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Editor's Note—Spring 2014

This issue of the *Michigan Child Welfare Law Journal* includes an exploration of the need for personality profiling when hiring Child Protective Services (CPS) investigators. In "The Need for a Child Protective Services Investigator Psychological Profile" (Pollack, D. & Eisenberg, K.), the authors begin by looking at the use of profiling when hiring law enforcement officials as an analogy. The authors then go on to discuss the unique stresses of CPS work and explore the possibility that improved screening of candidates may prevent the burnout and turnover pervading this field. Ideal personality characteristics for CPS workers are identified, followed by a discussion of an emerging movement in some parts of the United States to screen prospective CPS workers more rigorously.

In "Lawyer-Guardian ad Litem Review of Relative Placement Decisions" (Miller, T.), the author notes that parents naturally look to relatives to provide necessary substitute care for their children. Grandparents and other relatives currently reside with approximately 7.8 million children nationwide. In Michigan, 8.3% of children resided in a grandparent's or other relative's home in 2010. CPS encourages relative placements if a parent is unable to provide proper care to the child. Relatives are similarly available and willing to serve as foster parents for children who are involved in the child welfare system. The author provides a summary of law and policy pertaining to relative placement during the pre-disposition phase of child protective proceedings and concludes with a list of suggestions concerning LGAL review of a supervising agency's initial placement decision.

In "Unaccompanied Alien Minors: Facing the Federal Immigration Detention System or Child Protective Services" (Cobb, A.), the author summarizes the law and policy affecting unaccompanied alien minors: children who have no lawful status in the United States, are younger than eighteen, and do not have a parent or legal guardian in the United States to provide care and physical custody. The majority of unaccompanied alien minors are detained by the federal government shortly after they cross the border into the United States. This author explains the procedures in place to care for these children and describes how our court system treats unaccompanied alien minors. The author also suggests reforms and further protections for unaccompanied alien minors.

I hope you find all this information useful and interesting.

—Joseph Kozakiewicz

Editorial and Review Board

Message from the Chair

This is an exciting time for the Children's Law Section. The Michigan Supreme Court has rendered decisions in two of the cases that the Children's Law Section filed amicus curiae briefs. The first brief, written by Elizabeth Warner, focused on the One-Parent Doctrine in the case of *In re Sanders, SC 146680.* The second brief, written by Tobin Miller, tackled the issue of juvenile guardianships in the case of *In re COH, ERH, JRG, KBH, SC147515.* Both Supreme Court decisions are included in this edition of the *Child Welfare Journal* for your review.

Please save the date for the Children's Law Section Annual Meeting. The meeting will be held on September 19, 2014 at 9:00 a.m. The keynote speaker will be Michigan Supreme Court Justice David Viviano. We hope that you will make arrangements to join us on this special day. Please check out the "Upcoming Events" article for further details and activities.

Performance based funding is a hot topic in the State of Michigan. Performance based funding is part of the State's efforts "to align social policy with fiscal responsibility to deliver child welfare services". A copy of the Michigan Child Welfare Performance-Based Funding Report can be found in the journal in its entirety. A second report entitled "Funding Michigan's Child Welfare System: An Alternative to Performance Based Funding" provides a counter-viewpoint on the topic.

The Supreme Court "Task Force Report on the Role of the State Bar of Michigan" is not to be missed. All attorneys should be aware of the report recommendations and take the time to make your voice heard if you have an opinion regarding this topic.

The Michigan Council on Crime and Delinquency has just published "Youth Behind Bars". The report examines Michigan's juveniles in the adult system and outlines the case for change in advancing juvenile cases to the adult criminal system. This is excellent information for attorneys that practice in the area of juvenile delinquency.

The Children's Law Section is working on several ideas to provide better service to our membership. Currently, a new website is in the works. This will include a unique system for the listserv. Along with the website, a list of helpful resources is gearing up for release. This includes a new competency manual and evaluator provider list. The Annual Conference (not to be confused with the Annual Meeting) is also being planned. Please look for announcements and information concerning these items over the summer months.

As always, the Children's Law Section is advocating for issues of importance to attorneys. At the top of the priority list is increased funding for juvenile legal work. Activism in this area is being pursued in the hope that support by various committees and organizations will encourage counties and the state to recognize the value and substance of the specialized knowledge and difficult work that is required when representing children and families in these important cases.

Along these same lines, please find attached an article from the Child Welfare Information Gateway that may assist you in your reunification efforts on behalf of your clients.

We hope to see you at the Annual Meeting. Have a great summer!

Best wishes,

Christine Piatkowski

The Need for a Child Protective Services Investigator Psychological Profile

by Daniel Pollack and Khaya Eisenberg

Abstract

This article explores the need for personality profiling when hiring Child Protective Services (CPS) investigators. It begins by looking at the use of profiling when hiring law enforcement officials as an analogy. The article then goes on to discuss the unique stresses of CPS work and explores the possibility that improved screening of candidates may prevent the burnout and turnover pervading this sensitive field. Ideal personality characteristics for CPS workers are identified, followed by a discussion of an emerging movement in some parts of the United States to screen prospective CPS workers more rigorously.

Keywords: Child Protective Services, personality profiling, hiring procedures

Introduction

Personality traits are elemental, stable, essential predispositions that cause individuals to respond consistently to the world around them in particular ways. One's constellation of personality traits, or personality profile, may make an individual more or less suited to fulfilling the requirements of a particular profession. This is especially relevant in the sensitive field of child protective services, which presents a great many complex demands and challenges for its workers. Is there an ideal personality profile for a Child Protective Services (CPS) investigator?

We know that hiring the wrong CPS investigator may result in tragedy. To avoid such a calamity, it seems logical to conduct an in-depth evaluation of a candidate's psychological profile and to compare the individual's results with a psychological profile that has been demonstrated as ideal for this profession. This evaluation could take the form of a battery of standardized personality tests, not dissimilar to those given for potential police officers. The screening of prospective police officers involves an elaborate process that includes, among other things, a high degree of psychological testing and personality assessment.

Of course, screening is necessary for law enforcement employees since police officers are empowered to use lethal weapons, which can have irrevocable consequences. Still, it is surprising that such procedures are used rarely if at all for selecting a child protective services worker[1] whose decisions also carry serious, if longer-term, consequences. A review of the professional literature yields little information on personality profiling for these professionals.

This article advocates exploration of an ideal CPS investigator psychological profile with certain characteristics forming the cornerstone of that profile. Since a great body of literature is devoted to psychological characteristics that are relevant for performance as a police officer, a brief review of this literature serves as a first step toward creating a similar personality profile and screening process for child protective services investigators.

Use of Psychological Profiles in Law Enforcement

The 1990s saw a dramatic increase in the use of psychological assessment as part of the screening process for law enforcement candidates[2]. Police departments have become more cognizant of the costs of hiring unqualified employees, including a wasted investment of time and money spent training candidates who later prove unable to fulfill their duties,[3] lateness and absenteeism which lead in turn to understaffing, overtime pay, and a breakdown of trust among personnel,[4] the financial and time costs of disciplinary interviews,[5] and the costs of police brutality and law-

suits.[6] As such, much research is devoted to identifying the traits that make up an ideal profile for a police officer and the best ways to evaluate these traits.

Guller[7] lists several traits that are relevant to effective performance as a police officer. These traits include intelligence, honesty and integrity, racial objectivity, the ability to accept supervision, motivation to carry out one's duties, dependability and responsibility, and the ability to be assertive without being authoritarian. Other traits include low anxiety and high control,[8] good judgment, lack of impulsivity, conflict resolution skills, team orientation, appropriate motivations for entering the field, ability to deal with tedious or boring tasks, willingness to take reasonable risks, absence of substance use, absence of serious psychological problems, stress tolerance, and absence of sexual disturbance.[9] While many of these traits are relevant to any job (e.g., good judgment; honesty and integrity), some are particularly important for the work of a police officer.

Fischler[10] lists the best methods for screening police officers. He recommends that this screening be completed only by a licensed psychologist and suggests that the screening include objective, validated psychological instruments and a face-to-face, standardized interview only after the psychologist has had the opportunity to review all available background information and test data. The Minnesota Multiphasic Personality Inventory (MMPI) has been found to be a useful tool in screening prospective police applicants,[11] but many evaluators include at least one additional test and possibly an entire battery, selecting from among the California Psychological Inventory (CPI), the Sixteen Factor Personality Questionnaire (16PF), and the Inwald Personality Inventory, among others.[12] Overall, potential police officers undergo a demanding screening process prior to being hired.[13] Much research evidence supports the use of personality assessment as part of the selection process for law enforcement personnel.[14]

In contrast to this multi-step selection process for police officers, instituted in great measure because they are permitted to use lethal force, the selection process for child protection workers varies nationwide[15] but overall seems far less rigorous. A strong case has been made that psychological screening is indicated for selecting capable employees for many law enforcement roles. This would be particularly true in the sensitive and challenging area of child protection.

CPS Stressors and the Need for Improved Screening

Child Protective Services workers' jobs frequently involve heavy caseloads, encounters with negative situations, and hostile interactions with clients, resulting in a high potential for burnout.[16] Burnout is a likely factor influencing the high degree of turnover in this field, with a rate of turnover reported between 30-40% and an average duration of employment cited as less than two years.[17] While studies of burnout in CPS workers frequently cite external causes, e.g., intensity of the job experience and social environment of the work setting,[18] there seems to be little attention paid to the person-environment fit and psychological characteristics of the individual worker, which may be interacting with the demands of the job. This is a discrepancy that has been noted in burnout literature more generally as well.[19]

It is also worth noting that in addition to the likely relevance of individual characteristics to burnout, researchers have posited that social workers' biases, personalities, and temperament influence their decisions in general.[20] Many individual traits have been found to influence not only burnout but also job performance, job satisfaction, counter-productive work behaviors, and turnover.[21] Clearly, the personality structure of CPS workers is an area that warrants examination.

Personality Profile Characteristics for a CPS Investigator

Is there an ideal personality profile for a CPS worker? The Bureau of Labor Statistics[22] lists the following personal qualities as important for a social worker: compassion, listening skills, organizational skills, people skills, problem-solving skills, and time management skills. Parents have reported that they value CPS workers who are caring, respectful, accepting, friendly, genuine, responsive, supportive, and trustworthy.[23]

Findings from research on burnout may also be considered in formulating an ideal personality profile for a CPS worker, given this tension-ridden field's high propensity for burnout and turnover.[24] In general, individuals who are high in neuroticism (i.e., anxiety, insecurity) and low in extraversion (defined as cheerfulness, enthusiasm), conscientiousness (efficiency, diligence), and agreeableness (warmth, supportive-

ness) were found to be more susceptible to burnout.[25] The research suggests, then, that a personality profile that includes emotional stability and low reactivity to stress, positivity, commitment to working hard, and a tendency to be good-natured would be ideal for avoiding burnout in any profession.

In fact, research specifically relevant to CPS workers found that workers who were high in agreeableness were particularly successful when it came to collaborating with other professionals, sharing information with families, and involving families in planning.[26] Another important finding was that CPS workers who were highly conscientious and able to avoid emotional over-involvement with their clients were able to focus on their work duties and complete tasks efficiently, whereas emotional exhaustion led to increased burnout.[27] Realistic ideas about the outcomes of their work were also related to better performance for child protective services workers.[28] These findings further support the utility of personality profiling in making hiring decisions.

Current Screening Procedures for CPS Investigators

Unfortunately, there does not appear to be a standardized procedure that is widely used for ensuring that child welfare workers possess ideal qualities. Testing requirements vary from state to state.[29] Although national agencies recommend a minimum of a bachelor's degree in social work or a related field, and an extensive relevant knowledge base, as recently as 2008 only 40% of states enforced this requirement.[30]

This is unfortunate as research suggests that child welfare workers with degrees in social work have higher job performance and lower turnover rates.[31] Flexibility when it comes to educational qualifications, labeled the "de-professionalization" of the field,[32] may result in a broader range of child welfare workers. In contrast, in the police force, where the field of applicants is restricted to those meeting certain criteria, the psychological functioning among applicants may be more homogeneous.[33]

Researchers have recommended some alternative selection techniques for child welfare agencies. High scores on a cognitive ability test, which measures reasoning, language comprehension, memory, and word fluency, have been found to correlate with employee job performance ratings on critical child welfare tasks such as assessing safety, risk, and progress.[34] Child protective services workers who scored high on a measure of critical thinking were found to be particularly adept at communicating information, writing reports, and evaluating and monitoring safety.[35]

Other recommended instruments include a situational judgment test measuring the applicant's decision-making skills and a measure of time management and organizational skills.[36] Additionally, the Western Regional Recruitment and Retention Project[37] noted that personality tests assessing such traits as stress tolerance, adaptability, dependability, attention to detail, initiative, sociability, conscientiousness, extraversion, emotional stability, agreeableness, and openness to experience could be helpful. They add that tests evaluating a candidate's honesty and integrity have been found to predict job performance and counterproductive behaviors.

Fortunately, efforts are being made to improve the screening process for CPS workers.[38] The University of Nebraska's Center on Children, Family, and the Law now uses both a self-assessment tool and a standardized, structured hiring interview to screen prospective CPS workers.[39] The Texas Department of Family and Protective Services (DFPS) contracted with Performance Assessment Network (PAN) in 2006 to create a pre-employment screening instrument for CPS applicants. This test quantifies applicants' skill sets so as to hire more qualified candidates and minimize turnover.[40]

In addition to a test of basic knowledge, DFPS also administers the Six Factor Personality Questionnaire (SFPQ). This instrument assesses agreeableness, extraversion, independence, industriousness, degree of being methodical, and openness to experience, qualities which are then calculated to determine the degree to which a candidate is recommended for the position.[41] Evaluators note that after instituting this pre-employment screening, DFPS experienced a lower degree of turnover, although they acknowledged that the new screening process may have been one of many factors.

The movement toward improved screening of CPS investigators is a positive step. Hopefully, the future will see an expansion of this movement so that careful, standardized evaluation of prospective CPS investigators becomes the norm rather than the exception.

