ABA supports prompt enactment of Family First Preventive Services Act

The ABA reiterated its support last month for the Family First Preventive Services Act and urged Congress to give final approval to the legislation, which takes crucial steps toward reforming the federal child welfare financing structure to support keeping children safely with their families.

H.R. 5456, which passed the House in June, and S. 3065, companion legislation ready for floor action in the Senate, would allow use of federal child welfare funds under Title IV-E of the Social Security Act for preventive services. These funds, which are currently available only after a child enters foster care, would provide opportunities for children to remain in their homes or with kin caregivers while receiving needed support and services.

The bills also would reauthorize the Court Improvement Program (CIP), which was established 20 years ago to provide funds to state courts in all 50 states, the District of Columbia and Puerto Rico for various activities, including: developing mediation programs, establishing joint agency-court training, automating docketing and case tracking, linking agency-court data systems, formalizing relationships with child welfare agencies, and improvement of representation for children and families. Authorization for the CIP program, which has been authorized and funded at $30 million, expired Sept. 30.

The ABA has consistently advocated for policies that address key services and support for families involved in the child welfare system.

“The bipartisan legislation will improve the lives of many children,” ABA President Linda A. Klein said in a statement issued Sept. 29 as she urged the Senate to pass S. 3065. “It will end fiscal incentives to place children in foster care and instead provide services that can keep children and families safely together.” She added that the “urgency to keep the Court Improvement Program fully funded makes passing this bill more imperative.”

Other provisions in the bill supported by the ABA would:

• reauthorize the Stephanie Tubbs Jones Child Welfare Program and the Promoting Safe and Stable Families Act (PSSF) under Title IV-B of the Social Security Act, which support programs that help stabilize families by providing immediate preventive services while children remain at home and by funding reunification services so that children can be safely returned home in a timely manner. In addition, the legislation would eliminate a 15-month time limit on providing reunification services under PSSF so that federally supported reunification efforts can continue in appropriate circumstances.

• identify model licensing standards for relative foster family homes;
## LEGISLATIVE BOXSCORE

<table>
<thead>
<tr>
<th>LEGISLATIVE ISSUE</th>
<th>HOUSE</th>
<th>SENATE</th>
<th>FINAL</th>
<th>ABA POSITION</th>
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<tr>
<td><strong>Immigration.</strong> The president announced 11/20/14 that he would take executive action to provide temporary deportation protection for up to five million undocumented immigrants. A federal district court in Texas issued a temporary injunction blocking implementation. An appeals court panel denied the administration’s request for a stay. A 4-4 decision by the Supreme Court on 6/23/16 leaves the appeals court ruling in place.</td>
<td>Judiciary Committee held hearings on immigration issues on 4/14/15, 4/29/15, and 10/7/15.</td>
<td>Judiciary Committee held hearings on immigration issues on 3/3/15, 3/17/15, 3/19/15 and 7/21/15. Judiciary Committee held a hearing on unaccompanied immigrant children on 2/24/16.</td>
<td>Supports comprehensive immigration reform that promotes legal immigration based on family reunification and employment skills and a path to legal status for much of the undocumented population currently residing in the United States. Opposes detention except where individual presents a threat to national security or public safety.</td>
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<tr>
<td><strong>Supports adequate judicial resources and opposes efforts to infringe on separation of powers or undermine the judiciary. See page 6.</strong></td>
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New CMS rule bans pre-dispute binding arbitration clauses in nursing home contracts

The Centers for Medicare & Medicaid Services (CMS) published a new final rule Oct. 4 for nursing homes that includes a provision prohibiting the facilities from requiring pre-dispute binding arbitration to settle disputes over residents’ care.

The final rule, which goes into effect on Nov. 28 for facilities participating in the Medicare or Medicaid programs, is the first comprehensive update to nursing home regulations since 1991 and contains numerous changes to strengthen long-term care. The new rule will apply to approximately 1.5 million nursing home residents.

The language relating to binding arbitration bans such agreements unless they are entered into after a dispute arises – a position that closely mirrors a recommendation made by the ABA in comments submitted to CMS in September 2015.

