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Protecting Mothers Against Gender-Plus Bias: Part 2

By Diane L. Redleaf, Melissa L. Staas, and Jonathon N. Fazzola – March 29, 2012

Mothers are predominantly the targets of child-protection system intervention. In Part 1 of this article, we reviewed the basis for our observation, derived in significant part from the Family Defense Center’s case-handling experience and our review of research and data, which stated that mothers are often subject to gender-plus discrimination in the child welfare system. The child-protection system frequently relies on unreasonable assumptions that the mother should have or could have acted differently because of a gender stereotype rather than evidence of abuse or neglect. In many of the cases that affect the mothers in the center’s caseloads, the allegations against the mothers are based solely on their status as mothers, “plus” their membership in another highly stigmatized category.

In 2011, our offices handled 87 Mother’s Defense Project cases (of 526 total cases that open during the year). Eighty-one percent of these cases were handled on a complete fee-waiver basis (compared to 57 percent of all cases in our offices). Because our offices only accept cases in which there is a strong claim or defense, the mothers we represented in the Mothers’ Defense Project have simultaneously strong, and often very compelling, cases on the merits and relatively few financial resources to address their legal needs.

The three largest gender-plus categories in our Mothers’ Defense Project are domestic violence victims (25 cases in 2011), mothers with a mental illness (22 cases in 2011), and nonoffending mothers held liable for the actions of a partner (37 cases in 2011). In Part 3 of this series, which will appear in the Summer 2012 issue of Children’s Rights Litigation, we will describe our work on behalf of mothers in two additional categories—extreme poverty and teen moms—including mothers in multiple gender-plus categories, and we’ll discuss one very promising legal strategy the center has pursued to reduce the operation of gender bias in the child-protection system in Illinois.

Domestic-Violence Victims

The misuse of child-protection authority against mothers who are themselves victims of domestic violence is well-documented nationally through the efforts of the National Council of Juvenile and Family Court Judges “Greenbook,” a policy guide for handling domestic violence cases in the context of the child welfare system that was published in 1999, and the successful litigation on behalf of domestic-violence victims against the New York City Administration of Children’s Services in Nicholson v. Scoppetta, 344 F.3d 154 (2nd Cir. 2003) (challenging as a violation of the Fourteenth Amendment the separation of children and mothers who are domestic-violence victims). See Family Defender, Issue 3 and Issue 5.
However, throughout the United States, mothers continue to be the target of child-protection investigations, with rampant threats of separation from their children, actual separation, findings of abuse or neglect, and placement in abuse/neglect registers, even when the mother is the primary or sole victim of abuse and the children were entirely unharmed. These findings occur even when the mothers have taken all reasonable action they could possibly take to protect themselves and their children. Because domestic-violence victims face dangers to themselves and their children that escalate at the time they attempt to leave the relationship, inappropriate state intervention can be particularly counterproductive and may even contribute to keeping the mother/victim trapped in an abusive home.

Hannah B.’s recent case with the center was a case in point. A well-meaning friend called the police, seeking a well-being check on Hannah. When the police arrived, Hannah was fine. As soon as Hannah’s husband thought the police had left, however, he attempted to choke her, punched her, and pulled out some of her hair. The couple’s one-year-old baby was asleep in her own room throughout the incident; there was no evidence the baby was ever aware of violence against her mother. When the police, waiting outside, heard Hannah’s cries, they came back and arrested Hannah’s husband. They also called the child-protection authorities, who in turn initiated an investigation against both Hannah’s husband and Hannah. The child-protection investigator accused Hannah of child neglect, threatened her with removal of her infant from her care if she did not immediately leave her husband (while offering no support to enable her to safely do so), forced her to give up custody of her infant to relatives in a distant state to avoid the filing of a juvenile court petition against her, and ultimately “indicated” her as guilty of child neglect for creating an “environment injurious” to the welfare of her child. Through this process, Hannah repeatedly felt a need to minimize the harm her husband had inflicted on her to avoid the filing of a juvenile court action against her, despite the lack of any fault on her part in the assault that precipitated child-protection intervention.

In effect, the child-protection system used Hannah’s status as an unprotected victim of her husband’s violence to compound her powerlessness rather than help her keep custody of her daughter or remain free of violence herself. And because Hannah was a psychologist who worked with children, the “indicated” finding against her had the ironic impact of causing her to lose her job and become even more dependent on her husband for financial support. While the center ultimately won Hannah’s appeal and got the indicated finding removed, the four months of proceedings in her case diminished Hannah’s trust in the authorities’ ability to help her, leaving her more unwilling to reveal her injuries and more fearful of taking steps to end the violence against her or to get the help she desperately needed.

Sometimes, even mothers who do take immediate action to protect themselves after a violent incident against them find themselves embroiled in child-protection cases. Ashley V. was another domestic-violence victim the center represented in 2011. Ashley was a student at a local community college when a domestic-violence incident against her led to a lengthy entanglement with the child-protection system.
After a long day at school, Ashley returned home and found that her boyfriend, Ken, who was twice her size, had been drinking. He was watching television while their then 17-month-old daughter, Alexis, played in a nearby room. When Ashley tried to change the channel, Ken cursed at her and slammed her body to the ground, causing her great pain and injuring her lower back. Alexis had wandered into the room, but fortunately was never injured herself. Ashley took the incident very seriously; she immediately ended the relationship, moved out of their shared apartment, and secured an order of protection against Ken the next day.

Despite taking these proactive steps, Ashley was soon notified by DCFS that she was to be indicated for child neglect, specifically for causing an “environment injurious to health and welfare” of Alexis. Because of the “indicated” report labeling her guilty of child neglect, Ashley became hesitant to follow through with her plans to enroll in a medical technician program at a local college. Ashley lost her first-level hearing on the merits of the indicated report. The administrative law judge found her equally responsible as Ken for the incident in which she was clearly the victim. Only after extended legal briefing in an administrative review action did the circuit court overturn the indicated finding against her and clear her from the child-abuse register.

While both Hannah and Ashley found help at the center and were able to clear their names from the state’s list of child neglectors, thousands of mothers in Illinois and other states are not so fortunate. The center is a unique legal-services program that handles many indicated report appeals for indigent and low-income mothers. Most mothers involved in child-protection investigations are not able to access legal resources like those the center provides.

**Mothers with Mental Illness**

Parents with any mental illness are at an increased risk of intervention by the child welfare system compared to parents without mental illness, but mothers are more vulnerable than fathers to child welfare intervention on the basis of a mental-health-related allegation. The National Alliance on Mental Illness reports that women experience depression at a rate double that of men. Because of the prevalence of depression, studies have discovered that, in terms of sheer numbers, more women lose custody of their children because of depression compared with any other mental illness. See, L. Hollingsworth, “Child Custody Loss Among Women With Persistent Severe Mental Illness,” *Social Work Research* (National Association of Social Workers, December 2004). Additionally, there is a demonstrated link between pregnancy and mental health, with more than 10 percent of women experiencing depression during pregnancy and approximately 15 percent of women experiencing post-partum depression. Finally, children of parents with mental illness are most likely to live in mother-headed, single-parent households, and women with mental illness are more likely to be single parents, to experience poverty, and to be victims of abuse themselves. NAMI “Women and Depression Fact Sheet” (October 2009).