Conclusion

Stress, burnout, and high turnover rates limit the entrance and stability of the CPS investigator workforce. Would a psychological profile hurdle serve to further constrict the entrance of interested applicants or would hiring a more suitable employee at the outset curb the burnout and turnover rate? The answer is, of course, unknown.

While there is no single type of lawyer, teacher or soldier, members of the same occupation may display personality similarities. Not everyone is suited to be a CPS investigator. The work style demanded of CPS investigators is unique. It is a brutally reality-based job that needs applicants with stable personality characteristics that will positively affect judgment, performance and error management. Research offers considerable evidence to support the relevance of personality characteristics for success in various occupations, and CPS investigator is likely among them. Consequently, there is a pressing need for more reliable empirical data to identify the relevant criteria related to the ideal personality profile and contours of a CPS investigator, and the best ways to evaluate prospective candidates for this job so that the screening process may be improved.

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35 *Id.*

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41 *Id.*

Syllabus

In re Sanders

This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. Reporter of Decisions: Corbin R. Davis

Michigan Supreme Court—Chief Justice: Robert P. Young, Jr. Justices: Michael F. Cavanagh, Stephen J. Markman, Mary Beth Kelly, Brian K. Zahra, Bridget M. McCormack, and David F. Viviano

Docket No. 146680. Argued November 7, 2013 (Calendar No. 6). Decided June 2, 2014.

The Department of Human Services (DHS) petitioned the Jackson Circuit Court, Family Division, to assume jurisdiction over the minor children of Tammy Sanders and Lance Laird after the youngest child was born with drugs in his system. The court, Richard N. LaFlamme, J., removed the child from Sanders's custody and placed him with Laird, who at the time also had custody of the older child. The DHS subsequently filed an amended petition, alleging that Laird had tested positive for cocaine, that Sanders had admitted using drugs with Laird, and that Sanders had spent the night at Laird's home despite a court order that prohibited her from having unsupervised contact with the children. At the preliminary hearing, the court removed the children from Laird's custody and placed them with the DHS. Laird contested the allegations in the amended petition and requested an adjudication with respect to his fitness as a parent. Sanders pleaded no contest to the allegations of neglect and abuse in the amended petition, but Laird declined to enter a plea and instead repeated his demand for an adjudication and requested that the children's temporary placement be changed from their aunt to their paternal grandmother, with whom Laird resided. At a placement hearing, Laird admitted that he had allowed Sanders to spend one night at his house after the court removed the children from her custody but asserted that the children never saw her that night. Laird also testified that he was on probation for a domestic violence conviction. The court took the placement motion under advisement and maintained placement of the children with their aunt pending Laird's adjudication. A few weeks later, the DHS dismissed the remaining allegations against Laird, and his adjudication was canceled. Following a review hearing, the court ordered Laird to comply with a service plan, including parenting classes, a substance-abuse assessment, counseling, and a psychological evaluation; restricted his contact with the children to supervised parenting time; and continued placement of the children with their aunt. Laird subsequently moved for immediate placement of the children with him, arguing that the court had no authority to condition the placement of his children on his compliance with a service plan because he had not been adjudicated as unfit. The court denied the motion, relying on the one-parent doctrine derived from *In re CR*, 250 Mich App 185 (2002), which provides that if jurisdiction has been established by the adjudication of only one parent, the court may then enter dispositional orders affecting the parental rights of both parents. The Court of Appeals denied Laird's application for interlocutory leave to appeal in an unpublished order, entered January 18, 2013 (Docket No. 313385). The Supreme Court granted Laird leave to appeal. 493 Mich 959 (2013).

In an opinion by Justice MCCORMACK, joined by Chief Justice YOUNG and Justices CAVANAGH, KELLY, and ZAHRA, the Supreme Court *held*:

Application of the one-parent doctrine impermissibly infringes the fundamental rights of unadjudi-

cated parents without providing adequate process, and the doctrine is consequently unconstitutional under the Due Process Clause of the Fourteenth Amendment. Due process requires a specific adjudication of a parent's unfitness before the state can infringe that parent's constitutionally protected parent-child relationship.

1. MCL 712A.2(b) governs child protective proceedings generally. MCL 712A.2(b)(1) gives the family court jurisdiction over a child in cases of parental abuse or neglect. Child protective proceedings have two phases: the adjudicative phase and the dispositional phase. Generally, the court determines during the adjudicative phase whether it can take jurisdiction over the child in the first place. Once the court has jurisdiction, it determines during the dispositional phase what course of action will ensure the child's safety and well-being. With respect to the adjudicative phase, once the court authorizes a petition containing allegations of abuse or neglect, the respondent parent can admit the allegations, plead no contest to them, or request a trial (the adjudication) and contest the merits of the petition. If there is a trial, (1) the parent is entitled to a jury, (2) the rules of evidence generally apply, and (3) the petitioner must prove by a preponderance of the evidence one or more of the statutory grounds for jurisdiction alleged in the petition. When the allegations are proved by a plea or at the trial, the adjudicated parent is determined to be unfit. Under MCR 3.973(A) and MCL 712A.6, the purpose of the dispositional phase is to then determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult. Unlike the adjudicative phase, the rules of evidence do not apply and the parent is not entitled to a jury determination of facts. The dispositional phase ultimately ends with a permanency planning hearing, which results in either the dismissal of the original petition and family reunification or the court's ordering the DHS to file a petition for the termination of parental rights.
2. The one-parent doctrine permits the family court to obtain jurisdiction over a child on the basis of the adjudication of either parent and then proceed to the dispositional phase with respect to both parents. The doctrine therefore eliminates the petitioner's obligation to prove that the unadjudicated parent is unfit before that parent is subject to the dispositional authority of the court.
3. Included in the Fourteenth Amendment's promise of due process is a substantive component that provides heightened protection against governmental interference with fundamental rights and liberty interests, including the right of parents to make decisions concerning the care, custody, and control of their children. A parent's right to control the custody and care of his or her children is not absolute because the state has a legitimate interest in protecting the children's moral, emotional, mental, and physical welfare, and in some circumstances neglectful parents may be separated from their children. The United States Constitution, however, recognizes a presumption that fit parents act in the best interests of their children and that there will normally be no reason for the state to insert itself into the private realm of the family to further question the ability of fit parents to make the best decisions concerning the rearing of their children. Due process demands that an individual be afforded minimal procedural protections before the state can burden a fundamental right, and the three- part balancing test of *Mathews v Eldridge*, 424 US 319 (1976), is applied to determine what process is due when the state seeks to curtail or infringe an individual right. The test requires consideration of three factors: (1) the private interest that the official action will affect, (2) the risk of an erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, and (3) the state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. In essence, the test balances the costs of certain procedural safeguards (in this case, an adjudication) against the risks of not adopting those procedures.
4. In *CR*, the Court of Appeals interpreted MCR 3.973(A) as permitting the family court to enter dispositional orders affecting the rights of any adult, including the parental rights of unadju-

dicated parents, as as long as the court had established jurisdiction over the child. According to the DHS, the requirement of a dispositional phase obviated an unadjudicated parent's right to a fitness hearing. Applying the three-part *Mathews* test, however, led to the conclusion that dispositional hearings are constitutionally insufficient and that due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights. The private interest at stake is a core liberty interest recognized by the Fourteenth Amendment. With respect to the second and third *Mathews* factors, the state has an interest in protecting the health and safety of minors, which will, in some circumstances, require temporary placement of a child with a nonparent. This interest runs parallel with the state's interest in maintaining the integrity of the family unit whenever possible, however, and the state's interest is undermined when a parent is erroneously deprived of his or her fundamental right to parent a child. The state has an equally strong interest in ensuring that a parent's fitness or lack thereof is resolved before the state interferes with the parent-child relationship. Therefore, the probable value of extending the right to an adjudication to each parent in a child protective proceeding benefits both public and private interests. While requiring adjudication of each parent will increase the burden on the state in many cases, an adjudication would significantly reduce any risk of the erroneous deprivation of the parent's right. The adjudication is the only fact-finding phase regarding parental fitness, and the procedures afforded parents are tied to the allegations of unfitness in the petition, protecting them from the risk of erroneous deprivation of their parental rights. Dispositional hearings do not serve this same function because the court is concerned at that time only with what services and requirements will be in the children's best interests. There is no presumption of fitness in favor of the unadjudicated parent. The procedures during the dispositional phase are not related to the allegations of unfitness because the question before the court at a dispositional hearing assumes a previous finding of parental unfitness. Therefore, while extending the right to an adjudication to all parents will impose additional burdens on petitioners, those burdens do not outweigh the risks associated with depriving a parent of that right without any determination that he or she is unfit, as the one-parent doctrine allows. The one-parent doctrine is therefore unconstitutional and *In re CR* is overruled.

5. Laird's current incarceration for violating federal drug-trafficking laws did not render his complaint moot. Incarcerated parents can exercise the constitutional right to direct the care of their children while incarcerated, and Laird had tried to do just that, requesting several times during the proceedings below that the children be placed with their parental grandmother. As long as the children are provided adequate care, state interference with those decisions is not warranted.

Trial court order vacated and case remanded for further proceedings.

Justice MARKMAN, joined by Justice VIVIANO, dissenting, stated that the issue was whether the Legislature acted in an unconstitutional manner by enacting statutes that for more than 70 years have provided the underpinnings for the one-parent doctrine. Although Justice MARKMAN agreed with the majority that all parents are entitled to due process in the child protective context, with the presumption of fitness and the burden of proof to the contrary resting on the state, he saw no constitutional barriers to the long-established procedures in Michigan that guarantee that such a fitness determination is fairly made. He concluded that *CR* correctly held that the one-parent doctrine, as well as the statutes and court rules on which the doctrine was grounded, were constitutional and would have affirmed the family court. In its opinion the majority only perfunctorily referred to its threshold obligation to presume the constitutionality of statutes and court rules and did not accord any weight to the good-faith judgments of the Legislature. While Justice MARKMAN agreed with the majority that absent exigent circumstances, the state cannot remove a child from a parent's custody or otherwise interfere with a parent's parental rights unless a court first finds that the parent is unfit, he did not believe that the statutory

scheme (which includes the one-parent doctrine) allows the state to do so. The statutory provisions and the court rules presume that parents are fit and require the state to prove a parent's unfitness before the state can remove a child from the parent's custody. Once the court adjudicates one parent pursuant to MCL 712A.2(b), however, the court can exercise jurisdiction over the child and, pursuant to MCL 712A.6, enter any orders affecting adults that the court determines are necessary for the physical, mental, or moral well-being of the child. If a child is being abused or neglected, it is imperative that a court have the power to intervene immediately and effectively. The issue in this case concerned the propriety of an unadjudicated parent being deprived of the adjudicative phase of a child protective proceeding. The adjudicative phase only determines whether the court has jurisdiction over the child. It is the initial phase in which the court acquires jurisdiction in order to attempt to alleviate the problems in the home so that the children and the parents can be reunited. A finding of jurisdiction does not necessarily or immediately foreclose the parent's rights to his or her child, and not every adjudicative hearing results in removal of custody. Once a jury has determined that one parent has abused or neglected a child, however, that child should not have to wait for a secure placement until a determination, following an additional jury trial, that the other parent also abused or neglected the child. Abolishing the one-parent doctrine will cost the state in terms of time, financial resources, and social-services manpower because the state will now have to adjudicate both parents as unfit before a court can even exercise jurisdiction over abused and neglected children. Most troubling are the additional costs and burdens that will now be placed on abused and neglected children, who are in the greatest need of expedited public protection but will be given that protection considerably less quickly because both parents are for the first time constitutionally entitled to jury trials. Although the majority addressed at length the parental interests involved in the case, it mentioned in only the most peremptory way the existence of the children's interests. While the majority apparently believed the most important (if not the exclusive) constitutional interest involved was that of the parent, Justice MARKMAN believed that the most important (albeit not the exclusive) constitutional interest involved was that of the children. He disagreed that both parents are constitutionally entitled to a jury trial on their fitness before children can be placed within the protective jurisdiction of the court. The Legislature adequately protected the due process rights of an unadjudicated parent of an abused or neglected child by requiring a hearing on the parent's fitness before the state can interfere with his or her parental rights, and Laird was reasonably determined to be unfit after several such hearings in this case.

Editor's Note: The opinion can be found, in its entirety, here.

Syllabus

In re COH, ERH, JRG, & KBH, Minors

This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. Reporter of Decisions: Corbin R. Davis

Michigan Supreme Court—Chief Justice: Robert P. Young, Jr. Justices: Michael F. Cavanagh, Stephen J. Markman, Mary Beth Kelly, Brian K. Zahra, Bridget M. McCormack, and David F. Viviano

In re COH, ERH, JRG, & KBH, MINORS

Docket No. 147515. Argued December 10, 2013 (Calendar No. 2). Decided April 22, 2014.

The Department of Human Services (DHS) petitioned the Muskegon Circuit Court, Family Division, to terminate the parental rights of the mother and two fathers of the minor children COH, ERH, JRG, and KBH, who had been removed from the mother's home and placed in foster care. At the dispositional hearing, Lori Scribner, the biological grandmother of three of the children, submitted a letter expressing interest in becoming all four children's guardian if they were not returned to their mother. The court concluded that terminating the mother's rights was not in the children's best interests, although it granted the petition with respect to the fathers. The following year, the DHS again petitioned to terminate the mother's parental rights. The mother pleaded no contest to the allegations in the petition, and Scribner moved to be appointed the children's guardian under MCL 712.19c and MCR 3.979. The court, William C. Marietti, J., denied Scribner's motion after considering the best-interest factors from the Child Custody Act, MCL 722.21 *et seq*., and admitted the children to the Michigan Children's Institute (MCI) under MCL 400.203. Scribner requested consent from the MCI superintendent to adopt the children, but the superintendent denied it, and the trial court denied Scribner's motion to reverse the denial. Scribner appealed both this decision and the order denying her petition for guardianship. After consolidating the appeals, the Court of Appeals, TALBOT, P.J., and MARKEY and RIORDAN, JJ., reversed the order denying Scribner's petition for guardianship in an unpublished opinion per curiam issued June 25, 2013 (Docket Nos. 309161 and 312691) and remanded for the entry of an order appointing Scribner guardian. The Supreme Court granted the DHS's application for leave to appeal. 495 Mich 870 (2013).

