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Articles

Investigative Strategies in Confession Cases

By Laura H. Nirider – July 9, 2012

We’ve all been there. A case comes across your desk involving a child or teen who has confessed to a crime under police interrogation. You review the confession, and it seems plausible enough on its face. What can a juvenile defender do when confronted with such a situation? Is there anything to do, other than to file a motion to suppress—which, of course, may be unavailing—and start planning for the all-too-probable guilty plea?

None of us is wrong to feel challenged by a confession case. The U.S. Supreme Court has long recognized that a “voluntary confession of guilt is among the most effectual proofs in the law” and that “triers of fact accord confessions such heavy weight in their determinations that the introduction of a confession makes the other aspects of a trial in court superfluous.” Empirical researchers, too, have concluded that confessions can be so prejudicial that they can persuade fact-finders to convict despite the existence of exculpatory physical evidence, contradictory accounts of witnesses, and alibis. Successfully defending a client who has confessed is a tall order for even the most talented litigator.

The persuasive power of confession evidence, however, poses a particularly acute problem for juvenile defenders. Why? Children and teenagers are particularly likely to react to the pressures of police interrogation by making involuntary or false confessions. This reality was first recognized in U.S. Supreme Court jurisprudence 45 years ago in In re Gault, which famously noted that “authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of confessions by children.” After decades in the jurisprudential shadows, this reality has surfaced again in the 2011 U.S. Supreme Court case J.D.B. v. North Carolina, which concluded that “the pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed. That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.” Even Justice Samuel Alito, writing in dissent, acknowledged in J.D.B. that “I do not dispute that many suspects who are under 18 will be more susceptible to police pressure than the average adult.” While children are particularly likely to falsely or involuntarily confess, however, they appear to be no less likely to be convicted or adjudicated delinquent based on their confessions. The result is an unacceptably high risk that children will be wrongfully convicted.

In difficult cases where your clients have confessed under police interrogation, the best defense is to go on the offense against your client’s statement. This means investigating all aspects of the interrogation and confession and, when warranted, letting the judge know early and often that serious problems can arise when police overbear the will of children to obtain evidence.

Classification
In any confession case, a defender should pursue three basic avenues of investigation:
classification, coercion, and contamination. See Richard A. Leo and Steven A. Drizin, *The Three Errors: Pathways to False Confession and Wrongful Conviction*. Regarding classification, you ask why the police classified your client as a suspect who needed to be interrogated. In other words, how did your client end up in the interrogation room? In any case—whether the confession is true or false—the answers to these questions reveal important background information about the way police approached the interrogation. For instance, was your client questioned because he was a known troublemaker in the neighborhood—in other words, a “usual suspect”? If so, police may have intensified the tone and timbre of their interrogation to counteract your client’s anticipated street savvy. Was your client interrogated based on a tip from a witness? If that’s the case, it will benefit you to know exactly what the police knew—or thought they knew—about the crime before the interrogation began so that you can examine whether your client’s confession contains any new information that was not previously known by the police. Did the police become suspicious of your client during an initial interview because of nonverbal cues such as facial expressions and body language—so-called deception indicators on which police are trained to rely when determining whether someone is telling the truth? If so, the police’s reliance on this type of junk science may well give you ammunition to attack the entire thrust of the investigation. Typical teenage mannerisms—slouching, failing to make eye contact, and so on—are far too often misinterpreted as exactly the kinds of deception indicators that can lead police to conduct an intense, guilt-presumptive interrogation.

Coercion

After getting some answers regarding classification, the next avenue of investigation is coercion. Coercion, of course, refers to the method in which police officers influenced, persuaded, cajoled, or forced a suspect to make a statement. In analyzing coercion, courts around the country examine the tactics used by police and weigh them against the individual ability of the defendant to resist those tactics. The good news is that this balancing framework enables defenders to raise avenues of attack that are particularly relevant to juvenile clients.

The coercion analysis often starts with a close examination of the giving and waiving of *Miranda* warnings. A suspect must be Mirandized, of course, when he or she is interrogated while in custody. Failing to do so—or failing to secure a knowing, intelligent, and voluntary waiver from the suspect—can not only invalidate the confession, but it can also be viewed as an indicator of coercion. As an initial matter, *J.D.B. v. North Carolina* gives the juvenile defender plenty to work with regarding the question of custody. Finding that “a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go,” the *J.D.B.* court held that a child’s age is relevant to the custody analysis. This holding enables defenders to argue that children who were interrogated at school, for instance—as J.D.B. himself was—were in custody and should have been Mirandized, even if an adult in a similar position would not have been in custody.

Beyond the question of whether a child should have been Mirandized, defenders should also examine the nature of the child’s *Miranda* waiver. Were steps taken to ensure that the child understood his or her rights before the police accepted the waiver? Was the child asked to explain the warnings in his or her own words? Was he or she allowed to consult with a friendly
adult before waiving his or her rights? If an adult was consulted—whether it was a parent, guardian, or youth officer—did that adult do anything to ensure that the child understood his or her rights and the consequences of waiver? Many researchers have indicated that such steps are necessary before one can have full confidence that a child understands the *Miranda* warnings and can meaningfully waive them. Failure to take such steps, in turn, could form the basis for a motion to suppress.

Defenders should also investigate statements that were made by police after *Mirandizing* but before the confession. This is obviously easier done with a recorded interrogation, but, at the least, defenders should interview their clients concerning this point. Some courts have found that certain statements made after the *Miranda* warnings effectively negated the warnings. For instance, in *Hart v. Attorney General* (11th Cir. 2003), a 17-year-old’s *Miranda* waiver was rejected when a detective assured him that “honesty wouldn’t hurt him” shortly after administering *Miranda*. The court concluded that such an assertion was “simply not compatible with the phrase ‘anything you say can be used against you in court.’” This innovative argument—which is particularly resonant in cases involving children and teens who may not fully comprehend the *Miranda* warnings—deserves to be applied nationwide.

While the coercion inquiry begins with *Miranda*, it extends far beyond it. Any investigation into coercion also requires an analysis of the client’s individual characteristics and the particular interrogation tactics used by police. The client’s individual characteristics, of course, can include age, education level, suggestibility, psychological or mental limitations, use of drugs or medications, language ability, and prior experience with law enforcement, among nearly countless other factors. With respect to a juvenile’s prior experience with law enforcement, it is worth noting that the Wisconsin Supreme Court held in the 2005 case *State v. Jerrell C.J.* that such experience may actually make juveniles more susceptible to coercion under certain circumstances. Examining a juvenile who had been arrested on two previous occasions, the court noted that he had admitted involvement and was allowed to go home both times. It found that this experience “may have contributed to his willingness to confess in the case at hand . . . . We note the argument of Jerrell’s counsel that such an experience may have taught him a dangerous lesson that admitting involvement in an offense will result in a return home without any significant consequences.” Such an argument may well apply in many similar cases across the country.

While information about the client’s personal characteristics is discoverable through interviews with the client, family members, educators, mental-health professionals, and others, it can be more difficult to discover information about the interrogation tactics that were used by police—particularly in the absence of a complete electronic recording of the interrogation. When faced with an unrecorded statement, defenders must begin by interviewing their clients as soon as possible after the interrogation occurs to glean an understanding of the types of messages that police sent during interrogation. Beyond this, however, defenders should take a few other investigative steps in the absence of a recording. Investigate whether there were any witnesses to the interrogation or, at least, to the child’s arrest. Seek a court order to allow you to view and, if necessary, photograph the interrogation room. Obtain a full set of police reports concerning the
interrogation and confession, as well as police reports describing the corroborating evidence on which the state will rely to substantiate the confession. If other witnesses or codefendants gave statements, it is essential to obtain those statements to assess whether their stories differ from your client’s story. Get a copy of your client’s written statement, if one exists, and evaluate whether it was written in an authentic teen voice or, on the other hand, if it was written in legalese or copspeak. If needed, get an adolescent linguistics expert to weigh in on the question.

If you do have a recording, then the next step is to examine what police said during the interrogation to extract a statement from your client. Identify any promises of leniency and threats of harm—both direct and implied. Such promises and threats can be strong evidence of coercion and, in turn, form the basis of a motion to suppress on voluntariness grounds. In Commonwealth v. Truong (Mass. Sup. Ct. 2011), a trial court suppressed a 16-year-old girl’s confession to murder after the interrogation transcript revealed that officers implied that her confession would result in her being sent to foster care, rather than prison. In suppressing the confession, the court noted that such implied promises prevented her from understanding “the implications of her statements.” In the 2012 case State v. Polk, moreover, the Iowa Supreme Court suppressed a 20-year-old’s confession when police told him that prosecutors are “much more likely to work with an individual that is cooperating with police than somebody who sits here and says I didn’t do it.” And in the 2009 case Ramirez v. State, a Florida appellate court suppressed a young man’s confession when his interrogator stated that he would help him if he confessed, but failed to explain the limits of his ability and authority to do so.

