Juan Hernandez, a 16-year-old boy, arrived in the United States in October 2010. Upon his entry, he was stopped by U.S. Immigration and Customs Enforcement in Texas. He came with no family, no friends, no luggage, and no ability to speak English. Unknown to U.S. Immigration and Customs Enforcement, Juan was carrying a different kind of baggage.

Juan grew up in El Salvador in a small, crowded two-bedroom apartment with his mother, father, grandmother and younger siblings. His father was an alcoholic who often took out his frustrations by viciously beating him. When Juan was 10 years old his father abandoned the family and to this day his whereabouts are unknown. The burden of caring for the family fell on Juan’s shoulders. His mother suffered from schizophrenia, and her untreated mental health issues were so severe she was unable to work or take care of herself, let alone her children. To help his family, Juan dropped out of school and found a job as a mechanic.

One afternoon, not long after securing his job, Juan was walking home when he witnessed the murder of a civilian by members of the MS-13 gang. Unfortunately, the gang members noticed his presence. Fearing for Juan’s life, his grandmother advised him to flee to the United States where a maternal uncle lived.

After arriving in Texas, U.S. Immigration and Customs Enforcement released Juan to his uncle’s custody in Baltimore, Maryland and gave him a court date to appear before immigration court. He was cautioned by the immigration officer who released him that unless he had a basis for remaining in the United States, the Immigration Court would order his departure.

Soon after moving in with his uncle, who was unaware that Juan was coming to the United States, Juan was forced out of the home. With no other contacts in the United States, Juan wound up on the streets.

Unaccompanied Minors: Where They Come From
Juan’s story is not unusual. Every year more than 10,000 children without lawful immigration status cross the United States’ border unaccompanied by an adult.1 Referred to as “unaccompanied alien children,” these individuals are without legal status, under the age of 18, and have no parents in the United States who are capable of caring for them.2 The number of children who attempt crossing the border is closer to 80,000, but the vast majority are deported within 72 hours.3

About 80% of the minors who do enter the United States come from Latin American countries such as Honduras, El Salvador, and Guatemala where poverty, gangs, and drug-related crimes are rampant.4 Many of these children are fleeing violence, whether it is abuse in their homes or threats from organized gangs, while others are trafficked across the border for commercial sexual exploitation.

Challenges Unaccompanied Minors Face
Many of these children are detained and taken into federal custody. Placed in federally funded residential facilities, they wait for court hearings to determine if they can stay in the United States or be deported.5 Their fate is largely determined by whether an attorney will represent them and serve as their advocate.

Others are released to the custody
Ninth Circuit Court of Appeals found the district court erred in dismissing case on qualified immunity grounds and that foster children’s statutory and due process rights were violated. The allegations met qualified immunity exceptions and some allegations were regarding privately enforceable child welfare statutory provisions.

A group of foster children in Clark County, Nevada filed suit under 42 U.S.C. § 1983 against state and county officials alleging violations of due process and statutory rights. The plaintiffs claimed they were harmed as a result of systemic failures including the failure to train caseworkers, provide case plans to children and foster parents, provide medical care, provide guardians ad litem (GALs) to investigate abuse allegations in foster homes, and the failure to incorporate federal law into county policies.

Several examples of the impact of the alleged failures were noted. One foster child was reported to have waited for months in pain with an impacted colon because the county would not approve a colonoscopy despite his doctor’s recommendation. Treatment was finally provided when the condition became life-threatening, justifying an emergency visit.

Another child was discharged from a psychiatric facility without paperwork needed to fill her prescriptions, resulting in withdrawal. Several plaintiffs were alleged to have been left or placed in foster homes despite physical and sexual abuse complaints.

The district court dismissed the claims finding the defendants were entitled to qualified immunity.

The Ninth Circuit noted the substantive due process claims, the Fourteenth Amendment does not generally create a state duty to protect individuals from the actions of third parties. However, there are two exceptions: (1) Courts have recognized a special relationship exception when the state assumes some responsibility for the individual’s safety and well-being; and (2) A state-created danger exception arises when the state affirmatively places the individual in danger through deliberate indifference to a known and obvious danger.

The Ninth Circuit held the district court erred in finding the defendants were entitled to qualified immunity. The district court had improperly looked at each allegation and concluded the specific medical procedures had not been clearly established as a constitutional right. The Ninth Circuit found the allegations were sufficient to survive a motion to dismiss on qualified immunity grounds if they could show generally that the individuals had been deliberately indifferent to the children’s well-being when they had a responsibility for their care as foster children. A reasonable official would have understood that the defendants had responsibility for the children’s medical care and safety and that failing to address them would violate the children’s rights to adequate care.

The defendants could also be liable under a state-created danger exception. The complaint alleged affirmative actions that put the children in danger in that they where placed in homes despite abuse allegations. The rule that the district court relied on, that qualified immunity applied where the state did nothing but expose the individual to danger that already existed, was from a prior dissenting opinion, and not the law of the circuit. The correct test is that the state knowingly...
exposed the individual to a danger that the plaintiff would not have otherwise faced.

Regarding claims under 42 U.S.C. § 1983 that defendants violated federal statutory rights, there must be a showing of privately enforceable individual rights. This entails showing that the right was intended by the Congress to benefit the individual, is not so vague or amorphous as to strain judicial competence, and is mandatory rather than precatory.

Plaintiffs asserted the following statutory claims: (1) the case plans and records provisions under the Adoption Assistance and Child Welfare Act, (2) the Guardian Ad Litem (GAL) provisions of the Child Abuse Prevention and Treatment Act (CAPTA), and (3) the early intervention provisions of CAPTA and the Individuals with Disabilities in Education Act (IDEA).

The district court had concluded that none of the provisions were privately enforceable.

Regarding the requirements that each child in foster care have a case plan and that records be provided to foster parents, the Ninth Circuit found they were privately enforceable rights. Both benefit the child individually, have specific judicially determinable requirements, and are couched in mandatory ‘shall’ language.

Unlike the case plan and records requirements, CAPTA’s GAL requirement and the early intervention services requirements of CAPTA and the IDEA are too general to create individually enforceable rights. Whereas the case plan and records requirements have detailed descriptions of what is to be done in each child’s case, the GAL and early intervention provisions merely require any state receiving the federal funds develop plans for providing these services. Further, the IDEA has a comprehensive enforcement scheme that precludes § 1983 enforcement.