In a unanimous opinion by Justice CAVANAGH, the Supreme Court *held*:

The preference created in MCL 722.954a for a child who has been removed from the parental home to be placed with relatives applies when the DHS is making its initial placement decision, but it does not apply to a court's decision regarding whether to appoint a guardian for the child under MCL 712A.19c(2). In deciding whether to appoint a guardian under MCL 712A.19c(2), a court must determine whether the guardianship is in the child's best interests. In so doing, the court has the discretion to consider the best-interest factors from the Child Custody Act, MCL 722.23; the Adoption Code, MCL 710.22(g); or any other factors that may be relevant under the circumstances of a particular case.

1. The Court of Appeals erred by holding that the preference set forth in MCL 722.954a for placing a child with relatives after the initial removal from a parent's custody applies to a court's decision under MCL 712A.19c whether to appoint a guardian for a child whose parents' rights have been terminated. MCL 722.954a applies from the moment a child is removed from his or her parents' care and throughout the review process, but there is no indication in the statutory language that the Legislature intended this pref-

erence to apply beyond the time frame identified within MCL 722.954a. Similarly, MCL 712A.19c expressly applies only to instances in which a child remains in placement following the termination of parental rights, which occurs after the DHS makes the initial placement decision regulated by MCL 722.954a. Moreover, MCL 712A.19c(14) expressly provides that MCL 712A.19c, which includes the court's authority to appoint a guardian under MCL 712A.19c(2), applies only to cases in which parental rights to the child were terminated, and MCL 712A.19a(7)(c) establishes a separate process for appointing a guardian before parental rights have been terminated. The fact that MCL 712A.19c(2) refers neither to MCL 722.954a nor to "relatives" bolsters the conclusion that the preference for placement with relatives created in MCL 722.954a does not apply outside the period for determining a child's initial placement immediately after removal.

2. MCL 712A.19c(2) provides that at a review hearing for a child who remains in placement after parental rights were terminated, the trial court may appoint a guardian if it determines that doing so is in the child's best interests. Because MCL 712A.19c(2) does not direct a court to apply certain factors or otherwise limit a court's method for determining the child's best interests, a trial court has discretion to determine the best method for analyzing the child's best interests by considering the circumstances relevant to the particular case. While the Adoption Code factors set forth in MCL 710.22(g) provide a useful list of considerations that may be relevant to a guardianship decision, neither the language of MCL 712A.19c(2) nor the similarities between a guardianship and an adoption requires application of the Adoption Code factors to all guardianship petitions. Depending on the circumstances, a case may more reasonably lend itself to application of the Child Custody Act factors, some combination of the Adoption Code and Child Custody Act factors, or a unique set of factors developed by the trial court for purposes of a particular case.

3. The trial court did not abuse its discretion by applying the best-interest factors from the Child Custody Act rather than those set forth in the Adoption Code to decide Scribner's petition for a guardianship under MCL 712A.19c. The Child Custody Act factors incorporate a comparative analysis, which was a logical method for determining which of the two placement options was in the children's best interests. The court did not clearly err in its factual findings regarding these factors or in its conclusion that a guardianship with Scribner was not in the children's best interests under MCL 722.19c(2). Because the Court of Appeals erroneously concluded that a preference for placement with relatives existed under MCL 712.19c(2) and substituted its judgment for the trial courts' on questions of fact regarding the children's best interests, the Court of Appeals judgment was reversed and the case remanded to that Court for consideration of Scribner's appeal of the MCI Superintendent's denial of consent to adopt the children.

Court of Appeals judgment reversed; case remanded to that Court for further proceedings.

Editor's Note: The opinion can be found, in its entirety, here.

Michigan Child Welfare Performance Based Funding - Final Report Executive Summary

by Alliance for Children and Families Engagement Team for the Michigan Department of Human Services and Child Welfare Performance Based Funding Task Force, February 24, 2014

The Michigan Department of Human Services (DHS), with support from the State's Legislature and public and private stakeholders, has sought to develop and implement innovative social and fiscal policies to support its on- going efforts to improve the quality of life for vulnerable children and families in Michigan. As a means to accomplish its goals, the State has taken steps to develop a performance based framework that aligns effective social policy with fiscal responsibility to deliver child welfare services.

Most recently, Michigan's Legislature codified this work through Public Act 59 of 2013, Section 503, which requires "The Department, in conjunction with members from both the House of Representatives and Senate, shall carry out a workgroup to review the feasibility of establishing performance-based funding for all public and private child welfare services providers. By March 1, 2014, the Department shall provide a report on the findings of the workgroup to the Senate and House appropriations subcommittees on the Department budget, the Senate and House standing committees on families and human services, and the Senate and House fiscal agencies and policy offices." (Note: Subsequent to this Act, the term "workgroup" has been replaced by "Task Force". Workgroups are smaller groups of individuals that will work on specific systems issues identified by the Child Welfare Performance Based Funding Task Force (CWPBF) Task Force and Alliance Engagement Team)

This Public Act is unique in that both public and private child welfare providers are included in the new performance based funding model. As such, the CWPBF Task Force was charged at its first meeting by DHS Director, Maura Corrigan, to determine feasibility of performance based funding, develop recommendations and provide a pathway for implementation of an approach that could work in the State of Michigan building upon the large number of past and current efforts to further improve outcomes for Michigan's children and other successful efforts across the country

The Alliance for Children and Families Engagement Team was retained to work with the CWPBF Task Force and other key stakeholders to develop this implementation pathway that would integrate the best of current and prior initiatives, including but not limited to Michigan's Title IV-E Waiver Project: Protect MiFamily; Wayne County Permanency Pilot; Enhanced MiTEAM and Expanded Continuous Quality Improvement (CQI) plan strategies; the MiSACWIS implementation; County Child Care Fund (CCF) Task Force; and the Kent County 100% Purchase of Services Project Plan. (Appendix I) The goal of the CWPBF Task Force was to address many of the already identified issues that have consistently created barriers to development of a performance based funded system, identify new barriers and construct a framework for a balanced and equitable system for public and private child welfare agencies that would lead to improved outcomes and the most efficient and effective allocation of resources.

Throughout the work of the CWPBF Task Force it became clear that the promise of a performance funded child welfare system does not include cost reduction but rather the opportunity to allocate and maximize resources most effectively. It is likely that new dollars will be needed in various aspects of the system to fully implement the pathway developed by the CWPBF Task Force that improves the safety, permanency and well-being of the children served in the child welfare system.

The CWPBF Task Force recognized that because of the inherent differences between public and private

agencies, it came to support a "balanced and equitable" approach that does not mean "balanced and equal." The term, "balanced and equitable," applies throughout the recommended Process of Care (Appendix A). "Balanced and equitable" advances the principle that public and private agencies will continue to provide child welfare services. In addition, they will be held accountable to the same outcomes, transparency of reporting and case management responsibility. The Task Force identified the following areas where a "balanced and equitable" approach can be created for both public and private agencies:

- Accountability for the same outcomes
- Regular and transparent reporting of performance
- Equitable and fair access to necessary and sufficient resources to be successful
- Shared definition of full case management by Department of Human Services' (DHS) office and private agencies with expectation for quality services and practice

This report supports the CWPBF Task Force's conclusion that based on the successful experience in States including Florida, Tennessee, Kansas and Illinois, combined with the number of performance funding initiatives the State of Michigan has experience with, that establishing a performance based funding model is indeed feasible.

However, the successful implementation of performance based funding is feasible and should proceed if the core components identified in the Process of Care (Attachment A) and recommendations in this report are accepted in their entirety and the identified key barriers are mitigated as recommended. Michigan's experience in the Wayne County Permanency Pilot, mental health services, Protect MiFamily, adoption incentive payment program, and expansion of its continuous quality improvement (CQI) efforts are just a few examples of Michigan's competency in the core elements of a performance based funding model: pay for performance, innovative funding and performance management. The report further articulates the principles and goals underpinning the move to performance based funding, the required scope of work, necessary legislative changes needed, performance metrics, an operational and funding model and the timeline necessary to successfully guide a phased, integrated implementation of a performance based funded system.

Key Recommendations and Issues Identified and Covered in the Report

- A description and visual representation of Michigan's re-envisioned Process of Care (Appendix A) for the child welfare and dual ward populations, including guiding principles, and the five core components for successful implementation and improved outcomes. For the purpose of this report, the dual ward population is defined as children and youth who are involved with the juvenile justice and child welfare systems where the child welfare issues are the prevailing condition.
- A detailed definition of "balanced and equitable" as it is to be applied across public and private sectors and how measurement of the public and private agencies will be completed and publicly reported in order to meet the requirements of Public Act 59.
- An explanation of how the current county Child Care Fund (CCF) represents the most significant fiscal barrier to the successful implementation of a performance based funding system. In particular, this bifurcation of funding impedes the ability of the State to develop a flexible, comprehensive case rate model. Many key stakeholders interviewed by the engagement team and discussions with the CWPBF Task Force indicated that in some counties, a child's Title IV-E eligibility is used to determine whether the DHS or a private agency will manage his/her case. If this is accurate, it is not consistent with Michigan's guiding principles or best practice. The report will also offer strategies for the CCF Task Force and Legislature to consider in remediating this barrier for those children with child welfare and dual child welfare and juvenile justice court orders.
- A recommendation for statutory and appropriations language giving the Department authority to fund and manage Child Welfare Performance Based Funding (CWPBF) implementation. The goal is to provide financial, policy, and administrative flexibility in the design of the model and the phased implementation of one or more approaches in select locations throughout the state. The Department's financial, policy and administrative decisions will be unique to the entities participating in the initial phased implementation. For example, the Department will

need to create flexible and integrated funding and resource allocation strategies from existing categorical fund sources (Title XX, Title IV-E, Title IV-B, TANF, State of Michigan General Fund, county Child Care Fund, and the State Ward Board and Care) that support child welfare services into a single, cohesive funding source to support a rate based approach.

- A recommendation that legislative language be advanced that provides authority to the courts to hold private sector agencies fully accountable for their case management of child welfare cases assigned to them, as is currently the law with the public sector.
- A recommendation that a Child Welfare Partnership Council (CWPC) be legislatively created and convened by DHS. The success of CWPBF will be dependent on the fullest engagement and transparency across invested stakeholders on the CWPC, with emphasis on DHS, the provider community, the courts, the counties and the Legislature. This will be key to the continued analysis, planning and final decisions called for in this report, to help ensure the success of the phased implementation plan and the need for engagement and transparency in continuous monitoring and quality improvement throughout the implementation processes and ongoing in the system thereafter.
- A commitment to the Department's expanded CQI plan and the full and complete integration of the enhanced MiTEAM case practice model with CWPBF phased implementation. The Task Force endorses expanded CQI and enhanced MiTEAM as key variables necessary for success. Expanded CQI will ensure that the performance and outcomes of public and private agencies are tracked, transparently reported, and integrated with other current and emerging CQI efforts across the state. Fidelity to the enhanced MiTEAM case practice model will ensure that public and private child welfare agencies are using a shared best practice model that promotes safety, permanency, and well-being for children and youth.
- A recommendation to develop a continuum of care/network model. Under this model, one or more providers and/or community based agencies would form a consortium, establish an organizational structure that accepts and comprehensively assesses referred youth, assigns cases to members of its continuum or leverages services from other entities that may offer services not funded in the rate, and makes appropriate case management decisions during the duration of a case. The organization would hold the contract with DHS and would be fully accountable for all case outcomes, charged with coordinating care, and continuously building capacity and competency throughout their organizations and their provider network. The organization would also assume associated risks for care management and case outcomes. Network services would be funded through an inclusive actuarially-sound rate or rates that should be structured to cover the full costs of the assessment, case management, cost of out of home care, organizational capacities and the supports and services required by the DHS in the final contracts. In addition there is a recommendation for establishing an initial hold-harmless period during which providers are not liable for financial risk. During this period, cost, assessment, and performance data will be gathered and analyzed in order to refine operational elements of the performance based funding model.
- A recommendation for a full cost prospective rate system necessary for quality case management and outcomes, which includes Michigan's successful application of adoption incentive payments.
- A description of how cases will be distributed, transferred, and assessed including a recommendation for how children and youth with acute and/or intractable needs will be assigned, managed and funded.
- A recommendation regarding the critical importance of securing experienced actuarial services to support the state's desire to establish an equitable and periodically reviewed case rate or rates. This rate should be structured to include the elements identified in the Process of Care diagram (Appendix A) that include case load ratios, case managers and supervisors salaries at mid-point of the market, market basket indicators, distribution of cases, cross-walk of state standards, costs to rate, frequency of rebasing, risk sharing, MiTEAM practice model, comprehensive clinical assessment, full case management, MiSACWIS, diagnos-

tic needs of children, incorporation of adoption incentive funds and cost of out-of-home care. The actuarial review will also consider market variation including differences based on geography, early comprehensive clinical assessments, caseload and service mix, and incentives/ penalties based on performance outcomes. (Appendix A, core components #2)