For all of these reasons, mothers with a mental-health diagnosis are particularly vulnerable to the biases, prejudices, and discrimination that pervade the child welfare system when it comes to issues of mental health.
Though many states, including Illinois, require evidence of specific behavior that placed a child at real and significant danger, child-protection investigators often ignore this evidentiary requirement. Investigators frequently conclude that a mother is guilty of neglect without collecting any evidence of wrongdoing other than a diagnosis. In these instances, child risk is automatically assumed for children of mothers with unusual behavior or diagnosed mental illness, and some states explicitly permit child welfare officials to take action based solely on the existence of a psychiatric diagnosis. Some mothers are even found guilty of neglect when a diagnosis is lacking.

Indeed, mothers’ reasonable responses to stressful situations are misinterpreted as symptomatic of a dangerous mental illness and can lead to calls to the child-protective services hotline. For example, the day after the birth of her son by caesarean section, hospital nurses interrupted the center’s client Pamela by surprise while she was undressed. Pamela asked the nurses to leave and tried to close the door to stop their entry. Unbeknownst to Pamela, there was a note in her hospital records claiming that she had an unclear psychiatric diagnosis, and after this incident, the hospital called child protection based on a misinterpretation of Pamela’s actions. Though the hospital was unable to provide clarity as to the origination of this alleged diagnosis, the child-protection agency forced Pamela and her infant son to live separately for an extended period of time and then “indicated” an allegation of neglect against Pamela, claiming she had created an “environment injurious” for her child. In Illinois, this is the same overly broad allegation that is used to “indicate” findings against victims of domestic violence.

Accusing mothers of neglect based solely on a mental illness is both unfair and counterproductive to the goal of encouraging mothers to seek mental-health services. Many mothers are apprehensive about speaking candidly with a mental-health provider for fear of a call to the child protection hotline. As it turns out, this fear is often well-placed. Family Defense Center client Angela reached out to a mental-health provider for help when she began having feelings of being overwhelmed following the birth of her son. Even though Angela never behaved in a way that placed her son at risk, protective custody was taken based solely on her diagnoses of bipolar disorder and post-partum depression and the self-reported thoughts and feelings that she disclosed during a conversation in which she was trying to obtain help.

Nonoffending Mothers in Relationships with “Risky” or Accused Partners
The third, and largest, category of Mother’s Defense Project cases (37 of 87 cases in 2011) involves mothers who are brought into a child-protection case because of their relationship with an accused/offending and/or “risky” partner. Presumptions about the relationship between the mother and what the mother “must have known” about the father/husband/paramour’s actions take the place of concrete evidence of wrongdoing or knowledge by the mother. Treating these mothers as guilty by association is legally suspect, however, in light of the constitutional right of these nonoffending mothers to direct the upbringing of their children absent proof of parental unfitness. See Stanley v. Illinois, 406 U.S. 645, 649 (1972). And case law in many states, including Illinois, prevents a presumption that one parent is guilty of neglect or should suffer an
impairment of his or her custodial rights simply because another parent has abused or neglected a child. See, e.g., In re Arthur H., 212 Ill. 2d 441, 819 N.E. 2d 734 (2004). Recent Family Defense Center cases nevertheless demonstrate how the child-protection system presumes guilt through association in cases involving mothers.

The center represented Ignacia in the fall of 2011, after she had struggled to find legal representation for several months. Child-protection authorities received a call in April 2011 claiming that Ignacia’s husband had sexually abused her daughter four years earlier. The abuse consistently occurred while Ignacia was at work, and Ignacia learned of the abuse after the Department of Children and Family Services (DCFS) did. When Ignacia did learn of the abuse, she immediately sought an order of protection barring her husband from having contact with her children, filed a criminal complaint against him, and assisted in the ensuing criminal investigation to such an extent that she was awarded a U visa for her cooperation. Ignacia’s husband eventually fled the country, and DCFS indicated him for abuse. But DCFS also indicated Ignacia, even though it had no evidence that she had knowledge of the abuse any time before the hotline call. Betraying an implicit gender bias, DCFS concluded, without evidence, that, as the victim’s mother, it was “implausible” that Ignacia did not know about the abuse. This presumed implausibility of a mother not knowing of abuse is prevalent in the child welfare system, and, indeed, it has been asserted as a reason to relax protections of mothers’ rights to consent to interrogations of their children. See Brief of Bob Camreta before the U.S. Supreme Court in Camreta v. Greene, (available at www.familydefensecenter.net/camretalanding.html).

Fortunately, the center helped Ignacia successfully challenge the indicated finding, but only after an administrative hearing at which Ignacia’s daughter was forced to testify about the intimate and painful details of her abuse and her mother’s lack of forewarning. The decision to indicate Ignacia perpetuated the trauma Ignacia’s family suffered throughout the ordeal.

Physical abuse cases against fathers are also commonly coupled with neglect claims against mothers whose sole “offense” is to be married to or living with the father at the time of the alleged abuse. Sally C.’s case dramatically illustrates the system’s use of “guilt by relationship.” Sally’s five-month-old infant son, Kenny, died in an incident in which he was thought to have been shaken by his father. All parties knew that Sally had been at work at Brooks Brothers at the time. Nevertheless, Sally’s other son was removed from her care, and a juvenile court action was instituted against both Sally and the father. At no time was Sally suspected of causing the injuries leading to her younger son’s death, but her guilt by association was sufficient to cause her to temporarily lose custody of her surviving child. Eventually, the father was effectively exonerated after an autopsy showed the infant had suffered a heart attack, most likely from congenital causes. Sally’s efforts to secure redress from the removal of her surviving son from her care were ultimately unsuccessful. Cornejo v. Bell, 592 F.3d 121 (2nd Cir. 2010). (The center wrote a friend of the court brief supporting Sally’s claims that her constitutional rights were violated in this case, but the Second Circuit determined that the investigators were entitled to qualified immunity from her suit.)
Conclusion
In all of the Mothers’ Defense Project cases the center handles, presumptions and stereotypes that are highly gender-based negatively impact mothers. Extricating mothers who are victims of domestic violence, who have mental health diagnoses, or who are presumed to be at fault simply through “guilt by relationship” to a suspected partner can be challenging, requiring extended legal proceedings even when the child-protection authorities lack evidence of any specific wrongdoing by the mother. Changing rules, policies, practices, and attitudes, including recognizing the constitutional principles that each parent is entitled to a presumption of fitness that cannot be overcome by a stereotype alone, would go a long way to prevent the harm so many mothers face at the hands of child-protection authorities.