The agency quoted extensively from the ABA’s comments to explain the decision to amend its original proposal, which would have retained pre-dispute arbitration agreements while establishing minimum procedural requirements.

Arbitration is a method of dispute resolution in which a neutral decision-maker is selected by one or both parties to resolve a dispute. In an arbitration agreement, a party agrees to waive the rights to sue and to a trial by jury, to participate in a class action lawsuit, or to receive any type of judicial review apart from the very limited grounds applicable to setting aside arbitration decisions.

In its comments, the ABA maintained that the conditions set forth in the proposed regulation would have worsened the current situation by allowing facilities to use the rule as a shield for actions for which they should be liable.

The ABA recommended prohibiting pre-dispute agreements for binding arbitration between the facility and its residents while permitting voluntary, post-dispute arbitration agreements as long as certain conditions are met and the residents have provided informed consent.

The ABA comments pointed out that anticipating the possibility and nature of future disputes with a facility is the last thing on a resident or family’s mind when seeking nursing home care, and there is generally no time to seek the advice of a lawyer to address secondary issues such as methods of resolving future disputes. On the other hand, post-dispute arbitration in many circumstances can be advantageous, and residents should continue to have the choice to use it to resolve disputes after a dispute arises, the association stated.

In addition to banning pre-dispute binding arbitration, the final rule also expands regulations regarding food and medical treatment for residents as well as proper training for staff focusing on the care of residents with dementia and the prevention of elder abuse. The final rule also requires nursing homes to develop infection prevention and control programs and plans for monitoring the use of antibiotics.

Bill would reform use of solitary confinement

Citing the damaging effects of solitary confinement, Sens. Richard Durbin (D-Ill.) and Chris Coons (D-Del.) introduced legislation Sept. 28 that would make significant reforms in the use of the practice in federal prisons and encourage states to implement similar changes.

The bill, S. 3432, builds on a memorandum issued in January by President Obama that directed the Department of Justice (DOJ) to implement recommendations from a DOJ report supporting steps to reduce the use of solitary confinement as well as ban the use of solitary confinement for juveniles. The bill would ensure that inmates are placed in solitary confinement only when absolutely necessary and would improve the conditions of confinement and establish firm time limits on segregation. It also includes strict limits on the use of solitary confinement for: those nearing their release dates; those in protective custody; LGBT inmates; and inmates who are minors, have serious mental illness, have an intellectual or physical disability, or are pregnant or in the first eight weeks of postpartum recovery after birth.

The bill also would improve access to mental health care for those in segregated housing and establish a civil rights ombudsman within the Bureau of Prisons to review inmate complaints and to submit an annual assessment of solitary confinement policies, regulations and data. In addition, a National Resource Center on Solitary Confinement Reform would be established to provide resources to state and local jurisdictions working to reduce the use of solitary confinement.

Durbin said he began his efforts to address the problems associated with solitary confinement by holding the first-ever hearing on the issue in 2012 when he chaired the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights. He followed up two years later with

see “Solitary confinement,” page 7
ABA president expresses concerns about proposals that could undermine independence of Malaysian Bar

ABA President Linda A. Klein expressed concerns last month that a number of proposed amendments to the Legal Profession Act of 1976 (LPA), the Malaysian law governing the Malaysian Bar, appear to be inconsistent with international legal principles and could severely undermine the independence of the Malaysian legal profession.

In a Sept. 23 letter to Malaysia Prime Minister Najib Razak, Klein emphasized that the Malaysian Bar Council has existed for over 70 years as an independent legal association governed by the LPA with the aim “to uphold the cause of justice without regard to its own interest or that of its members, uninfluenced by fear or favour.” The proposed amendments, she said, “would lead to drastic changes in the leadership of the Malaysian Bar, the election process of its leaders, and the organization of its annual meetings.”

One of the proposals would allow the Malaysian government to appoint two members to represent the government on the Bar Council, the executive body of the Malaysian Bar. Klein explained that the United Nations “Basic Principles on the Role of Lawyers” state that the executive body of a professional association should be elected by its members and shall exercise its functions without external interference. She said that the government is free at any time to express its views to the Malaysian Bar, and the proposed change would create “an unjustified infringement upon the right of association of members of the legal profession that is enshrined in the Malaysian Constitution, international law, and required by the U.N. Basic Principles.”