- A recommendation that the DHS consider applying the range of cost factors used by the actuaries in their development of the case rate, to the DHS per diem rate setting process including adding performance based funding approaches to future per diem rates.
- A recommendation for maximizing all federal revenue with an emphasis on expanding Medicaid to enhance and increase medically necessary and integrated physical and behavioral health services to children and youth.
- A timeline for Michigan's phased implementation of performance based funding with an outline of specific action steps that need to occur in FY 2014, 2015 and 2016. Additionally, this section will describe the statutory and legislative changes necessary to fund and manage CWPBF. There is an immediate need to identify a CWPBF Project Director and begin the Child Welfare Partnership Council (CWPC) to guide the on- gong planning and procurement processes and system CQI throughout and after the implementation of CWPBF. The CWPC should be closely aligned and integrated with the current DHS Child Welfare State Implementation Team (SIT) structure that is guiding the current child welfare system improvement efforts.
- A recommendation that, as part of the CQI process, providers anticipate that contracts will evolve as more children safely stay home with services and supports, and more children leave the out-of-home care system with permanency. This section will define an anticipated "tipping point" which will occur and will require the State to anticipate and address this change in a variety of ways including, but not limited to, contract consolidation, rate/contract amendments, and the likely need to assign some in-home cases to out-of-home care providers to ensure that public and private agencies have a sufficient number of cases, a diverse case mix to control their financial risk, and funding to adequately support the children and families in their care.
- A recommendation that the CWPC and DHS should provide an annual report to the Legislature to describe the progress towards phased implementation and any issues that may need legislative assistance or resources for the performance of public and private agencies and the courts in accomplishing system goals and measurable outcomes.
- A recommendation that an independent third-party evaluator be engaged for a minimum period of 5 years to conduct an ongoing analysis of CWPBF implementation. This should not be a point in time evaluation. Rather, the analysis should be a continuing study, coordinated with the state's expanded CQI efforts, that regularly reviews CWPBF model development and implementation as well as program data and metrics. Information periodically provided by the evaluation will support ongoing CQI efforts and permit continuous system improvements. The independent evaluator will validate findings and data with involved parties before making this information public. The independent third party evaluator will be selected through a competitive process that involves representatives from public and private agencies.
- Additionally, the RFP will require that the selected vendor meets the highest standards of its profession.
- A recommendation that the Department seek authorization to achieve and reinvest unspent dollars to cover the necessary start-up costs for phased implementation, an ongoing risk management pool, and an ongoing pool of incentive funds. The Department may prefer to request flexibility to fund any of these from other line items as well. The dollars to reinvest would be realized through efficiencies in both the number and duration of placements in out-of-home care or efficiencies and effectiveness achieved through in-home services programs that further and safely reduce the number of children in out of home care. Any unspent dollars or savings would be accounted for separately by either the public or private agency within the limits on total dollars that could be retained in any one contract or budget period. The timeframe

for utilizing the funds or having them returned to the State General Fund would be specified. Agencies would be able to invest the dollars under an approved plan for capacity building, innovation, quality improvement or other allowable costs that will further improve system outcomes for children and families.

- A recommendation to establish sound program metrics that adhere to principles of best practices for performance measurement. The report will specify metrics for the core outcomes of safety, permanency and well-being. It will also specify performance indicators that relate to the achievement of these core outcomes as well as system indicators that support continuous improvement. The report will recommend that metrics be developed to control for differences by age group and by geography, and to permit entities to compare performance to both statewide averages as well as to entity specific performance over time.
- A recommendation that there be a defined mechanism for identifying and funding expenses associated with high-cost and extremely complex cases that will either be "carved-out" of the proposed case rate, or funded through a specified risk pool.

The report documents critical elements of the pathway needed to create phased implementation of CWPBF in Michigan. However, there are still significant decisions and analytical work that must take place in order to successfully pursue this effort. Of immediate importance is the broad statutory authority needed by DHS to manage and fund CWPBF implementation including the ability to create flexible and integrated funding and resource allocation strategies from existing categorical fund sources that currently support the Department's child welfare programming. A cohesive funding source will be necessary to support a rate-based approach. Further statutory and appropriations changes will also be necessary to advance the goal of providing financial, policy and administrative flexibility in the design of the model as well as phased implementation of CWPBF beginning in select locations throughout the state.

The CWPBF Task Force support and the concurrence with the consultant engagement team is contingent upon the assumption that the CWPBF recommendations are not to be acted upon in isolation. The CWPBF Task Force recommendations intersect with one another and premature action on one without action on others will create further system disruption and could jeopardize improved outcomes for children. CWPBF Task Force member support is also contingent upon the understanding that this report is an implementation pathway for a performance funded system and was built with the spirit and experience of inclusivity, engagement, collaboration and transparency. It will be critical that the CWPC as described in the CWPBF Task Force recommendations be created as soon as possible to provide continuity to the CWPBF Task Force's work before further feasibility analysis, detailed planning and implementation begin. While all stakeholders are important to the success of the Michigan's child welfare system, it is critical that DHS, Private agency providers, the Courts and the Counties all be at the table and actively engaged in the CWPC.

While all of the issues and necessary actions identified above are very important to success, there are five that the Task Force believes are critically important. If these issues along with the ones identified above aren't adequately addressed, phased implementation will not only be difficult, it will very likely be unsuccessful. These five critical issues are:

- The complete, timely, and robust implementation of MiSACWIS in FY 2014 is necessary to ensure that public and private agency members have the information they need to safely and successfully manage children and youth in care.
- The state's budgetary process must allow for adequate funding of CWPBF implementation, including continued implementation of the integrated enhanced MiTEAM and expanded CQI strategies, start-up funding, requested project management and CWPC implementation.
- Development and implementation of a modification to the county child care fund (CCF) to remove the noted fiscal barriers it currently presents. It is recommended that consideration be given by the CCCF Task Force and the Legislature to extract the allocated funding for the child welfare and dual ward populations from the fund and that the alternative funding mechanism hold counties harmless from any increase in contributions for this population. These dollars would be allocated to the DHS along with all future fiscal responsibility for these

populations so that the DHS can integrate categorical fund sources to develop a comprehensive and flexible case rate and ensure that regardless of title IV-E eligibility, all children are served equally. This will also make accountability for performance clearer and easier to manage.

- Formation of the legislatively created CWPC, to take responsibility for moving this CWPBF forward following the conclusion of the task force. It is recommended that the Council be co-chaired by one high ranking official from DHS and one representative from the private child placing agency sector. The Council will include representatives from the public and private child welfare agencies, the courts, counties, the legislature and others with a vested interest in improving the outcomes of the system and advancing the performance based funding system in Michigan. The Council will be responsible for providing support and oversight to the development and phased implementation of CWPBF as outlined in this report. The Council's initial priority will be to ensure a thoughtful approach and execution of the recommended actions for the remainder of the State's fiscal year. Further, the Council must establish an operational infrastructure that will align with the Department's existing Child Welfare SIT structure. The SIT was established as a part of the Michigan's expanding CQI plan and serves as a structure for addressing priority issues and initiatives within the child welfare system. The Council will benefit from specific interface with two of the sub-teams within the SIT: Resource Development and MiTEAM/CQI. The purpose of the Resource Development sub- group is to "address the development and implementation of the performance based funding model expected to affect outcomes and indicators in a variety of areas; identifying and developing the resources needed to implement MiTEAM effectively." The purpose of the MiTEAM/CQI sub-team is to "monitor the implementation of plans related to expanding the MiTEAM practice model and the ongoing implementation of the model statewide" as well as "monitor the implementation of the statewide CQI plan and ensure coordination between MiTEAM and CQI."
- The naming of a Project Director with dedicated project team to ensure the success of this plan, staff the CWPC and serve as a member of the current DHS Resource Development sub-team. As phased implementation of the performance based funding occurs, the Department, by and through its statewide CQI plan and SIT structure, will facilitate the collection of performance metrics specific to CWPBF implementation that will help inform and guide DHS and the CWPC on the progress of CWPBF.

Phased Implementation Timeline

The recommended phased implementation necessary to support CWPBF in Michigan follows. The initial timeline will continue to shift as more detailed analysis and decision-making occurs, and it will need to be implemented flexibly.

FY 2014 (October 2013-September 2014)

1. Complete the planning process for the Kent County rollout and its alignment with CWPBF principles and approaches.
2. Establish the post Task Force Child Welfare Partnership Council as a permanent advisory body.
3. Complete MiSACWIS implementation.
4. Provide transparent reporting of outcomes statewide for private agencies and public agencies by State office and by county.
5. Integrate the recommended expanded Performance Evaluation Management (PEM) unit with the expanded CQI implementation.
6. Secure broad statutory authority to manage and fund performance based contracting.
7. Secure statutory and appropriations changes to provide a fully integrated funding model to support the initiative which allows the Department to integrate state, local and federal funds into a cohesive funding source.
8. Continued resolution of the Child Care Fund issue as it relates to child welfare and dual ordered children.

9. Establish DHS Project Director and Project Team to direct and manage phased implementation.
10. The Department will contract with an independent actuary to establish an actuarially sound rate based on parameters established by the Department with input from the CWPC and other stakeholders.
11. The Department will complete a full cost analysis of the model in partnership with the actuarial rate setting process.
12. In cooperation with the CWPC, the State will identify the next MiTEAM geographic areas which may be considered for later CWPBF rollout.

FY 2015 (October 2014-September 2015)

1. Implement the Purchase of Service model in Kent County which assumes the alignment of the project with CWPBF implementation, principles and approaches.
2. The Department will issue both an RFI and competitive RFP that covers the areas identified by the state to participate in phased implementation.
3. Implement the actuarially developed rate and case mix.
4. Integrate the training and implementation of the enhanced MiTEAM model and expanded CQI plan with the phased implementation of CWPBF implementation.
5. The Department will procure and begin an independent third party evaluation that runs through FY 2020.
6. Finalize selection of next areas for phased implementation.

FY 2016 (October 2015-September 2016)

1. Implement CWPBF in multi-urban or rural proximate counties that include Kalamazoo County or Kalamazoo by itself.
2. Based upon a comprehensive analysis of implementation efforts in 2014-2015, the Department will make necessary legislative, fiscal and program adaptations and final decisions for implementation of the model across the state.
3. State to finalize selection of next areas for phased implementation.

FY 2017 through FY 2020 (October 2016-September 2020)

1. Implementation of rollout across state.
2. State to finalize selection of next areas for phased implementation.

Editor's Note: This report can be found, in its entirety, here.

Funding Michigan's Child Welfare System: An Alternative to Performance Based Funding

by the Michigan Association for Family Court Administration and the Northern MI Juvenile Officer's Association

This document has been written in response to the Performance Based Funding Model (PBF) currently being proposed by the MI Dept. of Human Services. The PBF Model suggests the current Child Care Fund (CCF)funding system is "broken" as it does not provide adequate requirements for accountability, etc. Many professionals who work in the juvenile justice and child welfare systems disagree and support the current funding system with a few improvements. This document notes the current concerns expressed through the development of a PBF system and offers alternative recommendations for improvement of the current Child Care Fund funding system.

Background

In an effort to improve the quality of life for vulnerable children and families, the Michigan Department of Human Services (DHS) has developed a performance based framework that asserts it "aligns effective social policy and fiscal responsibility to deliver child welfare services". Through support from 59 PA 2013, DHS was charged in boilerplate to provide the legislature a feasibility report as follows: "The Department, in conjunction with members from both the House of Representatives and Senate, shall carry out a workgroup to review the feasibility of establishing performance based funding (PBF) for all public and private child welfare services providers. By March 1, 2014, the Department shall provide a report on the findings of the workgroup to the Senate and House appropriations subcommittees on the Department budget, the Senate and House standing committees on families and human services and the Senate and House fiscal agencies and policy offices." Note: Following the passage of this Act, the term "workgroup" was replaced with "Task Force".

On March 1, 2014 the Michigan Performance Based Funding Initiative report was submitted to the legislature per the 59 PA 2013 mandate. In the Executive Summary, it is noted the "promise of a performance funded child welfare system does not include cost reduction but rather the opportunity to allocate and maximize resources most effectively. *It is likely that new dollars will be needed in various aspects of the system to fully implement the pathway developed by the Task Force* …" In addition, the report references the need for performance measures in contracts; "balanced and equitable" principles that require public and private agencies to be held to the same outcomes, transparency of report and case management responsibility; parity for private and public agencies; improved allocation of resources; regular and transparent report of performance that reflect accountability, etc.

Although this report examines many aspects of a potential PBF concept for child welfare, it is very difficult to discern the specific problems the model is trying to correct. Thus, in an effort to understand the issues further, Senator Bruce Caswell, Chair of the DHS Appropriations Committee, was asked by juvenile justice professionals and stakeholders to identify the areas of concern more specifically.

Problem Statement

The basis for the proposed PBF initiative as described by Senator Bruce Caswell in a meeting on April 11, 2014 has four, basic elements:

1. **Rising Child Care Fund (CCF) costs to the counties** - The counties have complained about the continuing expansion of their CCF budgets due to increased costs for child welfare cases so there must be a method to reduce costs or the fiscal exposure of the care for children within the child welfare system;
2. **Lack of performance based contracts and accountability** - The current contract between DHS and the purchase of service (POS) agencies lacks adequate performance measures and enforcement alternatives to hold them accountable; and
3. **Late payments** - Private providers have complained about late payments and want a system developed in which agency payments are made in a timely manner; and
4. **Loss of local control** – Currently, many counties/courts provide oversight of local CCF expenditures for child welfare, and they are actively invested in the treatment of these children. PBF is equated to increased loss of control over fiscal oversight and community investment.

The need for transparency and trust were also identified by Senator Caswell, and although it is hoped through the proposed PBF funding scheme, transparency and trust would be improved, those involved also understand this is a deliberate, constant endeavor for the system, in general, and is based on the building of positive, consistent relationships.

Therefore, performance based funding (PBF) is predicated on the assumptions:

1. It will provide DHS the needed accountability of the POS agencies;
2. Through capping the CCF child welfare expenditures fiscal exposure of the for the counties, holding them harmless to increased costs, the rising costs to the counties will be eliminated, allowing them to have a fixed cost of care; and
3. By DHS taking over all billing management at the state or regional levels, the POS agencies issue of late payments will be mitigated, if not corrected because DHS will be the clear responsible party for timely payments.

Counter Point

After significant discussion and review of the aforementioned report, many juvenile justice and child welfare professionals in the juvenile courts, public and private agencies, and other stakeholders do not support the proposed PBF system of funding child welfare. Rather, they assert, with improvements to the current CCF system, the same outcomes could be attained without the costly implementation of a totally different system.