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

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Meeting the Needs of Children with an Incarcerated Parent

By Lynne Reckman, Katie Gates, Meredith Schnug, and Debra Rothstein – March 29, 2012

The eyes of a child tell an important story. System providers caring for a child whose parent is absent due to incarceration are challenged to look at the circumstances through the eyes of the child and respond to the needs reflected. In the previous Children’s Rights Litigation article, “A Voice for the Young Child with an Incarcerated Parent” by Lynne Reckman and Debra Rothstein, the authors promote a mental-health perspective that increases the visibility of children swept into the criminal justice system by virtue of their parent’s incarceration. The article makes a strong case for respecting that a parental relationship exists for all children in the absence or the presence of that parent. Acknowledging the significance of the child-parent relationship is the starting point for creating best practices for children. The article also offers the belief that “collaborative and reflective practice within and among the systems involved with children whose parents are incarcerated can contribute to creative problem-solving and fresh new solutions.” In that spirit, this follow-up article offers three case studies presented by attorneys/guardians ad litem (GAL) with an accompanying mental-health analysis of each.

Case Study No. 1
Three boys—ages five, two, and one—were placed in foster care following their parents’ arrest for shoplifting while the one-year-old was with them. This was not the first time that this family was involved in the criminal justice system. The boys’ mother had several outstanding warrants for theft and drugs at the time of this arrest. The father had a criminal history, including a felony conviction for drug trafficking and two counts of child endangering, both three years earlier. When the police raided the family home on the drug-trafficking arrest three years ago, the oldest child, then two years old, was present. Heroin was being sold out of the family home. During the parents’ incarceration for these earlier convictions, the paternal grandparents cared for the children with no formal order of custody.

At the time of the current arrest for shoplifting, both parents had been out of jail for six months and were caring for their children themselves. They had their one-year-old with them during the arrest. The parents are back in jail as criminal charges for the shoplifting arrest are proceeding. The children are living together in a licensed foster home.

The grandparents are requesting that the children be placed with them. A complication that led to the children’s placement in foster care this time is that the boys’ father fled the shoplifting scene and was found hiding in the paternal grandparents’ home after the grandparents said they did not know his whereabouts. The father was discovered by a social worker from children’s services, who was doing a home study on the grandparents’ request for possible placement of the children. The grandparents were thereafter determined not to be appropriate for placement. The grandparents are arguing that they did not know the father was in the home when children’s services did the unannounced walkthrough for placement. The attorney/GAL for all three
children reports that when the grandparents were caring for the children in the past, they took them to see their parents in jail during previous periods of incarceration. The attorney/GAL describes the children as having a close relationship with their parents and their grandparents. The grandparents currently have weekly, supervised visitation with the children at the children’s services visitation center. The children’s parents are requesting visitation with their children while in jail.

The attorney/GAL reports that the children have not shown any identified behavior problems in the foster home where they have lived for two months with a single foster mother and no other children. The five-year-old child, Sam, talks about the fun things he has done with his dad, such as going to the park and fishing. The attorney/GAL believes the court will consider ordering custody to the grandparents after they complete counseling to address their enabling their son’s behavior. The attorney/GAL raises the question as to whether visitation for Sam with his parents in jail is in his best interest.

Case Study No. 1 Analysis
This case study provides an excellent opportunity for collaboration between criminal justice and mental-health systems, both on a micro/clinical level and a macro/advocacy level. Focusing first on the clinical issues, the family history of multiple criminal offenses and parental incarcerations describes a significant trauma history in the lives of these children. That trauma history includes multiple moves between family members’ homes, witnessing adult drug use, and exposure to other criminal elements in the drug-trafficking trade. The issue of moves between family members raises questions from a mental-health perspective as to the primary attachment relationship of the children. Is it with the paternal grandparents or the parents, and what is the quality of that attachment for each child? These questions are important in this case because the answers guide the planning around custody as well as visitation. A mental-health consultation and perhaps a diagnostic assessment of the attachment history for Sam, as well as his siblings, can provide helpful information in this planning process. Understanding the nature of the child’s ties to biological family members can help prepare Sam for a parental visit in jail. In this case, if Sam has a positive attachment relationship with his grandparents, their participation in parental visits will help him feel safe.

Unfortunately, Sam at age two and his now one-year-old brother have the shared experience of witnessing their parents’ arrest. Seeing a police raid as well as a shoplifting arrest at one and two years old can be a frightening and overwhelming experience. Young children are aware of the chaos, loud noises, and often strong emotions expressed during an arrest. If weapons are drawn, an added measure of fear exists. All this is capped off by the child’s parent being abruptly taken away in a police car with no opportunity to say good-bye. At one year of age, a typical child is developmentally in the height of separation anxiety as he or she learns that his or her parents still exist even when they can’t be seen. The trauma of a separation by arrest challenges this normal developmental task. A timely mental-health consultation can provide helpful support to the child and his or her caregivers following this kind of trauma. Addressing the child’s emotional needs
immediately following the trauma works to prevent traumatic feelings from developing into longer-term behavioral issues. Also worth examining is the interpretation of the children’s lack of behavior problems two months into their foster placement. The absence of overt behavioral concerns does not necessarily suggest an absence of emotional conflict or needs. Children often experience a honeymoon period at the beginning of an out-of-home placement for a variety of reasons, including fear that if they misbehave they will be moved again. Ongoing monitoring of the children’s behavior before, during, and after parental visits will assist in understanding their overall emotional needs.

Another issue raised by this case is the parental request for visits in jail with their children. Assuming that contact with the child’s parent is recommended, the next step is to explore the circumstances of the jail. The previously mentioned article stated that the most effective type of visitation toward promoting a child’s well-being is conducted in a developmentally appropriate and child-friendly environment. A child-friendly environment for Sam is one that provides a place for parents and children to play together, and it includes another adult whom the child trusts. The visit is “planned and considered a therapeutic intervention in which the child’s needs are continually monitored as well as the parent’s ability to provide a positive experience for the child.” In the absence of an adequate visitation environment at the jail, a webcam can provide the next best alternative. This technology allows the child to sit in front of a camera in a comfortable and safe place with his trusted adult, and he can talk with his parent via a television screen. Perhaps as more child advocates request this webcam service in jails and prisons, it will become more widely available. Encouraging the exchange of letters and hand-drawn pictures is also helpful to children who value having a tangible reminder of their parent. This five-year-old boy remembers favorite outings with his father. Describing these special times in a picture, a letter, or an audiotape can help the child and the parent keep their connection alive during their separation.