The proposed amendments also would allow the minister in charge of legal affairs in Malaysia to determine the electoral rules and regulations of the Malaysian Bar, a step that could be seen as exerting improper influence over the independent bar.

Also included in the proposed changes in the elections and governing processes is an increase in the quorum from 500 members for general meetings to approximately 4,000 members, or 25 percent of the membership. “Such a change,” Klein said, “would effectively prohibit the Malaysian Bar from having general meetings where resolutions and policies can be debated and passed.”

“The independence of the legal profession – and the bodies that represent the legal profession – is essential to ensuring the rule of law, access to justice and respect for human rights,” Klein said.

She urged the prime minister to reconsider introducing the amendments to Parliament and to open discussion of any need to amend the LPA to the Malaysian Bar, incorporate their comments and requests, and redraft the amendments “to protect and ensure the independence of the Malaysian Bar and the legal profession as a whole.”

Family First

continued from page 3

- provide a 50 percent federal match for evidence-based Kinship Navigator programs that provide critical services and information to support kinship care providers; and
- expand access to the John E. Chafee Foster Care Independence Program to ensure that youth in foster care have access to quality education and additional resources to successfully transition to adulthood.

Although the House passed H.R. 5456 by voice vote, action on the Senate bill has been blocked by several senators who maintain that the legislation’s new standards and requirements could have a negative impact on some states, particularly California, that already have made substantial improvements in their foster care systems without additional federal legislation. They recommend that the bill be amended prior to final passage.

Proponents hope to reach an agreement with those who have placed holds on the Senate bill so that the legislation may move during the upcoming lame duck session.
Bipartisan legislation pending in Congress seeks to increase access to pro bono legal services for victims of domestic violence.

S. 2280, which unanimously passed the Senate in November 2015, and H.R. 6149, introduced in the House Sept. 22 just ahead of Domestic Violence Awareness Month in October, would require the U.S. Attorney in each judicial district across the country to hold at least one public event per year promoting pro bono services “as a way to empower victims of domestic violence, dating violence, sexual assault, and stalking and engage citizens in assisting those survivors.” The bills also would require at least one public event every three years that focuses on increasing pro bono services for Indian or Alaska Native victims in judicial districts that contain an Indian tribe or tribal organization.

“Domestic violence and sexual assault are scourges that we must work to eliminate,” said Sen. Dan Sullivan (R-Ark.), who sponsored the Senate bill with original co-sponsors Sen. Heidi Heitkamp (D-N.D.), Senate Judiciary Committee Chairman Charles E. Grassley (R-Iowa), and the committee’s ranking member, Sen. Patrick J. Leahy (D-Vt.). “Too often victims of domestic violence are unable to seek permanent refuge because they lack the protective legal services to keep them safe from their abusers — but our bill aims to change this,” Heitkamp said. “We can make sure domestic violence victims — especially those living in Indian Country — can access affordable legal services that can help them escape the often cyclical abuse they experience.”

In the House, Rep. Joseph P. Kennedy (D-Mass.) — who introduced H.R. 6149 with original co-sponsors Don Young (R-Ark.), Tulsi Gabbard (D-Hawaii) and Susan Brooks (R-Ind.) — said the legislation, the Pro Bono Work to Empower and Represent Act (POWER Act), “will help restore the promise of equal protection for the millions of domestic violence victims across the country.”

The Justice Department estimates that one in four women experience domestic violence during their lifetime, and a recent census conducted by the National Network to End Domestic Violence found that over the course of one day in September 2014, more than 10,000 requests for services, including legal representation, were not met. Research also shows that the provision of legal assistance to victims of domestic violence, dating violence, sexual assault and stalking reduces the probability of such violence or behavior recurring in the future and can help survivors move forward.

The ABA supports the expansion of pro bono legal services by all lawyers as a critical priority, and the legislation includes the following language from the commentary of the ABA Model Rules of Professional Conduct: “...every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life a lawyer.”

