A lex’ grabbed at his mother and sobbed uncontrollably. They were on their way to visit his new school for the first time, and Alex was terrified. He wanted to stay at home with his mother and alternated between clutching at her desperately and pounding his fists against her side as she struggled to haul him up the subway steps. Although part of her wanted to give in and keep him at home with her, she persevered because she knew that, for her son, letting go of her was an important step in Alex’s path to adulthood. In many ways this was a typical battle, fought in some form between countless parents and countless children. Except that Alex was 13 years old.

The Education Rights Project began with a telephone call. I had attended a training session at DLA Piper’s Boston office conducted by Massachusetts Advocates for Children (MAC), a nonprofit children’s advocacy organization with a 40-year history of advancing the welfare of low-income children. The session was designed to familiarize attorneys with the basics of special education dispute resolution in the hopes that they would agree to help one of the many low-income parents that form MAC’s client base. Shortly after that training, Tom Mela, the director of MAC’s Children’s Law

Continued on page 7

Children’s SSI Disability Benefits: Identifying Eligibility and Handling Claims
By Stephen Olden

Most people are aware that the Social Security Administration (SSA) oversees various Social Security retirement and disability insurance benefit programs. Through some of these, children may become eligible to receive benefits during their childhood based on the disability, retirement, or death of their parent or guardian. These benefits accrue to children based simply on their status as a child of the qualifying adult. The SSA also administers another benefit program known as Supplemental Security Income (SSI).1 The benefits of this program are provided to eligible disabled or elderly adults and to disabled children. Whereas eligibility for Social Security benefits is premised on a person’s work history, eligibility for SSI benefits is based on a person’s financial need. One need not have worked any certain number of quarters or paid any certain amount “into Social Security” in order to qualify for SSI. Instead, the claimant must show that the family’s income and resources fall below a set amount (which is quite low). If the claimant’s income and resources are not so high as to be disqualifying, SSA will then go on to determine whether the SSI claimant is elderly or disabled.

This article focuses on SSI disability benefits for children and addresses two topics: (1) what busy lawyers coming into contact with children or families should know so that they can spot a potential SSI-eligible child, and (2) practice tips and ideas for those advocates handling

Continued on page 11
You will notice some changes on the webpage of the Children’s Rights Litigation Committee in the coming months, thanks so our new webmaster Marlene Sallo. Marlene is an attorney with the Children’s Law Center of the University of South Carolina School of Law. She trains DSS workers, judges, guardians ad litem, and attorneys in South Carolina on laws, policies, and procedures pertaining to foster care and adoption.

We are looking forward to working with Ms. Sallo, who will guide us in redesigning the committee’s webpage. Several new features you can expect to find are Monthly Case Updates (everything you need to know about emerging cases in children’s law); The Monthly Spotlight (focusing on an advocate, an agency, or a clinic and what they are doing with respect to children’s issues); and This Month in the News, a roundup of new legislation and media coverage pertaining to children involved in litigation.

We will be updating the committee’s website regularly, adding links to upcoming training programs, recently decided cases, materials, guides, and other resources to assist you in your work on behalf of children. You can find our webpage at www.abanet.org/litigation/committees/childrights. Be sure to bookmark it or make it your homepage so that you can visit it regularly.

We encourage your comments, as well as your participation in this process. If you would like to help by joining the webpage editorial board, please contact our committee director Cathy Krebs at krebsc@staff.abanet.org.

We are also pleased to have 2 new members of our 10-person working group, the group that assists us in planning and executing projects for the committee. Kristin Henning is codirector of the Juvenile Justice Clinic at Georgetown University School of Law. Lourdes Rosado is the associate director of the Philadelphia-based Juvenile Law Center.

We are thrilled to have these new folks with us and invite you to get involved as well!

Children’s Rights on the Web

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- Find additional resources
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www.abanet.org/litigation/committees/childrights
Tips for New Juvenile Defenders
By Robin Walker Sterling

Since the U.S. Supreme Court ruled in In re Gault1 that Fourteenth Amendment due process requires that youths facing delinquency proceedings have the right to counsel, the role of the juvenile defender has evolved to require a complex and challenging skill set. Juvenile defense attorneys must have all the legal knowledge and courtroom skills of a criminal defense attorney representing adult defendants. In addition, juvenile defenders must be aware of the strengths and needs of their juvenile clients and of their clients’ families, communities, and other social structures. Juvenile defenders must understand child and adolescent development to be able to communicate effectively with their clients, and to evaluate the client’s level of maturity and competency and its relevancy to the delinquency case; have knowledge of and contacts at community-based programs to compose an individualized disposition plan; be able to enlist the client’s parent or guardian as an ally without compromising the attorney-client relationship; know the intricacies of mental health and special education law, as well as the network of schools that may or may not be appropriate placements for the client; and communicate the long- and short-term collateral consequences of a juvenile adjudication, including the possible impact on public housing, school and job applications, eligibility for financial aid, and participation in the armed forces.