This family’s situation also draws attention to an area needing child advocacy on the macro level. “Both the criminal justice and child welfare systems can contribute to increasing the visibility of children when their parents enter the criminal justice system by routinely requesting and collecting family information when an adult is arrested,” the previous article states. Sam’s story includes his witnessing a police raid in his home during a drug-trafficking investigation when he was just two and before his siblings were born. He apparently went to live with his paternal grandparents, but not with a formal custody arrangement. The raid and arrest should have brought Sam to the attention of children’s services if the criminal justice system had a routine way to collect information about him following his parents’ arrest. Knowledge of Sam would have allowed appropriate authorities to explore his custody status and offer any services to meet his physical, social, and emotional needs. A closely related need is for child-sensitive arrest practices that can ameliorate the trauma that occurs if the child is present to witness the arrest. The child’s fear and separation anxiety on parental arrest should be minimized with arrest practices that consider the emotional needs of children.
Case Study No. 2

Three-year-old Danny was removed from his mother’s care when he was 20 months old because of his mother’s drug use. Danny was placed in the care of his father. His father eventually struggled with his own substance-abuse issues, and Danny was removed from his care as well. Danny has been in three different placements since he left his father’s home: a brief stay in foster care, a relative placement, and, currently, his father’s paramour. When Danny was first removed from his mother’s care, she was referred for a variety of services, including substance-abuse treatment. She did not successfully complete her treatment program. She also did not avail herself of the opportunity to visit with Danny consistently at the supervised visitation center because there was an outstanding warrant for her arrest, and she feared being arrested at the visitation center. Within the last few months, the mother was arrested and, as part of her sentencing, confined in a jail/substance-abuse treatment facility. This time, the mother is engaged in treatment and requesting visits with Danny, who is now age three.

Danny’s children’s services worker complied with the mother’s request, believing that a treatment facility would provide an environment conducive to a positive visit between Danny and his mother. The caseworker brought Danny to the facility for the visit and, in retrospect, felt that the environment there was “more like a jail.” During the visit, she observed Danny displaying behavior not typical for him, such as hitting and biting his mother. Danny’s temporary custodian reported that he was “like a totally different child” during the week following his visit, displaying atypical behavior, including hitting, temper tantrums, and not listening to adult direction. The caseworker decided the facility was not an appropriate environment for Danny. She and Danny’s attorney/GAL consulted with each other and determined that no further visits with the mother will be planned while she is in her current setting. They are, however, open to parental visitation in a therapeutic setting after the mother is released from her treatment program. Factors contributing to this decision included Danny’s age at the time of his removal from the mother’s care, the length of time that transpired since the removal, the mother’s inconsistent and minimal efforts to maintain a relationship with Danny from the time of his removal until her recent incarceration, and Danny’s troubling behavior during and after the initial visit with his mother.

Case Study No. 2 Analysis

The factors considered in the decision to suspend Danny’s visitation with his mother are all significant, but there are important questions missing. The first question is about the overall case plan. Is the case plan to reunify Danny with his mother? Closely aligned with the first question is another: What is the goal of maternal visitation for Danny? The answers to these questions will begin to guide service providers thinking about visitation. Let’s assume that reunification is the case plan. The purpose of visitation is to reestablish contact between Danny and his mother and build their relationship. For a three-year-old who has had little to no contact with his mother for 16 months, the introduction of visitation needs to be well-planned and slow. The behaviors Danny exhibited are often observed in children who experience their world as being unpredictable and out of their control. He may have been expressing fear, anger, confusion,
sadness, or combinations of many feelings. These are feelings and reactions that are likely to occur in any setting, no matter how appropriate the visitation environment is for Danny. In other words, the greatest need is to prepare him for seeing his mother, no matter where she is living. Mental-health practitioners have many tools for assisting children with this careful preparation. The planning is focused on meeting the specific needs of each child and family within a trusted, therapeutic relationship. The specific tools can include family photographs and life books that can be used to support the child’s receiving accurate information about the parent’s absence, as well as preparing for a reunion. Mental-health practitioners help children recognize, understand, and begin to accept the varied feelings that are created by these often confusing and stressful life events. On the other hand, if the case plan is to file for permanent custody, the approach will be very different. In that case, the focus might be on helping Danny achieve a more complete story of his life through supported contact with his mother rather than on building a relationship.

Case Study No. 3
Paul is a teenager who has been in a planned permanent living arrangement for several years. Prenatal drug exposure started him off early on a path of problematic behavior, including an inability to regulate his basic biologic systems, impulsivity, and explosive behavior. His father is in prison for a long list of crimes. Paul has been through many out-of-home placements, including a year-long stay in a residential treatment facility. The mental-health treatment staff at the residential facility explored many creative ways to redirect Paul’s self-destructive behaviors. In collaboration with Paul’s attorney/GAL, they reached out to Paul’s father to encourage contact that might help Paul in some way. Paul’s father began sending appropriate and encouraging letters to Paul. The children’s services caseworker and a staff member from the residential treatment team decided to bring Paul to the prison for a visit with his father. Paul had not seen his father for many years. Paul expressed a desire to visit his father, but the attorney/GAL also had concerns that such a visit might be traumatic. However, after consultation with the team, including Paul’s therapist, the attorney/GAL’s concerns were addressed, and all agreed to the parental visit. The team prepared Paul’s father in advance about the goals of the visit and advised him what would be appropriate and helpful for Paul to hear. Paul’s father was very cooperative. He talked to Paul about his own mistakes and his wish that his son could avoid making the same mistakes and, most importantly, that he avoid ending up in prison himself. Paul’s problematic behaviors improved after this visit, and he has remained fairly stable since then. The attorney/GAL concludes that, overall, the visit provided very helpful support to Paul’s therapeutic efforts to make sense of his life.

Case No. 3 Analysis
This situation demonstrates the potential power of parental contact on a child’s emerging sense of self, even when there has been an absence of that contact for many years. There are many key elements contributing to the success of Paul’s meeting with his father. The brief case summary highlights the participation of an active, interdisciplinary care team advocating for Paul’s best interest. The members of the team collaborated and drew from one another’s expertise to make difficult but creative decisions for him. One might speculate that both the treatment staff at the
residential facility and his attorney/GAL had significant relationships with Paul. They each leveraged their relationship with him to encourage him to explore a part of his past they thought would be helpful to him. In this case, his significant attachment relationships existed within his treatment community, and they became the secure base from which he could explore his past. Paul was prepared for the meeting by a therapist he trusted. Paul’s father was also prepared and coached about the significance of this event for his son. Children of all ages need to have a simple and honest narrative of their life stories. Even absent reunification realities, it is important to recognize the positive impact that planned contact can have on the emotional well-being of the child. The meeting between Paul and his father provided an opportunity for Paul’s father to offer his son a piece of the family narrative. In addition, it afforded an opportunity for Paul to develop a more realistic understanding of his father’s circumstances and see his father model appropriate interaction, perhaps for the first time.

**Conclusion**

The needs of children who have been thrust into the criminal justice system by the actions of their parents are complex and highly individualized. The best child advocacy occurs when there is a team of professionals, including a mental-health practitioner, to collaborate regarding the overall needs of children. Ongoing dialogue provides an environment in which each professional can share his or her expertise and reflect on the significance of the expertise of others. In this way, we can meet the needs of these children.