No further action has been scheduled for the bill, but there is a possibility that the legislation may come up during the lame duck session following the Nov. 8 general election.
ABA president urges Senate votes on judicial nominations

The ABA is continuing to urge Senate leaders to promptly schedule floor votes during the upcoming lame duck session on the federal judicial nominees pending on the Senate calendar.

The number of Article III judicial vacancies has ballooned from 45 at the beginning of the 114th Congress to more than 90, which represents more than a 10 percent vacancy rate.

“With over 10 percent of authorized judgeships now vacant, the prompt filling of vacancies is becoming a matter of increasing urgency,” ABA President Linda A. Klein wrote to Senate Majority Leader Mitch McConnell (R-Ky.) and Senate Minority Harry Reid (D-Nev.) this fall. “This is especially true for vacancies that have existed for so long and created such untenable workloads for the remaining judges on the court that the Administrative Office of the U.S. Courts has declared them to be judicial emergencies,” she said.

Klein urged the Senate leaders to schedule floor votes on the district court nominees that were all found by the Senate Judiciary Committee to be fully qualified for life-time appointments and approved by the committee with overwhelmingly bipartisan support.

“As lawyers who practice in federal courts across this nation, ABA members know firsthand that longstanding vacancies on courts with high caseloads create strains that inevitably will reduce the quality of our justice system and, as importantly, deprive litigants of the opportunity to resolve their civil disputes in a timely matter.” She added that this has “real consequences for the financial well-being of businesses and for individuals who have to put their businesses and personal lives on hold while waiting for their day in court.”

Recognizing the time constraints under which the Senate will be operating for the remainder of this Congress, Klein urged that multiple confirmation votes be scheduled at a time. There is ample precedent for this, she said, pointing out that nine district court nominees were confirmed on October of the last year of the Reagan administration, four during October in the last year of the Clinton administration, and 10 in September in the last year of the George W. Bush administration.

Failure of the Senate to vote on pending nominees before adjournment of this Congress will waste taxpayer dollars and government resources, she said, explaining that once the 115th Congress convenes, the president and the Senate will have to begin the entire process again to fill the same vacancies.

Judicial Vacancies/Confirmations—114th Congress* (as of 10/26/16)

<table>
<thead>
<tr>
<th>Court</th>
<th>Vacancies</th>
<th>Pending Nominations</th>
<th>Confirmations</th>
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<tr>
<td>US Supreme Court (9 judgeships)</td>
<td>1</td>
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<tr>
<td>US Courts of Appeals (179 judgeships)</td>
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<td>US District Courts (678 judgeships)</td>
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<tr>
<td>Court of International Trade (9 judgeships)</td>
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<td>2</td>
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<tr>
<td><strong>Totals</strong></td>
<td><strong>95</strong></td>
<td><strong>54</strong></td>
<td><strong>22</strong></td>
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*Includes territorial judgeships
NATIVE HAWAIIAN SELF-DETERMINATION: The Department of the Interior announced a final rule Sept. 23 that sets out an administrative procedure and criteria for the department to use if the Native Hawaiian community seeks to reestablish a formal government-to-government relationship with the United States — a move strongly supported by the ABA. “Today is a major step forward in the reconciliation process between Native Hawaiians and the United States that began over 20 years ago,” Interior Secretary Sally Jewell said in making the announcement. “We are proud to announce this final rule that respects and supports self-governance for Native Hawaiians, one of our nation’s largest indigenous communities,” she emphasized. Native Hawaiians have not had a formal unified government since 1893, when the United States was involved in a takeover of the Hawaiian government and the deposing of the reigning monarch, Queen Liliuokalani. The U.S. government acknowledged in 1993 that the U.S.-sponsored overthrow of the Hawaiian kingdom was illegal, issued an apology, and expressed support for reconciliation efforts and a process for federal recognition of Native Hawaiians. In 2006, the ABA adopted policy specifically supporting the right of Native Hawaiians to seek federal recognition of a native governing entity within the United States similar to that which American Indians and Alaska Natives possess under the U.S. Constitution. Since then, the association has supported legislation to establish a process that would lead eventually to the formation of a native governing entity that would have a government-to-government relationship with the United States, but the legislation was never approved. The Interior Department’s final rule provides an opportunity for a Native Hawaiian government to exercise its inherent powers of self-government, self-determination, and economic self-sufficiency and recognizes the special political and trust relationship between the United States and the Native Hawaiian community, according to the department.