Know the Law
A very accomplished trial lawyer at one of the country’s leading public defender offices used to tell all his supervisees, “there are two kinds of lawyers: those who know the code, and those who don’t.” Be the lawyer who knows the code. Study your jurisdiction’s juvenile code and juvenile court rules. Get some good guidance on juvenile court practice. The second edition of the American Law Institute/American Bar Association’s Trial Manual for Defense Attorneys in Juvenile Court, by Randy Hertz, Martin Guggenheim, and Anthony Amsterdam, is one of the best places to look; chock full of clearly written, comprehensive advice, it even includes a searchable DVD.

Juvenile defense is a specialized area of practice. So, even if you have practice experience in other areas—including misdemeanors, felonies, and civil cases—be sure to take the time to learn the ins and outs of juvenile defense practice in your jurisdiction. Competent representation in juvenile delinquency court requires legal training in a wide range of traditionally legal areas, including the rules of evidence, constitutional law, juvenile law and procedure, criminal law and procedure, trial skills, and appellate procedure. It also requires familiarity with child and adolescent development, the collateral consequences of adjudication and conviction, expungement, special education, abuse and neglect, mental health, cultural competency, child welfare and entitlements, and immigration. So, seek out juvenile-specific training opportunities. Also, try observing juvenile court proceedings for several weeks before you start practicing, and even after you start, log a couple of hours of observation each week.

Know Your Client
The juvenile defense attorney plays a critical role in juvenile court. All the other courtroom players—the judge, the prosecutor, and the probation officer—have an ethical obligation to do what they think will serve the child’s best interest. The juvenile defense attorney, on the other hand, is the only person in the courtroom ethically charged with representing the child’s stated interest. Just as in the relationship between an adult and his or her criminal attorney, in the relationship between a juvenile and his or her delinquency attorney, the client calls the shots. The juvenile court’s power is based in parens patriae, a common-law doctrine under which the juvenile court assumes parental-like authority to intervene in a child’s life.2 Combine parens patriae with the reality that children who, in other circumstances, would not be able to drive, drink, vote, marry, or enter into a legal contract, are empowered to direct the course of their court matters, and the result can be confusion for many juvenile defense attorneys about how they should pursue their cases. For example, should you obtain sorely needed services for the child, or should you advocate for what the child wants, even if what the child wants goes against your own legal judgment? On this point, ABA ethical rules are clear: With respect to the duty of loyalty owed to the client, the juvenile delinquency attorney-client relationship mirrors the adult criminal attorney-client relationship. That coextensive duty of loyalty requires defenders to represent the stated interests of their juvenile clients, and not the best interests as determined by the attorney, the judge, the prosecutor, or the probation officer.3

In the juvenile defender’s day-to-day client interactions, this mandate means, above all, listening to the client. In client-centered practice, the attorney’s role is to provide the youth, objectively and using age-appropriate language, with complete information concerning all aspects of the case, including candid
predictions concerning the short-term goals of the case (e.g., whether the client will be detained pending trial or whether the client will win the probable cause hearing) and the long-term goals of the case (e.g., whether the child will be acquitted or whether, if found involved, the child will be committed and/or face additional collateral consequences). In other words, the juvenile defense attorney’s role is to empower the client to make informed decisions, and then vigorously pursue the case goals the client has chosen.

Besides asking your client, there are a lot of ways to gain insight into your client’s goals. Spend time talking with your client about things besides the case, such as school, sports, video games, movies, and other things that will help you build a rapport. Try to get to know the client outside of court. With the client’s permission, visit his or her home. Spend time getting to know his or her parents so that you can enlist them as allies when appropriate. In working with parents, it is crucial to remember that juvenile defense counsel has an affirmative obligation to protect a client’s information or secrets from everyone, including parents or guardians; that interviews with the client should not include their parents or guardians; and that parents or guardians do not have any right to inspect juvenile defense counsel’s file, notes, discovery, or any other case-related documents without the client’s expressed consent, even if the parent or guardian is paying counsel’s fee.

Don’t Be Afraid of Confrontation

Sometimes pursuing the client’s goals will mean advocating for the opposite of what everyone else in the courtroom thinks is the right result. But the introduction of advocates to the juvenile court system was meant to infuse juvenile court with more of the constitutional protections of adult criminal court and their attendant adversarial tenor. Noting that the “absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment,” the Gault Court held that a child’s interests in delinquency proceedings are not adequately protected without adherence to due process principles. In other words, unless defense compliance is in the youth’s stated interest, a juvenile court proceeding in which the defense counsel is not advocating to protect the child’s stated interest is exactly the kind of pre-Gault proceeding that the Court found unconstitutional four decades ago.

