Virginia, West Virginia, and Wyoming. Negative case law, sometimes precedential, guides judges in states such as Alabama, Arkansas, Arizona, Kentucky, Louisiana, Mississippi, Michigan, Ohio, Nebraska, North Carolina, Tennessee, and Wisconsin.

But even in states hostile to second-parent adoption, practitioners can persevere in helping their clients legally protect their families. In Wisconsin, where case law prohibits second-parent adoption, attorney Emily Dudak-Taylor reports that practitioners have successfully obtained second-parent adoptions where the biological parent consents to a termination of parental rights and subsequently both parents jointly adopt the child. In more conservative areas of the state, however, judges are reluctant to recognize even limited legal relationships such as guardianship. In Louisiana, where the case law is hostile and unmarried couples are prohibited from joint adoption, there are still anecdotal reports of successful second-parent adoptions performed by sympathetic judges. While these reports offer a glimmer of hope, practitioners are becoming increasingly apprehensive about the potential risk of asking trial courts to perform second-parent adoption in jurisdictions where the legal climate is generally hostile to LGBT rights.

Recent Litigation

Second-parent adoption is a particularly opportune field for impact litigation, precisely because of the lack of direction offered by most states' family laws. While the potential for litigation gives hope to families that their case could change the law of their state, it is also a cause for concern. A negative ruling in such a case could harm all other LGBT families in the state. In states where the law is unclear or silent, every custody battle between same-sex parents has the potential to affect the legal status of all same-sex parents; even other nontraditional family structures are potentially affected.

North Carolina: Boseman v. Jarrell

In North Carolina, a recent case demonstrated the frightening downside of impact litigation gone awry. Prior to last year, North Carolina fell into the category of states where the law was silent but practitioners reported numerous second-parent adoptions granted by trial courts. Then, in December 2010, the North Carolina Supreme Court issued an opinion in *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010), a contentious custody case between two lesbian parents. Melissa Jarrell and Julia Boseman began a relationship in 1998 and thereafter planned to raise a family. Jarrell conceived a child via anonymous sperm donation in 2002, and Boseman adopted the child via second-parent adoption in 2005. The women raised the child together as co-parents until their separation in 2006. When Boseman filed a petition for custody after the separation, Jarrell argued that the adoption was void and that Boseman had no custody or visitation rights. Boseman responded that the state's statutory time limit to contest an adoption had run and prohibited Jarrell's argument, a strategy that has worked in similar cases in other states. On appeal, however, the North Carolina Supreme Court sided with Jarrell and held that Boseman's adoption of the couple's child was void *ab initio*, exempting Jarrell's argument from the statutory time limit. Unfortunately, the court didn't limit its ruling to the case before it; the majority went on to find that all second-parent adoptions that have ever been performed in North Carolina are void *ab initio*.

Sharon Thompson, a North Carolina family-law practitioner and former state legislator, estimates that more than 200 families are directly affected by the ruling in *Boseman*. The result for these families, she says, is mass confusion. She is forced to explain to clients that the adoption decrees they thought were final are likely void and unenforceable. "It is heartbreaking for these families," she says. "I have to advise my clients that an insurance company could cut their child off of insurance, likely right after a big claim is filed." Thompson explained that when she is consulted by same-sex families considering a move from out of state to North Carolina, she must advise them that they will be unable to legally protect themselves under the state's adoption laws.

But Thompson is also adamant about pointing to the silver lining of *Boseman*: It confirmed a nonbiological parent's right to seek custody even if he or she is unable to adopt the child. Under the state's custody laws, if the biological parent acts in a manner that is inconsistent with "paramount" parenting rights—such as allowing a nonbiological caretaker to assume the role of primary parent—the nonbiological parent has standing to seek custody in court. Other states recognize different incarnations of de factoparentage, which is the only way for a nonbiological parent to protect his or her relationship with a child in states where second-parent adoption is prohibited.

Ohio: In Re Mullen

Underlining the silver lining of *Boseman*, the Ohio Supreme Court recently ruled the opposite way in a case with a notably similar fact pattern. In *In Re Mullen*, Slip Opinion No. 2011-Ohio-3361 (Ohio, Jul. 12, 2011), Kelly Mullen and Michele Hobbs agreed to parent a child together,

and Mullen conceived a child, using a known sperm donor in 2005. The women shared parenting responsibilities until their separation in 2007, at which point Hobbs filed a petition for custody. The court held that a biological parent must explicitly and in writing relinquish sole custody to a nonbiological caretaker through a formal shared-custody agreement for the caretaker to have standing to seek custody. Because Hobbs and Mullen had no written agreement regarding parenting, Hobbs did not have standing to seek custody. Coupled with Ohio's general hostility toward same-sex families, the ruling means that, practically speaking, nonbiological parents in same-sex relationships in Ohio are at risk of losing all contact with their children if they separate from the biological parent. This is also true in New York for same-sex couples who do not formalize their relationship through marriage or a marriage-like status. *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010). While visitation and custody rights do not solve the problem of eligibility for tangible benefits, they go a long way to protect a child's right to a relationship with a nonbiological parent in the event that the biological parent attempts to sever those ties during a divorce or separation.

Louisiana: Adar v. Smith

The recognition of second-parent adoptions varies widely from state to state, and family-law attorneys are increasingly concerned about the portability of such adoptions. States have so consistently recognized full faith and credit for the adoption decrees of other states that, until recently, most practitioners did not consider portability to be a significant issue. Advocates are now worried about the results of a closely watched full-faith-and-credit case out of Louisiana that could be the first second-parent adoption case to land before the Supreme Court of the United States.