It is similarly important to assess whether an interrogator lied to your client about the evidence against him or her—in other words, whether the interrogation included false-evidence ploys. John E. Reid & Associates, the leading interrogation training firm in the country, has publicly stated on its website that interrogators should not use false-evidence ploys while interrogating young children. Even with older children and adults, moreover, Reid & Associates has cautioned against interrogations that combine false-evidence ploys with promises of leniency or threats of harm. By showing a court that the interrogators in your case flouted these basic principles of interrogation, you may be able to convince a judge that your client’s case deserves a more careful look.

In raising these types of arguments, moreover, no juvenile defender should be dissuaded by adult criminal case law indicating that certain types of promises, threats, false-evidence ploys, or other interrogation tactics can be permissible. As long ago as 1994, the Seventh Circuit recognized in Johnson v. Trigg that “police tactics that might be unexceptionable when employed on an adult may cross the line when employed against the less developed reason of a child.” Since then, J.D.B. has enshrined this reality in Supreme Court jurisprudence, while researcher upon researcher has confirmed it through empirical evidence. Cases involving adult defendants should not be considered dispositive when it comes to assessing the coercive impact of police interrogation tactics on children.

**Contamination**

The third avenue of investigation in confession cases is contamination—a factor that goes directly to the confession’s reliability. An ever-increasing number of confessions are proven false every day; the
Innocence Project reports that, to date, 291 individuals have been exonerated by DNA evidence and approximately one-quarter of them falsely confessed to the crimes for which they were convicted. Similarly, the just-launched National Registry of Exonerations, which, to date, has catalogued 890 wrongful convictions, reports that 135 of those convictions were caused at least in part by false confessions. Children and teens, moreover, are even more likely than adults to falsely confess during police interrogation. But how does a child know what to say when making a false confession? How can any person, for that matter, plausibly claim to have committed a crime about which they should, by rights, know nothing? The answer is contamination.

Contamination occurs when important facts about a crime are disclosed to a suspect before or during an interrogation. This information can come from several different sources. Police interrogators, for example, may inadvertently disclose information to suspects during interrogation. In 2008, District of Columbia Homicide Detective Jim Trainum wrote compellingly in the *L.A. Times* about how he induced a suspect to falsely confess when, “to demonstrate the strength of our case, we showed the suspect our evidence, and unintentionally fed her details that she was able to parrot back to us at a later time.” Even when an interrogator does not show the suspect pieces of evidence, the mere use of leading questions during interrogation—“Who shot the victim in the head?”—can educate the suspect about the facts of the crime. Beyond police, other sources of contaminating information can include the media, community gossip, and even the suspect’s own previous familiarity with persons or places involved in the crime.

When a suspect’s confession has been recorded, the defender must screen it for contamination. This screening process is essential because on first glance, the confession may look well-corroborated and reliable. The suspect may have described the crime scene accurately, for instance. But when that accuracy is attributable to contamination—when the police educated the suspect about the crime scene by using leading questions or showing photographs—then that corroboration is meaningless, and the confession, in turn, is worthless. Importantly, this is not a position held only by criminal-defense attorneys. In its interrogation manual, Reid & Associates instructs interrogators to “hold back information about the details of how the crime was committed” and warns that admissions “only become useful as evidence if they are corroborated by (1) information about the crime the suspect provides which was purposefully withheld from the suspect, and/or (2) information not known by the police until after the confession which is subsequently verified.”

When screening a confession for contamination, it is essential for such a screening to be done systematically. First, identify each detail in the confession, large and small. What did the crime scene look like? What time did the crime occur? Who was with the suspect? What was the victim wearing? Where did the suspect hide incriminating evidence? What happened right before and right after the crime? For each detail, note whether your client got it right. Can the detail be corroborated by objective evidence that stands independent of the confession? Then, isolate the details that your client appears to have gotten right and ask whether his or her knowledge of those details could be attributable to contamination. Were those details fed to your client by police during the interrogation? Were they widely known due to news media coverage or community rumors? Could your client have some innocent explanation for his or her knowledge of certain aspects of the crime? Could he or she have simply guessed correctly with respect to certain details?
By conducting such a rigorous analysis, you may end up with a range of results. If your client was able to identify at least some details about the crime accurately without contamination, you may not be able to mount a strong reliability challenge. But if your client was not able to get anything right about the crime absent the guiding hand of contamination, such a result is a red flag. You may be dealing with an unreliable or downright false confession.

Using Your Investigative Results in Court
After conducting an investigation into classification, coercion, and contamination, a defender will be armed with an arsenal of information about his or her client’s confession. The question becomes: What is the best way to present this information in court?

Information about coercion, of course, is best presented in a pretrial motion to suppress a confession on voluntariness grounds and, if necessary, repeated in full at trial. However, if you believe that your client has given a contaminated or false confession, such information should not be saved for later. Argue that police fact-feeding, for instance, rendered your client’s interrogation coercive. Several courts across the country have suppressed confessions on those grounds, including courts in Nevada (Passama v. Nevada, 1987), West Virginia (State v. Randle, 1988), and Utah (State v. Rettenberger, 1999). Even if your judge may not be likely to take such a step, the pretrial motion to suppress provides an opportunity to plant the idea of unreliability.

Even outside the context of a voluntariness motion, there are still ways to raise unreliability before trial, as outlined by Richard A. Leo et al. in the 2006 Wisconsin Law Review article “Bringing Reliability Back In.” If you believe your client may have falsely confessed, for example, consider filing a pretrial motion to suppress under the state-law equivalent of Federal Rule of Evidence 403, which excludes evidence if its prejudicial effect substantially outweighs its probative value. Such a strategy has been foreshadowed by the Seventh Circuit, which noted in 2011’s Aleman v. Village of Hanover Park that “a trick that is as likely to induce a false as a true confession renders a confession inadmissible because of its unreliability even if its voluntariness is conceded.” It also finds some support in the 2011 case People v. Juan Rivera, in which the Illinois Appellate Court decided that the state has the burden to prove beyond a reasonable doubt that a confession was not the product of contamination.

In sum, the mere fact that your client has confessed should not render his or her conviction a fait accompli. The creative litigator has many avenues of investigation to pursue—and many legal strategies to deploy—when confronted with a confession case. It is to be hoped that these strategies, combined with dedicated representation of the type shown by many juvenile defenders in courtrooms every day, will advance the representation of juvenile clients who have confessed during police interrogation and result in increased protections for juveniles across the country.

Keywords: litigation, children’s rights, false confessions, contamination, coercion, classification

Laura H. Nirider is project co-director of the Center on Wrongful Convictions of Youth at Northwestern University School of Law.
Protecting Mothers Against Gender-Plus Bias: Part 3

By Diane L. Redleaf and Melissa L. Staas – July 9, 2012

In Part 1 of this three-part series, we introduced the Family Defense Center’s Mothers’ Defense Education and Advocacy Project, explaining that many mothers in the child-protection system appear to be the victims of “gender-plus” bias. They are targeted not solely because they are mothers, but because they also happen to be members of another highly gendered category that takes the place of actual evidence of specific wrongdoing by the mother toward her child. In Part 2 of this series, we presented three of the categories of Mothers’ Defense Project cases: domestic-violence victims, mothers with mental-health conditions, and nonoffending mothers in relationships with “risky” partners.

The two remaining categories of gender-plus discrimination that the Mothers’ Defense Project addresses are mothers in extreme poverty (16 of the 87 cases the Mothers’ Defense Project handled in 2011 fell into this category) and teen mothers, a category added in fall of 2011 with seven cases handled during the year. The Mothers’ Defense Project has adopted a cross-cutting legal strategy to reduce gender-plus discrimination and narrow the grounds for intervention against mothers who have not harmed their children.

Mothers in Extreme Poverty
Sometimes, mothers’ poverty and living circumstances alone are reason enough to bring child-protective services into their family life. Mothers raise children by themselves much more often than do fathers; single female heads of household also often have inadequate or no child support and inadequate housing. For these reasons, there is a “feminization of poverty,” and poverty itself can operate as a gender-plus discrimination factor in the child-welfare system. For mothers in extreme poverty, any crack in their personal safety net can lead to a hotline call. In a number of the Family Defense Center’s cases, mothers have done nothing wrong except lack financial means to provide a middle-class level of care.