**Keywords:** litigation, children’s rights, incarcerated parents, child development

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Five Mistakes for New Child-Welfare Lawyers to Avoid

By Jennifer Baum – March 29, 2012

You’ve graduated, passed the bar, and started your first legal job working with children and families. Perhaps you work for an institutional provider of legal services for children or as a prosecutor of dependency cases, or perhaps you are defending such cases. Perhaps, still, you are in private practice, and this is your first pro bono experience working on a family or juvenile court matter. Whatever your role, your job is the same: to represent your client and seek as favorable an outcome as possible.

But you are new—you don’t know the ropes or who the players are, you are unsure what your papers should look like, and you are worried about your upcoming cross-examination, interview, or motion. You don’t want to make a mistake, you don’t want to embarrass yourself, and you definitely don’t want to imperil your client’s legal position. You may have had some orientation training, but putting the rubber to the road at this early stage in your career is still so daunting—so what is a new lawyer to do? These universal moments of new-lawyer doubt are part of your initiation to the profession. The doubt isn’t what defines new attorneys; what they do about it is—and that sets the course for the rest of their legal careers.

Your new law license would be so much easier to manage if it came with a user’s manual. Of course, there are ethical rules, state and federal bar practice standards, CLE courses, and other resources to help guide your decision-making and skills development, but these may be of little use when you are mid-objection in your trial, as you count down the minutes to a midnight electronic court filing deadline, or while you sweat through a supervision meeting with the partner overseeing the case who wants to know yesterday what you plan to do with the witness tomorrow.

As a clinical professor of child advocacy, I’ve had the pleasure of introducing many years’ worth of law students to the thrill and responsibility of their first real lawyering jobs. I have also had the opportunity to observe the most commonly repeated mistakes made by these soon-to-be new lawyers. By avoiding these five mistakes, new attorneys can set themselves up for a creative, proactive, and skilled child-welfare-litigation practice in which ongoing learning and controlled risk-taking can form the centerpiece of a very rewarding career.

Writing like a Lawyer

One of the most common new-lawyer mistakes is “writing like a lawyer.” Otherwise clear and straightforward prose is rendered incomprehensible by unnecessary (but legal-sounding) “heretofores” and “whereases”; some words are RANDOMLY CAPITALIZED; number words are followed automatically by their numerical counterparts so that “three-year-old child” becomes “three- (3) year-old child”; and plain English is tortured into sentence structure that resembles Middle English—all in the name of writing like a lawyer. The problem with jargon,
legalese, and Middle English is that your reader is so distracted trying to decode your sentence that he or she doesn’t know what point you are trying to make. The result is a missed advocacy opportunity.

Much has been written on the subject of writing like a lawyer who wishes to be understood. *Plain English for Lawyers* (Richard Wydick), *Just Writing* (Anne Enquist), and *Woe Is I: The Grammarphobe’s Guide to Better English in Plain English* (Patricia T. O’Connor) are three such books recommended by the legal writing faculty at St. John’s; there are many more. New lawyers would do well to remember that legal writing is writing in English about legal matters, not writing in some foreign legal language. Before cutting and pasting the boilerplate language from your office’s last set of legalese-laden papers, why not first review that language for the opportunity to minimize jargon and simplify sentence structure? In the Child Advocacy Clinic, we advise students that borrowing language from previously drafted papers, letters, and emails is good practice if it keeps you from reinventing the wheel but bad practice when it perpetuates the use of legal mumbo jumbo. Even worse is cribbing language you don’t understand because “it was there before, so I’d better leave it there now.” Lawyers should never use words or phrases (or statutes or cases) they don’t actually understand. Instead, decode the phrase, and, if it turns out to be surplus or simply isn’t doing any work for you, take it out. Think of the old story about the art student who wanted to learn how to carve an elephant: His teacher instructed him to carve away everything that doesn’t look like an elephant. The same holds true for legal writing. You need to carve away all the words that aren’t doing any work for you. You are left with your argument (or letter, or email.)

Particular care should be taken when writing to clients. Because child-welfare litigation is predominantly a poverty-law practice, and because there is an inverse correlation between poverty and level of education, lawyers who wish to be understood should draft letters that do not require knowledge of Latin as a second language, or a thesaurus, to understand.

It cannot be overemphasized that legal writing is intended to be understood. To do so, draft short, clear sentences in the active voice. Organize your writing in a simple and straightforward manner. “The argument proffered by respondent mother Ms. Jane Doe is, accordingly, and for the foregoing reasons, factually and legally incorrect insofar as . . .” becomes “the respondent’s argument is wrong because . . .”

On the flip side, extra effort to be sufficiently formal should be made when communicating electronically. The near-instantaneous nature of electronic communication (email, texts, and tweets) is intoxicating and addictive, and attorneys should consciously slow it down before texting or emailing their clients, opposing counsel, and witnesses. Our clinic represents children who often request that we, at least initially, communicate with them by text. Caution is advised when you need to communicate about confidential matters (which should never be done by text), and attention must be paid to not appear too casual and familiar lest you inadvertently blur the lines of the attorney-client relationship or reflect a less-than-professional level of informality to opposing counsel.
Asking for Advice Without Offering Suggestions
New lawyers are, understandably, often hesitant and deferential about how to proceed in their cases, preferring to seek the advice of more senior attorneys than reason out a course of action independently. To be sure, experienced attorneys are a gold mine of practical how-to knowledge for the novice lawyer—but relying too heavily on the advice of others will do little to build up your own legal muscle.

One way to look at it is to remember that the minute you graduate, you become a “veteran legal expert in training.” It may sound counterintuitive to suggest that brand-new lawyers should make recommendations to supervising attorneys, but in fact, it works. As in physical exercise, the best way to develop independent legal muscle is to exercise it. Because supervising your own litigation is a learned skill, and because everyone has to start somewhere, the best way to begin developing your own good legal judgment is to start proposing possible courses of action during supervision meetings. There is a world of difference between the attorney who asks “what should I do now?” and the one who walks, no matter how tentatively, into his supervisor’s office armed with three possible suggestions about what to do next—even if every suggestion is ultimately shot down. Good supervision will generate a conversation about the pros and cons of each suggestion, leading to a better understanding of the factors that go into a wise course of action and the factors that result in a course of action being sent back to the drawing board. It is this process of developing independent litigation supervision skills that will set self-motivated and creative thinkers apart from the crowd. Independent thinkers will not only develop skills more rapidly than their counterparts, but also they will quickly develop a reputation as a thoughtful and proactive attorney.

Underestimating the Importance of File Maintenance
Just the words “file maintenance” bring tears to the eyes. Updating call logs, scanning in correspondence, keeping the contact list current, maintaining contemporaneous time records—your law-school essay likely did not focus on the desire to serve justice through record keeping. And yet, here we are—me writing about it, and you reading about it.