Lambda Legal brought *Adar v. Smith* in Louisiana federal district court on behalf of Oren Adar and Mickey Smith, two men who jointly adopted a Louisiana-born child in New York. When Smith and Adar applied to the Louisiana registrar to amend their child's birth certificate to reflect the New York adoption, the registrar refused, pointing to Louisiana's laws prohibiting unmarried couple adoptions. The men sued, arguing that the refusal violated the Full Faith and Credit Clause of the Constitution and that their rights under the Equal Protection Clause of the Fourteenth Amendment. Initially winning at the trial level and in front of a three-judge panel on the Fifth Circuit, on rehearing en banc, the Fifth Circuit reversed and found that the Louisiana registrar has no duty to give full faith and credit to the adoption decree of another state. *Adar v. Smith*, No. 09-30036 (5th Cir. Apr. 12, 2011) (en banc). The decision is one that Lambda attorney Kenneth Upton Jr., who argued the case, found "surprising in its scope and breadth." Like *Boseman*, the case may affect many families other than the litigants. If states are legally allowed to ignore out-of-state adoption decrees, Upton speculates that an adoptive parent traveling with a child could be accused of kidnapping or be unable to obtain emergency medical care for the child.

While Upton firmly believes that the Fifth Circuit's dissenters in *Adar* correctly found that the Full Faith and Credit Clause requires Louisiana to acknowledge the out-of-state adoption by



amending the birth certificate, there is also significant danger to further appeal. A loss could overturn the Tenth Circuit's opinion in *Finstuen*, and it could embolden other states to enact bans on the recognition of out-of-state second-parent adoption decrees. Any negative results could take decades to correct. After a months-long inquest into the possible ramifications of appealing, including multiple consults with seasoned Supreme Court attorneys, former judicial clerks, and leading academic scholars, Lambda teamed up with private firm Jenner & Block to appeal to the U.S. Supreme Court. "If you focus on the interests of the children," Upton says, "this seems like the case to bring."

Conclusion

Same-sex families are currently imperiled by the uneven application of ill-fitting family-law codes and customs, and the trend will likely continue into the near future. Practitioners can best protect clients by keeping their knowledge current and seeking out creative relief. Until every state provides equal protection for these families, conscientious lawyering is often the only protection available.

Keywords: litigation, children's rights, second-parent adoption, same-sex couples

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Special Education Advocacy at School Meetings: Part 1

By Erin Han, Janeen Schlotzer, and Richard Cozzola — October 25, 2011

As attorneys, we are accustomed to fighting others' battles on our turf, often the courthouse, in hearings controlled by rules of evidence, legal precedence, statutes, and courtroom rules. However, when working on behalf of a student in need of special education services, most initial advocacy can take place in meetings at the student's public school. An effective attorney is able to adapt many of the fundamental courtroom skills learned in law school and practice to communicate and advocate with educators at these meetings to help meet students' needs.

The road to appropriate special education services for students is paved with a multitude of meetings. The most common of these meetings include the following:

- A *domain or assessment planning meeting* is typically the shortest and least contentious special education meeting. It occurs after a school has consented to a parent's request to have his or her child evaluated for special education services and involves the various professionals at the school who will conduct the evaluation.
- An *eligibility conference* occurs after the special education testing is complete. The full team reviews the testing to determine whether the child meets the federal and/or state criteria as a child with a disability and, as such, is eligible for special education services.
- *Individual education program (IEP) meetings* are meetings that occur at least annually to review the educational progress and services for a student eligible for special education



and related services. IEP meetings may occur more frequently if either the parent or school has concerns about the child before the annual review date.

- A *manifestation determination review (MDR)* is a meeting that must occur before a school can attempt to expel a student who has an IEP. Its purpose is to determine whether the alleged behavior is a manifestation of the student's disability or a result of the school's failure to implement the IEP. An affirmative answer to either question halts the expulsion proceedings.

Note that many school districts offer meetings under a variety of other names. These include response to intervention (RTI), school-based problem solving, or student study team meetings as a response to a parent's request for special education services for his or her child. These are informal meetings that do not fall under the auspices and protections of federal law. They are often of limited usefulness to a struggling student—agreements reached at these meetings are unenforceable and promised services are not entitlements. The meetings are largely inappropriate venues for legal advocacy because they fall outside of the formal special education process enforceable under federal law.

Before the Meeting: Preparing to Advocate

In preparation for any school meeting, attorneys should take a number of preparatory steps. They should gather and review records, give notice to a school of intended participation and confirm the purpose of the meeting, determine appropriate outside participants, prepare the parent, and determine the extent of student's participation in the school meeting.

The Power of Investigation

If you have not started to gather documented information prior to getting a meeting date on your calendar, you should begin to do so as early as possible in advance of a meeting. The most relevant documentation will probably be in the student's school file. A parent is entitled to access all student records (Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (1974)). School records are more than just a student's report card and may include daily attendance and discipline records; security officer reports or correspondence; transcripts; parent communications; social worker, teacher, and aide records; health records; portfolios of schoolwork; data from RTI and school-based problem solving; email correspondence; electronic database records; and videotaped records.

Before attending any meeting, review the records you receive carefully. The records reflect who spends time with the student as well as school staff concerns and perceptions of the student's behavior. In so doing, they may suggest staff whose input would be helpful at school meetings. Only one special education teacher and one general education teacher are required to attend an IEP meeting under the Individuals with Disabilities Education Act (IDEA). *See* 34 CFR § 300.321(a)(3). The school will often unilaterally choose which teachers to fill in these slots, but there may be reasons for you to specifically request the attendance of additional teaching staff. This is especially true where the staff chosen by the school present a view of the student that glosses over the presence or impact of any disabilities. Records will sometimes show that

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particular teachers or other professionals have suggested that a student needs an evaluation for special education services or the services themselves. Such information can help rebut claims at an eligibility meeting that a student has no such needs. Records also offer a timeline of the student's progress or lack thereof. It is also good to review teachers' corrections on assignments and tests that may corroborate conclusions that appear in evaluations.