It is well-established that mothers who are living in extreme poverty are at risk of child-protection intervention at significantly higher rates than the average parent. See Kristen Shook Slack et al., “Risk and Protective Factors for Child Neglect During Early Childhood: A Cross-Study Comparison,” 33 Child and Youth Services Review 1354, 1358 (2011). Mothers in extreme poverty find that their living circumstances and child-care arrangements are often brought to the attention of authorities, including mandated child-abuse reporters, much more frequently than the arrangements of middle-class families. See, e.g., J.A. Schumacher et al., “Risk Factors for Child Neglect,” 6 Aggression and Violent Behavior 231–54 (2001) (finding 18 times the rate of child neglect incident reports for the highest poverty level communities compared with the communities with the lowest incidents of poverty). The Mother’s Defense Project cases demonstrate that some cases of mothers in extreme poverty are not due to actual neglect, but rather due to unfair presumptions that have been applied to poor mothers that penalize them for their poverty alone.
“Cindy’s” currently pending case is a case in point. Cindy attends a junior college and receives a child-care subsidy to attend school. When the state of Illinois delayed payment of her subsidy and her caregiver was forced to quit as a result, Cindy, like other classmates who were also single parents, brought her children to school with her, instructing them to wait in the hallway outside the classroom for her. They did as they were told, but her 11-year-old son grew restless. He asked her for keys to get a book from their car while he waited. He went to the car with his younger brother, and campus police saw him trying to enter the car. The police escorted the two children back to find Cindy in her class. She was then arrested and charged with child endangerment, and the campus police made a hotline call to the Department of Children and Family Services (DCFS) against her. While criminal charges against Cindy were eventually dropped, the hotline call was indicated for inadequate supervision after a cursory investigation that did not consider the reasons why Cindy did not have child care that day. Cindy is currently registered as guilty of child neglect in the Illinois Child Abuse Register while she appeals that finding. The child-neglect finding, if maintained, will prevent Cindy from pursuing her career goal of becoming a registered nurse.

In a second case, “Angela” was homeless and living in a shelter. A worker there accused Angela of leaving her baby unattended after Angela had asked shelter staff to watch the baby while she went to the restroom. The worker called DCFS to report Angela for inadequate supervision, but, during the investigation, her account of what Angela had done wrong changed three times. DCFS indicated Angela for child neglect anyway, and her appeal is now pending. Angela’s dream of working with children with disabilities, however, is now put on hold due to the neglect label she acquired simply because she was too poor to afford housing and came under the scrutiny of a shelter worker.

When the reason for the intervention is a breakdown in social services or public benefits to which they are entitled, mothers like Cindy and Angela who come to the attention of child-protective services are effectively being blamed for the inadequacies of the very social-services system that is investigating them. Instead of addressing truly problematic parenting practices that actually endanger children, which is the core function of the child-protection system, the system pathologizes social conditions and turns them against society’s most vulnerable victims. For mothers who are trying to better themselves through educational and/or social-service programs, as in both of the mothers’ cases cited here, the child-protection intervention can have the tragic consequence of trapping a family in poverty instead of helping to free them.

**Teen Mothers**

In late 2011, the Mothers’ Defense Center added teen mothers to its list of case categories after observing that the treatment of teen mothers appeared harsher than the treatment of older mothers and also more severe than the treatment of teenage fathers, even if the alleged offending behavior was similar. Additionally, as the recent case of “Nadine B.” demonstrates, teen mothers are often the victims of many overlapping gendered categories, including being victims of domestic violence and extreme poverty, that, taken together, substitute for evidence of any wrongdoing toward their children.
Research establishes that teenage mothers are roughly twice as likely to have a child placed in foster care compared to mothers who become parents after the age of 20. See Teen Pregnancy and Child Welfare, National Campaign to Prevent Teen Pregnancy (Aug. 2010); Robert M. Goerge, Allen Harden & Bong Joo Lee, “Consequences of Teen Childbearing for Child Abuse, Neglect, and Foster Care Placement” in Kids Having Kids (Saul D. Hoffman & Rebecca A. Maynard ed., 2d ed., 1997). The reasons for this starkly higher rate of child removal for teen mothers are myriad and complex. Compared to parents who delay childbearing until later in life, teenage mothers are more likely to live in a poor or low-income household, more likely to be unmarried, and more likely to be former state wards themselves, all of which are risk factors for having a child removed from the home. American Academy of Pediatrics Committee on Adolescence, “Adolescent Pregnancy—Current Trends and Issues: 1998,” 103 Pediatrics 2 (Feb. 1999); see also Teen Pregnancy and Child Welfare, supra.

In addition to these social factors that place teen moms in a position especially vulnerable to state intervention, stereotypes and prejudice against teen mothers pervade the approach of child-protection caseworkers to the point that merely being a teen mother, regardless of the mother’s individual strengths and weaknesses as a parent, creates a negative bias. In many of these cases, the investigators and caseworkers presume that the mother is not capable of making sound decisions for her child. If the teen mother’s child experiences some sort of accidental injury, child-protection caseworkers may presume that the mother acted in a blameworthy manner. See Slater v. DCFS, 953 N.E.2d 44 (Ill. App. Ct. 1st Dist. 2011) (see infra). Of course, some teens do lack the maturity that full-time parenting demands, and many teenage mothers may benefit from stronger systemic supports and safety nets. See, e.g., Hill v. Erickson, 88 CO 296, Consent Decree, Ill. Cir. Ct. of Cook Cty (Jan. 3, 1994) (class-action lawsuit that secured legal protections and services for state wards who are pregnant or parenting) (on file with the Family Defense Center). However, any per se inference of neglectful parenting based solely on an admitted need for services is inappropriate and unfair.

Nadine B. is a young mother who had a strong need for additional extra support systems. Not only was she just 15 years old when she had her baby, but also she had previously been a ward of the state due to allegations of abuse by her parents. Nadine lacked stable housing, and she was also experiencing domestic violence perpetrated by her baby’s father. These factors led to an unfair assumption by state agencies that Nadine was fundamentally incapable of parenting her son. Following a false claim that Nadine had permitted her father to be alone with her infant son for a short period of time, DCFS caseworkers strong-armed Nadine into acquiescing to an involuntary separation from her son and placed her son with a relative of her son’s father without Nadine’s authorization. When Nadine first sought the Family Defense Center’s legal services, her son had been with this distant relative for months, despite Nadine’s objections, without any court approval for the agency’s placement. One reason for this long separation was Nadine’s lack of awareness as to her own rights and the agency’s refusal to recognize her rights, which in part was due to Nadine’s inability to advocate for herself. This knowledge gap and lack of self-confidence is another commonality among cases involving teen mothers—often, young mothers will have greater difficulty asserting their rights in the face of state authority, even when they have done nothing wrong in caring for their children.
Legal Strategies to Reduce Gender-Plus Discrimination

The Mothers’ Defense Project uses specific advocacy tools to address each form of gender-plus discrimination, insofar as each case category presents a unique set of legal issues. The project has recently had success, however, with advocacy that cuts across categories.

Domestic-violence victims can make use of Fourteenth Amendment claims developed in Nicholson v. Scoppetta, a class-action challenge to the policies and practices of the New York City child-welfare agency of removing children from their domestic-violence victim mothers solely because the mothers had “allowed” themselves to be abused. 116 Fed. App’x 313 (2d Cir. 2004); see also http://www.familydefensecenter.net/images/stories/fdcfall07-final.pdf [PDF] (page 6).

In 1989, homeless and other impoverished families in Illinois sued DCFS for failure to provide subsistence support to prevent the removal of children and to reunite families. As a result of the consent decree that was entered in that federal court litigation, Norman v. Johnson, families may now receive targeted housing and cash assistance when environmental neglect issues are being investigated. 930 F. Supp. 1219 (N.D. Ill. 1996) sub nom. Norman v. McDonald (enforcement action regarding monitoring of the 1991 Norman consent decree).

Mothers with mental illness may have protections under federal laws prohibiting discrimination on the basis of actual or perceived mental illness. See 42 U.S.C. § 12102 (Americans with Disabilities Act) (defining disability to include impairment or “being regarded as having such an impairment”); see also 28 C.F.R. § Pt. 25, App. B, 35.104 (explaining that the determination that an individual poses a risk to the health or safety of others “may not be based on generalizations or stereotypes about the effects of a particular disability . . . [but] must be based on an individualized assessment” of whether the threat will actually occur); see also Bragdon v. Abbott, 524 U.S. 624 (1998) (the risk assessment [under the “direct threat” provision of the ADA] must be based on medical or other objective evidence. . . .”).