Care and attention to record keeping isn’t just important, it’s critical. It’s critical so that private practitioners can bill their clients properly; so that attorneys can protect themselves from malpractice claims; and so that trial lawyers can quickly respond to inquiries from the court. More than once, our office has made motions based on a pattern of unreturned phone calls, letters, and email. Such motions can only be made by keeping accurate records of not just the conversations had, but also the attempts made to have those conversations. We once obtained a court order directing the local agency to return our phone calls within 24 hours this way.

On this same subject, there are many ways to organize a file, and so long as you are able to locate the documents and information you need when you need them, your system will probably work for you. But new practitioners may find the following practices particularly helpful in maintaining files. First, maintain a contact list for each case in a central location in the case file. Update the list regularly when addresses, phone numbers, or attorneys change. It is especially...
important to keep track of the locations and contact information of foster homes, as they can change frequently, and you cannot predict when or why you might need to communicate with or about a prior foster parent. Make sure to date your contact list each time you update it. Never delete old contacts from a contact list; instead, retire old lists to a separate folder or use a strikethrough font with an “as of” date to indicate when the information changed. This way, you will always have a record of the contacts relevant to each point in time during the litigation.

Next, never keep recorded time by jotting it down on little scraps of paper stuffed into your pockets. This is an invitation to send your billable hours to the dry cleaner instead of the client. Instead, carry a notebook for the purpose of recording time, download a timekeeping program to your smartphone or iPad (there are, literally, hundreds of such programs), or, as a last resort, address an email to yourself on your phone, noting the time you spent on various tasks, saving the email as a draft as you update it throughout the day and sending it before you go home for the night. Just last year, the Second Circuit denied half a million dollars in fees to a solo practitioner for lack of contemporaneous timekeeping. See, Scott v. City of New York, 643 F.3d 56 (2d Cir. 2011). Reconstructing billable hours, therefore, is not only unwise, it is almost always impermissible and financially painful as well.

Some offices have document-naming conventions that can be extremely helpful in organizing computer files. If your office does not use a document-naming convention, consider creating one for yourself. Instead of version numbers, you might name documents using the format CaseName.DocType.DocDescrip.Date.Time so that you do not end up with documents such as “Smith Visitation Motion_Tuesday Morning Version 4,” but with “Smith.OTSC.visits.070411.0830am” (Order to Show Cause for visits on Smith case, July 4, 2011, 8:30 am) instead. However you choose to name your documents, avoid using the word “final” until after the papers have been filed or sent. There is nothing more annoying than a document named “FINAL.final” or the equally bad “final[2].”

**Becoming Emotional**

Working with children and families in crisis is draining work. Emotions run high, and it takes skill, self-control, and personal and professional maturity to be an effective and passionate advocate without crossing the line and becoming emotional. Judges do not wish to hear from emotional attorneys, and your argument would be swallowed by the drama of the presentation in any event. Emotional attorneys are also written off as difficult to work with.

New attorneys can be full of outrage and passion for justice—but law happens. Sometimes you will be successful, and sometimes you will not. Sometimes you can persuade your adversary, and sometimes you cannot. Keep in mind that you can only control what you can control—your own work, not the work of others. The more effective advocate is the one who can maintain his or her composure in the courtroom and in the conference room. If you find yourself becoming emotional, take a drink of water, request a brief break, or step outside for a moment to compose yourself. If you are moved by a client’s circumstance and find yourself becoming emotional in conversation with or about him, try to (discretely) briefly and physically refocus your attention...
elsewhere, perhaps by contracting a muscle or gripping your fingernails into your palm. (I’ve done both.) Remember your legal options: Is the issue appealable in one forum or another? Is there a legal avenue on which you can focus your emotional energy?

Avoiding strong displays of emotion and remaining composed under all circumstances is critical for maintaining and enhancing your reputation as a professional.

**Failing to Reflect on Experiences**

Lawyers are “professional learners.” Not only must lawyers keep up with current developments in the law by learning about new cases and legislative amendments, but they must also keep up with litigation—including child-welfare litigation—which often requires learning about entirely new substantive subject areas. Lawyers must learn not just how to get widgets into evidence, but also what widgets are, what makes widgets tick, how widgets are built, common off-label widget uses, how the public (a jury) feels about widgets, the main differences between a widget and a gizmo, common widget misconceptions and biases, policy implications of widget regulation, and more. Child-welfare lawyers must also learn about the effect of widgets on adolescent development, widgets for siblings, safety concerns for children and widgets, and so on. Learning all of this information and much, much more is what lawyers do every day. Becoming a skillful and well-rounded lawyer, therefore, requires becoming a skillful and well-rounded learner.

Skillful learning requires reflection. Whether or not your reflective process thus far has been the product of deliberate and conscious effort, it is unlikely that you made it past the bar exam without some degree of reflection on which kinds of note-taking, test preparation, or study-group practices worked best for you. Until this point, you have probably also relied on grades to help you assess the success of your various learning techniques. But how does the practicing child-welfare lawyer gauge the success of his or her lawyering skills without a final exam as a guide? How does he or she know whether a client interview, legal argument, cross-examination, or letter to opposing counsel was excellent or if it missed the mark?

Lawyers must learn to reflect on their experiences to learn from them. New lawyers can ask themselves, “What made that winning argument tick?” Expensive videos and training materials are not necessary when live action is unfolding before you. Take notes on what you observe. Was the effective attorney organized, speaking clearly, prepared with case law? Was the less-effective attorney scattered, caught off-guard, and unsure of his or her position? Take similar notes on that cross-examination you are sitting through while waiting for your case to be called. Which kinds of questions are most effective? How did the attorney set a trap for the witness? Observe, too (but from a distance), attorneys speaking with their clients in waiting rooms. Do the clients appear interested, angry, despondent, terrified, or reassured? How is the attorney handling the client? Is it effective? Review your adversary’s papers. Are they well organized? Did your adversary use a particularly effective rhetorical device? Were there unprofessional aspects of the papers?
New lawyers might form a regular lunchtime meet-up to discuss what they observed that week. Or a lawyer might choose to journal privately about recent events. Regardless of the method used, making a regularly scheduled time each week to consciously reflect on the elements of excellence in lawyering will allow the new litigator to focus on the specific skills needed to improve his or her own performance.

As noted above, reflection is a skill. Each of the “mistakes” outlined in this article is, in fact, a learning experience on which new attorneys can build an improved practice—but only if the attorney takes the time to analyze each experience thoroughly for ways to move forward. It is hoped that the tools set out in this article will help give new attorneys the confidence to try new methods of moving toward excellence in the field of child welfare.