Remember that your focus in reviewing records will vary depending on the specific purpose of a meeting. For example, if the upcoming meeting is an initial domain meeting, preparation will focus on identifying the areas in which a child may be delayed. To investigate these questions, examine the records for those indications of areas in which a student demonstrates problems (e.g., speech, dexterity, attention, conduct). Doing so will support your request for evaluations in those areas at the domain meeting. Similarly, the interview with a parent prior to a domain meeting will center on having the parent identify those areas in which the child has delays and articulate concrete examples of those problems.

If, however, the upcoming meeting is an MDR, the preparation will focus on the school's implementation of the IEP and the description of the student's disability contained in that IEP. At an MDR, the team operates under the assumption that the alleged conduct did happen as stated in the school misconduct report and proceeds to determine whether that conduct is a manifestation of the child's disability or a result of the school's failure to implement the IEP.

To answer the first question and to argue for a manifestation, you must become an expert on the student's disability. Look beyond just the eligibility label in the records to the characteristics of that disability as described throughout the IEP and the child's Behavior Intervention Plan (BIP). 20 U.S.C. 1415(k)(1)(F); 34 CFR 300.324(a)(2); 34 CFR 300.530(f)(i)(ii). If the child has a therapist, get releases to talk to that therapist to identify the ways in which the child's disability manifests itself through his alleged behavior. To answer the question regarding the school's implementation of the IEP, talk to the student and parent about whether the student was receiving the services set forth in the IEP and how they were being delivered. Compare this information with the requirements of the IEP so that you are prepared to argue that the school staff failed to implement the elements of that plan. Finally, note that if the MDR process were to result in a finding that the alleged conduct is not either a manifestation of the disability or a result of the school's failure to implement the IEP, then the case could proceed to an expulsion hearing, where the parties could contest whether the actual conduct occurred.

RSVP: Giving Advance Notice

Before attending a school meeting, give the school advance notice of your intended participation. If you do not notify the school of your intention to attend and participate, you can expect the meeting to be cancelled on your arrival while the school scrambles to speak to its own legal representative. We have found best practice is to forward written notice of representation to the school's special education case manager or principal in advance of the meeting. We usually do this by fax or email so that we can have a receipt. If the school district is represented by counsel,



send a copy of all communications to the lawyer so that you do not expose yourself to professional misconduct allegations for communicating with a represented party.

When you notify the school of your intended participation, take the opportunity to confirm the purpose of the meeting to properly prepare and confirm the school's intentions. Because your preparation varies depending on the meeting, it is critical to know the purpose of the meeting in question.

It is also important to give the school advance notice on those occasions when you are asking the school to schedule a "special" IEP meeting outside of the annual review. These types of meetings occur when you want the school to address escalation of behaviors, inadequate progress despite compliance with the IEP, or inadequacies in an existing IEP. If you request such a meeting and leave your purpose vague, the school may panic and come up with a defensive agenda that has little to do with your actual concerns. The result can be a long and unfocused meeting. Instead, when requesting a special IEP meeting, send the school case manager a very brief list of the topics that you would like to cover, such as a need for more social work or speech therapy time, and the school professionals (e.g., social worker, speech therapist, special education teacher) that you want to be present. In our experience, schools have generally been both receptive and appreciative of this advance notice because it facilitates a more efficient meeting.

Set Aside Enough Time for the Meeting

A good IEP meeting takes at least two to three hours. This means that you should schedule half a work day in your calendar so that you can see the meeting to completion. If the meeting is a combination of an eligibility conference followed by an IEP drafting meeting, the meeting could very well become a five-hour meeting or more. Be skeptical if the school representative who schedules the meeting tells you that your meeting is scheduled in a half-hour time slot. If this occurs, inform the case manager that you believe this will be inadequate to appropriately discuss the issues you intend to bring to the table.

Given the lengthy nature of these meetings, bring snacks. This may sound trivial. However we have seen too many IEP meetings that break down due to participants becoming unreasonable or belligerent due to hunger. Teams are generally loath to take a lunch break, as school staff are often anxious to finish the IEP as quickly as possible because other meetings may be pending. Have a snack in your bag to tide you over when your 9:00 a.m. meeting is stretching on toward 2:00 p.m.

Outside Participants

Including participants beyond school personnel is an important way to ensure a balanced team that knows your child holistically. When representing children in foster care or adolescents involved in delinquency court, consider incorporating the child's caseworker or probation officer at the meeting. An outside therapist is another professional who can bring valuable insight to an IEP meeting, as well as at an eligibility conference or MDR.



At an eligibility conference, the therapist's expertise is especially critical if the team is considering "emotional disturbance" as the student's possible disability. Eligibility under emotional disturbance requires that the student meet one of five specific categories of characteristics set forth in the IDEA regulations. The therapist can set the stage for finding eligibility by showing that the student has one or more of the characteristics IDEA requires and that these characteristics have been present over a long period of time. It is important to let the therapist know that even diagnoses or conditions that do not meet the standard of a diagnosis under the DSM IV can nonetheless meet the IDEA standard for an emotional disability. For example, a student may not meet the DSM IV criteria for depression, but he or she may still meet the IDEA characteristic of "pervasive mood of unhappiness," which can qualify the student as emotionally disturbed. Similarly, at an MDR, the therapist might be crucial to articulating how a particular behavior is a manifestation of the child's disability.

Finally, if the hourly rate for the therapist is too prohibitive for a parent, consider asking the parent to sign a release, and ask the therapist to write a letter to the team, addressing issues relevant to the conference.