Go ahead and get angry. The trick is to know the code, juvenile practice, and courtroom practice well enough to be able to translate the things that make you angry into colorable claims. If you think the police were not properly able to search your client’s home, research and file a suppression motion; if you did not get discovery until the three days before trial and now it’s too late to hunt down an exculpatory witness, file a motion for sanctions; if you think the police officer will use your client’s alias at trial to prejudice the court, file a motion in limine to keep him or her from saying it; if the government testifies that the basis for his or her traffic stop was that your client ran a stop sign, and the police report did not contain any mention of a stop sign, impeach the police officer. File motions. Make arguments. Call witnesses. Kick up dust. In a healthy adversarial system—the system that Gault intends—the parties understand that they are in different roles, will often be at odds, and will enjoy mutual respect that survives disagreement.

Don’t Forget Disposition

Although there will be plenty of times when you will disagree with the juvenile system actors, there will also be times when your client’s wishes might be in line with what the other stakeholders want. Often, you will reach a point like this at disposition. At disposition, juvenile defense counsel’s role is to present the court with a creative, comprehensive, strengths-based, individualized disposition alternative, consistent with the client’s expressed interests, that is responsive to the court’s concerns. As important as trial skills are, in most jurisdictions, a small number of juvenile cases go to trial, but the vast majority goes to disposition. For this reason, it is very important to remember that, particularly in rural jurisdictions, maintaining good working relationships with the other courtroom actors is good advocacy. Generally, so long as you are respectful and reasonable, and a consistently zealous advocate for the client’s stated interests, people will work well with you.

It is as important to maintain good working relationships with colleagues inside the courtroom—the judge, prosecutor, and probation officer—as it is to maintain good working relationships with colleagues outside the courtroom, such as detention center staff or youth counselors for community-based programs. You may even introduce yourself to the youth police officers in the areas where most of your clients live. The system is configured so that things can happen in your client’s case and you have no idea. Your client might be rearrested, interrogated, and give up a confession before you are even aware that your client has a new case. The probation officer might decide to revoke your client’s
probation because your client has missed too many appointments; you would not find out before your client does, until you receive notice in the mail. Your goal is to make it easier for people to include you. So, when your client is rearrested, the police officer will call you to the precinct. Or, when your client misses his third appointment with probation in a row, the probation officer calls you and you have one more chance to convince the probation officer to give your client one more chance before he or she moves to revoke your client’s probation.

The best dispositional investigation and advocacy begin at the beginning of the case; or, as one juvenile defense attorney put it, “I sentence my clients the second they walk through the door.” This statement does not mean that the attorney assumes the client is guilty and gives up the fight. Far from it. It means that, in light of the reality that a good disposition plan takes a long time to put into place—often longer than the time the court allotst between the plea or the verdict and the date for the disposition hearing—disposition planning and investigation should start at the earliest opportunity to maximize the chance that the appropriate investigation, evaluations, and interviews are completed, and the necessary documents are located and submitted. The goal is that, should the client be found guilty, the client receives the most appropriate, least restrictive disposition with as little delay as possible.

Finally, remember to be creative. Enlist professional allies, such as mitigation specialists; social workers; and mental health, special education, and other experts to develop a plan consistent with the client’s expressed interests. Also consider volunteer allies, such as your client’s neighbors who might be willing to watch your client after school until his or her parents get home from work for the next few months, church members, after-school programs, teachers, family members—as many responsible adults as you can find who will be willing to stand up for your client. The more thoughtful and comprehensive the plan, the more likely it is that the court will see things your way.

Be a Good Colleague
When you’re new to practice, experienced mentors can be your greatest resource. Take every opportunity you can to watch experienced juvenile defense attorneys in court and to seek out their advice. Learning from this kind of modeling is the best way to evolve the sensibility to make the difficult judgment calls that juvenile defense attorneys have to make regularly.

Disposition planning should start at the earliest opportunity to maximize the chance that the appropriate investigation, evaluations, and interviews are completed, and the necessary documents are located and submitted.

It is just as important to find a group of similarly experienced peers who appear in juvenile court. You are going to have a lot of moments when you’ll need to talk with someone about a tactical call that you’ve made that you’re questioning. There also will be times when you’ll have a victory that you will want to share. Other times, you might feel overwhelmed about the realities of practice—frustration, for example, that a judge will not see an issue your way despite your best efforts; that a particular drug or mental health program will not admit your client; or even that your client will not come to court or answer your calls. You can lean on your colleagues for sample motions and arguments; advice about the practices of individual judges, probation officers, and prosecutors; and mock cross-examinations of your witnesses as you prepare for evidentiary hearings, as well as for emotional support. The importance of building a juvenile defender community, and of knowing that you are part of a juvenile defender community, simply cannot be understated.

Robin Walker Sterling is special counsel at the National Juvenile Defender Center, Washington, D.C.