**Father Who Lived Out of Country and Could Not Visit Did Not Abandon Child**

*In re Doe.* 2012 WL 1432619 (Idaho).

Idaho trial court improperly terminated father’s rights based on abandonment and default grounds. The father’s right to notice was violated and he had not willfully abandoned his child given his legal inability to visit as a foreign national or pay child support.

Daughter was removed from her mother when she failed to protect her children from physical and sexual abuse from an older half-sibling. Child’s father was residing in Mexico at the time and was a Mexican citizen.

Father spoke with an agency worker a few months after removal expressing his desire to be a part of her life and that he hoped he would reunite with the mother. At a subsequent case-planning meeting, the father agreed to the reunification plan with the mother.

Thereafter, the father made monthly phone calls to the agency caseworker to learn how the reunification plan was progressing. Approximately six months after the removal, the father indicated that he would like to obtain custody of his daughter if the mother could not complete her plan.

When the caseworker told the father that reunification with the mother was no longer viable, he contacted the Mexican consulate to obtain assistance. It took several months for the consulate to call him back. Eventually, the father obtained a positive home study from the Mexican public child welfare agency.

Around this time, the Idaho agency filed to terminate the father’s parental rights. The trial court granted the petition.

The Idaho Supreme Court overturned the termination.

The supreme court wrote that the father’s parental rights were terminated by default despite the fact that he was not given adequate notice. Publication of notice in a local Idaho newspaper was not made to inform the father, even though his address was known in Mexico.

The trial court also improperly found the father had abandoned his daughter. There was no substantial evidence that the father willfully failed to support or maintain contact with his child. The father could not visit child. When he married the mother, he had been in the U.S. illegally and voluntarily left when he was picked up by immigration authorities. As such he could not come into the U.S. unless the mother petitioned for him as a spouse, which she did not do.

The findings regarding the father’s lack of financial support were also erroneous. There was no finding at any point regarding the amount of support the father could pay given his modest income of $70.30 a week and his need to contribute to support a household of extended family.

The supreme court further noted that even if there had been valid grounds for termination, the trial court’s best interests findings were in error. In a contest between a parent and a third party, the parent has a presumption that it is in the child’s best interest to be placed with them. The evidence below could not overcome the parental assumption.

There was no allegation that the father ever abused or neglected his daughter. The father did everything the agency had asked him to do in the case. The caseworker’s contention that the child would be better off with the “luxuries” available in the U.S. was not a valid basis to find it was not in her best interests to be with her parent.

In reversing the order, the supreme court directed the agency to promptly place the child with her father.
STATE CASES

Alaska

In re Josh L., 2012 WL 1759306 (Alaska). TERMINATION OF PARENTAL RIGHTS, ACTIVE EFFORTS
In termination of parental rights proceeding, trial court correctly found that state made active efforts to preserve Indian family under the Indian Child Welfare Act. Though the state did not fully investigate the father’s relatives, it did determine that each relative he offered was inappropriate due to having abusers in the homes or due to their inability to support the child with her special needs.

In re Paula E., 2012 WL 1649165 (Alaska). DEPENDENCY, PLACEMENT PREFERENCES
Trial court properly determined good cause existed to deviate from the Indian Child Welfare Act’s placement preferences where children were removed from their grandmother at her request. Though she later wanted the children returned to her, fact that their emotional and behavior problems had improved dramatically in their new foster home and the agency continued to have concerns about the grandmother’s ability to care for the four children, supported finding.

Connecticut

Individual was properly convicted of employing a minor in an obscene performance though he took photographs of daughter’s friend solely for his own use. Term ‘audience’ in statute could constitute the photographer himself; the legislature could not have intended language to require a public element to the crime or it would condone creating any child pornography for individual use.

In re Zowie N., 2012 WL 1557267 (Conn. App. Ct.). TERMINATION OF PARENTAL RIGHTS, PARTICIPATION IN TRIAL
Trial court did not abuse discretion in not ordering a second competency evaluation before father represented himself in termination trial. Father had a recent competency evaluation in connection with his criminal trial, which noted no concerns about competency and none arose during trial.

Florida

Father’s rights were improperly terminated on ground that he failed to protect his children where he had been suspicious when his child had broken a leg, but he was unsure that mother had perpetrated the abuse. In fact, the child welfare agency had been unable to conclusively determine that the mother had caused the broken leg during its investigation and no evidence was presented that father knew more than agency.

Trial court abused its discretion in ordering no contact between parents during a drug court review hearing without notifying the father because he had refused to sign a medical release and the court could not determine whether he was using and posing a risk to the mother’s recovery. Father had been involved in the case and appeared previously and no other justification was provided for the lack of notice.

Idaho

Abolafia v. Reeves, 2012 WL 1434340 (Idaho). CUSTODY, GUARDIANS AD LITEM
In case in which parents reached a settlement after guardian ad litem (GAL) was appointed and then GAL was dismissed by court, GAL had no further protected interest in the matter and lacked standing to appeal anything other than the issue of attorney’s fees.

In re Doe, 2012 WL 1433187 (Idaho). TERMINATION OF PARENTAL RIGHTS, FAILURE TO IMPROVE
Trial court properly terminated mother’s parental rights because she failed to demonstrate the ability to safely parent despite services. Evidence supported finding that though agency assisted her in obtaining low-income housing she was evicted for repeated lease violations. Further, at time of trial, she was living in a trailer in a junk yard and she was provided counseling services but had benefited little from them.

Illinois

Trial court did not violate mother’s due process by accepting her stipulation to neglect adjudication without inquiring into factual basis of allegation. Though the better practice would be to do so, the allegations were well known to the parties based on the shelter care hearing. Finding could also be based on the fact that the mother’s husband had died from a drug overdose, his substance abuse caused the children’s neglect, and mother presented no evidence that neglect was cured by his death.

In re V.C., 2012 WL 1605425 (Fla. Dist. Ct. App.). TERMINATION OF PARENTAL RIGHTS, BEST INTERESTS
Trial court erred in denying termination petition and placing the children in guardianship with the maternal grandparents with parental visitation. The decision was based solely on the availability of the placement with the grandparents despite strong evidence that termination was in their best interests, including the parents’ history of denying and covering up the abuse.