Giving Advocates an Advance View of the Meeting and Strategy

It is important to prepare the parent and additional student advocates for how the meeting will be conducted. This includes helping them understand your strategy for how you and they will participate in the meeting. First, make sure that they understand the purpose of the meeting. Let them know that the meetings can run the gamut from those in which everyone agrees on a child's needs, to one in which it is clear that the school has one goal and the parent has another.

If you are following a particular strategy at the meeting, let the parent and anyone else attending on behalf of the student know what that strategy will be. For example, one effective strategy is to let the school's team present its side first with little initial commentary or interruption from you, aside from clarifying questions. This strategy helps you to determine where there is general agreement between parent and school, before moving on to any differences. If you plan to use this strategy, you should explain it to the parent and his or her invitees in advance of the meeting. Doing so enables them to understand that your method of initial silence has a purpose and will reassure them that you will speak up at the proper time.

It is also important to get the client's team to agree to participate in the same strategy. This enables all of you to work together as a team, with a goal of learning the school's position first, then moving on to present your side's position. Remember that the parent may have attended numerous meetings at the school before retaining your services, and he or she may come to the table already frustrated by the treatment from school staff at the prior meetings. The parent will be more likely to stay calm at this meeting, knowing that he or she has a strong advocate.

Student Attendance at the Meeting

One of the most challenging decisions for advocates is determining whether the student should attend a particular meeting. While student participation at meetings can be helpful in some



circumstances, a number of elements of the special education process can be disempowering to students. We have found that school meetings that focus on students' problems and disabilities can be counterproductive to supporting the self-esteem of the students, who often already feel upset because a large school meeting is happening "about them."

For example, eligibility and MDR meetings identify specific disabilities and how they impact on a student's day-to-day life at school rather than on strategies for improvement. This means that to achieve an appropriate finding that the student is disabled or that a student's disability led to problematic behavior, the advocate must highlight the student's deficits. Having the child listen to this list of indicators for a disability may wreak havoc on the student's self-esteem. Yet avoiding or downplaying the student's problems to make the student feel better leads to glossing over actual disabilities. The result could be an inappropriate finding of ineligibility for initial special education services or an inappropriate finding of no manifestation in the case of an MDR. In either case, a truly disabled student may be denied needed services or legal protections because that student's presence at the meeting caused the team members to minimize the student's deficits. Simply put, when a meeting focuses on the *identification* of disabilities, and that focus will negatively impact the student, it may be better to not incorporate the student into the meeting.

Students with disabilities do need to understand and recognize their strengths and weaknesses, but a better forum for this can be the IEP development meeting after eligibility has been determined, or a behavior intervention plan (BIP) development meeting that may follow a successful MDR. IEP and BIP development meetings are inherently more positive forums for student participation in that they focus on strategies for helping the student overcome his or her weaknesses to achieve optimal success in life.

If the student does attend a meeting contrary to your advice, explain to the student that he or she can leave the room at any point the meeting if it becomes uncomfortable. Help him or her to identify in advance a person to converse with in private should this occur. If the student heeds your advice and does not attend a meeting, be prepared for some push back from the school. You may encounter judgmental looks or statements about the importance of the student "understanding the process" or "accepting responsibility." In these situations, explain that, in your experience, the particular meeting in question can be extremely difficult for a student to sit through. However, assure members of the team that once an IEP or BIP is being drafted, you are happy to bring the student to the table to participate at that more positive juncture.

Keywords: litigation, children's rights, special education, individual education program, manifestation determination review, behavior intervention plan

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Part 2 of this article will appear in the next issue of the [Children's Rights Litigation newsletter](#).



Part 2: LGBTQ Youth in the Juvenile Justice System

By Amanda Valentino – June 27, 2011

The saying “Never judge a book by its cover” is one of the lessons we were all taught since childhood. It has been used to teach us to look at the whole picture before judging and categorizing an individual. A novel theory, coined “multidimensionality,” embraces this well-known saying. Multidimensionality illustrates that, to understand someone, it is necessary to know where he or she comes from and all of the identities that he or she encompasses before trying to address specific needs. This theory can reveal the diverse material, social, and emotional harms that are caused by the interconnectedness of racism, sexism, poverty, and heterosexism. Darren Leonard Hutchinson, “‘Gay Rights’ for ‘Gay Whites’?: Race, Sexual Identity, and Equal Protection Discourse,” 85 *Cornell L. Rev.* 1358, 1368 (2000).

Because not all young clients will be willing to freely speak about his or her orientation or gender identity, possibly because of past trauma associated with coming out to adult family figures, juvenile advocates need to be attentive to who their young client really is. Multidimensionality is the key to understanding clients; it examines the sexual identity (together with race, gender, and class) and the complex life experiences of young clients. An extreme attentiveness to subtle cues and hints at possible issues is needed when working with all young clients because they are usually the most reluctant to place their trust in adults.

Once an attorney becomes familiar with the specific issues affecting their clients, the attorney needs to be aware of ways to effectively represent the youth throughout all of the proceedings following arraignment. A variety of issues affect lesbian, gay, bisexual, transgender, and questioning/queer (LGBTQ) youth differently from their heterosexual counterparts, while some issues are the same. Advocates for these young clients need to take a multidimensional approach to recognize the particular concerns for LGBTQ clients.

Discriminatory and Inappropriate Charges

Juvenile advocates and defense attorneys should be on alert for the system’s propensity to overcharge youth that engage in same-sex conduct compared to their heterosexual counterparts. Overcharging is typically the result of a frantic parent who finds his or her child engaging in same-sex conduct with another child and subsequently insists that his or her child is the victim, even though the conduct was consensual. The parent may insist on filing charges against the “perpetrator,” potentially resulting in incarceration and the stigmatization of being labeled a sex offender.