Endnotes
1. 387 U.S. 1 (1967).
2. Id. at 16 (1967) (explaining that the doctrine of parens patriae “was taken from chancery practice, where, however, it was used to describe the power of the state to act in loco parentis for the purpose of protecting the property interests and the person of the child”).
Children’s rights

Raising Our Hands: Creating a National Strategy for a Child’s Right to Counsel and Education
By Cathy Krebs and Rosa Hirji

On October 23, 2009, approximately 200 lawyers gathered at Northwestern University School of Law in Chicago for a working summit. The summit consisted of two different tracks, one focused on the right to counsel for children in child welfare cases and the other focused on education. The right to counsel track brought lawyers together from across the country to develop a national strategy to promote the right to counsel for children in abuse and neglect cases. Participants engaged in a series of workshops, each designed to prompt in-depth discussions of some of the greatest challenges we face as we strive to ensure lawyers for every child in every case. The summit was envisioned as a catalyst for a strong and vibrant national campaign. Based on the productive and lively conversation during the summit, we will develop materials and resources to assist advocates in furthering this campaign.

The goal of the right to education track was to develop a model code that applies international human rights standards to promote a right to a high-quality education, counsel, and dignity in schools. In advance of the summit, key conference participants wrote a draft that presented topics for dialogue, debate, and informational exchange. Several breakout groups at the summit critically examined the draft of the model code and developed recommendations. Following the breakout sessions, there were two panels, one focused on media strategies to halt the school-to-prison pipeline and the other focused on developing action steps to promote and implement the model code as policy.

The education track concluded with an unprecedented Socratic dialogue in the form of a roundtable: The School to Prison Pipeline: Is It a Human Rights Violation? The dialogue was a forum that sparked intense critical thinking and exciting solution-driven dialogue about education, school pushout, and human rights. The dialogue can be seen on the webpage of the Children’s Rights Litigation Committee.

In addition to the exciting work done during each track, there was a morning plenary session that featured James Bell of the The W. Haywood Burns Institute for Juvenile Justice Fairness and Equity and Jaclyn Jenkins, a deputy district attorney in Umatilla County, Oregon, and a former foster child. Their inspirational words set a wonderful tone for the day. For lunch, the plenary tracks came back together to hear from Dr. John Jackson, president and chief executive officer of The Schott Foundation for Public Education. The morning and lunch plenary sessions can be viewed on our committee’s website at www.abanet.org/litigation/committees/childrights.

Each track will have post-summit materials. If you are interested in receiving materials from either or both tracks, please email Cathy Krebs at krebsc@staff.abanet.org.

THE BENEFITS OF MEMBERSHIP

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DLA Piper’s Signature Projects
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Support Project, called to ask if I could help with Alex’s case.

Some context is necessary. The provision of special education services to children with disabilities in the United States is governed by the Individuals with Disabilities Education Act (IDEA). The IDEA requires that local school districts provide a “free and appropriate education” (FAPE) to all students with disabilities in their jurisdiction. What exactly constitutes a “free and appropriate education” is a matter of some debate, as its requirements span several pages of federal regulations, and the phrase’s meaning has been interpreted and reinterpreted by virtually every court in the country. Moreover, parents (who tend to focus on the requirement that their child’s education be “appropriate”) seldom interpret FAPE in the same manner as school districts (which tend to fixate on the requirement that they provide educational services for “free”). As a result, parents and school districts often fail to see eye-to-eye regarding the law’s requirements.

In theory, and often in practice, disputes regarding a student’s services are worked out in an Individualized Educational Program (IEP) team process. The IEP team consists of a student’s teachers and other educators, school administrators, parents, and, in some cases, social service representatives. These team members are supposed to determine by consensus what services are appropriate. If this does not happen, parents must negotiate a sometimes Byzantine administrative appeals process to enforce their rights. Needless to say, if the parents of a student with a disability cannot afford an attorney or advocate, cannot speak English, or suffer from disabilities of their own, a student can easily slip through the cracks. Such was the case with Alex.

Alex was 13 years old but functioned at a first-grade level. He was bipolar, had low cognitive functioning, and suffered from a host of other disabilities, including post-traumatic stress disorder and attention deficit disorder. He had been institutionalized seven times, usually at the instigation of school officials unable to control his behavior. The most shocking aspect of Alex’s case, however, was that he had not attended school in months. At his last placement, a school for children with disabilities, Alex’s violent outbursts ultimately triggered his seventh commitment, and the school indicated that he could not return.

When Alex was finally released from the hospital, the school district attempted to place him in a second day school for disabled students. That school refused to accept him, however, after Alex threw his shoe through an office window during his entrance evaluation.

Ever since this incident, Alex had stayed at home. None of the standard placement schools would take him, and the constituent members of Alex’s IEP team were at loggerheads as to what to do next. While it was abundantly clear by this point that Alex needed a residential educational placement with psychiatric support to stabilize him, adjust his medications, and get him to the point where he could actually start to learn again, neither the school district nor the Massachusetts Department of Children and Families (which provided stabilization services to Alex’s family and participated on his IEP team) were willing to fund it. The social service agency argued that it was the school district’s responsibility to fund the placement because without it Alex could not attend school, while the school district argued that it was the social service agency’s responsibility to pay for residential services because, when properly stabilized
at home, Alex was capable of attending school. The result was a deadlock. Alex’s mother, who spoke only Spanish and grappled with disabilities of her own, was so bewildered by the bureaucratic jousting that she could not comprehend what was happening to her son, let alone advocate on his behalf. Alex had fallen through a crack in the system.