Primary concerns revolve around the PBF system resulting in loss of local control, including:

1. Reduction in case management oversight at the local level;
2. Future increased costs regardless of the current "hold harmless" cost for counties proposal;
3. Modification of the Social Welfare Act to accommodate this approach; and
4. Increased lack of DHS accountability to the courts when the ultimate responsibility for children in the child welfare system lies within the courts and the community.

Additional concerns involving the capping of the CCF based on an average number of years also exist. For instance, how Title IVE - a federal reimbursement program based on eligibility criteria - cases would be factored into the equation? Often the eligibility determination of these cases takes months; tracking, monitoring and appealing of cases to ensure these cases are counted in the average would be just one issue, among many others, needing to be addressed. Counties required to pay their CCF contribution to the state in advance also presents multiple issues that reflect the complicated funding system involving Title IVE.

There is substantial concern in the PBF study regarding an implicit bias and assumption that the current CCF funded approach for child welfare is broken or substantially flawed. Yet the PBF approach is far too extreme of an approach, given the exhaustive list of unanswered questions, and there was no equal study completed on the current CCF funding system to identify how it might be improved to address the issues.

It is also recognized Kent County has chosen to move in this direction because of its decades of experience that similarly reflects PBF practice as taking their system to the next level and formalizing it with the state appears to make business sense to them. It is

important to note, although lessons can be learned from Kent County, as some lessons have been learned from Wayne County and their managed care system, this does not mean such a funding approach is in the best interest of all the counties/courts nor can the same principles be applied to or extrapolated to other counties within the state. There is support for Kent County to move forward with the system they feel best reflects their local business practice, but it should not be imposed on other counties/courts. Rather, a bifurcated system similar to Wayne County's managed care approach with the state may be supported.

Issues & Proposed Solutions

Issue #1: Rising Costs to the Counties

Holding counties harmless does not prevent rising costs; it simply moves the costs from the counties to the state. This approach may be appealing to counties who are looking for immediate relief from rising costs. However, it is an attempt to pacify counties and buy support for a system that cannot be adequately defended. Further, if costs are rising because more children are going into care, doesn't this present an issue with the Modified Settlement Agreement? PBF does not prevent children from going into care; it just changes the way care is purchased after a child is in care. PBF also suggests a potential Headlee Amendment issue in that Headlee requires a 50/50 cost share for child welfare. Paying a fixed, "hold harmless" amount based on a three year (or other) average offers no assurance to the counties the amount will be 50% or less of the ultimate costs. Counties will not know what share they are paying nor will they have an avenue to reduce costs. Based on DHS data and evidenced by the reduction in residential placements and the closure of several public treatment facilities, although it may appear to some counties their CCF costs are rising, they need to look at the total costs as an overall amount in all funding sources, these costs have been reduced dramatically statewide.

Of primary concern is how PBF shifts focus to potentially purchasing more expensive interventions such as residential placements, instead of building a system that addresses the needs of the child welfare children and their families within their communities. Further it does not provide a strategy for preventive interventions and provides no incentive for local communities to provide in-home programming to address the needs of child welfare kids and families. This is a negative result for kids, families, communities and the state.

Further, the counties and the state should be cautious because there is a strong suggestion – even in the PBF feasibility study – this is NOT a cost saving approach and additional funds and resources will be needed. Thus, there is no evidence PBF and holding the counties harmless will be sustainable. As history often repeats itself, future lawmakers may look at the "hold harmless" legislation and see this as an opportunity for future revenue, not understanding the logic behind the legislation.

Proposed Solution:

1. If assuring the counties are not at risk for higher costs truly is a goal, the state can assume responsibility for case management by supporting their civil service staff or paying the full cost of the administrative rate in the POS agency contracts just as the courts do this for juvenile justice youth. Just as CCF reimbursement of counties for Intensive Probation exists, DHS could negotiate locally for intensive services through the CCF, In Home Care program.
2. Encourage local, outcome driven community based services to provide care for child welfare involved children and families. PBF significantly removes incentive for local, collaborative problem solving initiatives toward solutions to the child welfare problems of children and families.

Issue #2: Performance Based Contracts and Increased Accountability

There is a general consensus performance measures should be included in the DHS contracts with the POS agencies; this has been a significant concern to the courts for years. However, the way the system is funded or billing is changed does nothing to assure positive outcomes. Performance based contracts are only as good as the performance of the service providers. Currently, DHS could include performance measures in these contracts and enforce them, accordingly. However, it will be equally important for the performance measures in all contracts be enforced, consistently, which is a primary concern of the current system.

A capitated rate is suggested to address this issue, as well, which is similar to Wayne County's funding system, currently. CMOs are paid a pre-determined,

set daily rate (reimbursed by the CCF) and are responsible for the care of the children assigned to their agency regardless of the disposition. The result has been a significant reduction of their CCF costs, but county budget issues required Wayne County to reduce their daily rates to the CMOs which translates into reduced performance measures, overall.

Funding of the child welfare system is complicated especially when it involves federal Title IVE dollars. Title IVE is a federal reimbursement program that sometimes takes months to confirm a determination for reimbursement of a case. PBF that provides a capitated rate and caps the CCF using an actuarial average of three (or other) years, presents serious questions about how Title IVE dollars would be incorporated into the average. Multiple questions as to how Title IVE cases would be factored into the equation arise when examining PBF.

Proposed Solution:

1. Include additional performance measures in the contracts with the POS agencies with proper reporting and oversight policies in place. Clearly identify the graduated consequences of non-compliance, and require consistent enforcement across jurisdictional boundaries by DHS. Mandate the Department submit an annual report of the performance measures findings to the legislature.
2. It is proposed that any county who wants to move to this model could do so based on the precedence of the juvenile justice model in Wayne County and the CCF. The Social Welfare Act provides some general direction but the real intricacies of the CCF are found in the promulgated Administrative Rules (R 400.2001) required by the Social Welfare Act.

The payment requirements for the CCF reimbursement indicate there must be a state established rate and/or a contract. This provision is not a problem. Wayne County requested an exception to the rule allowing a capitated rate concept that provided a daily established rate to be paid regardless of the services provided by the CMO. This was important because a review would show in some cases, a child is home but a higher rate was being paid.

R 400.2002 allows for exceptions to the CCF Rules as long as the alternative to the Rule complies with the intent of the Rule from which the exception is sought. Also, this was allowable because the rate being paid included either out of home or in home placement costs under the CCF.

If a county such as Kent desired to move to a PBF model similar to Wayne County, Kent County would need an agreement with DHS regarding Title IVE. The Department would accept Kent County's reported data and request reimbursement from the federal government. An agreement between Kent County and the Department would allow Kent County to supervise their child welfare children rather than DHS. For the proposed performance based contracting scheme, this may be a moot point because Wayne County's agreements were establishing a system for delinquent cases and the performance based funding or managed care approach deals with NA cases which DHS already supervises and for which DHS has the data.

Another agreement between the court in Kent County and the Department to allow services to be provided by the CMOs or POS agencies rather than the court may be needed. It is not anticipated this would be a problem since DHS supervises either way, and the court is assumed to be in agreement with this model.

CCF rules and reporting may require Kent County to track and report foster care, residential placements and In Home Care placements. Although Wayne County had some challenges in data tracking, Kent County already has a quality data system in place to track this, as does DHS through the recent MiSACWIS deployment.

Allowing a county that wants to move to this model under similar circumstances as Wayne County's juvenile justice contracts seems like a win-win. This eliminates the objection to a mandate. If it works well, analysis can be completed noting areas needed for improvement and statewide implementation can explored at a later date. Further, if the state assumed responsibility for the full case management administrative rate in full for case management, it would reduce or eliminate resistance due to fear of rising costs and some loss of control.

Issue #3: Late Payments

Reportedly, several POS agencies have complained about the receipt of late payments. Although it is unclear as to the circumstances involving late payments and what agencies are involved in the complaints, it

is the general consensus of juvenile court administrators and counties that if late payments are received by the private agencies, there are commonly experienced reasons, including:

1. The courts/counties are not receiving the invoices in a timely manner either from the POS agency or from the Department;
2. Payment is late due to lack of proper paperwork substantiating the expenditures being submitted and received by the court/county in a timely manner or without additional prompting by the courts/counties;
3. DHS worker who has approval authority has been on vacation or absent from his/her employment for a period of time and no one has taken over his/her responsibilities;
4. The private agencies submit proper documentation to DHS for approval, but the paperwork does not get forwarded for payment in a timely manner;
5. Department may be occasionally late paying invoices and on occasion, has a history of errors, which take time to correct.

PBF does not correct these situations. Most counties use generally acceptable accounting principles (GAAP) and pay invoices on a timely basis once proper documentation is received. Further, the juvenile courts or counties often receive private agency invoices from 6 months prior and in some cases, 2 – 6 years. To that end, many courts/counties have limited payment to 6 months or thirty days at close of the fiscal year.

In addition, currently, many courts provide fiscal oversight for the counties as it relates to child welfare CCF expenditures. Such oversight requires the courts to monitor the length of time children are remaining in placement and the overall progress of a child's treatment. Such arrangement provides a "check and balance" within the local child welfare system.

Proposed Solution

1. A centralized or regional billing payment system is not going to resolve the aforementioned issues. Only consistent enforcement of fiscal performance measures/policies will help resolve this issue.
2. The enforcement of timelines could improve the payment issue for everyone involved. Establish and enforce expenditure payment policies within DHS including fiscal performance measures in POS contracts; and in annual county CCF plans, mandate timely payment of CCF expenditures. Making certain proper documentation is received by the payer from the payee, the POS agency could be required to submit invoices within "X" days following the issuance of a legitimate service; DHS has "Y" days to process and forward to the court/county; and the courts/counties have "Z" days to provide payment. A multidisciplinary oversight body including members from MAC, the private agencies, DHS and the courts could be created to enforce disputed billings processes to determine, track and remedy the cause.
3. The issue of local oversight and control would be moot with solution #2.

Issue #4: Local Control

There is a difference between services and case management in child welfare. On a local level and through a collaborative process, the courts are the ultimate authority and accept the responsibility for the children of the child welfare system in their respective communities. They provide significant leadership in driving appropriate continuums of services for child welfare and juvenile justice children; the entire community is invested in the outcomes because these children and families are part of the community's fabric. Thus, it is imperative any child welfare funding system retains a strong element of local control and oversight. The judiciary play a vital role in the case management oversight of child welfare cases, too, in that judges have a strong interest in children and families progressing in treatment through services being provided. Through the judge's involvement from the bench and court administrators establishing proactive policies governing review of children in placements, children are less apt to languish in out of home placements.

Proposed Solution

1. Retain the current CCF funding system for child welfare and make the necessary improvements to address the issues.
2. Review and evaluate the outcomes of the changes within 3 years to determine the progress and explore additional improvements.

Summary

Although DHS, judges, private agencies and almost all parties involved in the examination of the PBF approach have committed extensive resources to determine the viability of this model, too many significant questions cannot be answered and may not be answered until it is too late. The model is wrought with potential to prevent adequate investment in the lives of system-involved children on local and state levels.

It is strongly believed by many that drastic changes to child welfare funding through PBF would be seriously detrimental to children and families and would have a potential irreversible, negative impact on many aspects of the child welfare system. The issue of contract agencies not being held accountable for performance and improved outcomes will not be fixed by changing the system to the state paying the bill. Rising costs will not be addressed by shifting those rising costs from county to state; as taxpayers, we have a vested interest in costs associated with the PBF proposal, which are going to rise. Late payments will not be fixed by centralized billing through the DHS, and an improved child welfare system will not be the result of the proposed PBF model due to lack of support and malicious compliance; potential modifications to the CCF through modifications of the Social Welfare Act; and potential for chaos in the system.

This document provides comment on the issues in an effort to broaden perspectives and the current discussion. It has also offered viable solutions that are less severe and perhaps more effective than the proposed PBF. There is certainly room for improvement in the current CCF system relating to policies and procedures that will result in better performance measures and outcomes. Rising costs of child welfare have been perceived as the demand for a whole new funding system, but metaphorically, PBF is utilizing a sledge hammer when a scalpel is the tool that would reap the optimum result.

Acknowledging the hard work by many committed professionals who devoted their time to the PBF feasibility initiative, the authors and endorsers of this document respectfully propose and strongly urge the legislature to re-evaluate the PBF model approach and consider improving the existing CCF system for child welfare. Similar to the Michigan legislature and the DHS, members of the professional organizations supporting the concepts contained within this document are committed to an improved child welfare funding system and offer their services to assist in the efforts to improve the existing Child Care Fund funding system rather than implement an unknown, unproven concept.

Lawyer-Guardian ad Litem Review of Relative Placement Decisions

by Tobin Miller, Investigator, Office of Children's Ombudsman

Introduction

Parents naturally look to relatives to provide necessary substitute care for their children. Grandparents and other relatives currently reside with approximately 7.8 million children nationwide; in Michigan, 8.3% of children resided in a grandparent's or other relative's home in 2010.[1] If a parent has placed his or her child with a relative who provides proper care to the child, Children's Protective Services (CPS) will not find that the parent has neglected or abandoned the child. CPS encourages such placements if a parent, for whatever reason, is unable to provide proper care to the child.[2] Relatives are similarly available and willing to serve as foster parents for children who are involved in the child welfare system. When a child is removed from parental custody by court order, that child should be placed, if possible, with a fit and willing relative-foster parent.[3]

The Michigan Department of Human Services (MDHS) and private child-placing agencies do frequently place children with appropriate relative-foster parents. In February 2014, 4,429 children resided with relative-foster-parents (licensed and unlicensed). In comparison, 6,518 children resided in "unrelated" licensed foster homes.[4] Nonetheless, appropriate relative caregivers are denied placement even though the placement appears to be in the child's best interests.