Another typical scenario stems from discovered homosexual consensual conduct in schools or group-care homes. Administrators in charge of these locations feel obligated to identify a “perpetrator” in the situation to shield themselves from liability and charges of inadequate supervision. There is a need to pin the blame on someone else so that any charges that are filed are against the identified scapegoat. Additionally, charges are sometimes filed by youth



who willingly engaged in same-sex conduct at the time but later experience shame or regret because of burdensome familial pressure to reveal the instigator.

One public defender stated in an email interview that she has had a handful of incidents where her lesbian clients were punished in juvenile detention facilities and group homes because of same-sex teenage behavior. These behaviors are described as “problematic,” even though the defender believes that they result from limited sexual opportunities in same-sex group homes, so “lesbians are basically forced into these situations where they live with other girls and then are sanctioned for acting on their normal impulses.”

Awareness of the potential for the overcharging of LGBTQ youth as sex offenders is one step toward eradicating the abuse that these youth face. This is an initial step that can stop discrimination when it begins to take shape during arraignment.

Constitutional Rights

As an attorney, it is important to understand the constitutional rights and claims that are specific to LGBTQ youth. As wards under the care of the state, these young people have a constitutional right to safety and equal protection. Attorneys should be alert for all of these rights; however, the rights to safety and equal protection are imperative. When working with young clients who fall below the LGBTQ visibility level, these two protections are the most important. Safety and due process work to keep LGBTQ youth the most secure from discrimination and harassment. These two rights are the most vital when dealing with less-visible LGBTQ youth because they might not fit into the normal stereotypes and might be dealing with other serious personal issues that keep them silent about their sexual identity and orientation. This silence may make these youth more susceptible to undetected abuse and harassment in the system, which is why juvenile advocates need to have a heightened awareness for the constitutional claims that can be utilized as remedies.

Due to their legal status as wards of the state, all young people in state custody have a constitutional right to safety grounded in the Due Process Clause of the Fourteenth Amendment. Rudy Estrada & Jody Marksamer, “Lesbian, Gay Bisexual and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice Systems Safe for All Youth Through Litigation, Advocacy and Education,” 79 *Child Welfare* 6 (2006). In contrast with adult defendants, youth in the custody of the state juvenile justice system have not yet been convicted of crimes per se and are therefore committed to the care of the state. The theory of the juvenile court is rooted in social-welfare philosophy and rehabilitation rather than punishment, which is why the proceedings are deemed civil rather than criminal.

Knowledge of this inherent right is crucial when advocating for incarcerated LGBTQ youth. Defense counsel should familiarize themselves with the available detention facilities and any possible past complaints there might be regarding the treatment of youth. The right to safety encompasses the right to protection from psychological, verbal, and physical abuse. This interest was recognized in *R.G.*, 415 F. Supp. 2d. at 1156, via the landmark holding of *Youngberg v.*

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Romeo, 457 U.S. 307 (1982). The court in *Youngberg* made it clear that the Constitution requires state officials to take steps to prevent children in state institutions from physically and psychologically deteriorating. 457 U.S. 307. In *R.G.*, this right was specifically attached to all children, especially the LGBTQ youth in HYCF. 415 F. Supp. 2d.

The right to safety also includes the right to appropriate and necessary medical or mental health care. Estrada, *supra* note 4, at 12. For example, this protection would enforce liability on the agency if correctional employees were aware of a transgender youth's mental or medical health needs regarding a gender identity disorder diagnosis and failed to take appropriate steps to address the issue. This specific awareness of transgender rights in the youth community extends from the medical rights of adult transsexual clients. Courts have held that transsexualism constitutes a "serious medical need," and denying access to a transgender-related health-care issue for prisoners amounts to cruel and unusual punishment under the Eighth Amendment.

In addition, juvenile detention facilities need to employ appropriate policies, treatment options, and supervision for suicidal wards. This includes the right to have mental-health screening for youth who might be a suicide risk. This is highly important for the LGBTQ incarcerated youth community because they are generally more at risk for abuse and harassment, which tends to lead to an increased rate of suicide. *Id.* at 13; See Jody Marksamer & Shannan Wilber, *The Model Standards Project* (2002) at 4. Ironically, LGBTQ youth are subjected to higher levels of inappropriate mental-health treatment, perpetuating their state of decreased psychological well-being. However, even though LGBTQ youth may be at a higher risk for suicide, this alone should not be the main reason to place them on suicide risk. There needs to be additional factors going into a suicidal diagnosis than just an LGBTQ identity. Additionally, heightened surveillance for these youth to prevent suicidal tendencies could also lead to discriminatory practices, so striking a middle ground is essential.

Furthermore, the right to safety means that LGBTQ youth should not be forced to undergo inappropriate or unethical services that can damage their emotional welfare. Unsuitable procedures include the use of conversion therapies and other practices intended to involuntarily change a person's sexual orientation or gender identification. Estrada, *supra*, at 8–9. In general, these practices have been condemned because they can cause serious emotional harm, especially to adolescents. However, as defense counsel, it is imperative to be on guard for these procedures that may be employed in detention and mental-health facilities.

Finally, the right to safety in juvenile detention facilities includes the right to be free from isolation. Adolescents in these facilities should not be placed in conditions amounting to punishment or stigmatization because they have not been convicted of crimes. Even though many staff members feel that they are protecting LGBTQ youth from harm when employing isolation practices, they are actually inflicting psychological distress on them in a punitive way. Isolation deprives people of support systems, friendships, or any other interpersonal connections that can help them avoid abuse. This is especially damaging to LGBTQ youth because many of them are already feeling isolated as a result of the rejection they have experienced from their



families and friends due to their lifestyle. These youth do not need additional barriers to human contact like the “protective” isolation practices that promote mental-health deterioration. In contrast, these youth need the chance to form support systems with peers of their own age and possibly of their own identity and orientation. Allowing these youth to form connections with other LGBTQ adolescents might prove therapeutic and allow them to realize that they are not alone.