Indiana

In re V.C., 2012 WL 1453839 (Ind. Ct. App.). DEPENDENCY, WITNESSES
Trial court did not err in denying father’s request to subpoena his sister to testify that she could be a placement for the child or in denying his request for a continuance for that purpose. Father failed to show good cause that aunt was a necessary witness in that the agency stipulated that the aunt was willing to be a placement and court knew aunt had been previously approved to be a respite placement for the child.

Kansas

RIGHTS, GROUNDS
Trial court erred in terminating father’s parental rights where he had complied with all plan requirements. Despite the court’s concerns that the father was not capable of parenting long term, the majority of the witnesses, including the foster parent and agency staff that had worked closely with the father, advised against termination.

Kentucky
Commonwealth v. O’Conner, 2012 WL 1450103 (Ky.). CHILD ABUSE, UNSAFE HOME
Evidence was sufficient for jury to find that father intentionally abused children by exposing them to unsafe conditions in the home. Home exposed children to animal feces, moldy food, and unventilated, locked rooms that lacked air conditioning on hot days. Father declined agency’s offer of free day care so that he could work and provide for his children.

Nebraska
Trial court erred in finding child dependent based on mother taking morphine which was not prescribed to her. While mother’s use of an unprescribed over-the-counter medication was illegal, no evidence was offered to show that it made her child unsafe.

New Jersey
In re A.C., 2012 WL 1592144 (N.J. Super. Ch. Div.). DELINQUENCY, JURY TRIALS
Due process does not require a right to a jury trial in a delinquency case because the possible dispositions include some conditions that could be seen as punitive. In juvenile’s case, the sex offense registration requirement was not punitive but was consistent with the state code which seeks to rehabilitate the youth and protect the community.

Maryland
In stepparent adoption case, trial court properly found father’s failure to respond to show cause order within 30-day time frame resulted in an irrevocable consent and father’s due process rights were not violated. Statutory scheme provides adequate notice of the risks of not responding in time and father offered no excuse that would form an equitable basis for ignoring the statute because he could have simply signed the attached objection and returned it by mail.

Massachusetts
Sex Offender Registry Board examiner’s findings were in error where they were based in part on agency report containing multiple levels of hearsay. Hearing examiner could not reasonably rely on references to incidents reaching back several years without clear indications of who observed the child’s behaviors or in what context they occurred or on conclusory statements by unknown professionals.

New York
In re Chorus SS., 941 N.Y.S.2d 745 (App. Div. 2012). TERMINATION OF PARENTAL RIGHTS, FAILURE TO IMPROVE Family court properly terminated mother’s parental rights where she had failed to benefit from services including inpatient substance abuse treatment. Despite intensive treatment, mother could not remain clean as evidenced by her selling her car and using the proceeds to buy cocaine for daily use for a month.

Oregon
In re C.M.M., 2012 WL 758906 (Or. Ct. App.). TERMINATION OF PARENTAL RIGHTS, SUBSTANCE ABUSE
Trial court properly terminated mother’s parental rights where her substance abuse made her unable to safely parent her children in the reasonable future. Though mother had some recent success with an opiate blocker, fact that she had requested increased dosages of the treatment showed she was continuing to struggle with her cravings rather than being weaned from the prescription.

Texas
In re A.J.E., 2012 WL 1644946 (Tex. App.). CUSTODY, IMMUNIZATIONS
In case where parents had joint custody, father favored immunizations but mother opposed them, arguing her family had a history of bad reactions and her research questioned their safety. Trial court properly found immunizations were in the child’s best interest based on report and recommendation from physician who met with the family.

FEDERAL CASES
Eleventh Circuit
Neely v. McDaniel, 2012 WL 1521091 (8th Cir.). CHILD ABUSE, DUE PROCESS
Individual’s due process rights were not violated when he was convicted of soliciting sex from a person under 15 over the Internet. Statute was not facially unconstitutional and could be applied against a defendant who never met the victim face to face and arguably could not ascertain the victim’s age. Many other strict liability statutes, like statutory rape, have withstood constitutional challenges and there was no compelling reason to distinguish petitioner’s case.
of relatives who often take advantage of their illegal status by using them as servants and refusing to allow them to enroll in school, a legal right. In 1982, the U.S. Supreme Court held in *Plyer v. Doe* that undocumented school-aged children may not be denied a free public education.5

Still others live with relatives and parents who care for them, but they live under the radar, in poverty, without medical insurance and education. Many are forced to work illegally and are paid less than minimum wage, while suffering abuse from employers. They are often denied basic rights such as health insurance, workers’ compensation, and freedom from sexual harassment. Children who try to escape their abuse face homelessness, often leading them into lives of prostitution or crime to survive.

**Forms of Relief: How to Help an Unaccompanied Minor**

In recent years, many legal avenues have been created to help eligible immigrant children obtain legal status in the United States so they do not have to be deported to potentially dangerous situations. Many legal avenues have been created to help eligible immigrant children obtain legal status in the United States so they do not have to be deported to potentially dangerous situations ...

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- The second avenue is where a child resides with one parent and the other parent abused, neglected, or abandoned the child in the home country or in the United States. The parent residing in the United States can file for custody and ask that the state court find in its order that the child was abused, neglected, or abandoned by the other parent. A petition for SIJS can then be submitted, with a copy of the requisite state court order, which must have specific findings, including a finding that the child has been abused, neglected, or abused by the other parent.

After the Special Juvenile Immigrant Status petition is approved, the child can pursue adjustment of status, to change their status from illegal to legal.