Placing a child with relative foster parents has several possible benefits:

- It ameliorates the trauma and other negative effects of removal from parental custody.
- It may militate against termination of parental rights (TPR), both before and after a supplemental petition requesting TPR has been filed,[5] allowing the court to preserve the parent-child relationship while restructuring the family to promote child safety and permanency.
- The relative may serve as a permanent caregiver through adoption, juvenile guardianship, or "permanent placement with a fit and willing relative." However, if a relative is improperly denied placement of a child at or near the time of removal, the relative may have a difficult time obtaining juvenile guardianship of or adopting the child later in the case because the preference for relative placement has not been applied to "permanent placement" decisions.[6]

The "best interests of the child" standard applies to initial child-placement decisions.[7] Because Lawyer-Guardians ad Litem (LGAL) are charged with determining and advocating for their client's best interests, LGAL's should closely review a supervising agency's placement decision and insist on the agency's compliance with state law and policy governing relative placement.

This article provides a summary of law and policy pertaining to relative placement during the predisposition phase of child protective proceedings (i.e., during the first 90 days of proceedings). The article concludes with a list of suggestions concerning LGAL review of a supervising agency's initial placement decision.

Identifying Appropriate Relatives

When a child is removed from parental custody, the supervising agency must "identify, locate, notify, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs."[8] A court must order the supervising agency to comply with this directive following a preliminary hearing,[9] and the supervising agency has 30 days to complete these tasks.

MCL 722.952 does not contain a definition of "relative." The definition of relative in MCL 712A.13a(1)(j)[10] includes adult individuals within the fifth degree of relationship by blood, marriage, or adoption; spouses and former spouses of those individuals; and the parents of a putative father.

CPS workers begin the process of identifying and locating appropriate relatives. CPS workers must ask parents and age-appropriate children to identify relatives who may take placement. If a parent, guardian, or legal custodian cannot be found, a petition must identify a child's nearest known relative.[11] At a preliminary hearing, "[t]he court must inquire of the parent, guardian, or legal custodian regarding the identity of relatives of the child who might be available to provide care."[12] Foster care workers must continue the diligent search for appropriate relative placements.

Identified relatives are notified of the child's removal from parental custody via the Form DHS-990.[13] Workers must also send copies of Form DHS-989, which allows identified relatives to indicate whether they would like placement of the child or would like to participate in the child's care in some other way (such as supervising parental visitation, visitation, phone contact, or taking the child to medical appointments), and the Form DHS-988, which allows relatives to identify other relative resources. Identified relatives are listed on the Form DHS-987, which must be maintained in the child's case file.

Preference for Placement with a Relative

Federal law encourages states to "consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards . . . ."[14] Michigan has chosen to give relatives a preference for placement if such a placement is in the child's best interests. MCL 722.954a(5) states:

> "Before determining placement of a child in its care, a supervising agency shall give special consideration and preference to a child's relative or relatives who are willing to care for the child, are fit to do so, and would meet the child's developmental, emotional, and physical needs. The supervising agency's placement decision shall be made in the best interests of the child."

MDHS policy contains specific prerequisites for applying the relative-placement preference. This policy states that preference *must* be given to a relative who will meet the child's needs, passes the initial safety screen, lives within 75 miles of the home from which the child was removed (unless it is in the child's best interests to be placed with a relative who lives farther away), and will keep siblings together.[15]

The "initial relative safety screen" consists of a home visit, a criminal history check on all household members, and a central registry check on all adult household members. Placement in a relative's home is prohibited if any member of the household (adult or juvenile) has a felony conviction for child abuse or neglect, spousal abuse, a crime against a child or children (including pornography), a crime involving violence, a physical assault or battery within the last five years, or a drug-related offense within the last five years. Placement is also prohibited if a member of the household is a juvenile who has been adjudicated as a sex offender. Felony convictions that do not fit within the above categories, convictions of "good moral character" offenses,[16] and placement on the central registry must be evaluated to determine whether the person poses a safety risk to children.

The 75-mile distance limitation prevents burdening the child, relative provider, and parents when reunification is the permanency goal and regular parenting time must take place. If MDHS seeks TPR at the initial disposition, and if parenting time is suspended prior to the hearing on TPR, then an agency may consider placing a child with a relative who lives farther away in Michigan or another state. Exceptions may also be made in other cases, such as a placement that will keep siblings together.[17]

If a proposed relative caregiver cannot take placement of all siblings, and another available placement can take all siblings, this is a legitimate reason for denying the relative placement. In other words, the preference for keeping siblings together "trumps" the relative placement preference.[18]

Home Studies and Licensure

Home studies must be completed on appropriate relatives within 30 days of placement in a relative's home or before placement in a relative's home (if the child wasn't initially placed with the relative).[19] A copy of any home study must be placed in the child's case file and given to the studied relatives and the court.

All relative caregivers must become licensed as foster parents unless one of several "exceptional circumstances" listed in MDHS policy applies. Those "exceptional circumstances" include cases where the relative has refused licensure or the home cannot be licensed due to non-compliance with a licensing rule not affecting child safety. In other words, the relatives must be able to care for the child without the financial and other benefits of licensure, and the home must be safe. A county director or child welfare administration director (in certain counties) must approve a waiver.[20]

Supervising Agency's Placement Decision

MCL 722.954a(4) requires a child's supervising agency to make and document a formal placement decision within 90 days of the child's removal from home. A supervising agency must complete a form DHS-31 to document its decision in all cases. (A copy of this form is attached as an appendix to this article.) In addition, the form DHS-31 must be given to several persons, including the child's LGAL. The statute states as follows:

> (4) Not more than 90 days after the child's removal from his or her home, the supervising agency shall do all of the following:
>
> (a) Make a placement decision and document in writing the reason for the decision.
>
> (b) Provide written notice of the decision and the reasons for the placement decision to the child's attorney, guardian, guardian ad litem, mother, and father; the attorneys for the child's mother and father; each relative who expresses an interest in caring for the child; the child if the child is old enough to be able to express an opinion regarding placement; and the prosecutor.

If a child was not initially placed with a relative, the child may be re-placed in the relative's home within 90 days of the child's initial removal from home without Foster Care Review Board oversight.[21]

An LGAL should ensure that the supervising agency completes a Form DHS-31 in all cases. If the LGAL does not receive the form, he or she should request it from the agency.

In conjunction with the required meeting with or observation of a child before a pretrial hearing or disposition hearing, the LGAL should "assess the child's needs and wishes with regard to" placement with a relative.[22] A supervising agency must give a LGAL access to a child's case file,[23] and the LGAL should review all documentation pertaining to relative placement, especially any home study of a relative.

The DHS-31 triggers the limited review process available to relatives denied placement of the child.

Obtaining Court Review of the Agency's Refusal to Place a Child with a Relative

A relative denied placement of the child may ask the supervising agency for a statement of reasons for the denial. If the relative believes that the reasons provided do not justify the denial, the relative may ask the LGAL to review the decision. MCL 722.954a(6) states:

> "(6) A person who receives a written decision described in subsection (4) may request in writing, within 5 days, documentation of the reasons for the decision, and if the person does not agree with the placement decision, he or she may request that the child's attorney review the decision to determine if the decision is in the child's best interest. If the child's attorney determines the decision is not in the child's best interest, within 14 days after the date of the written decision the attorney shall petition the court that placed the child out of the child's home for a review hearing. The court shall commence the review hearing not more than 7 days after the date of the attorney's petition and shall hold the hearing on the record."

MCR 3.966(B) restates the procedural requirements to obtain court review of the supervising agency's placement decision. Note that a relative denied placement does not have to request LGAL review of the decision; any person who receives notice of the placement decision may make the request, or the LGAL may seek court review of the decision on his or her own initiative if the LGAL determines that the placement decision is not in the child's best interests.

If the relative will meet the child's needs, passed the initial safety screen, lives within 75 miles of the home from which the child was removed, and will take placement of the child's siblings or sibling place-

ment is not a concern, and if the supervising agency did not place the child with the relative, the LGAL should seriously consider requesting court review of the placement decision. If the relative has met the prerequisites for the relative-placement preference established by the Legislature and MDHS but has still been denied placement, the denial is most likely not in the child's best interests. Be particularly wary of such denials when MDHS is seeking TPR at initial disposition, the child is an infant or very young, a private child-placing agency is the child's supervising agency, and the child's foster parents have expressed interest in adopting the child.

The supervising agency's placement decision must be based on the factors described in FOM 722-3, especially the "placement selection criteria," which include the relative-placement preference. The Form DHS-31 must identify which of the "placement selection criteria" the agency relied upon in making its decision. It is also appropriate for a LGAL to refer to the "best interest factors" in the Child Custody Act, MCL 722.23, when evaluating the supervising agency's placement decision.[24] Of particular importance is MCL 722.23(a) (the "love, affection, and other emotional ties existing between the parties involved and the child"). If the child has an established and supportive relationship with the proposed relative-foster parent, that should weigh heavily in the "best interests" calculation. This is also reflected in FOM 722-3, p. 8 (the "caseworker must consider a placement which preserves and maintains relationships with the relative network . . .").

Practice Suggestions

- Review the child's case file to determine whether CPS and the supervising agency conducted a diligent search for relative caregivers.
- Ensure that the supervising agency has conducted background checks and (if applicable) home studies of all identified relatives.
- Ensure that the supervising agency completes and provides you with a DHS-31 in each case.
- If a relative has been denied placement, review the relative's background checks to determine whether the relative is prohibited from taking placement.
- If a relative meets all of the legal and policy prerequisites for the relative-placement preference but has still been denied placement, strongly consider seeking court review of the supervising agency's decision.
- If a relative or other person who received the Form DHS-31 requests review of the placement decision and/or if you determine that the decision is not in the child's best interests, seek court review of the decision within 14 days after the date of the decision.

Endnotes

1 GrandFacts: state fact sheets for grandparents and other relatives raising children, AARP. *http://www.aarp.org/relationships/friends-family/grandfacts-sheets/*.

2 PSM 712-6, p. 15 ("Children residing with a relative or an unrelated caregiver who does not have a legal guardianship are not in an abusive/neglectful situation based solely on the living arrangement"). Temporary relative placements are also used as a "safety plan" during CPS investigations. PSM 713-1, pp. 19-20.

3 The applicable definition of "foster care" includes "care provided to a juvenile in a relative's home under a court order." MCL 712A.13a(1)(e).

4 Michigan Department of Human Services Fact Sheet, DHS Office of Communications, February 2014. *http://www.michigan.gov/documents/dhs/FIA-Fact-Sheet_389389_7.pdf?20140327105003*.

5 See MCL 712A.19a(6)(a) and *In re Mason*, 486 Mich 142, 164 (2010).

6 See *In re AEG,* unpublished opinion per curiam of the Court of Appeals, issued November 7, 2013 (Docket No. 316599) ("A review of the plain and unambiguous language of MCL 722.954a indicates that the Legislature intended the statute to provide procedural requirements where a child is removed pursuant to a child protective proceeding; there is no indication that the statute was intended to apply to MCI's adoption decisions after termination"), ADM 610, pp. 2-3 ("If a child resides with licensed foster parent(s), the psychological attachment of a child to the foster parents must always be considered before replacing the child to a different adoptive home"), and *In re COH,* unpublished opinion per curiam of the Court of Appeals, issued June 25, 2013 (Docket Nos. 309161 and 312691), lv gtd ___ Mich ___ (2013). In *COH,* the Michigan Supreme Court is considering whether the relative placement preference in MCL 722.954a(5) applies to post-TPR juvenile guardianships under MCL 712A.19c.

7 MCR 3.966.

8 MCL 722.954a(2).

9 MCR 3.965(E).

10 "'Relative' means an individual who is at least 18 years of age and related to the child by blood, marriage, or adoption, as grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew or niece, first cousin or first cousin once removed, and the spouse of any of the above, even after the marriage has ended by death or divorce. A child may be placed with the parent of a man whom the court has found probable cause to believe is the putative father if there is no man with legally established rights to the child. A placement with the parent of a putative father under this subdivision is not to be construed as a finding of paternity or to confer legal standing on the putative father."

11 MCR 3.961(B)(2)(c).

12 MCR 3.965(B)(13).

13 The contents of the notice to relatives are specified in MCL 722.954a(3). These are based in federal law, 42 USC 671(a)(29).

14 42 USC 671(a)(19).

15 PSM 715-2, p. 11 and FOM 722-3B, p. 4.

16 See Mich Admin Code, R 400.1152 for the list of "good moral character" offenses.

17 FOM 722-3, p. 5.

18 "When there are at least two options for placement, one with an adult relative and the other with a sibling in foster care or an adoptive home, **and both are equal** in placement selection/best interest criteria, preference should be given to placement with the sibling." FOM 722-3, p. 7. See, e.g., *In re Booth,* unpublished opinion per curiam of the Court of Appeals, issued May 15, 2008 (Docket No. 280381).

19 FOM 722-3, p. 5.

20 FOM 722-3B, pp. 11-14.

21 MCL 712A.13b(1)(b)(*iii*).

22 MCL 712A.17d(1)(d)(*i*)-(*ii*).

23 MCL 712A.17d(1)(b).

24 See *In re Sherman,* 231 Mich App 92 (1998), quoting *In re Barlow,* 404 Mich 216, 236 (1978) ("The Legislature has . . . set forth a number of areas of concern in [the Child Custody Act] which it deemed should be evaluated in a large category of inquiries into a child's welfare").

FOSTER CARE PLACEMENT DECISION NOTICE

Michigan Department of Human Services

This foster care placement decision notice is being sent to you to notify you of the placement decision made for the child. MCL 722.954a requires to make a placement decision for the child and document the reason(s) for the decision. The statue states that any person who receives this notice may, within 5 business days, request in writing, more specific reasons for the placement decision.

If you do not agree with the placement decision, you may request that the child's attorney review the decision to determine whether the decision is in the child's best interest. If the child's attorney disagrees with the placement decision, s/he shall petition the court for a review hearing within 14 days of receipt of this notice. At the hearing, the court will determine where the child will be placed. The child will remain in their current placement during this procedure and until the court has made a decision.