The Right to Equal Protection

Another constitutional guard for LGBTQ youth encompassed in many of the other inherent protections is the right to equal protection. Generally, if an LGBTQ youth in state custody is refused access to a program based on his or her sexual orientation or gender identity, his or her constitutional right to equal protection is violated. Similar to the constitutional right to safety, if a juvenile justice professional fails to take action against anti-LGBTQ harassment, the court could extend liability to the agency and its actors and find that they violated the youth’s right to equal protection. The court in *Marisol A. v. Giuliani*, 929 F. Supp. 662 (1996), enforced agency liability, and, as a result, there was a settlement award for damages and important policy changes within the New York City child welfare system to improve the standard of care for LGBT youth. Even though this case involved the failure to protect LGBTQ youth in the child welfare division, all youth in the custody of the state have the inherent right to equal protection, including wards in juvenile detention facilities.

State Nondiscrimination Protections

In addition to legal protections under the Constitution, defense attorneys working with LGBTQ youth should also familiarize themselves with state and local law nondiscrimination statutes and ordinances. Estrada, *supra*, at 15. For example, some states have regulations that specifically protect individuals from discrimination by governmental agencies, and these regulations would extend to juvenile justice detention facilities. Again, if youth advocates are aware and knowledgeable about these applicable laws, they work as important additional tools that can be used to reinforce safety for LGBTQ incarcerated youth.

Nonlitigation Strategies: Education and Awareness

In addition to the litigation strategies mentioned above, there are also nonlitigation techniques that can be employed to help unidentified LGBTQ youth in the juvenile justice system. A main reason why these less-visible LGBTQ youth exist is because many people employed in the juvenile justice system are uneducated about LGBTQ youth issues and are unaware of the techniques used to recognize specific underlying LGBTQ concerns for youth that are reluctant to speak up.

Educational resources and awareness training might be valuable resources that many state facilities, like public defender offices, do not have the luxury of utilizing because of budgetary cuts. However, these are programs that should be integrated as much as possible into training programs. Currently, even in a time of economic turmoil and very few resources, some jurisdictions are working to develop multidisciplinary approaches for improving the care and



outcomes of LGBTQ youth in the juvenile justice system. These programs include education and training on sexual orientation and gender identity issues for employees. LGBTQ-specific training is effective in combating homophobia and transphobia while improving the quality of life and care for LGBTQ children in the juvenile justice system. Estrada, *supra*, at 17 n. 75.

Public defender offices and other state employees may look to the City of San Francisco and the State of Massachusetts for guidance on how to effectively set up LGBTQ training programs and policies. *See* Peter A. Hahn, "The Kids Are Not Alright: Addressing Discriminatory Treatment of Queer Youth in Juvenile Detention and Correctional Facilities," 14 *B.U. Pub. Int. L.J.* 117, 139 n.171, and 139–140 (2004). The City of San Francisco is the only local department in the county that has implemented a specific, comprehensive antiharassment policy that includes sexual orientation and gender identity awareness. The San Francisco Juvenile Probation Department Anti-Harassment Policy for Youth strictly forbids harassment and discrimination, applies specific procedures for handling complaints from youth, describes the review and appeal process, delineates remedial and disciplinary action, and necessitates age-appropriate training about the policy and issues of diversity for staff and youth. In addition, even though Massachusetts does not have a comprehensive policy regarding LGBTQ youth, it does have a number of regulations that promote diversity and tolerance within the system that include the Department of Youth Services (DYS) Code of Employee Responsibility. This code, enacted in 1999, holds employees accountable for their personal demeanor and prohibits discriminatory conduct based on sexual orientation. Additionally, at the commencement of employment, all DYS staff go through training addressing sexual harassment and diversity regarding sexual identity and orientation.

These two locales provide comprehensive training on sexual orientation and gender identity to caseworkers, foster parents, group-home staff, and direct service providers. Estrada, *supra*, at 17. Additionally, some jurisdictions, including Connecticut, Illinois, the City of Philadelphia, and Santa Clara County in California, have designated an LGBTQ point person to conduct trainings on the specific issues facing this particular population. In these locations, the point person addresses any other concerns that may arise, such as finding safe placement homes and appropriate medical services for LGBTQ youth.

Other sources of educational information are the [Child Welfare League of America](#) (CWLA, a union of private and public organizations that advocate and serve vulnerable children and families worldwide) and the [National Center for Lesbian Rights](#) (NCLR, an organization dedicated to the pursuit of justice, fairness, and legal protections for all LGBT people). Both organizations have published numerous educational pieces to further educate those employed in the juvenile justice system about LGBTQ youth rights. Each association has a vast amount of material that can provide state systems with helpful resources when starting LGBTQ youth training and continuing legal education for their staff. *See also* Majd, *supra*, at 149.

In addition, simple tools, such as learning how to speak gender-neutrally to young clients, can result in a stronger attorney-client relationship and provide understanding regarding a client's



background, especially if he or she identifies as LGBTQ. This will help attorneys advocate for the specific needs that certain LGBTQ clients might have and help keep them safe while in the detention halls. Generally, when speaking to young clients, attorneys should avoid language that assumes heterosexuality. Marksamer, *supra*, at 1. Youth usually pick up on subtle adult suggestions, such as asking a young girl client if she has a boyfriend. This can suggest to her that homosexuality is frowned upon and can possibly result in her silence about her sexuality if she is in fact having same-sex attractions. Additionally, attorneys should be tuned into hints that their youth clients give. Adolescents may test whether their attorney will accept them by avoiding the use of gender pronouns when talking about a romantic partner or mentioning that they have LGBTQ friends or family. These subtle hints can provide defense attorneys with a major opportunity to show their clients their open-mindedness and acceptance of their situation and identity.