**Asylum**

Any child who arrives and fears returning to their country of origin because of past or future persecution based on race, religion, nationality, membership in a particular social group, or political opinion, can apply for asylum based on their status as a refugee.11 This relief option is valuable for children who are being persecuted because of their sexual orientation or persecution by a gang, recruitment as a child soldier or child prostitute, or even the political activities of their parents.12

**U-Visa**

Created through the Battered Immigrant Women Protection Act of 2000, a child who has been the victim of a qualifying serious crime in the United States can apply for a U-Visa, so long as they cooperate with law enforcement in the investigation and/or prosecution of the individual who committed that crime.13 Although the title of the act suggests the visa only applies to women, in fact any person, adult or child—male or female—is eligible for this visa if they suffered any mental or physical abuse as a victim of a crime.14

Qualifying crimes include “rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.”15 The petitioner must submit a letter from a certifying agency (a law enforcement agency, prosecutor, or judge) verifying that they were a victim of a qualifying crime and were helpful or will be helpful to the investigation or prosecution of such crime.16

**T-Visa**

The T-Visa (T nonimmigrant visa) applies to victims of human trafficking, age regardless. To qualify, victims
must show they have been a victim of severe trafficking, which means they were lured to the United States under false pretenses and used for either commercial sex acts or labor equating to involuntary servitude or slavery.\textsuperscript{17} Victims must cooperate with law enforcement and also show hardship if removed from the U.S. For victims under age 18, these requirements are eliminated.\textsuperscript{18} Enacted in 2000 through the Victims of Trafficking and Violence Protection Act, recipients of a T-Visa are granted legal status in the United States.

**VAWA Petition**

A VAWA (Violence Against Women Act) petition can be filed by any adult or child who does not have legal status in the United States and is being abused by their spouse or parents. The abusive spouse or parent must be a U.S. citizen or have lawful permanent residence. The VAWA petition allows the abused adult or child to obtain legal status in the United States without any assistance from the abuser.

**The Need for Advocacy for Unaccompanied Minors**

Although these laws protect unaccompanied alien minors, many illegal children are unable to access the protections that these laws offer. Those in detention centers are often unable to find an attorney, due to the shortage of pro bono attorneys who are willing to help unaccompanied minors. Others are living in abusive situations and/or are homeless, without any way of accessing the very laws that are designed to help them.

A number of organizations formed to help such children, specifically Kids in Need of Defense, which has a number of offices including one in Washington D.C., The Young Center for Immigrant Children’s Rights in Chicago, and the Immigrant Legal Resource Center in San Francisco.

Other organizations such as Catholic Charities, which has long since provided assistance to immigrants, have started programs specifically designed to aid unaccompanied minors. The Office of Refugee Resettlement was transferred the responsibility of meeting the needs of unaccompanied minors in 2002 through the Homeland Security Act, and consequently provides residential placement for unaccompanied minors, as well as runs a legal access project to recruit pro bono attorneys to represent unaccompanied minor children.

**From Undocumented Minor to Legal Resident**

Juan’s story did not end on the streets of Baltimore. Because of his immigration case, Juan was put in touch with Kids in Need of Defense, in Baltimore, Maryland. He was assigned a pro bono attorney who had him placed in foster care and applied for SIJS on his behalf. Juan’s petition was granted and he now lives legally in the United States. Through his foster care program he learned English, and is now preparing to take his GED.

Many immigrant children have stories like Juan’s, but few have the skills to navigate the complicated world of immigration law on their own. Any attorney interested in taking on a pro bono case should consider representing an unaccompanied minor.

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**Endnotes**


2 Ibid.


10 Ibid.


12 Ibid.


14 Ibid.


16 Ibid.

17 22 U.S.C. § 7102(8).

The Fostering Connections to Success and Increasing Adoptions Act, Public Law 110-351 (“Fostering Connections”), is a federal law designed to promote permanent families for children and youth in foster care. This law encourages:

- maintaining family connections,
- supporting youth transitioning from foster care,
- ensuring the health and educational well-being for foster youth, and
- providing many Native American children important federal protections and support for the first time by allowing Tribes to directly administer their local programs authorized by Title IV-E of the Social Security Act.

This and future articles will present a brief overview of each section of Fostering Connections, outline some general judicial considerations for implementation and provide questions to be asked from the bench to help ensure compliance with the law and best practice.

**Title I: Connecting and Supporting Relative Caregivers**

**Section 101: Kinship Guardianship Assistance Payments for Children**

**Overview**

Fostering Connections gives states the option to use federal Title IV-E funds for kinship guardianship assistance payments (GAP) for Title IV-E eligible children cared for by relative foster parents committed to caring for these children permanently when they leave foster care.

Prior to Fostering Connections, 38 states and the District of Columbia had some form of subsidized guardianship supported by state or local funds, TANF or the Title XX Social Service Block Grant. Eleven states had over time had waivers from HHS allowing them to use Title IV-E funds for subsidized guardianship payments. When Fostering Connections was enacted, six of the states with waivers were still operating programs under the waiver authority, while the other five continued the program with state dollars for at least those children who had exited to guardianship under the waiver. These subsidized guardianship programs varied dramatically in size and scope. The use of federal funding for subsidized guardianship, as authorized by Fostering Connections, will help free funds previously used for state guardianship programs and will help children placed with relative foster parents achieve permanency. Judges should provide judicial leadership to get their state to pursue this option.

**Eligibility - Guardians**

Guardians are eligible if they are relatives who have assumed legal guardianship of the child and have demonstrated a strong commitment to care for the child permanently. They must have cared for the child for at least six consecutive months as a licensed foster parent (and have undergone criminal record and child abuse registry checks). Kinship caregivers who choose not to adopt should be encouraged to pursue subsidized guardianship and not forced to adopt.

**Eligibility - Children**

Children eligible for the federal guardianship assistance program must be eligible for Title IV-E federal foster care maintenance payments while in the home of the relative for at least six consecutive months. They must demonstrate a strong attachment to the prospective relative guardian and, if 14 and older, the child must be consulted about the kinship guardianship arrangement. Siblings of eligible children may be placed in the same home and receive support even if they themselves are not otherwise eligible. As stated in Section 206 – Sibling Placement, children should be placed with their siblings unless it is contrary to the safety or well-being of any of the siblings. Children eligible for these IV-E guardianship payments are also automatically eligible for Medicaid.

**State Requirements**

The state must amend and submit a revised state Title IV-E plan to the Administration for Children and Families, Children’s Bureau, Department of Health and Human Services requesting Title IV-E funds for GAP...
and must provide the state and/or local dollars required to match federal dollars for the program. The kinship guardianship assistance payment rate must not exceed the foster care payment made to a foster family had the child remained in a foster family home. The state must also share, under the federal match, the total cost of nonrecurring expenses associated with obtaining legal guardianship of a child up to $2,000.