Case Name**:**	DOB:	Case Number #:
Date of Initial Removal:	SWSS Log #	Court File #:

Child's Current Placement: If other, specify: _____

Name: _____

Address: _____

City: _____

State: _____ Zip Code: _____

Placement Decision: If other, specify: _____

Child will remain in current placement: ☐

Child will be moved to a new placement: ☐ (Check one)

Name: _____

Address: _____

City: _____

State: _____ Zip Code: _____

Rationale for placement decision: (Check all that apply)

- Best interest of the child ☐
- Attempts to identify relatives were unsuccessful ☐
- Available relatives do not meet current DHS standards for placement ☐
- Identified relatives unable to take placement of child ☐
- Indian Child Welfare Act (ICWA) Compliance ☐

In determining the most appropriate placement for this child, the following factors were considered as they relate to a goal of permanence for the child.

- Long range plan for the child. The permanency-planning goal is: _____ .
- Permanent family for the child at earliest possible date.
- Minimum number of placements for the child.
- Child's previous placement history.
- Potential for permanence within the child's kinship network.

DHS-31 (Rev. 7-13) MS Word 1

Case Name: _____

Placement decision is based on the following placement selection criteria for this child: (Check all that apply):

☐ **Best interest of child and placement meets the needs of the child, including:**
- ☐ Physical and emotional needs of the child.
- ☐ Special needs of the child.
- ☐ Specialized services required to meet the needs of the child.
- ☐ Accessibility of required services to the child.

☐ **Placement with relatives:** priority is to be given to placement with extended family able to meet the needs of the child. **Criminal history, CPS central registry check and written home study are required for all relative placements.**

☐ **Proximity to the child's family:** Placement is in the county of residence or in a contiguous county or the placement is with a relative where there is family agreement for the placement.

☐ **Placement with sibling(s):** efforts to place sibling groups in the same out-of-home placement must be given priority except when not in the child(ren)'s best interest.

☐ **Child's and child's family's religious preferences:** placement affords the child an opportunity for expression of religious beliefs and practices as identified by child's family.

☐ **Least restrictive setting:** placement is the most family-like setting to meet the needs of the child.

☐ **Continuity of relationships:** placement preserves and maintains relationships with the psychological parents, friends, teachers, etc.

☐ **Availability of placement resources for purposes of timely placement:** placement is available to meet the child's needs and is in the child's best interest.

☐ **ICWA compliance.**

Copies of this decision must be mailed to all that are applicable:

Child's attorney ☐	Guardian ☐	Guardian Ad Litem ☐	Mother ☐	Father ☐
Attorney for mother ☐		Attorney for father ☐	Prosecutor ☐	CASA ☐
All relatives who have expressed an interest ☐			The child, if old enough to express an opinion ☐	

Foster Care Worker Signature: _____ Date: _____

Foster Care Supervisor Signature: _____ Date: _____

DHS Monitor Signature: _____ Date: _____

Department of Human Services (DHS) will not discriminate against any individual or group because of race, religion, age, national origin, color, height, weight, marital status, sex, sexual orientation, gender identity or expression, political beliefs or disability. If you need help with reading, writing, hearing, etc., under the Americans with Disabilities Act, you are invited to make your needs known to a DHS office in your area.

cc. Court
Case File (Required)

Unaccompanied Alien Minors:

Facing the Federal Immigration Detention System or Child Protective Services

by Anna Jordan Cobb, J.D. Candidate, University of North Carolina School of Law

Author's Note:

This article describes what most are very unfamiliar with: the law and policy affecting unaccompanied alien minors, children who have no lawful status in the United States, are younger than eighteen, and do not have a parent or legal guardian in the United States to provide care and physical custody. The majority of unaccompanied alien minors are detected and detained by the federal government shortly after the have crossed the border into the United States. This article explains the procedures in place to care for these children and describes how the system treats this group of unaccompanied alien minors. The article discusses and compares another group of children the law also defines as unaccompanied alien minors, who are being placed in state custody in child protective services. Finally, the article suggests reforms and further protections for unaccompanied alien minors.

Introduction

Six-year-old Lilliana crossed the border into the U.S. through a border station with another child's documents.[1] Her parents, also undocumented, had been living in Georgia for five years.[2] They sent for their daughter after a spree of shootouts and kidnappings by drug traffickers near her home in northeast Mexico.[3] Lilliana did not make it to meet her parents in Georgia.[4] A Customers & Border Patrol agent apprehended her, after noticing Lilliana did not fit the description of the identification she presented.[5] As an unaccompanied minor, the immigration officials transferred Lilliana to a detention center, where she was held under federal custody.[6] It wasn't until a month later that Lilliana's parents successfully secured her release.[7] Lilliana now faced immigration court and a fight to avoid deportation.

Sixteen-year-old Isaac Lugo and his father, a single parent, had lived in Utah as undocumented immigrants for nine years. While driving to pick up a pizza, two police cars stopped them.[8] The police arrested Isaac's father for an unpaid parking ticket.[9] Immigration authorities discovered Isaac's father was not legally present in the U.S and his father agreed to voluntary deportation.[10] Isaac lived completely on his own for a month until family friends informed the local Department of Child and Family Services.[11] Isaac's father did not disclose leaving his son behind for fear that Issac would also be detained due to his undocumented status.[12] The Department of Child and Family Services placed Isaac in state custody and then transferred him to foster care.[13] After living in the U.S. for a significant time period with his father, who was never considered an unfit dad, Isaac was forced to move and live with a stranger.[14]

An unaccompanied alien minor is defined as a child who has no lawful status in the United States, is younger than eighteen, and does not have a parent or legal guardian in the United States to provide care and physical custody.[15] Immigrant children come to the U.S. to "flee violence, crime, gang activity, abuse, and poverty, and [ ] seeking safety, reunification with parents, and economic opportunities."[16]

Unaccompanied alien minors are typically considered to fall into one category: children, like Lilliana, who enter the U.S. alone and who are almost immediately detected and apprehended by immigration officials.[17] These unaccompanied alien minors are either deported within days of apprehension or detained in custody of the Office of Refugee and Resettlement ("ORR"). While detained in an ORR facility, the federal government works to identify a sponsor within the U.S. to release the child, whether it is the minor's parent, relative, or an adult family friend. Upon release

to an adult, the child's "unaccompanied" status is relinquished.

Although the majority of unaccompanied alien minors fall within the aforementioned group, there is a lesser-discussed category of unaccompanied alien minors that raises a unique set of issues. Unlike the minors placed in ORR custody, some undocumented children, like Isaac, successfully cross the border without detection[18] and settle into their new lives in the U.S. These children are not apprehended or detained because of their immigration status.[19] Instead, Immigration and Custom's Enforcement ("ICE") detects the child's parent's[20] undocumented status,[21] and in many cases, ICE detains the child's parent.[22] These children, despite entering the U.S. "accompanied," obtain the "unaccompanied" status when they are left alone due to the detention of their single father, single mother, or both parents and the children.[23] Unlike the unaccompanied alien minors placed in ORR custody soon after crossing the border without legal status, the now "unaccompanied" alien minors are forced into the state foster care system.[24] Similar to some unaccompanied minors in federal custody, they strive to reunite with their family in a system very unforgiving to undocumented parents.[25]

Both Lilliana (when detained at the border) and Issac (after his father was apprehended) fit the description of an "unaccompanied alien minor." Their stories greatly differ: Lilliana entered the U.S. as "unaccompanied", and Issac lived nine years in the U.S. before becoming "unaccompanied."[26] Lilliana was detained in federal custody and reunited with her parents, where Issac was pushed into state custody and separated from his father.[27] Their stories are only one example of the discrepancies in our failed immigration system. The law governing unaccompanied minors supposedly applies equally to both groups of minors, however while Lilliana faces immigration court, Isaac confronts juvenile court. Unsatisfactory policies with seemingly diverging purposes guide the government in dealing with unaccompanied minors whom are held in federal detention and those in state custody. The ORR system attempts to reunite families, while the state welfare system separates families. In both cases, the system forces children into an unstable, traumatic environment for extended periods of time and fails to take into account the distinctive issues the children face.

This article seeks to uncover the different procedures applied to two groups of unaccompanied minors, legally the same. Part I reviews the existing law and policy relating to unaccompanied children, solely addressing those minors in federal custody. Part II discusses the options for immigration relief available to all unaccompanied minors and reflects on the existing shortcomings. Part III compares the two systems unaccompanied children face, recognizes the many problems unaccompanied minors encounter, and suggests potential solutions relevant to the specific groups. Part IV proposes reforms to better provide for unaccompanied minors in government custody and advocates for prosecutorial discretion as the best method of preventing government custody of unaccompanied minors.

I. Legal Protections for Unaccompanied Minors in Immigration Law and Policy

The law and policy guiding the treatment and protection of unaccompanied minors developed in recent years, but continues to lack essential legislation. Currently, immigration law mostly reflects concerns relevant to those unaccompanied minors apprehended soon after crossing the border and outlines model practices while these minors are in ORR custody. The Flores settlement, the Homeland Security Act, and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 represent the primary laws and practices addressing the needs of unaccompanied alien minors.[28]

The Flores Settlement serves as the leading policy guidance relating to unaccompanied alien minors and primarily concerns those children apprehended soon after crossing the border. The Settlement is a result of the action of four unaccompanied minors, who brought a class action suit against Immigration & Naturalization Services ("INS", now U.S. Citizenship and Immigration Services, "USCIS") in 1985 claiming a regulation mandating unaccompanied alien children only to be released from federal detention to their parents, close relatives, or legal guardians except in unusual and compelling circumstances violated their due process rights.[29] The Supreme Court held that unaccompanied minors have due process rights, but rejected the claim that "alien juveniles suspected of being deportable have a fundamental right to freedom from physical restraint."[30] On remand, the district court approved the Flores Settlement, an agreement between the parties of standards to be implemented for the detention, processing, and release of juvenile aliens.[31]

The plaintiffs in *Flores* also challenged the deplorable conditions within the INS detention centers.[32] The settlement continues to serve as the legal framework guiding the federal government in their practice of handling unaccompanied minors.[33] The overall objective of the agreement is to ensure that federal agents "treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors."[34] Pursuant to the Flores settlement, all ORR facilities must provide children in their care with education, health services, recreational activities, and case management.[35] The agreement establishes a general policy favoring release of a minor to an adult in the following order: (1) a parent, (2) a legal guardian, (3) an adult relative, (4) an adult or individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well being, (5) a licensed program willing to accept legal custody, or (6) an adult individual or entity seeking custody.[36] The Flores settlement also requires the government to advise unaccompanied alien minors of their rights, provide them with a list of attorneys, and allow counsel to visit and communicate with them.[37] The agreement mandates that the ORR "place each detained minor in the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with its interest to ensure the minor's timely appearance before the [immigration court] and to protect the minor's well-being and that of others."[38] The Flores settlement represents a realistic and obtainable minimum standards for the federal government in its treatment unaccompanied minors. However, many scholars argue the Flores standards consistently are not met.[39] Promulgating regulations codifying the Flores agreement would solidify procedural policies and require more enforcement to protect unaccompanied minors while apprehended, detained, and released.[40]

Minimal legislation recognizes the rights of unaccompanied alien minors. Before the enactment of the Homeland Security Act in 2002, the Immigration and Naturalization Service ("INS") coordinated services for unaccompanied minors.[41] The attacks on September 11, 2001 brought attention to the immigration system, including the conflict of interest created in charging the same office to protect alien minors and enforce immigration law.[42] The Homeland Security Act partly dissolved the conflict of interest concerns by transferring responsibility of unaccompanied alien minors to the Office of Refugee Resettlement (ORR), under the authority of the Department of Health and Human Services (DHHS).[43] The ORR responded by creating the Unaccompanied Alien Children ("UAC") program. The UAC coordinates and implements the care and placement of unaccompanied alien children, makes placement determinations, "implement[s] policies with respect to the care and placement" of the children, and "conduct[s] investigations and inspections of facilities" where unaccompanied minors reside.[44]

Finally, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA") also provides some protection to unaccompanied minors.[45] The TVPRA includes a mandate for non-adversarial adjudication of asylum cases for unaccompanied alien minors and a provision requiring the Secretary of Health and Human Services to develop procedures to ensure that unaccompanied alien children are "safely repatriated to their country of nationality."[46] In addition, the TVPRA grants authority to the government to appoint guardians ad litem to trafficking victims and other vulnerable unaccompanied children.[47]

Supplementing the minimal legislation currently enacted could greatly increase the protections afforded this vulnerable population. Possible solutions are contemplated *infra* Part IV.

II. Forms of Immigration Relief Available for Unaccompanied Alien Minors

The immigration system was not designed with children in mind, and unaccompanied minors have few options for relief.[48] Only one form of immigration relief offers legal status exclusively to children, the Special Immigrant Juvenile Status ("SIJS"). Other options are identical to those available to adults, among them: asylum and T visas. The qualifying visa categories exclude an expansive group that should be granted relief. In addition, although all unaccompanied alien minors (both groups previous discussed) are in need of options to obtain legal presence in the U.S., barriers to legal representation and lack of resources result in the deportation of minors potentially eligible for relief.