Conclusion

Numerous issues plague the juvenile justice system, and there are very limited resources for resolving these problems. However, this does not mean we can turn a blind eye to LGBTQ youth. LGBTQ discrimination in the juvenile justice system is a reality, and even a little education can go a long way. With the increasing number of LGBTQ incarcerated youth, the less visible are pushed to the side, and their concerns are not adequately addressed. These are the youth that will most likely face the most discrimination and violence within the system. However, implementing education, knowledge, and awareness today, it is possible that all LGBTQ youth will receive the adequate representation and protection they deserve.

Keywords: litigation, LGBT, multidimensionality, juvenile justice, right to safety, right to equal protection

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Part 1 of this article is available [here](#).

The National Conference on Children and the Law

By David Lansner — October 25, 2011

The ABA Center on Children and the Law presented two excellent conferences this summer. The first was “Improving Representation in the Child Welfare System: The Second National Parents’ Attorneys Conference,” which was held July 13–14, 2011. That conference is discussed in some detail in the article "[Conference Provides Resources for Parents' Attorneys](#)." The second conference was the 14th ABA National Conference on Children and the Law, which was held July 15–16, 2011, and it provided advice and training for attorneys representing children. Both conferences included nuts-and-bolts sessions for handling cases; reports on new research on

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children, families, education, and medicine; and panels discussing important policy issues in the field.

The Children's Attorneys Conference

During this conference, there were excellent sessions on both policy and practicing, including ethics. Among the additional problems covered in this conference were improving educational outcomes for foster children; the health-care needs of foster children; the legal paths for kinship caregivers; identity theft from foster children; youth aging out of foster care; homeless and runaway youth; the reinstatement of parental rights; drug courts; the issues related to lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth; counseling child clients; the psychotropic medication of children in foster care; reducing bullying; implementing the Fostering Connections Act; compassion fatigue; pre- and post-natal alcohol abuse; the effect of exposure to domestic violence; and children testifying in child-welfare court proceedings.

Attendees were able to receive the first findings from the National Quality Improvement Center on the Representation of Children in the Child Welfare System (QIC-ChildRep) on Best Practices & Research on the Legal Representation of Children from Professor Donald Duquette of the University of Michigan Law School.

Several policy sessions at both conferences covered the consequences of the Adoption and Safe Families Act (ASFA), which has forced states to begin termination of parental rights proceedings much sooner, even before there is an adoptive resource for the child. This policy may have resulted in more "legal orphans"—children who are freed for adoption but never adopted. Such children stay in foster care until they "age out" and are discharged to live on their own. Many wind up on the streets or in prison. One session followed up on this problem. American policy on child welfare has long emphasized the need for permanency for children in foster care, and it has often been used as justification for terminating parental rights and having children adopted. The Children's Law Center in New York City and a parents' attorney presented research that showed that many children who were adopted out of foster care did not live out their minority with their adoptive parents. They returned to their birth parents or ran away to the streets, or they were placed back in foster care by the adoptive parents.

The panelists suggested that termination and adoption did not always result in permanency, and attorneys for children should look very carefully at a case before supporting termination of parental rights.

There was a terrific plenary about former foster youth who were part of FosterClub, a program that exists to empower foster youth and train them in how to use their story and experience to speak to audiences about needed changes within the foster-care system. Three former foster youth spoke articulately about their experience.

New Trends in Representation

In a sign of the growing influence of advocates for families and their preservation, more than 300



Children's Rights Litigation

FROM THE SECTION OF LITIGATION CHILDREN'S RIGHTS LITIGATION COMMITTEE

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attorneys attended the parent representation conference—twice as many as attended the conference for children's attorneys.

Children's attorneys have a well-established membership organization: The National Association of Counsel for Children (NACC). NACC provides a newsletter, a listserv, books and manuals, a brief bank, training, amicus briefs, public-policy activities, and other services to its members and advances its positions on how children should be treated in the child-welfare system. NACC is directed by its members.

Children's attorneys also have the resources of the [ABA Center on Children and the Law](#), a superb resource that provides the same services. It has two listservs, one for children's attorneys and one for parents' attorneys (although anyone, including non-ABA members and nonattorneys, can participate on both listservs). However, the ABA Center is not a membership organization; it is directed by ABA management. Attorneys in the field, even ABA members, have no control over it.

Over the years, both organizations have moved from a position of intervention to a position focused on family integrity. Those positions could also be called pro-government and pro-parent. In the past, those who mainly represented children in juvenile court, and even some of those who represented the government agencies that prosecute parents in juvenile court, have used the term "pro-child" to describe the positions they take. However, many lawyers have moved beyond that in recognition of the fact that everyone working in child welfare either is or claims to be pro-child. The organizations are ahead of the curve nationally, although the federal government has moved from ASFA ("safety" and termination) in 1995 to Fostering Connections in 2008. We have seen a national reduction in foster care of almost 20 percent—although it is unclear exactly what the factors are that led to the decrease—and the substantial reform of several child-protective systems. But the change in thinking and speaking by the children's bar is perhaps the most significant sign of where we are going.

Of significance was the invitation to Richard Wexler, a long-time critic of child-protective systems, as one of the panelists at the opening session of the children's attorneys conference on countering public myths and stereotypes in child-welfare proceedings.

The ABA Center on Children and the Law convenes these conferences every other year, so the next set of conferences will be held in 2013.

Keywords: litigation, children's rights, ABA National Conference on Children and the Law, ABA Center on Children and the Law, child-protective systems

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Conference Provides Resources for Parents' Attorneys

By Darice M. Good and Diana Rugh Johnson — October 25, 2011

On July 13–14, 2011, in Arlington, Virginia, the American Bar Association's (ABA) Center on Children and the Law held its second National Parents' Attorneys Conference. This conference is a valuable opportunity for parents' attorneys to gather, share ideas, compare notes, and share war stories.