Teen mothers may rely on commitments that Illinois DCFS made in Hill v. Erickson (supra), and may, with the assistance of legal and social-service advocacy, be able to access school-based support services and community resources to assist them with daycare and other needs.

Specific advocacy for social-services supports for mothers will have spillover benefits in reducing the intervention of child-protection services in cases like Cindy’s, where a child-care snafu became the occasion for a child-protection hotline call.

Strategies that cut across all of the Mothers’ Defense Project areas have even more potential, however, to change the gender biases of the system. The separate strategies listed above do not address a central problem in the Mothers’ Defense Project cases: the breadth of the child-neglect laws themselves and their liberal allowance of discretionary judgments by child-protection investigators. The definition of neglect, which often includes things such as subjecting a child to an “injurious environment,” is considered an “amorphous concept that cannot be defined with particularity.” In re Arthur H., 212 Ill. 2d 441, 463 (2004) (quoting In re N.B., 191 Ill. 2d 338, 346 (2000)). See, e.g., S. D. Codified laws §§ 26-8A-2 (2010) (defining neglect as a child’s
“environment is injurious to his welfare”); Ohio Rev. Code Ann. § 2151.04 (child’s “condition or environment . . . warrant the state in the interests of the child, in assuming his guardianship”). But it is precisely because child neglect is viewed as sui generis, amorphous, and potentially limitless that gender-plus discrimination has flourished, enabling courts to avoid careful analysis of the specific harm to a child that a specific parent has caused.

One potentially effective and cross-cutting strategy for eliminating gender-plus discrimination is to limit the definition of child neglect, both under juvenile-court acts and under abuse- and neglect-reporting acts, which may have slightly different definitions and somewhat different purposes. By narrowing the grounds of neglect to real deprivations of care by a parent whose actions directly caused or contributed to the child’s condition, many of the categories of gender-plus discrimination would effectively disappear. For example, the status of having a mental health condition, such as depression, serves as a proxy for child neglect only if the definition of neglect does not require some specific harm to the child or actions by the parent. By requiring a showing of a specific action or specific failure to act that results in harm to a child, rather than amorphous “risk” of harm, large categories of stigma-based findings of neglect would be eliminated. Similarly, the status of being a victim of domestic violence would no longer suffice as a basis for a neglect registry if the definition of child neglect expressly excluded parents who did not themselves cause any injury to their child or other persons in the home.

Two successful appeals in Illinois, along with a successful effort to narrow DCFS-proposed legislation, have taken aim at exactly this issue: narrowing the definition of child neglect under the Illinois Abused and Neglected Child Reporting Act (ANCRA). The first of the two appellate cases that the Family Defense Center has pursued in an effort to narrow neglect grounds is Slater v. DCFS. In Slater, the Illinois Appellate Court addressed the case of a freak accident that happened to the child of the Family Defense Center’s client, Asia, a teen mom whose case was handled by pro bono counsel at McDermott, Will & Emery. Because Asia had been doing a high-school art project when her toddler suddenly grabbed a colored pencil and fell on it, puncturing the skin on her neck, DCFS was immediately called, even though Asia and her mother sought very prompt medical care and consistently explained the split-second accident that Asia could not have prevented. On two levels of appeal, Asia lost her claims that doing an art project with pencils in the same room as her daughter did not amount to child neglect. In a precedent-setting opinion, however, the appellate court declared that the Illinois law defining neglect did not extend to an accident that was not foreseeable. An injury by itself was insufficient to label a parent a perpetrator of child neglect. The appellate court ruled that it was incumbent on DCFS and its administrative law judges to determine that the injury “was the result of Asia’s neglectful conduct.” Given that Asia was “generally attentive” to her daughter and had a history of being a good mother, merely having pencils in the same room as an infant was not “neglectful conduct.” Therefore, the appellate court’s reversal of the neglect findings against Asia has created a precedent requiring evidence of neglectful conduct rather than a stereotype or presumption.

In the more recent case of Julie Q. v. DCFS, 2011 Ill. App. LEXIS 1299 (Dec. 22, 2011), the Illinois Appellate Court went even further and held the entire category of “environment injurious” findings, under which a large percentage of our Mothers’ Defense Project cases are
indicated, to be void. Julie Q. was a recovering alcoholic whose ex-husband harassed her with DCFS calls, claiming she was drinking, even though an AA sponsor and a substance-abuse counselor, among others, denied it. Nonetheless, Julie’s vindictive ex-husband was able to manipulate DCFS to make an indicated finding. Even though her nine-year-old daughter was unharmed, except by the aggressive custody battle itself, DCFS sustained an indicated finding against Julie at an administrative appeal, and a state circuit court upheld this decision in an administrative review action.

On further appeal to the Second District Appellate Court, argued by the Family Defense Center’s pro bono attorney Michael Otto of Jenner & Block, the appellate court struck the “environment injurious” rule under which Julie Q. had been labeled neglectful as “void.” The basis for the decision was simply that the Illinois legislature had explicitly removed the phrase “environment injurious” from the definition of neglect in the enabling statute (in other words, the Abused and Neglected Child Reporting Act) in 1980. Despite that legislative repeal, the child-protection agency later adopted an administrative rule defining “substantial risk due to an environment injurious” as a category of neglect subject to investigation and registry. Indeed, the category is currently used so prevalently that more than a third of the investigations in Illinois include this ground; more than 13,000 persons each year are indicated and registered as child neglectors under this category.

As this article was being written, briefing was underway before the Illinois Supreme Court in Julie Q., with the court having granted the child-welfare agency’s petition for review. See 2012 Ill. LEXIS 605. Simultaneously, DCFS sought to introduce legislation to enable the rule that has operated without legislative authority since 1980. But domestic-violence advocates and mental-health advocates have joined forces with family advocates in the battle to narrow the grounds for state intervention by limiting the environment injurious ground. Clear limiting language in an amended bill has passed both houses of the Illinois General Assembly. Without the background of representing dozens of mothers in ill-conceived environment injurious cases, and without first prevailing in the appellate court in the Julie Q. case, it is very doubtful that the Family Defense Center could have stopped DCFS from securing new legislation that could have effectively overturned the Julie Q. decision.

It is hoped that these efforts will bear fruit. This combined appellate and legislative advocacy has the potential to reduce the number of investigations against all the mothers that the Family Defense Center currently represents. At the same time, however, efforts to increase child-abuse reporting are also underway in the wake of the Penn State scandal, creating increases in hotline calls without simultaneously increasing public understanding of how improperly conducted investigations can enforce gender biases. Accordingly, the child-protection system is likely to continue to severely impact mothers who have not abused or neglected their children.

It is for these reasons that the Family Defense Center considers public education and legal training integral tools in the Mothers’ Defense Project’s strategic toolbox, along with its legal and policy advocacy. Speaking in the community; aligning with organizations that work on behalf of domestic-violence victims, teen mothers, poor families, and parents and children with
disabilities; and writing articles for the child-advocacy and legal community are all essential strategies to developing a consensus that our child-abuse laws and policies are being applied unfairly to mothers and are harming their children.

This consensus is starting to form. The Family Defense Center is cautiously optimistic that, by continuing to highlight the ways in which child-protection policies operate with gender-biased stereotypes in place of evidence, a fairer system will eventually take hold.

**Keywords**: litigation, children’s rights, gender-plus bias, Family Defense Center, Mothers’ Defense Project, legal community

Diane L. Redleaf is the executive director of the Family Defense Center. Melissa L. Staas is the Family Defense Center’s lead attorney for its pro bono program and the Mothers’ Defense Project. The authors acknowledge the assistance of Kennedy Cabell, University of Alabama Law School Class of 2013, for her research contributions.
Adoption Subsidies Are Unchecked for Fraud

By David J. Lansner and Carolyn A. Kubitschek – July 9, 2012

In 2010, the federal government paid $2,501,000,000 to states under the Adoption Assistance and Child Welfare Act. Hundreds of millions of dollars of that money may have been fraudulently collected by adoptive parents who no longer support their adoptive children, made possible because the U.S. Department of Health and Human Services has prohibited the states from even investigating the fraud. States have lost an equal amount of money.

The U.S. government has long provided funds to states to operate foster-care programs, initially under the federal Aid to Families with Dependent Children program (AFDC). Like Aid to Dependent Children (ADC), the foster care program provided a monthly stipend for each eligible foster child. Like ADC, the money was paid to the adult caretaker (the foster parent) for the support and benefit of the child. As soon as a child left foster care, the monthly payment ended, whether the child left foster care to be reunited with his or her parents or to be adopted by new parents.