MAC was created to solve precisely this type of problem. Founded four decades ago as the Task Force on Children Out of School, MAC issued an investigative report in 1970 on the exclusion of children from public schools in Boston. That report led to the enactment two years later of chapter 766, Massachusetts’s ground-breaking law guaranteeing education for children with disabilities. It also led to the Massachusetts Bilingual Education Act, the first such law in the nation. During the next two decades, MAC’s legislative and administrative advocacy produced reforms in child mental health, vocational education, lead poisoning prevention, student retention policies, and child nutrition. MAC also sued successfully to force the Boston Public Schools to live up to its special education obligations. MAC’s mission, however, is to “change conditions for many, while also helping one child at a time.” In furtherance of this mission, MAC’s attorneys step in, either directly or by assisting volunteer attorneys in private practice, to assist children, like Alex, whom the system has failed to help. Which is why Tom Mela called me.

Although it took several months of effort (and I still, on occasion, have to intervene when some aspect of Alex’s education goes awry), DLA Piper was eventually able to secure him a placement at a local residential school with on-site psychiatric and medical services. After six months of phenomenal attention and care by the school staff, a newly stabilized Alex was able to transition back to living at home. He now attends a vocational day school and is learning both a trade and the skills he will eventually need to function outside the home.

A year later, when DLA Piper’s Boston office was searching for a Signature Project, we quickly recognized that a partnership with MAC was an obvious choice. DLA Piper operates several large-scale Signature Projects as part of DLA Piper’s extensive commitment to pro bono. The Signature Project model harnesses the firm’s resources to tackle systemic issues within communities. Teams of firm attorneys work with local nonprofit organizations to develop multifaceted strategies to address and solve community problems. With many dozens of attorneys working on matters coupled with growing experience in an area of law, the firm’s impact can grow exponentially.

Currently, several DLA Piper offices are engaged in Signature Projects encompassing a variety of legal practices: The San Diego office has a project assisting veterans in obtaining medical and disability benefits, helping homeless veterans achieve a fresh start, and providing low-income veteran entrepreneurs with corporate governance advice and support.

- The Atlanta office works with victims of domestic violence to obtain protective orders against their abusers.
- In Northern Virginia, attorneys assist abused immigrant women to secure legal status in the United States.
- In Washington, D.C., the office works with the Access to Justice Commission on an in-depth report on the legal needs of disadvantaged people, including solutions for how the city can work to meet its residents’ legal needs.
- The firm also has a national Signature Project assisting Hurricane Katrina survivors whose homes were destroyed and who need assistance establishing ownership of the property so they can rebuild.

As an established public service organization with an existing infrastructure and vast experience with special education law and advocacy, MAC made an ideal Signature Project partner for our Boston office. Several other DLA attorneys had already begun working with MAC by this point, and the ties between our organizations were substantial. We did have to make some adjustments, however. MAC’s prior experience partnering with private attorneys had focused on individual advocacy for children like Alex. This required negotiation and, occasionally, administrative legal action in a context that was, at least superficially, more familiar to a litigator than a transactional attorney. To involve attorneys from the office’s real estate and corporate departments, we created new joint strategic projects that harnessed DLA Piper’s legal research, drafting, and contractual expertise to support MAC’s higher level initiatives.

Massachusetts Advocates for Children (www.massadvocates.org) is a private, nonprofit organization that has been a premier child advocacy leader in the state since 1969. In 1992, MAC became part of the network of civil legal aid agencies in Massachusetts and, through that network, began the Children’s Law Support Project, identifying emerging children’s needs and providing back-up legal support to legal service agencies around the state. During the 1990s, MAC added community outreach and coalition-building components to work with parent and community organizations for educational equity in Boston and to protect chapter 766 statewide. MAC employs an array of strategies to “change conditions for many, while also helping one child at a time.”
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WHERE  The Hilton New York
WHEN  Thursday, April 22, 2010
      5:30 p.m. – 6:30 p.m.
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I should note that our Boston office’s foray into special education work is not the firm’s first pro bono project involving education. The firm has several Signature Projects and other projects focused on education and children. In New York, attorneys provide extensive assistance to students in a program aimed at improving educational outcomes for low-income students. In conjunction with firm client PricewaterhouseCoopers, DLA Piper attorneys represent more than two dozen Head Start programs throughout the city, providing them with transactional, financial, employment, real estate, and litigation services. Attorneys also represent children in disciplinary and special education hearings, focusing on cases involving private placement reimbursement.

DLA Piper’s Chicago office recently kicked off an education project providing general counsel support to Head Start programs across the city while also representing children with disabilities in special education proceedings. The Washington, D.C., office has also explored ways to repair the system for resolving special education disputes. The firm expects to expand this nationwide commitment in the future. DLA Piper’s Baltimore office adopted two local schools, a public charter school and an innovation school, providing the families with legal and educational support.