This year's conference offered two plenary sessions and 16 breakout sessions taught by attorneys, judges, and social workers who are leaders in their fields. Some breakout sessions focused on innovative approaches to persistent issues in parent representation, such as the timing of the termination of parental rights hearings, representing minor parents who are themselves in foster care, representing parents who are accused in both dependency and criminal court, representing unaccused parents in sexual abuse cases, and advocating for incarcerated parents. Other sessions focused on emerging topics, such as the reinstatement of parental rights, representing parents prior to removal of the child, and interdisciplinary models of representation that include social workers and parents who have previously been involved in the child-welfare system.

The conference also offered the unique opportunity for attendees to participate in discussion groups on topics such as appeals, working with vulnerable populations, out-of-court advocacy, using social workers, and resources for rural practices. In these discussion groups, attorneys shared their knowledge and worked together to develop ideas for overcoming barriers to effective parent representation. Through their discussion groups, many attorneys were able to network and make the connections necessary for future collaborations.

Why This Kind of Gathering Matters

The ABA's National Parents' Attorneys Conference is an essential gathering for two reasons. The first is legal, technical, and educational. The family's right to protection from government interference has long been established under the Fourteenth Amendment, but defending that right in state court is complicated. Child-welfare law is unique in that the cases are heard in civil court, but they are quasi-criminal in nature. Effective parent attorneys must be well-versed in state statutory and case law, local court rules, U.S. Supreme Court cases, and the litany of federal legislation that governs child welfare. Add to this the fact that there is no blanket protection against self-incrimination and that the hearings are almost exclusively bench rather than jury trials, and you have an area of law that is full of nuances and pitfalls that take years of training and experience to truly master. The National Parents' Attorneys Conference is a rare opportunity for parents' attorneys to enjoy the exchange of information and sharing of ideas that many agency and children's attorneys, as part of their state or county systems, are able to take for granted.



The second reason is strictly emotional. Representing parents accused of abuse and neglect is lonely work. Attorneys who represent accused parents are often reviled by fellow attorneys and laypersons alike. Unlike criminal-defense work, which most people recognize to have serious constitutional implications, the representation of parents accused of abuse and neglect is viewed by many as defending the indefensible. Inside the courtroom, parents' attorneys fight constant pressure from opposing counsel and even from judges to go along. In many jurisdictions, filing motions, making objections, insisting on evidentiary hearings, and other forms of zealous advocacy are seen as obstructions, unnecessary delays, and a waste of the court's time. It is emotionally taxing to be in the trenches, fighting a system whose energies and resources are focused so squarely against our clients. In a field where burnout is a constant hazard, meeting with and learning from other parents' attorneys helps to reignite the passion that led us to this work.

Building a Movement

As parent representation has developed into a specialized field and its practitioners have become more skilled, across the country, courts are beginning to realize that effective representation for parents is good for families and good for children. Effective parent representation provides a necessary check to the power of child-welfare agencies and helps to ensure that children are not unnecessarily removed from their homes. Effective parent representation also helps to speed the reunification process for children who must be removed.

The closing session of the 2011 conference was a town-hall meeting led by Professor Marty Guggenheim of the New York University School of Law. Attendees discussed the current state of parent representation and what needs to be done to advance the practice. While many parents' attorneys already utilize the ABA's national listserv for parents' attorneys as a source of information and venue for discussing practice and policy issues, many attendees expressed the need for parents' attorneys to form a stand-alone organization, to publish a law journal, and to develop their own training materials. Parents' attorneys are building a movement that, whatever form it takes, will continue to strengthen families by fighting for the rights of parents.

To learn more about parent representation and to be connected to other lawyers representing parents, visit the ABA's Center on Children and the Law's [National Project to Improve Representation for Parents Involved in the Child Welfare System](#).

Keywords: litigation, children's rights, parents' attorneys, ABA Center on Children and the Law, National Parents' Attorneys Conference

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NEWS & DEVELOPMENTS

Handbook Offers Tools for Handling Trafficking Victims

The Center for the Human Rights for Children, Loyola University Chicago, and International Organization for Adolescents (IOFA) have released a handbook, [Building Child Welfare Response to Child Trafficking](#) [PDF], which focuses on helping child-welfare systems identify and appropriately respond to child trafficking victims. The handbook provides child-welfare systems with a comprehensive framework that can be adapted to local and state policies and procedures. The enclosed toolkit includes a child trafficking screening tool, a section on immigration protections and remedies, and a list of national referral programs and services available to child victims of trafficking. The handbook represents the first stage of a larger, more comprehensive effort to build capacity and expertise about child trafficking within state and private child-welfare agencies.

Keywords: litigation, children's rights, child trafficking, Center for the Human Rights for Children, Loyola University Chicago, International Organization for Adolescents

— Marlene Sallo, web editor, Children's Rights Litigation Committee

Report Reveals Ineffectiveness of Youth Prisons

The Annie E. Casey Foundation's new report, [No Place for Kids: The Case for Reducing Juvenile Incarceration](#), focuses on whether incarcerating youth works to reduce future offenses. The research within the report reveals that youth prisons do not reduce future offenses, they waste taxpayer dollars, and they frequently expose youth to dangerous and abusive conditions. The report also shows that many states have substantially reduced their juvenile correctional facility populations in recent years, and it finds that these states have seen no resulting increase in juvenile crime or violence. Finally, the report highlights successful reform efforts from several states and provides recommendations for how states can reduce juvenile incarceration rates and redesign their juvenile-correction systems to better serve young people and the public.

Keywords: litigation, children's rights, juvenile corrections, youth prisons

— Cathy Krebs, committee director, ABA Section of Litigation, Children's Rights Committee, Washington, D.C.

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<http://apps.americanbar.org/litigation/committees/childrights/home.html>