The state must negotiate a written guardianship assistance agreement with prospective guardians. The agreement must specify the amount of payment and manner of adjustment of payment. Note that the child maintains eligibility for adoption assistance in the event that the guardian wants to adopt the child later, if the child was eligible for such assistance when he or she exited to guardianship. Additionally, the kinship guardianship agreement remains in effect even if the guardian moves to another state.

Under Fostering Connections, federal kinship guardianship assistance (GAP) payments are only available when the child and guardian meet all of the Title IV-E eligibility requirements and have entered into a guardianship assistance agreement that meets the requirements of the Federal law. To provide the greatest number of children with this important permanency option, states may operate a subsidized guardianship program, which uses Title IV-E, other federal, state, and/or local resources, to support both children who are eligible for IV-E GAP and those who are not.


Judicial Considerations

- How does your state define relative, if at all?
  - Does it include “fictive” kin, people who are not related by blood, marriage or adoption to the child, such as Godparents and close family friends, but have a significant relationship to the child or family?
  - Is your definition of relative consistent with the definition used for the identification and notice provisions?
  - The Program Instruction issued on July 9, 2010 gives states discretion to define “relative” as they see fit and encourages states to use the same definition for both the GAP program and the identification and notice provisions. See sections D and H: Program Instruction, ACYF-CB-PI-10-11.

- Are lawyers available to represent relatives in your area?
  - Under Fostering Connections, the state must pay nonrecurring costs required to obtain a guardianship up to $2,000, which includes the cost of legal representation for the relative guardian.
  - Under Fostering Connections, increased resources are available to help train judges and attorneys in the event that additional legal resources are needed in your area. See: Section 203 - Short-Term Training for Child Welfare Agencies, Relative Guardians and Court Personnel

- Does the court order address the following, if applicable?
  - The case plan requirements for GAP (see below)
  - The contact/visitation plan with the parents, siblings, or other relatives - including whether the visitation is supervised, location, frequency, best interest controls
  - Clarify the rights of guardians vs. rights of parents
  - Identify a successor guardian, or need for a standby guardian if the guardian is chronically or terminally ill or require a court hearing if the guardian is no longer able to care for the child
  - Any other necessary provisions or conditions required under ASFA or state law

- Is there a clear process for considering modification of guardianship orders and the underlying assistance agreements, when necessary; i.e., change in custody or visitation terms, change in supports or services needed by the child, success or guardian?
  - This process can be documented in the form of policy, local court rules or state statute

Questions to Ask from the Bench

- Does the case plan meet all of the requirements of Fostering Connections?
  - Why is guardianship the most appropriate option for the child?
  - What steps have been taken to determine that reunification and adoption are not appropriate options for the child?
  - Is guardianship in the child’s best interest?
  - If siblings are not going to be placed together in a guardianship, because of contrary to safety or well-being, why not, and what is the plan to keep them connected? See: Section 206 – Sibling Placement
  - The Program Instruction allows states to define siblings for the purposes of subsidized guardianship. See: Program Instruction, ACYF-CB-PI-10-11
  - Did the child meet all eligibility requirements of GAP?
  - Is the child eligible for Title IV-E federal foster
care maintenance payments?

- Has the child been living in the home of the licensed, prospective relative guardian for at least six (6) consecutive months?
- In what ways does the child demonstrate a strong attachment to the prospective relative guardian?
- What efforts have been made to discuss adoption with kinship caregivers and the reasons why adoption was not chosen?
- What efforts have been made to discuss guardianship with the child’s parents or reasons why such efforts were not made?

- If the child is age 14 and older, how has he or she been consulted about the guardianship? What feedback did the child provide regarding guardianship, if any?
  - When appropriate, consider consulting the child in chambers or allowing the child to testify, if they would like to be heard.
  - The court should also consider consulting with younger children, in a developmentally appropriate manner.

- In what ways has the guardian demonstrated a commitment and ability to care for the child permanently?
- What is the relationship between the guardian and the parents?
- What is the visitation plan, if applicable?
  - Should the visits be supervised?
  - What is the location and frequency of the visits?

- Should the order contain a clause that the best interest of the child ultimately determines visitation? What is the process to determine the best interests of the child?
- Who is the successor or standby guardian?
- Are there any other necessary provisions or conditions that should be specified in the court order?

Section 102: Family Connection Grants

Overview

Fostering Connections authorizes a new grant program for activities designed to connect children in foster care (or at risk of entering foster care) with family. Funds can be used for the creation or expansion of:

1. Kinship navigator programs;
2. Intensive family-finding efforts to search for relatives or other important individuals in the child’s life and establish family connections;
3. Family group decision making, team decision making and other similar family group conferencing meetings; or
4. Residential family substance abuse treatment programs that prevent separation or facilitate reunification while parents receive comprehensive treatment services.

The act guarantees $15 million a year for competitive, matching grants to state, local, or tribal child welfare agencies and nonprofit organizations that have experience working with children in foster care or kinship care. $5 million of these funds are reserved each year for grants for kinship navigator programs. The act guarantees $15 million a year for competitive, matching grants to state, local, or tribal child welfare agencies and nonprofit organizations that have experience working with children in foster care or kinship care. $5 million of these funds are reserved each year for grants for kinship navigator programs.

Judicial Considerations

- Are there any of these programs in your area?
- If there are programs in your area, what are the eligibility requirements?
- How might they be helpful to families coming before you?
- Are there similar programs available to the families before you, such as through the CASA/GAL program or an agency trained by the National Institute for Permanent Family Connectedness (formerly the Center for Family Finding)?
- Judges should be familiar with local resources and if there are none, be willing to develop them.

- If there is not a formalized program, what efforts has the agency made to locate family members, including any missing or unidentified parents, and the use of the Federal and State Parent Locator Service? See: Section 103: Identification of and Notice to Relatives
- If there are no programs in the area, are any local agencies or organizations planning to apply for a grant in the future?
  - Judges should be willing to inquire and lead stakeholders in grant applications.

Questions to Ask from the Bench

- Were referrals made to relevant programs that could be helpful?
  - If not, should you order the agency to make a referral?