Matthew J. Iverson is an associate in the Boston office of DLA Piper LLP (US). He specializes in commercial and land-use litigation and manages the Education Rights Project.

**Endnotes**

1. Alex is a pseudonym.
2. 20 U.S.C. §§ 1400 et seq.
3. The Signature Project model has received significant attention within the legal community. Last year, DLA Piper received the American Bar Association’s Pro Bono Publico Award, given annually to a firm that has made an outstanding commitment to pro bono. The Signature Project model was singled out as the reason the firm was granted the award.
Children’s SSI Disability Benefits
(Continued from page 1)

these cases by representing disabled children in the claims and appeals processes. The payoff for a qualifying disabled child can be huge. He or she will receive a monthly cash benefit, which in 2009 can be up to $674 and, in most states, will be qualified automatically for Medicaid health care coverage. For low-income families, an extra $8,000 a year goes a long way. In some cases, the medical coverage is even more important, with out-of-reach surgical procedures and medications finally becoming available to the child. The cash benefits will be paid to a representative payee (typically a parent or relative) and will continue until the child turns 18 or is no longer disabled. At 18, child benefits will end, and SSA will review the case to determine whether SSI can continue under the adult disability standards. If the disability remains, the child may qualify for SSI as an adult if he or she can show that the impairment(s) preclude him or her from holding any job on a sustained basis. Usually, SSA will also review a child’s SSI case every few years to determine that the disabling medical or mental condition still exists and still is so severe as to be disabling.

Who Will Be Considered Disabled?
Suppose you represent a child and her family who are appealing a school’s denial of services in an Individual Education Plan (IEP). Or maybe you are a guardian ad litem for a young boy in termination of parental rights proceedings. Or perhaps you have been retained to represent a child who was arrested and charged with criminal activity. Or maybe you are the prosecutor in that case. As you start to develop the big picture around your client or charged party, you may sense that he or she is disabled, either physically or mentally. If so, you may have an opportunity to help this child in an important way. Your first step will be to make a rough assessment the child’s medical or mental condition and financial situation to see if an SSI application should be filed by the family.

In SSA’s words, disability can be established by symptoms, laboratory findings or tests, and signs. Signs are “anatomical, physiological, or psychological abnormalities that are demonstrable by medically acceptable clinical diagnostic techniques.” In addition, any impairment must have lasted, or be expected to last, at least a year or result in death, and it must result in marked or severe functional limitations. Examples of childhood impairments could be mental retardation, severe asthma, bipolar disorder, oppositional defiant disorder, the loss of two limbs, or uncontrolled epilepsy. A child may be disabled by a single impairment alone, as with cerebral palsy, or by a combination of several impairments, say, ADHD, borderline intelligence, and a neurological speech disorder. Therefore, it is important to find out all of the health concerns about the child. As noted above, impairments must last or be expected to last at least a year (or produce death). Many conditions improve with treatment, which ultimately is what any family wants. SSI is concerned only with conditions that do not improve or improve very slowly. Nevertheless, if the child’s prognosis is unknown, or doctors are taking a wait-and-see approach, the family should file an application for SSI disability so as to protect the child’s interests.

SSI benefits cannot be paid for any time prior to the date the claim was filed regardless of how disabled the claimant was. A child with traumatic brain injury may recover a lot of his or her function or very little of it. If the child waits six months after the event to file an SSI claim, he or she will have lost any right to be paid for those six months of disability. The child should file the claim when the injury takes place and later regains much of his or her function, everyone can be happy, and the claim can be withdrawn or proceed based on a “closed period” if the recovery takes 12 months or more.

As noted, the impairment(s) must be severe enough to satisfy SSI’s disability threshold: Either it does or it doesn’t. With SSI disability, either you meet the standard and receive full benefits, or you are not disabled and receive nothing.

The impairment(s) must be severe enough to satisfy SSI’s disability threshold: Either it does or it doesn’t. . . . With SSI disability, either you meet the standard and receive full benefits, or you are not disabled and receive nothing.

(Continued from page 1)
of Impairments. This listing is just that: a list—very detailed—of numerous medical and mental diagnoses and impairments, arranged by body systems. It currently includes the following:

- Growth Impairment
- Musculoskeletal System
- Special Senses and Speech
- Respiratory System
- Cardiovascular System
- Digestive System
- Genitourinary Impairments
- Hematological Disorders
- Skin Disorders
- Endocrine System
- Impairments that Affect Multiple Body Systems
- Neurological
- Mental Disorders
- Malignant Neoplastic Diseases
- Immune System

If the impairment “meets or medically equals” the criteria of a listing, the child will be found disabled and will receive benefits (assuming the other non-medical factors are established). If the impairment does not precisely meet or equal the diagnoses and severity called for by a listing, then SSA moves beyond the pure medical findings and uses a functional analysis to see if the child qualifies in that manner (“functionally equals the Listings”). The child’s ability to function in six different domains is assessed:

- Acquiring and using information;
- Attending and completing tasks;
- Interacting and relating with others;
- Moving about and manipulating objects;
- Caring for self; and
- Health and physical well-being.