Keywords: litigation, children’s rights, young lawyers, child welfare

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Title IX Liability for Anti-Gay Bullying

By J. Dalton Courson and Abigayle C. Farris – January 23, 2012

Lesbian, gay, bisexual, and transgender (LGBT) teens are frequently a target for school bullying. According to Mental Health America and Gay, Lesbian, and Straight Education Network (GLSEN), LGBT teens hear anti-gay slurs about 26 times per day, or once every 14 minutes. Nearly 9 out of 10 LGBT youth reported being verbally harassed at school because of their sexual orientation. Nearly half reported being physically harassed, and about a quarter reported being physically assaulted. Of those students who were harassed or assaulted, 60 percent did not report the bullying incident to their teachers or other school officials, claiming, most commonly, that they did not believe anything would be done to address the situation. Of those who did report the incident, nearly one-third said school staff did nothing in response. Too often, anti-gay bullying ends with the targeted students harming themselves, as demonstrated by the recent spate of media attention to this issue following several teen suicides.

Schools, school districts, and state education departments nationwide are examining and revamping their anti-bullying policies to better address the issue of LGBT bullying. The issue is often controversial. For example, after six teen suicides—including at least three attributed to gay bulling—Minnesota’s Anoka-Hennepin School District amended, but did not abolish, a controversial curriculum policy mandating “neutrality” in classroom discussions of sexual orientation, which barred discussion of LGBT issues in schools. Some parents and students claimed the policy left teachers and administrators uncertain as to what they could say to students about sexual orientation, undermining faculty and staff efforts to stop the bullying of LGBT students. In a May 24, 2011, letter to the district, seeking the repeal of the neutrality policy, the Southern Poverty Law Center (SPLC) and National Center for Lesbian Rights (NCLR) described the policy as singling out LGBT students and preventing school employees from addressing bullying.

The U.S. Department of Education also has addressed the bullying problem. On October 26, 2010, the Department’s Office for Civil Rights (OCR) wrote to the administrators of all schools receiving federal funding to remind them how important it is to implement and enforce anti-bullying policies that protect LGBT students from anti-gay harassment. In a “Dear Colleague Letter,” the OCR reiterates that some anti-gay bullying may trigger the school’s responsibilities under one or more federal antidiscrimination laws, including Title IX, which prohibits discrimination on the basis of sex in education programs receiving federal funds.

Title IX and Gay Bullying

Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). The Dear Colleague Letter warns that school districts violate Title IX and OCR regulations when
student peer-on-peer harassment based on sex is sufficiently serious that it creates a hostile environment, “and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.”

This statement is supported by jurisprudence of courts from coast to coast, including the U.S. Supreme Court. In Davis v. Monroe County Board of Education, the Supreme Court held that a Title IX funding recipient may be held liable for student-on-student harassment where the harassment was severe, pervasive, and objectively offensive; the school district had actual knowledge of the harassment; and it acted with deliberate indifference to the harassment. A plaintiff must establish that the harassment of students is so severe, pervasive, and objectively offensive, and that it so undermines and detracts from the victims’ educational experience, that the victims are effectively denied equal access to an institution’s resources and opportunities.

Though Title IX does not prohibit discrimination on the basis of perceived orientation, in some cases, harassment based on gender identity or orientation (even perceived orientation) may occur “because of” sex and, therefore, be sexual harassment of the type proscribed by Title IX. According to both OCR and numerous federal courts, harassment of students may constitute the type of sex discrimination prohibited by Title IX if it arises out of sex-based stereotyping or out of the student’s failure to conform to stereotypical notions of masculinity and femininity. The Dear Colleague Letter provides the example of a gay student who is subject to ridicule because he participates in nontraditional extracurricular activities or dresses in a way that does not conform to stereotypical notions of how boys should behave. The letter expressly and unequivocally states that a “school is responsible for addressing harassment incidents about which it knows or reasonably should have known,” and that, when responding to harassment, “a school must take immediate and appropriate action to investigate or otherwise determine what occurred.” Thus, failing to enforce an anti-bullying policy could amount to “deliberate indifference” and leave a school or school district open to liability for violating Title IX.

The Dear Colleague Letter was a not-so-gentle reminder for schools of their responsibility pursuant to Title IX to protect all students, including LGBT students, from sexual harassment.

Title IX Cases Based on LGBT Bullying in Schools
The Title IX responsibility of schools as it relates to LGBT students and anti-gay bullying is not new. In March 1997, the Department of Education released Title IX guidelines for schools that, for the first time, explicitly stated that while Title IX does not prohibit discrimination on the basis of sexual orientation, it prohibits sex-based harassment against homosexual students as well as heterosexual ones. That same year, Carolyn Wagner filed a complaint with the OCR against the Fayetteville, Arkansas, School District, seeking relief under Title IX for the years of homophobic harassment and bullying that her son, William, had endured while a student in the district and to which teachers and school administrators had turned a blind eye. It was the first time Title IX was used to address the bullying of gay and lesbian students, and, in 1998, the OCR and the Fayetteville School District reached an agreement requiring both OCR and the
school district to recognize that sex-based harassment of gay and lesbian students may fall under Title IX.

Following the Wagner case and the Supreme Court’s 1999 holding in Davis that student-on-student sexual harassment permits a private action for damages against a school board receiving federal funds under Title IX, students and their parents began to seek legal as well as administrative remedies and to bring Title IX claims against schools that, they claimed, failed to provide the protection Title IX requires. In 2000, in Ray v. Antioch Unified School District, a California federal court became one of the first to recognize that anti-gay bullying may be actionable under Title IX. 107 F. Supp. 2d 1165 (N.D. Cal. 2000). Just one month later, in Montgomery v. Independent School District No. 709, 109 F. Supp. 2d 1081, 1093 (D. Minn. 2000), a Minnesota federal court did the same. There, a student brought an action based, in part, on Title IX, claiming that a variety of school district officials—including teachers, bus drivers, principals, assistant principals, playground and cafeteria monitors, locker room attendants, school counselors, and even the school district superintendent—inadequately and inconsistently responded to the bullying he suffered over many years due, at least in part, to his perceived sexual orientation. In both cases, the defendants sought summary judgment on the grounds that any Title IX claims should be dismissed because Title IX did not protect individuals from discrimination based on sexual orientation or perceived sexual orientation. In both cases, the defendants’ motions for summary judgment were denied.

Since Ray, Montgomery, and OCR’s 1997 guidance, courts have not been shy in permitting Title IX actions to proceed in cases involving sex-based bullying of LGBT students. For example, in Pratt v. Indian River Central School District, the plaintiffs alleged that there existed within the school district a longstanding and widely known problem of “sexist and antigay discrimination” and that the school board nonetheless failed to amend its written policies and handbooks to prohibit discrimination based on sexual orientation; address harassment based on sexual orientation in any of its statements or publications; or provide adequate training to its employees with respect to discrimination, bullying, or harassment based on sexual orientation or sex. 2011 WL 1204804 (N.D.N.Y. 2011).