Section 103: Identification of and Notice to Relatives

Overview

Within 30 days after the child is removed from his or her parents’ custody, Fostering Connections requires state agencies to exercise due diligence to identify and provide notice to all adult grandparents and other adult
relatives of a child (including any other adult relatives suggested by the parents).

The notice must:
1. specify that the child was removed from the custody of the parent(s),
2. explain the options the relative has to participate in the care and/ or placement of the child, and any options that may be lost by failing to respond to the notice,
3. describe the requirements to become foster parents,
4. outline available services and supports, and
5. describe the state’s kinship guardianship assistance program (GAP), if one exists.

Further, Fostering Connections makes it very clear that this notice requirement is subject only to exceptions due to family or domestic violence. The law does not allow for any other exceptions to notice.

Although Fostering Connections does not require such notice to be in writing, best practice and the Program Instruction issued by Administration for Children and Families, Children’s Bureau, Department of Health and Human Services encourages the notice to be in writing, recommends early engagement of relatives for children at risk of removal and the use of multiple methods of notice to relatives.

The Act also allows the use of the Federal Parent Locator Service to obtain state and federal child support data to help child welfare agencies carry out their responsibilities. On December 29, 2010, the Office of Child Support Enforcement in the Administration on Children and Families issued a Final Rule expanding the disclosure of information in Federal and State Parent Locator Services to child welfare agencies to assist them in locating relatives of children removed from the custody of their parent(s) to identify potential placements for the child. See: Office of Child Support Enforcement Action Transmittal AT-10-12.

Federal, state and local laws require child welfare agencies to keep certain information confidential. The requirement that states provide notice that a child is entering or has entered foster care supersedes and preempts those provisions. However, only the information necessary to comply with this federal requirement can be shared. The relative should simply be notified of the removal or impending removal and provided the information described above. There is no requirement to share the circumstances leading to the removal in the initial notice. If the child is placed with the relative or the relative becomes involved in the child’s care, additional information may be shared as appropriate. As in most aspects of child welfare practice, a determination of what can be shared will depend upon the individual circumstances, as well as local, state and federal law.

While all state laws and policies may not yet comply with this federal requirement, this notice requirement has been in effect since October 2008. See: Key Considerations for Implementing the Notice Requirement of the Fostering Connections to Success and Increasing Adoption Act and the 50 state and the District of Columbia compilation of data on current state notice statutes at www.grandfamilies.org. See also: Sample Notice Letter at www.childrensdefense.org/child-research-data-publications/data/sample-notice-letter.pdf.

Judicial Considerations
The Program Instruction stresses that the courts can play an important role in relative identification and notification.

Beyond the federal relative identification and notice requirements, what are your state’s relative notice requirements or policies?

- Will the agency continue to proactively identify and provide notice to family members beyond the 30 day requirement, when appropriate?
- The Program Instruction encourages engaging relatives for children at risk of removal as well.

How does your state define relative for purposes of notice, if defined?

- Is your definition of relative consistent with the definition used for your state’s kinship guardianship assistance program (GAP)?
- The Program Instruction issued on July 9, 2010 gives states discretion to define “relative” as they see fit and encourages states to use the same definition for both the GAP program and the identification and notice provisions. See sections D and H: Program Instruction, ACYF-CBP-PI-10-11.

How is due diligence defined in your state? How can the court ensure that due diligence has been exercised?

- How are identification, location, and engagement of non-custodial parents handled?
- What documentation should the court require to show that proper due diligence was exercised in identifying and providing notice to all adult relatives?
- How is the state documenting diligent search efforts and their outcomes, including conversations staff have with relatives about the role they can play in the child’s life?
- Has notice been written in plain language, easily understood by the general population, available in other languages, and provided with any necessary accommodations for the deaf population, or for those with visual impairments or in need of an interpreter?
The Program Instruction encourages the notice to be in writing.

How does your state approach the family or domestic violence exception to notice?
- Who will be making these family violence exception determinations (e.g., judge, attorney, the department, caseworker, etc.)?
- What are the criteria and documentation requirements, if any, for the family or domestic violence exception?
- How does your state take into consideration the court or state’s belief that notice may be dangerous to the family or child?
  - If notice would not be in the best interest of the child due to past or current family or domestic violence; or
  - If notice would put the child or parent at risk of physical, mental, or emotional abuse.
  - Note: the exception may be decided on a case-by-case basis, and then the state is relieved of their diligent efforts to notify those specific relatives only.
  - Federal law does not allow the state to create “other exceptions” to the notice requirement, including parental objection to notice. The only exception is family or domestic violence.

What are the various placement options available in your jurisdiction to relatives, both informal and formal? See: Section 104: Allowing Waivers for Non-Safety Licensing Standards for Relatives.

Has the agency explored ways to keep the relative connected with the child if they are not a placement option?
- This could include participation in family group decision making conferences, in the child’s school or extracurricular activities, or providing a home for holidays or weekend visits.
- Continue notifying relatives for all hearings after the initial and jurisdictional/dispositional hearings.

Questions to Ask from the Bench
- Which relatives have been identified?
  - Have they all been notified? If not, why not?
- How has the agency exercised “due diligence” to identify and notify all relatives (ask at the first hearing and all subsequent hearings, when appropriate)?
  - Has the agency used a combination of good casework and technological resources?
  - Have both paternal and maternal relatives been identified and notified?
  - Has the agency asked the child to identify who is important in his or her life?

Ask parents and the child, in a developmentally appropriate manner, to identify relatives and possible placement and family resources. Judges should speak directly to parents on the record about:
- What efforts have been made to ensure that parent/s understand the possible benefits to the child if the child is placed with people he or she knows and of continued contact (even if not placed) with people who are important to him or her?
- What efforts have been made to ensure that parent(s) know that their child/ren may be placed with people they don’t know if the agency cannot locate a suitable relative placement?

Which relatives have come forward as resources for the child? How would they like to be involved?

What is the agency doing to follow up on each of these relative resources?

Is the agency making plans to license the relative/s that are seeking placement?
- If relatives who have been identified don’t qualify for licensing, has the agency considered licensing waivers?

Has the child been asked what his/her placement preference is?

Are there family or domestic violence issues that warrant making an exception to the identification and notice requirements?