This assessment relies on far more than MRIs, IQ scores, pulmonary studies, hospital discharge summaries, doctor’s opinions, and office visit notes. It brings in the opinions of teachers, day care providers, case managers, and family members, and it develops a broader picture of the child’s ability to function. The child’s home, school, and community functioning will be assessed.

If the child has “marked” limitations in two of these six domains or an “extreme” limitation in one domain, he or she is considered to have functionally equaled the relevant listing and is disabled for SSA purposes.

**To functionally equal a listing, the child’s impairments must result in “marked” limitations in at least two of the six domains of functioning or an “extreme” limitation in at least one domain.**

**What Are the Financial Eligibility Criteria?**
The income and resource limitations for the child and family are complicated. Income includes earned and unearned income of the entire family, but with various deductions and exclusions. Similarly, the resource limit includes the money, assets, and property of the family, but again with exclusions. SSA does not count a family’s home or a vehicle needed for getting to work or medical appointments.

In general, the countable resource limit for the child is $2,000 ($3,000 for a family), but the calculations for this depend on many variables. If the family is low-income by any measure—for example, if they live in federally subsidized housing or if the child receives free breakfasts or lunches at school, SSA should be contacted for an actual determination of SSI financial eligibility. Unfortunately, these financial limitations eliminate thousands and thousands of disabled children from SSI eligibility. Families who are able may consider setting up a special-needs trust for a disabled child by consulting with an attorney who has specific knowledge in the field of trusts, specifically special-needs trusts.

**Helping the Child Apply**
It costs nothing to apply, so families should err on the side of applying and getting a decision. The application process is time-consuming, however, in that detailed information is needed about the family’s finances and the child’s medical condition. An application may be filed by the child’s parent or guardian; it may be filed in person, by telephone, or online. The SSA website is **www.ssa.gov**. Numerous menus and links at the website can take the visitor to an office locator (to find the nearest District Office), telephone numbers for applying (e.g., 1-800-772-1213), and the online application form. In addition, SSA will mail out an application “starter kit” to help callers organize their records and information before sitting down to actually complete an application. It will take roughly five months for the claim to be decided, and a written decision will be mailed to the claimant and anyone who has filed a notice of representation. If the claim is denied, it may be appealed through the administrative process and ultimately into federal court.

**Functionally Equaling a Listing**
To functionally equal a listing, the child’s impairments, alone or in combination, must result in “marked” limitations in at least two of the six domains of functioning or an “extreme” limitation in at least one domain. As advocates in this area know, the terms “marked” and “extreme” are not defined with bright lines other than

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volved. Test results that are at least two standard deviations below the mean will demonstrate a marked limitation, and test results of at least three standard deviations below the mean will demonstrate an extreme limitation. These thresholds confirm that marked and extreme ratings based on test scores do not come easily and show a child who is far, far below the norm (roughly in the 1.25 and 0.15 percentiles). There also is an objective cut-off definition for the sixth domain, health and physical well-being (which is less of a look at the child’s functioning and more about the child’s overall health). Here, “marked” and “extreme” are defined objectively by the number of episodes or exacerbations of an illness (e.g., asthma attacks) and how long they last. Documents will often prove the case.

Most cases, however, will not be proven by a test score or a certain number of hospital admissions or clinic visits per year. Rather, they will rely on the other, more nebulous parts of the “marked” and “extreme” definitions. These are that the impairment(s) “seriously” (for marked) or “very seriously” (for extreme) interfere with the child’s “ability to independently initiate, sustain, or complete activities.” Also, when testing is unavailable for a child under the age of three, qualifying limitations are shown if the child is functioning at less than two-thirds of his or her chronological age (for “marked”) or less than one-half of his or her chronological age (for “extreme”). Obviously, there is room for subjectivity and opinion in these parts of the definition, and so good advocacy can go a long way here. This suggests that many cases will be won based on solid preparation that brings in the observations, opinions, and testimony of family members, teachers, coaches, case managers, therapists, or others who interact with the child.

Typically, the child already will have been evaluated, assessed, and compared by several counselors, psychologists, or others by the time you meet him or her. These reports may be dry and clinical or may be rich and anecdotal. Based on your interview of the parent(s) or guardian, and any records from schools, health providers, daycare workers, police, part-time employers, and others, you can develop your case strategy. The winning formula, however, is and will always be two “markedly limited” or one “extremely limited.” So, aim your fire at the one or two domains in which the child has the most severe limitations.

### Assessing and Using Evidence

With adult disability, the underlying question is “can you work at a job?” With many children’s disability cases, one might loosely say their “job” is doing acceptable work at school. So, look for IEPs, school disciplinary records, transcripts, rates of attendance, how much the child participates, and test scores. Is the child in special classes? For all classes or just some classes? Has the child been held back? Why? Does the child get tutoring? Accommodations? Counseling?