MEDIATION WEEK: The ABA declared the week of Oct. 16-22 as Mediation Week to celebrate the growing field of alternative dispute resolution around the world. The celebration also recognized that not all cases in the justice system are well-suited for the adversarial process and that there are multiple paths to justice that are increasingly shared by attorneys, judges and the public. The special week, which has been coordinated by the ABA Section of Dispute Resolution each October since 2011, builds in part on the efforts of many other national, state, and local organizations, including the Association for Conflict Resolution, that have traditionally celebrated conflict resolution during the month of October. More than 40 activities were held during Mediation Week to educate lawyers, parties, public officials, and the general public about mediation and to continue to promote the use of mediation. This year’s theme, “Celebrating Mediation in All Its Diversity,” focused on helping lawyers and mediators understand both the challenges and rewards of helping parties in conflict reach an agreement by getting past differences in positions, by understanding each other’s perspective better, and by finding ways to get their important interests met while staying true to their values and belief systems. As part of the celebration, the section developed an electronic Mediation Week Toolkit that includes program planning guides, talking points, handouts and articles.

Solitary Confinement

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a series of hearings during the 113th Congress. The ABA, which recognizes the negative effects of solitary confinement on prisoners, expressed its concerns in statements submitted for the record of hearings in both 2012 and 2014.

In the statements, ABA Governmental Affairs Director Thomas M. Susman emphasized the negative effects of solitary confinement on prisoners and emphasized that the impact on juveniles is especially pronounced. He talked about the immense costs to the public, the prisoners, and the communities to which the vast majority of once-isolated prisoners will return, adding that some data suggest that prisoners who have spent long periods in isolation are more like to reoffend and have a more difficult time creating lasting social bonds that are necessary to reintegrate into their communities.

The ABA Standards for Criminal Justice on the Treatment of Prisoners, updated in 2010, contain specific guidance on the use of prolonged isolation and apply to all prisoners in adult facilities, including jails.

Addressing the major impact of solitary confinement on juveniles, Susman explained that the American Academy of Child and Adolescent Psychiatry advises that even short periods of isolation too often have serious long-term mental health impact on juveniles, and segregation – while occasionally necessary for safety reasons – should be imposed in the most limited manner.
The ABA expressed support this month for bipartisan legislation in the House and Senate that would increase protection and assistance for victims of human trafficking.

S. 3441, introduced Sept. 28 by Sens. Kirsten E. Gillibrand (D-N.Y.) and Rob Portman (R-Ohio), and H.R. 6292 – introduced the same day in the House by Reps. Ann Wagner (R-Mo.), Tulsi Gabbard (D-Hawaii) and David W. Jolly (R-Fla.) – would permit a victim of human trafficking to move to vacate convictions and expunge arrests for nonviolent crimes committed by the victim as a direct result of the trafficking.

“Survivors of human trafficking – who have endured beatings, sexual assault and psychological control – are often arrested and convicted of prostitution and other related offenses,” ABA Governmental Affairs Director Thomas M. Susman wrote to the sponsors in an Oct. 5 letter. Their criminal records, he explained, prevent them from successfully applying for jobs, housing and loans.

“Legislation like the Trafficking Survivors Relief Act offers survivors of trafficking a significant opportunity to move forward with their lives and leave the reminders of their victimization in the past,” he said.

The legislation would require the victims to provide documentation in order to have their nonviolent criminal records vacated, including: certified court proceedings or law enforcement records; testimony or sworn statements from trained professionals from whom the person sought assistance; and affidavits or sworn testimony from the individuals indicating that they were victims of human trafficking at the time of their arrests and that the criminal activities of which they are accused are a direct result of being victims of human trafficking.

“We need to make sure we’re doing everything we can to take care of human trafficking survivors who manage to escape from captivity,” Gillibrand said. “In many cases, when trafficked people – including children – are forced into slavery, they are tagged with criminal charges that stay with them for the rest of their lives, even though they have absolutely no freedom to say no to their captors, who force them to commit crimes.”