An unintended consequence of the program was that it discouraged adoptions by foster parents. As soon as a foster parent adopted his or her foster child, the foster-care maintenance payments stopped. Many foster parents were of modest financial means and could not afford to support children without the foster-care maintenance payments. In addition, many foster children required a large amount of support because of their special health, behavioral, or other problems. Accordingly, many children who had no hope of ever returning to their parents simply languished in foster care because the foster parents who loved them could not afford to adopt them and lose the foster-care payments, and no other adults were willing to adopt children who had so many problems.

In 1980, Congress enacted the Adoption Assistance and Child Welfare Act, which, among its many provisions, created a statutory scheme to encourage people to adopt children with special needs who were in the states’ foster-care program by providing subsidies for the adoptive parents. The explicit purpose of the adoption assistance program, as articulated by the U.S. Department of Health and Human Services (HHS) Children’s Bureau, is to “remove barriers and contribute to an increase in adoption of children with special needs.” The statute implements its purpose by providing matching federal funds to state programs. The matching federal funds are contingent on a state “plan approved by the Secretary” of HHS, with the requirement that the state “administer, or supervise the administration of, the program.” 42 U.S.C. § 671(a)(2); see Administration for Children’s Families (ACF), HHS, Programs and Funding: Title IV-E Adoption Assistance.

The statute authorizes adoptive parents in participating states to receive reimbursement for one-time, nonrecurring adoption expenses and for monthly maintenance payments for the ongoing expenses associated with caring for the children. The amount of the monthly adoption subsidy payment for a child is determined by an agreement between the prospective adoptive parent and
the state. It states that the amount may be readjusted periodically, “with the concurrence of the adopting parents,” but may never be greater than the amount that the child would receive if he or she had remained in foster care. 42 U.S.C. § 673(a)(3).

The agreement between the adopting parent and the state is a “written agreement, binding on the parties to the agreement” that “specifies the nature and amount of any payments, services, and assistance to be provided under such agreement.” 42 U.S.C. § 675(3)(A).

A 2008 study conducted by the National Resource Center for Family-Centered Practice and Permanency Planning found that maintenance payments are around $400 to $900 per month. The average base amount nationwide is about $350 a month. The federal government generally reimburses the states for 50 percent of the payments, although in some cases it pays a larger percentage. In 2010, according to tables released by the Administration for Children and Families, the federal government paid $2,501,000,000 to states for adoption assistance, including one-time reimbursements and monthly maintenance payments. Thus, states probably paid about $2 billion of their own money in adoption assistance payments.

Federal statutes 42 U.S.C. § 673 and 42 U.S.C. § 675 mandate that states terminate adoption assistance payments when any one of three events takes place:

1. The child ages out of the program by turning 18, if healthy—although states may, at their option, extend the program adoption assistance program to age 19, 20, or 21—or 21 if handicapped;
2. The state determines that the adoptive parent is no longer legally responsible for supporting the child; or
3. The state determines that the adoptive parent is no longer actually supporting the child.

Adoptive Parents’ Failure to Support Their Children
While there may be many reasons that a parent is no longer supporting his or her adopted child under the age of 18, the most common scenario is that the child has stopped living with the parent. That may be the result of a divorce in which the state makes adoption assistance payments to one parent while the other parent has custody. More common are the cases where the child has left the home. Many children adopted from foster care run away from their adoptive parents or are forced out by them. The children may be put with another adult, return to their birth parents, return to foster care, live on the streets, or be incarcerated.

Because ACF guidance to states allows little room for states to monitor adoption assistance recipients’ eligibility, there is no data on the total number of children who prematurely leave the homes of parents receiving adoption assistance. Available data suggest that the number of adopted children who do not live with their adoptive parents until they turn 18 is significant. Nina Williams-Mbengue, program director at the National Conference of State Legislatures, found that 10–25 percent of pre-adoptive placements disrupt before adoption proceedings are finalized, and 10–15 percent of adoptions dissolve after they are finalized. Some practitioners believe that the numbers are much higher. That substantial fraction should not be surprising; children adopted out of foster care tend to have serious emotional and physical scars from their
“frequent displacement, exposure to drugs and alcohol from birth and at other points in their lives and other forms of abuse.” Nina Williams-Mbengue, Moving Children Out of Foster Care, The Legislative Role in Finding Permanent Homes for Children [PDF].

Some adoptive parents find raising such children too difficult and voluntarily surrender those children. In other cases, the children run away, either because they want to live without restrictions or because of abuse in the adoptive home. Indeed, some states, such as Wisconsin, even define categories of “hard to place children” who are eligible for adoption assistance, in part, by their tendency to run away. A child who is moderately difficult to care for may “run away four to seven times a year and three or four days at a time,” while a child who requires intensive care may “run away for long periods of time (eight or more times a year and five or more days at a time.”)” North American Counsel on Adoptable Children, Wisconsin State Subsidy Profile, Question 4.

Diane Riggs of the North American Council on Adoptable Children has pointed out that pressure on states to increase adoption rates may in fact be leading to an increase in the number of adoptions that fail as states encourage adoptions by foster parents who are not actually capable of meeting the children’s needs. Diane Riggs, Plan, Prepare, and Support to Prevent Disruptions. In the 1990s, disruption rates after adoption “for children with physical, mental health and developmental problems, range from approximately 10% to approximately 25%.” (Sheena Macrae, Ed., Disruption & Dissolution: Unspoken Losses [PDF]. For an extensive discussion on subsidized adoption failures, see Dawn J. Post and Brian Zimmerman, “The Revolving Doors of Family Court: Confronting Broken Adoptions.” 40 Cap. U. L. Rev. 437 (2012).

Oversight of Adoption Assistance Payments
As stated above, federal law requires a state to terminate adoption assistance payments when the state determines that the adoptive parent is no longer actually supporting the child. The statute does not explicitly provide a mechanism for a state to make such a determination. The sole provision in the statute is for self-reporting on the part of the adoptive parent: Persons “who have been receiving adoption assistance payments . . . shall keep the State . . . informed of circumstances which would, pursuant to this subsection make them ineligible for the payments, or eligible for the payments in a different amount” (42 U.S.C. § 673(a)(4)(B)).

Other federal benefit programs do not rely solely on the recipients to advise the government when they are no longer eligible for benefits. Many recipients simply will not advise the government and continue to receive benefits, even if they are no longer eligible. While knowingly accepting government benefits to which one is not entitled is, of course, a crime, many other federal-benefit programs do not rely on recipients’ honesty, combined with the threat of criminal prosecution, to ensure that people stop receiving the benefits when they become ineligible. Instead, many programs contain explicit provisions for the administrators of the programs to determine individuals’ continuing eligibility for benefits on a recurrent basis.

The Temporary Assistance for Needy Families (TANF) program requires states to develop procedures to track the income of people receiving payments through state TANF programs, efforts to gain employment, and the number of children living in a household, but the Social
The Social Security Act supplies no rules on what those procedures should be. States develop their own procedures to track benefits recipients and discourage fraud—for example, the Supreme Court noted in the 1971 case *Wyman v. James* that California had instituted a home-visit requirement in order to discourage fraud. The Social Security Act also does not explicitly allow states to condition benefits on cooperation with state monitoring procedures. Nonetheless, it is common practice for states to condition welfare eligibility on consent to home visits by a government employee, and the Court found in *Wyman* that mandatory home visits for welfare recipients do not violate the Fourth Amendment. The intrusiveness of home visits varies by state. San Diego’s 100% Project requires TANF recipients, even those whose documentation is up to date and who are not suspected of committing fraud, to consent to home visits to verify their eligibility. The unannounced home visits, during business hours, include an interview and a 5- to 10-minute walk through the house by plainclothes investigators from the district attorney’s office. Other TANF programs, such as Montana’s, require a home visit only if, for instance, the recipient fails to or is unable to attend a mandatory meeting or eligibility interview.

The Supplemental Security Income program, which provides benefits to disabled, indigent adults and children, does not rely solely on self-reporting by beneficiaries. Rather, the statute itself authorizes the Commissioner of Social Security to determine how often to determine recipients’ eligibility for benefits and the amount of benefits for which they are eligible.

Even the Social Security program, which provides insurance benefits to disabled workers and their dependents who have paid into the system through Federal Insurance Contributions Act (FICA) withholding, does not rely on self-reporting by beneficiaries. Instead, the government reviews disability determinations at least once every three years.