Here it is important to remember that the basic comparison SSA must use is the claimant’s own functioning in activities in relation to the functioning of children of the same age who do not have impairments. So, if a child’s fifth grade report card has B’s and C’s and the teachers comment that he or she is “doing OK” or even “doing well,” that information must be put in context. Is the child “doing OK” but only in a special classroom all day with just three other students? Or in pull-out classes for the core subjects and mainstreamed for specials (art, gym, and so on)? And are the teachers’ comments based on only their individual expectations for that child, which could be very low? For example, what about a child with severe oppositional defiant disorder who shouts, disrupts, and defies teachers less than last semester but still so much that he or she cannot return to regular classes? Compared with children who have no impairments, he or she is doing very poorly. But compared with last semester, he or she is doing better. The same would apply for children being schooled with adaptations, extra help, or in highly structured or even residential

#### PRACTICE TIPS AND IDEAS FOR PREPARING A CHILD’S DISABILITY CLAIM

The discussion here assumes familiarity with SSI disability claims and a basic knowledge of SSA’s disability listings and Step 3 of the Sequential Evaluation Process (SEP) for adult and children’s claims. Unlike adult disability claims, children’s disability claims are won or lost at Step 3 of the SEP—there is no Step 4 or Step 5. Either the child meets or equals some listing, or benefits are denied at Step 3 and the case is over (unless appealed).** The good news here, however, is that if the child’s impairments are not severe enough to meet or medically equal a listing, the case still can be won by “functionally” equaling a listing at Step 3. The concept of “functionally” equaling does not exist for adult claims. These determinations often rely heavily on the opinion of a medical expert (physician, psychologist, and the like).

This article does not discuss proving a child’s case through a meets-or-medically-equaling listing argument because it is so similar to proving an adult’s listing argument, where the reader’s experience is assumed. Instead, the focus here is on the additional and often case-winning component in Step 3 for children’s cases, “functionally equaling” a listing.
treatment schools. They could be “doing well” in those settings. In the setting that counts, that of non-impaired children, they would do poorly.13

A corollary to this is SSA’s consideration of how a child behaves and attends to tasks when being tested on a one-time basis (e.g., a consulting exam by a state agency’s speech-language specialist or psychologist). Reports in consulting exams often remark that the child with ADHD, depression, bipolar disorder, and the like, “was pleasant,” “cooperated in all testing,” and “was not distracted.” That may have been true on that particular day in that novel, one-on-one setting. But that does not necessarily represent the child’s normal behavior. SSA has made clear that one-time assessments in artificial settings should not trump other information showing ongoing, day-to-day behavior and activities.14

The SSA uses its Teacher Questionnaire (Form SSA-5665-BK) to solicit the opinions of teachers or others as to the child’s functioning in the six domains. This form is very detailed (over 60 questions, some multipart). A simpler domains questionnaire can be developed by any practitioner that, like SSA’s form, focuses on the child’s activities in each of the domains. It is imperative to obtain teachers’ opinions, if the child is in school, as well as opinions from outside counselors, case managers, and others. Questionnaires should be simple to understand and fill out, using check boxes, fill-in-the-blanks, or circle-the-answer formats and including space for comments. They should be accompanied by a short explanation of what each domain embraces and SSA’s definition of “marked” and “extreme” limitations. It is to be hoped that any medical expert testifying will have experience with children’s SSI cases and know the difference in Step 3 assessments for adult and children’s cases. If the medical expert’s testimony is not helping your case, be ready to cross-examine on this issue. A medical expert may concede that he or she does not have much experience with domains and come around to your point of view as to whether the child’s activities in one or two domains is markedly or extremely limited. For example, who can say for certain what the precise difference is between an impairment’s “seriously” and “very seriously” interfering with a child’s functioning? There often is wiggle room in these assessments unless the case hinges solely on test scores or the number of exacerbations.

**Conclusion**
Obtaining SSI disability benefits for a disabled child can go a long way in improving his or her life, both financially and medically. Those involved in caring for and treating the child usually are anxious to help someone representing the child so that benefits can be obtained. Lawyers in any field of practice can identify those who might qualify for benefits and help them apply or steer them to a specialist in this field. The rewards in doing so will last for years.

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**Endnotes**

1. 42 U.S.C. § 1381 et seq.
2. 20 C.F.R. § 416.911(a).
3. 20 C.F.R. § 416.928(b).
4. 20 C.F.R. §§ 906, 909, 922, 924(a).
6. 20 C.F.R. § 416.924(d).
8. 20 C.F.R. § 416.926(a).
11. 20 C.F.R. pt. 416, subpart L.
12. 20 C.F.R. § 416.926(d).
13. 20 C.F.R. § 416.926a(e)(2) and (3).
14. Id.
15. 20 C.F.R. § 416.924a(b)(5).
16. 20 C.F.R. § 416.924a(b)(6).
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