In Schroeder v. Maumee Board of Education [PDF], the plaintiff maintained that, while the defendant board of education failed to enforce policies prohibiting discrimination based on perceived sexual orientation, it did enforce policies protecting students against racial and gender discrimination. In Martin v. Swartz Creek Community Schools, an openly gay student alleged that sex-based harassment occurring persistently during his freshman and sophomore years but largely ignored by teachers and school officials brought him to the “brink of suicide.” 419 F. Supp. 2d 967, 973–74 (E.D. Mich. 2006). In each of these cases, the court found that the plaintiffs had presented plausible claims under Title IX and denied the defendants’ motions for summary judgment.

**Challenges to Bringing a Title IX Claim**

Even if a plaintiff bringing a Title IX case is successful in defeating a Rule 12(b)(6) motion, it
can be difficult to prevail on the merits. A school “is not required to ‘remedy’ sexual harassment nor ensure that students conform their conduct to certain rules, but rather, ‘the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable.’” *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000) (citing *Davis*, 526 U.S. at 648–49). Because the deliberate indifference standard is a high one, officials may avoid liability even if the harm to the harassed student ultimately is not averted, as long as they responded reasonably to the perceived risk. *Pemberton v. W. Feliciana Parish Sch. Bd.*, 2010 WL 431572 at *3 (M.D. La. Feb. 3, 2010).

Moreover, deliberate indifference is only one of the hurdles a plaintiff must clear before he or she will have a cognizable Title IX action for sex-based bullying. To establish a Title IX claim, a plaintiff must also meet the other two requirements set forth by the Supreme Court in *Davis*—namely, that the sexual harassment was severe, pervasive, and objectively offensive and that the school district had actual knowledge of the sexual harassment. Courts do not hesitate to dismiss Title IX claims on summary judgment where the plaintiff fails to demonstrate one of the prongs of the test. See *R.S. v. Bd. of Ed. of the Hastings-on-Hudson Union Free Sch. Dist.*, 371 Fed. Appx. 231 (2d Cir. 2010); *Watkins v. LaMarque Indep. Sch. Dist.*, 308 Fed. Appx. 781 (5th Cir. 2009).

However, prevailing in a Title IX case is far from impossible. In at least one case, a Title IX plaintiff established school-district liability by showing that a single school administrator with authority to take corrective action responded to harassment with deliberate indifference. *Fitzgerald v. Barnstable Sch. Cmte.*, 555 U.S. 246, 259 (2009) (citing *Gebser*, 524 U.S. at 290). Recently, in *Patterson v. Hudson Area Schools*, which many believe may become a landmark Title IX decision, a jury awarded one student and his parents $800,000 in damages for the school district’s failure to protect Patterson, while he was a student, from long-term, systemic bullying based on his perceived sexual orientation. See 551 F.3d 438, 448–49 (6th Cir. 2009).

However, prevailing in a Title IX case is far from impossible. In at least one case, a Title IX plaintiff established school-district liability by showing that a single school administrator with authority to take corrective action responded to harassment with deliberate indifference. *Fitzgerald v. Barnstable Sch. Cmte.*, 555 U.S. 246, 259 (2009) (citing *Gebser*, 524 U.S. at 290). Recently, in *Patterson v. Hudson Area Schools*, which many believe may become a landmark Title IX decision, a jury awarded one student and his parents $800,000 in damages for the school district’s failure to protect Patterson, while he was a student, from long-term, systemic bullying based on his perceived sexual orientation. See 551 F.3d 438, 448–49 (6th Cir. 2009).

While the $800,000 verdict certainly makes *Patterson* noteworthy, it is not the first case of its kind, as Patterson was not the first plaintiff to successfully employ a Title IX argument. Furthermore, while the fact that sizeable verdicts are possible may make school districts nationwide sit up and take notice, compensatory awards like the one in *Patterson* are only one piece of school districts’ potential exposure, as liability under Title IX is not limited to compensatory damages. Title IX allows a prevailing plaintiff to recover attorney fees, and a willful or reckless violation may support an award of punitive damages. See, e.g., *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1077 (D. Nev. 2001).

**Conclusion**

The one-two punch of the sizeable award in *Patterson* and the OCR’s Dear Colleague Letter that was issued just seven months later should be a wake-up call for school districts. Schools must provide students with the type of protection Title IX requires in instances of peer-on-peer sexual harassment of LGBT students. Accordingly, they must do more than simply rewrite the rules. They must enforce those rules fairly, consistently, and diligently, or risk Title IX liability for
potentially very large sums when they fail to correct the actions of students who pick on, assault, and harass other students on account of their sexual orientation.

In a press release issued shortly after the enforcement agreement in the Wagner case was finalized, a staff attorney for the Lambda Legal Defense and Education Fund, which represented Wagner in the administrative action, said, “School principals who question whether sexual harassment of gay students is illegal will learn a big lesson from this breakthrough. And now, more lesbian and gay students may be able to finish high school.” Whether Wagner amounted to a lesson learned for schools and school districts subject to Title IX is, at this time, unclear. Perhaps Patterson’s $800,000 verdict will finally bring that lesson home and push schools to address bullying so that more teens can study and learn in a safe environment.

Keywords: litigation, LGBT, Title IX, education, bullying

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NEWS & DEVELOPMENTS

Materials Now Online for LGBTQ Teleconference

Materials are now online for the complimentary teleconference, “Recognizing and Addressing LGBTQ Issues in Your Children’s Law Caseload,” which was held Tuesday, March 13, 2012. The teleconference focused on why lesbian, gay, bisexual, transgender, and questioning (LGBTQ), as well as gender-nonconforming, youth are overrepresented in the justice system and the challenges they face, as well as how to spot issues of sexual orientation, gender identity, and gender non-conformity in your cases and why it matters. It also included practical tips to advocate for your LGBTQ and gender nonconforming clients.

Keywords: litigation, children’s rights, LGBTQ, teleconference

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

Survey Studies Juveniles Serving Life Without Parole

The Lives of Juvenile Lifers: Findings from a National Survey [PDF], released by the Sentencing Project, provides a new perspective on the population of individuals serving life sentences without parole for crimes committed in their youth. It represents the findings of a comprehensive investigation into this population that includes a first-ever national survey of juvenile lifers. Survey findings from 1,579 individuals around the country who are serving these sentences demonstrate high rates of socioeconomic disadvantage, extreme racial disparities in the imposition of these punishments, sentences frequently imposed without judicial discretion, and counterproductive corrections policies that thwart efforts at rehabilitation.

Keywords: litigation, children’s rights, imprisonment

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

Department of Education Analyzes Bullying Laws, Policies

The U.S. Department of Education’s report, Analysis of State Bullying Laws and Policies [PDF], summarizes current approaches in the 46 states with anti-bullying laws and the 41 states that have created anti-bullying policies as models for schools. The report shows the prevalence of state efforts to combat bullying in the last several years. The report reveals that while most states have enacted legislation around this important issue, a great deal of work remains to be done to ensure that adults are doing everything possible to keep children safe.
Keywords: litigation, children’s rights, bullying

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

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