There is no language in the Adoption Assistance Act suggesting that self-reporting is the exclusive means of authorized oversight. On the contrary, 42 U.S.C. § 673(a)(4)(A) prohibits states from issuing payments to parents no longer supporting the adopted children, saying that a “payment may not be made . . . with respect to a child . . . if the State determines that the child is no longer receiving support from the parents or relative guardians.” (emphasis added). The statute imposes on adoption assistance recipients the duty to report to the state if their circumstances change, but it does not provide guidance on how the state should act to make continuing eligibility determinations.

The fact that the statute contemplates individualized Adoption Assistant Agreements to govern the details of assistance payments and allows states to develop their own plans for implementing the statute suggests that Congress intended to leave significant discretion to the states in implementing their adoption assistance programs.

**Federal Policy on Enforcement**

The official U.S. policy on re-determination of eligibility for adoption assistance is found in the [HHS Child Welfare Policy Manual](https://www.acf.hhs.gov/ocfund). In Q&A format, the manual states:

1. **Question:** What are the requirements for re-determinations of title IV-E adoption assistance eligibility?
Answer: The title IV-E adoption assistance program does not require redeterminations of a child’s eligibility. . . .

2. Question: Some States are requiring adoptive parents to complete annual renewals of their adoption assistance agreements. Does title IV-E require the State or local agency to perform annual renewals or eligibility determinations for adoption assistance?

Answer: No. There is no Federal statute or provision requiring annual renewals, recertifications or eligibility re-determinations for title IV-E adoption assistance.

While the Child Welfare Policy Manual itself does not prohibit states from re-determining eligibility (though it explicitly does not require states to re-determine eligibility), the HHS ACF has taken the extraordinary step of barring states from periodically re-determining eligibility for adoption assistance payments: “ACF advised against any intensive or intrusive inquiry into an adoptive family’s life. . . . ACF informed [New York State] that the state cannot terminate or suspend adoption assistance if the adoptive parents fail to reply to the state’s request for information.” Therefore, while the state may request information from the adoptive parents relating to the continued eligibility for adoption assistance benefits, the adoptive parents may ignore such requests with impunity. New York State Office of Children & Family Services, Administrative Directive, 09-OCFS-ADM-11 [PDF], Adoption Subsidy and Education Requirements for Adoptive Children (May 7, 2009).

HHS spokesperson Shari Brown stated the agency’s position even more bluntly, saying that “suspensions or reductions in a title IV-E adoption assistance payment are not permitted without the concurrence of the adoptive parents. . . .” Email message from Shari Brown to David J. Lansner, October 11, 2011.

The HHS interpretation of the statute thus makes it extremely difficult for the states to carry out their obligation to determine whether the adoptive parent is actually supporting the child. Indeed, at least one state has concluded that, even if the state knows that the adoptive parent is not supporting the child, the state is prohibited from suspending adoption assistance payments to the parent. In Ohio, even if an adopted child goes into foster care and the government is supporting the child, the state may not suspend adoption assistance payments to the parents. The most that the state of Ohio believes it can do in such a situation is to “renegotiate” the amount of the adoption assistance payment “with the concurrence of the adoptive parent.” See the Adoption Subsidy and Policy Blog.

The reason that HHS gives for prohibiting states from carrying out their statutory responsibility to determine whether the adoptive parent is no longer supporting the child and is consequently no longer entitled to adoption assistance benefits is that adoption assistance benefits are an “entitlement.” If states impose harsher requirements than those contemplated by Congress, they will deprive people of adoption assistance who are entitled to it under the Social Security Act. Therefore, ACF warned, while “attestations and affidavits by the adoptive parents” are “acceptable means of verifying support” (they fall under the self-reporting requirement quoted above), the state should not carry out “any intensive or intrusive inquiry into an adoptive family’s life.” 09-OCFS-ADM-11, p. 4.
Federal Policy Interferes with States’ Ability to Enforce Law, Prevent Fraud

The term “entitlement” refers to a property interest, created by statute, which may not be discontinued as long as the beneficiary remains eligible to receive it. The U.S. Supreme Court first used the term in the 1970 case *Goldberg v. Kelly* in connection with welfare benefits, specifically Aid to Families With Dependent Children. Six years later, in *Matthews v. Eldridge*, the Supreme Court also ruled that Social Security Disability benefits are an entitlement. While the Supreme Court has not reached the issue, the Ninth Circuit has ruled in the 2005 case *ASW v. Oregon* that adoption assistance benefits are an entitlement.

The fact that a benefit statute creates a property interest, or an entitlement, does not, however, mean that the recipient of those benefits is entitled to receive benefits in perpetuity. Rather, as the Supreme Court held in both *Goldberg v. Kelly* and *Matthews v. Eldridge*, it means only that the state may not deprive the individual of benefits without due process of law. As long as the state provides the recipient with notice and an opportunity to be heard at a meaningful time and in a meaningful manner, it satisfies the recipient’s procedural due-process rights. Thus, even if adoption assistance benefits are an entitlement, the fact of entitlement merely guarantees that recipients are entitled to some kind of hearing prior to the termination of their benefits. The fact of entitlement does not guarantee that recipients will win their hearings and continue to receive benefits, even if they are no longer eligible.

Moreover, the fact that both welfare and Social Security disability benefits are entitlements does not prohibit the state or federal government from determining whether the recipients continue to be entitled to receive benefits—a decision that, if negative, would trigger the procedural due-process requirements of notice and an opportunity to be heard. Nor should the states be precluded from determining whether adoption assistance recipients continue to be eligible for those benefits. Requiring adoption assistance recipients to complete and return to the state a questionnaire once a year providing information as to whether they continue to support their adopted children does not run afoul of the due-process clause. Nor does it interfere with either the recipients’ entitlement to receive benefits as long as they remain eligible or the recipients’ right to notice and an opportunity to be heard if the state determines that the recipients’ eligibility has ceased.

A Proposed Solution

While HHS apparently believes that it would be unconstitutional to require adoption assistance recipients to complete a brief questionnaire once a year and that failure to do so would trigger the due-process requirements of notice and a hearing on the termination of their benefits, other procedures exist in analogous situations. Congress recently expanded the adoption assistance program to include benefits to relatives who become legal guardians for children under “kinship guardianship programs.” See 42 U.S.C. § 673(d). The kinship guardianship program mirrors the adoption assistance program in numerous ways, including the requirement that benefits will be terminated when the state determines that the relative guardian is no longer providing any support for the child. 42 U.S.C. §673(a)(4)(A)(iii).
The state of New York has a procedure for re-determining eligibility for benefits under its Kinship Guardian Assistance Program (KinGAP). New York permits localities to take the following steps when there is “reasonable cause to suspect that the relative guardian . . . is no longer providing any support for the child.”

“[R]equire the relative guardian(s) to submit documentation” or attend a meeting to “address[] and verify[] the continuing responsibility of the relative guardian to support the child and the provision of support of the child by the relative guardian(s).” In determining how to investigate a given case, social services must consider the individual circumstances of the relative guardian and child, such as availability for meetings and employment situation.

“If the relative guardian is unable to make the scheduled meeting for reasons beyond the guardian’s control, the district must provide the relative guardian with one additional opportunity to meet in accordance with the standards set forth in this section.”

The relative guardian’s “failure to provide the requested documentation within the period requested or to meet with social services district staff as directed, may be a ground for termination of the kinship guardianship agreement and stopping payments of kinship guardianship assistance.” See the New York State Office of Children and Family Services, Administrative Directive, Transmittal 11-OCFS-ADM-03, Kinship Guardianship Assistance Program (KinGAP), pp. 20–21, April 1, 2011 (Revised July 6, 2011).

New York procedures also warn that “any follow-up letter sent by the social services district [must] indicate the consequences of failure to follow up in the manner prescribed by the social services district.” This procedure gives recipients numerous opportunities to verify their continuing eligibility for benefits.

Suspension of benefits based on a recipient’s failure to respond to one request for documentation of continuing eligibility might create a risk of erroneous deprivation of benefits. However, if a recipient fails to respond to multiple requests for documentation and interviews, as New York procedures for KinGAP outline, a state could reasonably suspect that the recipient is not responding because he or she is hiding a change in circumstances. The risk of erroneous deprivation would be less. Moreover, as the Court stated in Joint Anti-Fascist Comm. v. McGrath and quoted in Matthews v. Eldridge, the “essence of due process is the requirement that ‘a person in jeopardy of serious loss (must be given) notice of the case against him and opportunity to meet it.’” Several requests for documentation and notices would give a recipient ample opportunity to defend his or her position.