What efforts have been made to ensure that the relative understands the various placement options available to them?
- What efforts have been made to ensure they understand the options that may be lost by failing to respond to the notice?
- What efforts have been made to ensure the relative caregivers and the family (parents and child) understand the role of the relative in the process?
- How were family members made aware of ways that they may stay connected with the child and engaged in the child’s case, even if they are not a viable placement option for the child?

What efforts have been made to ensure that relatives understand the support and services available to them under the various placement options?
Have the efforts to indentify and notify relatives been documented in the court reports?

Section 104: Allowing Waivers for Non-Safety Licensing Standards for Relatives

Overview

Fostering Connections allows states to waive non-safety licensing standards for relatives on a case-by-case basis to eliminate barriers to placing children safely with relatives in licensed foster homes. These standards may include requirements such as mandatory square footage and minimum numbers of bedrooms or bathrooms per person. It also required HHS to submit a report to Congress by October 7, 2010 that examines state licensing standards, states’ use of case-by-case waivers, and the effect of these waivers on children in foster care.

The report was also required to review the reasons relative foster family homes may not be able to be licensed, and recommend administrative or legislative actions to allow more children to be safely placed in relative foster homes and be eligible for federal support.

Generally, when a child is placed in the custody of a state’s child welfare agency, that child must be placed in some form of licensed foster home to receive federal reimbursement under Title IV-E. Licensing requirements and terminology differ from state to state. States have discretion to establish licensing standards and define which standards are considered safety-related and which are non-safety related. For a 50 state and the District of Columbia compilation of data on current state waiver laws and policies, visit www.grandfamilies.org. See also Relative Foster Care Licensing Waivers in the States: Policies and Possibilities for an overview of current waiver policies in the states.

Judicial Considerations

What are your state’s licensing requirements? Note that licensing policy may be found in statute, administrative codes, and policies.

What is your state’s policy on waivers of licensing requirements?

What is the state’s philosophy and practice regarding licensing relatives as foster parents? Does policy differ from actual practice? If so, how?

Which licensing standards are considered safety-related? Non-safety-related?

What are the common reasons why relatives are not licensed? What assistance is available to help relatives who are denied licensing?

Are waivers applied equitably? What is the procedure for decision making regarding waivers?

Questions to Ask from the Bench

Have relatives come forward and/or been identified as placement resources for this child? Have they been licensed?

What barriers, if any, are there to licensing a relative placement for this child?

Have waivers been considered in this case to enable safe placement with a relative? If not, why not?

Does the relative need assistance in advocating for placement?

Stay tuned next month for guidance on implementing provisions addressing youth transitioning from foster care.

Endnotes


2Delaware, Illinois, Iowa, Maryland, Minnesota, Montana, New Mexico, North Carolina, Oregon, Tennessee, and Wisconsin.

New in Print

Improving Foster Care Licensing Standards around the United States by the Grandfamilies State Law and Policy Resource Center

Reviews foster care licensing standards in the 50 states and recommends improvements.

Free download at: www.americanbar.org/content/dam/aba/administrative/child_law/FC_Licensing_Standards.authcheckdam.pdf

For more resources on relative and kin caregivers, visit: www.grandfamilies.org

This article was adapted from the Judicial Guide to Implementing the Fostering Connections to Success and Increasing Adoptions Act of 2008, by the ABA Grandfamilies State Law and Policy Resource Center.
Helping Foster Kids Transition to Adulthood
A much-needed study will evaluate the merits of transitional living programs.
by Jonathan Walters

By now it is understood (and supported by several studies) that kids who age out of foster care generally wind up being less educated, more likely to engage in risky behavior and more likely to re-engage with human services and or criminal justice systems than other kids their age.

Additionally, they're more likely to contribute to that troubling and long-standing multigenerational trend: their kids are far more likely to follow in the same footsteps.

With roughly 25,000 kids aging out of foster care annually, and another 100,000 youth being bounced out of criminal justice facilities, programs aimed at breaking the cycle are now receiving some long-overdue attention, according to a recent white paper by the Manpower Demonstration Research Corporation (MDRC), a nonprofit, nonpartisan social policy research organization.

With the support of the Edna McConnell Clark Foundation and the Bill & Melinda Gates Foundation, MDRC is working with University of Chicago researcher Mark Courtney to evaluate transitional living programs launched by Youth Villages, a nonprofit established in 1986 that currently serves 18,000 kids and young adults in 11 states.

At the core of the program’s philosophy is full engagement with children, families, schools and communities, with a focus on helping to stabilize emotionally and behaviorally troubled children and their families.

The MDRC and University of Chicago study will track 1,300 Tennessee kids and young adults who are either aging out of foster care or leaving juvenile justice facilities. The study will answer the rather significant question of whether youth who participate in a more intensive transitional living program are less likely to experience mental health problems, substance abuse, criminal justice involvement, unemployment, poverty, housing instability and homelessness than a control group, which will be offered access to the standard array of community-based services available in their respective neighborhoods.

While such a divide might raise obvious ethical questions, keep this in mind: The fact is there’s only room in the Youth Villages program for 1,300 individuals, so the “control group” is, in essence, naturally occurring.

According to MDRC, the fact that participants will be randomly assigned to either the more intensive services track or offered the standard array of community services guarantees highly reliable data on program effectiveness because there’s no chance of “creaming,” where the least troubled study participants are offered the more intensive, comprehensive Youth Villages services.

Also helping boost the study’s credibility is the fact that it includes a healthy mix of males and females, various ethnic and racial backgrounds, widely varying educational backgrounds (from those with some technical or associate degrees to full-on drop outs), and young adults who are either aging out of foster care or leaving juvenile detention (roughly two-thirds of the study’s subjects have been in foster care and half in a juvenile justice facility).

While an interim study won’t be out until 2013 and a final report in 2015, there’s preliminary evidence that the transitional living program is having a positive impact, according to the white paper’s authors Sara Muller-Ravett and Erin Jacobs. Participation rates among those chosen for the more intensive transitional services are extremely high—more than 90 percent initially, with more than 80 percent still in the program three months out. Such robust participation rates are in part certainly due to the fact that caseworkers involved in the program carry a small load—six to eight individuals—and also to the fact that those receiving the more intense transitional living services get those services quickly (within a week) and frequently (at least one in-person session a week with a counselor or other professional).