Conclusion
The HHS limitation on how states may enforce adoption assistance eligibility requirements has no legal basis. Neither the Social Security Act nor the Constitution restricts states from requiring recipients to submit to annual interviews or minimally intrusive inquiries as to their continuing eligibility for benefits. Neither the statute nor the Constitution bars states from suspending or terminating payments when recipients fail to submit documentation verifying their continued eligibility for adoption assistance. By supporting state efforts to collect data on the number of
failed adoptions by proactively monitoring adoption assistance recipients, both the federal
government and the states can ensure that only individuals who remain eligible for adoption
assistance benefits continue to receive them. This is no small matter, considering the cost of the
adoption assistance program and the number of adoptive parents who stop supporting their
adopted children at some point during the children’s minority. Such a policy also has the
potential to reallocate significant sums of money that would otherwise be wasted on fraud to
services that increase the number of successful adoptions—the very purpose of the adoption
assistance program.

Keywords: litigation, children’s rights, adoption, Adoption Assistance and Child Welfare Act,
subsidies, fraud

Carolyn A. Kubitschek and David J. Lansner are partners at Lansner & Kubitschek in New York, New York.
Recognizing and Addressing LGBTQ Issues

By Cindy C. Albracht-Crogan – July 9, 2012

Lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth are, unfortunately, overrepresented in the child-welfare system, juvenile-justice system, and homeless population. While involved in these systems or living on the streets, LGBTQ youth experience more harassment, violence, and rejection, and engage in more suicide attempts, than their non-LGBTQ counterparts. The best practices for providing high-quality representation of the unique LGBTQ youth population was discussed during the March 13, 2012, 1.5-hour webinar and telephone conference “Recognizing and Addressing LGBTQ Issues in Your Children’s Law Caseload.” The conference was sponsored by the American Bar Association Section of Litigation, the Center on Children and the Law, the National LGBT Bar Association, and the ABA Center for Continuing Legal Education. The conference featured a panel consisting of attorneys, analysts, advocates, and practitioners who have firsthand knowledge and experience dealing with the struggles of LGBTQ youth who are in the foster-care or juvenile-justice systems or who may find themselves homeless.

Key Terminology and Concepts from the Teleconference

The acronym “LGBTQ” may lead to the conflation of terms related to sexual orientation, which describes to whom a person is attracted, and gender identity, which describes a person’s sense or experience of belonging to a particular gender group. Thus, before a meaningful discussion can take place about LGBTQ youth in the various state and court systems, the panel members first provided the following definitions of key terms and core concepts:

- Lesbian: A woman who is attracted emotionally, physically, and romantically to some other women.
- Gay: A man who is attracted emotionally, physically, and romantically to some other men.
- Bisexual: A person for whom gender is not the first criterion for attraction.
- Transgender: An umbrella term for people whose gender identity or gender expression does not match the cultural norm for the sex assigned to the person at birth.
- Questioning: The process by which people examine or consider their sexual orientation or gender identity.

A greater understanding of the specific meaning of these terms will assist you in explaining the specific challenges your client faces.

Identifying LGBTQ Youth on Your Caseload

It is estimated that somewhere between 4 percent and 10 percent of youth in state care are LGBTQ-identified, meaning that they have publicly identified themselves as LGBTQ to you or to others; however, it is important to note that the calculation is only an estimate, the panel said. There is no clear statistic that can accurately quantify the extent of the LGBTQ youth population in the state-care or juvenile-justice systems. The National Center for Crime and Delinquency...
recently conducted a survey of young people in Juvenile Detention Alternatives Initiative detention centers. In connection with that study, at least 15 percent of the youth sampled identified as LGBTQ or indicated that they engaged in gender-nonconforming behaviors. In addition, there is a higher rate of LGBTQ youth in the child-welfare and juvenile-justice systems, as LGBTQ youth are disproportionately subject to abuse and neglect in their families of origin.

In respect to homeless LGBTQ youth, there have been multiple research studies conducted within the last three decades. Those studies demonstrate that one in five homeless youth identify as LGBTQ and that, each year, between 240,000 and 400,000 LGBTQ youth experienced at least one night of homelessness in America.

Consequently, if you carry a caseload of youth in foster care and/or the juvenile-justice system, chances are you are representing at least one LGBTQ youth who may or may not have identified himself or herself as LGBTQ. But if a youth has not self-identified, there is really no way to determine whether a specific youth is LGBTQ. There are, of course, benefits to LGBTQ youth that an advocate can more readily provide if the youth identifies as LGBTQ. If an LGBTQ youth self-identifies to his or her attorney or case worker, that advocate can then direct the youth to the services, the counseling, and the placement that will best serve the youth’s interests. However, the goal should not be to force a youth to identify as LGBTQ. It is the client that should be in control of whether he or she ultimately identifies as LGBTQ. The identification should not be forced on anyone. The panel stressed that clients must be afforded that privacy, confidentiality, and control—even if the advocate believes that it would be in the youths’ best interests to publicly identify. The best way to encourage clients to be open and honest about their sexuality is to earn their trust. A youth may be more apt to identify as LGBTQ if, for example, an advocate uses gender-neutral language or hangs a poster in his or her office that will encourage the youth to be open. The panel agreed that every client should be treated in the same way so that you appear trusting and nonjudgmental.

Whether identified or not, the label placed on a client may ultimately be a distinction without a difference. Some of the non-LGBTQ youth on your caseload may experience the same difficulties and challenges as an LGBTQ youth if society perceives them as being LGBTQ or if a youth’s gender expression does not comport to what is appropriate for that particular gender. As a result, the panel discussion about challenges faced by LGBTQ youth applies not only to those youths who are LGBTQ-identified, but also those who are perceived by society as LGBTQ or who have gender-nonconforming behaviors.

**Increased Difficulties and Challenges for LGBTQ Youth**

LGBTQ youth can experience challenges that are largely unique to the LGBTQ youth population. According to the panel, it is important to identify and understand these difficulties and the potential consequences so that advocates can better serve their LGBTQ clients.

For example, there is a higher rate of drug and alcohol abuse among the LGBTQ youth in the child-welfare and juvenile-justice systems. LGBTQ youth report that they frequently use drugs and alcohol to cope with some of the abuse and intolerance that they experience in their schools, homes, or placement facilities. LGBTQ youth may also use alcohol or drugs to fit in if they feel...
as though they do not have a social group that accepts them. Another troubling statistic is that LGBTQ students are three times more likely to report carrying a weapon to school. This factor could have significant effects, including expulsion, suspension, and additional strife at home.

Foster care may also be more likely to serve as a pathway to detention and/or homelessness for LGBTQ youth due to the intolerance they experience in their homes or placements. During discussions with LGBTQ youth across the nation, the youths uniformly reported that they were often verbally and/or physically abused by their parent or guardian, verbally harassed by others if they were perceived as LGBTQ, and not permitted to dress and express themselves as they preferred. They also reported that they hide their sexuality in fear of reprisal.

A common perception is that LGBTQ youth run away because their families have abandoned or rejected them. While that is still true, the panel pointed out that research shows there is a cadre of reasons that result in LGBTQ youth being pushed out into the streets. A high incidence of family physical abuse, sexual abuse, and neglect can propel LGBTQ youth into the streets. But even ongoing family conflict, without any physical abuse, can result in LGBTQ youth running away from home. Parental addiction and poverty can also result in homelessness, as youth believe that they can better meet their needs on their own. Youth can also age out of foster care or other placements and find themselves with nowhere to turn. At 18–20 years old, these youths do not have the necessary skills or income and often end up in shelters.

Once homeless, LGBTQ youth have a higher incidence of victimization when living on the streets. They become a target for prostitution, stripping, and pornography, and sometimes trade sex in return for basic needs. One study shows that LGBTQ homeless youth experience 7.4 more acts of homeless violence than their heterosexual homeless peers, and they are also solicited to exchange sex for money, food, shelter, or clothing more often than their heterosexual peers. Thus, LGBTQ youth are more likely to be incarcerated for running away from home or placement, prostitution, or other status offenses than their non-LGBTQ counterparts.

When LGBTQ youth commit a crime, they are more likely to be arrested and/or convicted than their non-LGBTQ counterparts. Specifically, a 2010 study conducted by the American Academy of Pediatrics found that lesbian, gay, and bisexual youth are 40 percent more likely to be arrested and convicted in juvenile and adult criminal court. Additionally, LGBTQ youth in detention centers that do not have LGBTQ policies tend to travel deeper and deeper into the system. Harassment in detention centers leads to administrative segregation, isolation, or lockdown. These types of penalties do nothing to help rehabilitate the youth and have negative repercussions in court.

Finally, LGBTQ youth are also at risk for a mental-health disability. The suicide rate for LGBTQ homeless youth is 60 percent, while the suicide rate for heterosexual homeless youth is 29 percent.