In a world where resources for human services will continue to be squeezed, and in which it is arguably becoming tougher and tougher for young adults to make their way, such a long-overdue study should go a long way toward helping human services professionals identify the most effective ways to help move troubled and dislocated youth into permanency.

Jonathan Walters, executive editor of Governing magazine, has covered state and local government for more than 30 years.

This article was reprinted with permission from: www.governing.com/topics/health-human-services/col-helping-foster-kids-transition-adulthood.html
Children’s lawyers wanting to know how their states rank when it comes to appointing lawyers for abused and neglected children can check their state’s report card.

The just-released *A Child’s Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children* gives 26 states As or Bs, 9 states Cs, and 16 states Ds or Fs.

The report card is the third issued by First Star and the Children’s Advocacy Institute (CAI). It is based on a study of states’ legal representation practices on behalf of abused and neglected children across six criteria.

According to First Star and CAI, the report serves two purposes:

- Alert child advocates, policy makers, media and the public of inequities from state to state in providing abused and neglected children with legal representation in dependency proceedings;
- Prompt a national call to action to promote stronger federal and state laws to provide children highly trained and qualified legal representation that helps them resolve and overcome childhood maltreatment and have better futures.

What’s in a grade?

States receiving the highest marks fully met the following six criteria based on review of their laws, state court rules, case law, and administrative orders:

- require appointment of attorneys for children in abuse and neglect cases
- mandate appointment of attorneys for the full duration of the juvenile court proceedings
- require client-directed advocacy
- require specialized multidisciplinary training for attorneys representing children
- expressly give a child legal status as a party and do not limit a child’s rights
- apply their Rules of Professional Conduct (or state equivalent) to children’s attorneys

A point scale was used to rate states on each criterion, with point values set for each based on a state’s type and degree of compliance. States received up to 5 points extra credit if they mandated specific caseload standards for children’s attorneys in dependency proceedings. State officials were also invited to participate in and provide feedback in the grading process.

The grades

- **Fifteen states received an A or A+**: Connecticut, Massachusetts, Oklahoma
- **A+:** Connecticutt, Massachusetts, Oklahoma
- **A:** Iowa, Kansas, Louisiana, Maryland, Mississippi, Missouri, New Mexico, New York, Ohio, Texas, Vermont, West Virginia
- **Eleven states received Bs:** Arkansas, California, District of Columbia, Michigan, New Jersey, North Carolina, Pennsylvania, Rhode Island, Tennessee, Virginia, Wyoming
- **Nine states received Cs:** Alabama, Arizona, Colorado, Minnesota, Nebraska, Oregon, South Dakota, Utah, Wisconsin
- **Six states received Ds:** Alaska, Georgia, Illinois, Kentucky, Nevada, South Carolina

Ten states received Fs:

States receiving As climbed since the last report card published in 2009, a sign that more states have adopted strong laws and best practices on the right to counsel for abused and neglected children in child protection proceedings.

The report acknowledged that many states have excellent practices in place relating to child representation but that these practices are not codified into state law and therefore lack a mechanism to ensure consistent enforceable representation for children. The authors encouraged these states to take steps to codify these practices into law.

On the other end are states with strong right to counsel laws that are not followed in practice. The report urged advocates and policy makers in these states to pursue legal remedies and approaches to enforce these laws so children receive legal representation.

States receiving Ds or Fs were found to have deficiencies in their statutes after review of the six evaluation criteria. Some trends among lower-performing states include:

- More than 39% of states do not require all abused and neglected children to have legal representation.
- Only 24% of states require multidisciplinary training or education for child’s counsel.
- Only 31% of states mandate appointment of client-directed representation for the child.

At least one state, Florida, has disputed its F grade. Florida’s grade was based on the discretionary nature of appointing children’s lawyers, the
failure to specify the duration of the lawyer’s appointment in child dependency proceedings, and the failure to address high caseloads. Florida has countered that the grades ignore that CAPTA authorizes its model of representation, which appoints a guardian ad litem or court appointed special advocate to represent the child’s best interests. Florida stressed that the study should look at outcomes of representation models as a quality indicator, not only whether an attorney is appointed to represent the child.

**Call to Action**
The authors outlined the following “next steps” for states needing to improve their legal representation practices.

- **Implement the ABA Model Act on the Legal Representation of Children in Abuse, Neglect and Dependency Actions**, (http://www.americanbar.org/content/dam/aba/administrative/child_law/MACChildRep.authcheckdam.pdf) adopted at the ABA’s August 2011 annual meeting. The Model Act outlines best practices relating to the legal representation of children; many of these best practices are embodied in First Star’s and CAI’s report card criteria. The authors urged states to include these practices in their statutes.
- **Learn from other states.** States can learn from higher performing states’ (Oklahoma, Massachusetts, and Connecticut) laws and best practices and work with them to determine if certain laws and rules in those jurisdictions can be adapted.
- **Ensure state law compliance and enforcement.** States with good laws and practices in their statutes that are not being enforced need to take steps to ensure compliance, including public education, media exposure, and litigation.
- **Work with state Court Improvement Programs (CIPs) to incorporate changes related to legal representation of children into law and practice.** CIPs are leading reforms in dependency courts. Working with them may lead to opportunities to incorporate child representation best practices into law.
- **Fairly compensate children’s attorneys.** Raise the quality of children’s legal representation by improving compensation for children’s attorneys. Fully compensating children’s attorneys for their work can allow them to carry more manageable caseloads and devote their full-time careers to children’s advocacy.
- **Comply with CAPTA.** At the federal level, the authors recommended better monitoring of state compliance with the current requirement for representation for abused and neglected children under the Federal Child Abuse Prevention and Treatment Act (CAPTA). They also called for amendments to CAPTA that expand requirements for independent, competent legal counsel for children in dependency proceedings, and ensure children are treated as parties in these proceedings with rights.

The report cards offer an evaluation of states’ legal representation for children. According to the report, many states are doing well and have taken measures to protect children’s legal rights and ensure they receive quality legal advocacy in their laws. States with lower rankings can learn from higher ranked states and benefit from existing state statutes, the ABA’s recent Model Act, CAPTA’s guidance, and the work of state CIPs to foster change in juvenile dependency courts.

—Claire Chiamulera is CLP’s editor.