All of these experiences make it much harder for the youth to engage in a trusting relationship with an adult who is, perhaps, attempting to propel the youth into self-sufficiency. The panelists
cautioned that these problems faced by LGBTQ youth occur everywhere—even in cities that are more tolerant and supportive of LGBTQ rights.

**How Attorneys, Caseworkers, and Other Involved Adults Help**

The panelists discussed the multiple ways that you can assist the LGBTQ youth on your caseload, depending on their varied circumstances. As an advocate, you may be uniquely situated to make a life-altering, positive impact on the life of an LGBTQ youth. Indeed, many critical decisions about a child’s future will be made in court. You may be the only person in the courtroom who has any knowledge regarding the services and placements that will best assist an LGBTQ youth.

*Finding Appropriate Placement for LGBTQ Youth*

LGBTQ youth uniformly report that they feel most harassed or discriminated against in their group home or foster home. Thus, the most important thing an advocate can do to assist an LGBTQ youth is to locate a placement that is safe, affirming, and permanent. To find such a placement, an advocate should work to become knowledgeable about the services and placements that best serve LGBTQ youth in the geographical area in which they practice. An easy and effective way to become knowledgeable about appropriate placements in your area is to ask your client. Often, LGBTQ youth know exactly where they will feel safe and where they will not. Asking your client a direct question may yield better results than hours of research.

The panel also suggested that advocates look in places where placement for LGBTQ youth may not be obvious. For example, there may be a group home with religious tenants that are not necessarily tolerant to LGBTQ lifestyles. While this type of religious affiliation may initially provide an advocate with cause for concern, you should not make assumptions based on religious or political factors alone. Research the organization or group home and talk with the staff. There may actually be some support for LGBTQ youth within that organization or group home.

Appropriate placement can also be found through contact with LGBTQ community centers or LGBTQ drop-in centers in their cities. Moderate- to large-sized cities may have these and other resources for LGBTQ youth. By contacting these agencies, you can locate agencies that provide support for LGBTQ foster kids and foster parents and locate community groups that are actively involved with the LGBTQ community in an attempt to locate suitable foster parents. In some states, like New York and California, there are specialized group homes or placements for LGBTQ youth. In some situations, regretfully, LGBTQ youth are sent out of state to these facilities due to a shortage of placements in their hometowns.

It is preferable for an advocate to determine an appropriate placement in advance of the placement. Unfortunately, however, a client is often already in a placement when he or she identifies as LGBTQ and informs his or her advocate that the current placement is not affirming. In this situation, it is imperative that attorneys and case workers express to all interested adults—including the court—that the current placement is not affirming and not safe. Words like “safety,” “permanency,” and “affirming” are critical buzzwords that should be used to alert the court that immediate action is required. In addition, it is also wise to inform the court that a nonaffirming placement will make adoption and/or reunification difficult. Using these
buzzwords will assist the court in making decisions that will hopefully result in a more positive and permanent placement.

Finally, an advocate should realize that there is a constitutionally protected safety right for children in the foster-care system. This right derives from the Fourteenth Amendment of the U.S. Constitution, which provides all citizens with a right to substantive due process and liberty. The Fourteenth Amendment is specifically applicable to youth in foster care.

Creating a Positive Atmosphere and Maintaining Contact
If an LGBTQ youth is being detained in a facility that does not have policies that protect youth on the basis of sexual orientation, gender identity, or gender expression, an advocate can use his or her influence in the system to create and implement policies that will protect the client and all LGBTQ youth being detained in that facility. The first step in helping to create these policies and to address the general lack of understanding of LGBTQ youth is to approach the facility with a plan. Advocates should then consult with psychologists, social workers, and counselors to assist with the education and training process.

Advocates should also think about post-disposition representation when working with young people in detention or long-term facilities. It is difficult for public defenders to continue to monitor the youth and make visits to the facilities. Thus, it is important for an advocate to keep in touch with the youth while he or she is in detention. Advocates can partner with law students, a juvenile-justice reform agency, or local protection advocacy groups if a client has a disability to maintain contact with the youth. This follow-up is important, as it will assist an advocate in better representing the youth the next time he or she is back in the courtroom.

Helping a Family Accept an LGBTQ Child
We tend to assume that when parents are not supportive of their LGBTQ child, it is because they are ill-intended. However, the panel agreed that personally meeting with the family could produce a different perception and/or reality. Often, parents are simply acting in a manner that they believe will be in the best interests of the child. For example, parents may be fearful that a child will experience significant difficulties as a result of being LGBTQ-identified and, as a result, will discourage any nonconforming gender behavior. This conduct does not result from being ill-intended; it is a natural and positive instinct to protect the child from what they believe is a difficult lifestyle.

The panel agreed that the majority of parents of LGBTQ youth love their children and only want the best for them. Although the first inclination is to remove a child from his or her home if it is nonaffirming, talking with the family to improve its ability to accept the child has extreme positive outcomes. Working with families to help them better understand the struggles of LGBTQ youth could result in keeping their children out of the child-welfare and juvenile-justice systems, off the streets, and with their families.

The panel suggested that advocates interested in assisting with a family’s acceptance of a LGBTQ youth should contact the Family Acceptance Project in San Francisco, California, for additional information on this topic.
Supporting a Homeless LGBTQ Youth

In respect to the homeless LGBTQ youth population, an advocate’s understanding of the resources in his or her area is invaluable. It is important to direct homeless LGBTQ youth to shelters, counselors, and other important resources that will best suit their needs. Educating yourself about the resources in the geographic location in which you practice can be invaluable.

In addition, advocates may want to assist homeless LGBTQ youth in obtaining emancipation. If the youth is a minor, he or she obviously has some rights, but not the complete rights handed to an adult that is fully emancipated at 18 years old. This is because the law still recognizes parents as having physical custody of the child. If a child is under state custody as a juvenile delinquent, in a ward of the state, or in foster care, custody rights are shifted to the state. But if the state does not know where the child is, it can be very difficult to navigate custody rights. Nearly every homeless youth will express a desire to be emancipated, but emancipation as a legal status is more of a theory than a standard practice. There is not a clear road map to declaring a youth fully emancipated, as fewer than 15 states have a specified legal process for filing a legal emancipation petition. Attorneys interested in assisting a client with obtaining emancipation should carefully research their state’s existing practice in this area.

Conclusion

The panel made clear that all youth, including LGBTQ youth, have likely been repeatedly let down and disappointed by the adults in their lives. They may have experienced physical abuse, sexual exploitation, neglect, and empty promises. An advocate must be a safe role model—a professional that is a trustworthy and strong advocate that will represent their specific needs in the child-welfare and juvenile-justice systems. Attorneys, case workers, and other advocates have a tremendous amount of status and privilege in society. Advocates should use that status to not only assist our clients, but also highlight barriers to proffering services and ending the discrimination of LGBTQ youth.

Keywords: litigation, children’s rights, LGBTQ, foster care, juvenile-justice system

Cindy C. Albracht-Crogan is with Cohen Kennedy Dowd & Quigley, P.C.
NEWS & DEVELOPMENTS

FTC Offers Resources on Child Identity Theft

If your client’s (or child’s) identity is stolen, what will you do? Identity theft continues to top the list of consumer complaints to the Federal Trade Commission (FTC), the nation’s consumer-protection agency. An identity thief can hijack your tax refund, alter your medical records, prevent you from getting credit or a job, and even borrow money in your child’s name.

New publications from the FTC explain how to protect your child client’s information and your own, along with the immediate steps to take to limit damage from identity theft.

- **Taking Charge: What to Do if Your Identity Is Stolen** [PDF] is a handbook with tips about protecting your information and instructions, sample forms, and letters to help recover from theft.
- **Safeguarding Your Child’s Future** [PDF] is a guide to help parents and guardians protect a child’s information and repair damage caused by theft.
- **Identity Theft: What to Know, What to Do** is an easy-to-copy brochure covering the basics: how to avoid and respond to identity theft.

In addition, three one-minute videos demonstrate habits to protect personal information and the essential first steps to take if your identity is stolen.

**Keywords:** litigation, children’s rights, Federal Trade Commission, identity theft

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

Committee Teleconference Wins ACLEA Award

The Association for Continuing Legal Education (ACLEA) is awarding the Children’s Rights Litigation Committee’s teleconference, “Recognizing and Addressing LGBTQ Issues in Your Children’s Law Caseload,” the Award of Professional Excellence in the Public Interest category in its 2012 ACLEA’s Best Awards. The association will honor the American Bar Association during the group’s annual meeting July 31, 2012, at the Westin Denver Downtown.

**Keywords:** litigation, children’s rights, Association for Continuing Legal Education, LGBTQ

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