The Immigration Act of 1990 created the Special Immigrant Juvenile Status, a form of relief for unaccompanied minors who have suffered abuse, abandonment, or neglect by their parents or caretakers.[49] Determining whether a child meets the requirements

to obtain SIJS involves collaboration between state and federal systems.[50] To obtain SIJS, first, the child must be "declared dependent on a juvenile court" and "deemed eligible by that court for long-term foster care due to abuse, neglect or abandonment."[51] Next, the juvenile court must decide that it would not be in the unaccompanied minors "best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence."[52] Although these initial determinations are provided by a state juvenile court, the Secretary of Homeland Security has the ultimate authority to approve or deny an unaccompanied minor's status.[53] Children with bars to adjustment to status or children who hold grounds of inadmissibility are not eligible for SIJS.[54] One major benefit of this form of relief is the ability for the minors granted SIJS to immediately adjust to lawful permanent resident status, and begin the pathway to citizenship.[55]

SIJS has significant potential for providing relief, but there is much room for improvement in its implementation. SIJS is limited to 5,000 children annually.[56] Although in the past couple of years the minors receiving the special status have slowly increased, in 2010 the government only granted one-third of the available SIJS. The number of minors granted SIJS is not indicative of the increasing amount of unaccompanied minors entering the U.S.[57] One explanation for the wide gap between the need for immigration relief for unaccompanied children and the minors receiving the SIJS is the difficulties for minors to simultaneously face two separate court systems, which creates various complications.[58] However, many unaccompanied children are likely not granted SIJS because they are not aware the option exists or lack representation by counsel to assist in the process.[59]

Asylum is another option for unaccompanied alien minors to obtain legal presence in the U.S. and avoid deportation. A minor may apply for asylum if he or she faces persecution in his or her home country or a well-founded fear of persecution on "account of race, religion, nationality, membership in a particular social group, or political opinion."[60] Because in many cases, it is more challenging for an unaccompanied minor to express the reasons for fleeing the minor's home country, special procedures attempt to create a more child-friendly process.[61] Asylum officers follow the "Guidelines for Children's Asylum Claims", which recognizes the need for "child-sensitive interview procedures and analysis."[62] Although not enacted as law, the Guidelines suggest that age may affect the analysis of the child's refugee status and the officer may take regard to the child's specific vulnerabilities.[63] Despite this, due to "their age, immaturity, level of development, trauma experienced, and limited knowledge of conditions of their native country or the legal significance of the conditions," unaccompanied minors confront difficulties in proving their claim.[64]

The TVPRA outlined additional considerations for children in the process of filing for asylum. The TVPRA provides an exception to the one-year filing deadline for children who entered as unaccompanied minors and permits them to present their case in front of an asylum officer, instead of an immigration judge as is standard in removal proceedings.[65]

In 2000, Congress created a new visa category for victims of human trafficking through the Trafficking Victims Protection Act.[66] Applicants are required to show they suffered from a "severe form of trafficking in person."[67] Trafficked children must demonstrate they were exploited or forced into labor and they would "suffer extreme hardship involving unusual and severe harm upon removal."[68] The requirements to be issued a T visa are slightly more relaxed for minors, who do not need to put forth evidence that they helped the investigation against their traffickers.[69] Those granted T visas are eligible to adjust to lawful permanent residence status if certain conditions are met.[70] Despite the T visa serving as a valuable option for trafficking victims, like SIJS, a wide gap exists between those minors in need of a T visas and the number of T visas actually granted.[71] One study shows 17,000 children enter the U.S. as victims of human trafficking annually.[72] However, the government granted only thirty-one T visas in 2008,[73] despite the annual cap of five thousand. The familiar obstacles, including barriers to representation and lack of resources, prevent more unaccompanied minors from taking advantage of this option.[74]

III. Two Types of Unaccompanied Minors:

Lilliana's Group: Detection, Detention, and Deportation

Overview

The number of unaccompanied alien children entering the United States continues to rise.[75] The government gathers data on detected and detained unac-

companied minors. Most unaccompanied minors who enter the U.S. are from Central America and between the ages of fifteen and eighteen. Twenty percent enter under the age of fourteen.[76] The ORR served a total of 13,625 unaccompanied alien minors in 2012, doubling the number of children served in 2011.[77] While many activists and scholars focus their attention on the due process concerns,[78] detention standards,[79] and the practice of coercing unaccompanied minors to waive their right to a deportation proceeding,[80] few resources specifically describe in depth the procedures implemented in ORR. An overview of the process unaccompanied minors undergo in the federal system helps judges, lawyers, and advocates obtain an understanding of the areas of the law that need to be developed and the relevant policy considerations.

Detection

When unaccompanied minors cross the border or otherwise violate immigration laws, one of three federal agencies: Customers and Border Patrol ("CBP"), the U.S. Coast Guard, or Immigrations and Customs Enforcement ("ICE),[81] may detect children suspected of violating immigration law.[82] Most unaccompanied minors come into federal custody when trying to cross the border from Mexico into the U.S.[83] Immigration enforcement authorities place the minor in a temporary Department of Homeland Security ("DHS") facility[84] and make the determination whether the minor is "unaccompanied."[85]

Special rules apply to Mexican and Canadian nationals. When unaccompanied minors falling into this category are apprehended at the border, ICE provides the minors with a notice of rights, which allows the minors the option of requesting a hearing before an immigration judge or electing to voluntarily return immediately to their home country, usually within one business day.[86] The government conducts a screening to ensure the child is not a victim of human trafficking or at risk of being trafficked upon return, the child does not have a credible fear of persecution in his home country, and the minor is capable of making the decision to withdraw an application for admission to the U.S.[87] The child is then transported back to Canada or Mexico.

Children who are not Mexican or Canadian nationals (or who are, but have elected to have an immigration hearing) are detained and placed in ORR custody.

Detention

Upon detection, ICE contacts ORR and arranges for the minor's transfer to one of ORR's fifty facilities in twelve states.[88] ORR places the child in one of four types of facilities: shelter care,[89] staff-secure care,[90] secure care,[91] or transitional (short-term) foster care.[92] The placement facility determination is based on information from ICE regarding the child's gender, age, country of origin, date and location of apprehension, medical and psychological condition, and criminal history.[93]

Once placed in an ORR facility, the government works to identify sponsors of unaccompanied minor children, who can request the release of minors from detention in federal custody. Non-profit organizations, such as Legal Services of Southern Piedmont and Catholic Legal Immigration Network, Inc., coordinate with the federal government to locate potential sponsors.[94] If no viable family reunification options exist and a child is eligible for relief from removal, the minor may be transferred to long-term care, which includes foster care, group homes, and residential treatment centers.[95] Where a sponsor is located, the ORR facility completes an assessment of the child and potential sponsor.[96] The sponsor completes a packet of information to verify the sponsor's relationship with the child, household composition, employment, and immigration status.[97] The unaccompanied minor's sponsor also signs an agreement of responsibility to ensure the child complies with immigration court appearances.[98] The Flores Settlement, explained in depth *infra* Part I, provides in hierarchical order a list of who may sponsor an unaccompanied minor.[99] Of those children released to a sponsor, almost one- third are released to their parent.[100] While most children remain in ORR care for one week to four months, some children have been detained for over two years.[101] Many unaccompanied alien minors detected and detained, despite some being released to a sponsor, face deportation proceedings.

Deportation and the Need for Guaranteed Legal Representation of Unaccompanied Alien Minors

Almost one-fifth of the children in ORR custody are eventually deported.[102] If the child's deportation process initiates before his release to a sponsor, DHS begins the repatriation process by coordinating with the child's home country consulate and the ORR

facility where the child is detained.[103] After obtaining proper travel documents for the child, DHS arranges for the child's transport back to the child's home country.[104] If deportation proceedings begin after an alien minor has been released to a sponsor, the sponsor is required to ensure the minor's presence at the minor's court hearings.

While some unaccompanied alien minors obtain legal assistance through government programs or private family assistance, unaccompanied alien minors in federal custody should be guaranteed legal representation in deportation hearings. In *In Re Gault*, the U.S. Supreme Court held due process requires that an attorney represent children in juvenile delinquency proceedings.[105] The Court acknowledged minors' need for assistance in understanding the law, court proceedings, and ascertaining any possible defenses.[106] Minors "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[107] Children caught in the immigration system are not appointed an attorney at government expense.[108] Although removal proceedings are civil, and juvenile delinquency cases are criminal, the same rationale from *Gault* applies for appointing lawyers to all unrepresented unaccompanied minors confronted with immigration court.[109] In fact, unique issues that unaccompanied alien minors frequently encounter, such as lack of English proficiency and psychological problems caused from the traumatic experience of crossing the border, provide an even stronger case for requiring their representation. Courts have long recognized "[a] deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself."[110]

A U.S. District Court in *Perez- Funez* found the "limited understanding and decision- making ability of the class members, the critical importance of the decisions, and the inherently coercive nature of INS processing require that children be given some assistance in understanding their rights."[111] Almost thirty years after the court heard that case, the government shows essential improvements in its procedural protections towards unaccompanied minors, however much work is still needed. In an effort to secure attorneys for unaccompanied children, the ORR developed programs created through funding from Congress provided to the Executive Office of Immigration Review (EOIR).[112] EOIR contracted with the Vera Institute of Justice in 2005 to administer these programs, which identify lawyers willing to represent minors for pro bono.[113] The Vera Institute, in turn, subcontracted with nonprofit legal service providers to educate children about the legal process, evaluate whether they may have a case for relief from removal, and train volunteer attorneys to represent the unaccompanied children in court.[114] The ORR, the Vera Institute, and the partner non-profit organizations should be praised for their efforts in responding to the concerns surrounding unaccompanied minors and improving the access to representation. However, pro bono programs funded through the Executive Office, the branch responsible for enforcing immigration laws, raise conflict of interest questions and issues as to whether the minors can be effectively assisted.[115] In addition, although this framework permits some children to appear in court with a lawyer, many minors continue to appear in immigration court pro se.[116] TALK ABOUT WHY IT IS NECESSARY THAT MINORS in FEDERAL CUSTODY, ESPECIALLY, BE REPRESENTED.

Isaac's Group: Unaccompanied Alien Children in the State Court System: Involved with Child Protective Services

Overview

The broad definition of an unaccompanied alien minor does not strictly apply to those children who have recently crossed the border. In fact, undocumented immigrant children who have been living in the United States for a number of years may be included.[117] While the majority of unaccompanied children enter the U.S. "unaccompanied", other undocumented children enter the U.S. either accompanied by parents or other relatives or unaccompanied, and settle into their new lives without any detection by the federal immigration enforcement authorities. An estimated 48,000 unaccompanied minors enter each year undetected.[118] Many of these children only obtain the "unaccompanied" status when their parent is unexpectedly detained after living in the U.S. for a period of time. Recently, this problem has become more prevalent due to an increase in interior enforcement programs designed to identify undocumented immigrants,[119] which has resulted in an unprecedented number of deportations.[120] In 2011, the federal government deported almost 400,000 individuals from the United States due to their immigration status.[121] When parents are detained, they often leave behind

their minor children.[122] Presumably, children without legal presence whose parents are detained should be referred to the

ORR and placed in federal custody. However, sources indicate these children, although falling into the definition of "unaccompanied alien minors"[123] like Lilliana, are not referred to ORR. Instead, the state child welfare system gets involved.[124]

Child Protective Services ("CPS") exists in every state to address the needs of children living in unsafe homes and suffering from abuse.[125] CPS responsibilities include supervising the placement of children with alternative caregivers and managing the process of dependency cases, defined as juvenile court cases involving neglect or inadequate care on the part of the parents.[126] Because the system was created to serve mistreated and neglected children, the juvenile court system does not adequately consider parents separated from minors solely due to the detection of the parent's immigration violation and detention. In fact, CPS procedures completely ignore the hardships a parent in ICE custody faces, and the difficulty in complying with the requirements CPS and the juvenile court set forth. A brief overview of the current policies illustrates the severe problems in the system. While the process and issues presented here apply equally to undocumented immigrant parents of U.S. citizen children as they do to the parents of unaccompanied minor aliens, this article concerns solely the position of those unaccompanied minor aliens in the state system.

When immigration authorities detain a child's parent and an immediate relative cannot be identified to care for the child, CPS takes custody of the minor.[127] As required by law, CPS files a petition to a juvenile dependency court.[128] CPS then creates a permanency plan, referred to as the reunification plan, which identifies required steps for parents to regain custody of their children. If the parent cannot complete the plan, the law provides CPS with the authority to file to terminate parental rights and seek adoption.[129] CPS designs the reunification plan to "help *remedy the conditions* that brought the child and family into the child welfare system."[130] This is an appropriate mission for children who lived in abusive and neglectful homes, which represents the overwhelming majority of the CPS caseload. However, the reunification plan is not suitable for a parent who provided a safe and attentive home for an unaccompanied alien minor, and who was separated from the child solely due to the parent's unlawful presence in the U.S. In this case, the "condition" that needs to be "remedied" is the immigration system.[131] No reunification plan requirements, such as child-parent visits, parenting classes, or family therapy can fix the immigration system.

Reunification Plan

The juvenile court requires an unaccompanied alien minor's parents to comply with the reunification plan in order to be reunited with their children. However, it is almost impossible for parents in the immigration detention system to comply with the reunification plan.[132] Once apprehended, most immigrants are quickly transferred to other detention centers and it is not uncommon for parents to be detained in a different state than where their children live within a matter of days.[133] This creates tremendous difficulty in locating the parent. Many parents do not even receive a copy of the reunification plan and as a result, are completely unaware of the steps they need to take to obtain custody once released from detention. In addition, the distance between the parent and child severely complicates the ability for the court to communicate with the parent. Under these conditions, visits, which are required in most plans, are impractical.[134] Some courts find parents' failure to maintain contact with their child because of their incarceration an irrelevant justification.[135] Detention facilities do not honor juvenile court orders for parents to appear; therefore parents are completely cut out of the juvenile court process.[136]

A parent's prolonged detention is especially harmful to the reunification process and in some cases has completely prevented parents from gaining custody of their children. Juvenile law fails to take into account the circumstances of parents in immigration proceedings. The Adoption and Safe Families Act ("AFSA"), extremely unforgiving for detained immigrant parents, mandates the child welfare department to petition the court for the termination of parental rights if a parent has not had custody of his child for fifteen of the last twenty-two months.[137] Termination of parental rights may be granted before twenty-two months, if the child welfare department demonstrates to the court that "reasonable efforts" have been made to reunify the family and have failed due to the detention or deportation of the parent.[138] Generally, the termination of parental rights and permanency timeline continue to run despite the parent's powerlessness and inability to complete the plans.

The reality of the situation is that an unaccompanied alien minor could be permanently separated from his parent due to a workplace raid or a minor traffic violation. Permanent separation is even more likely if the parent is deported, which is very probable after detection of unlawful presence in the U.S.[139] Parents face even more barriers to reuniting with their unaccompanied alien minors and complying with the reunification plan once deported to their home country.[140] The majority of child welfare departments lack the protocol to initiate reunification of children with deported parents.[141] Court decisions indicate harsh, insensitive attitudes toward detained and deported parents. When the court grants termination of parental rights, children can even be adopted.[142] State juvenile court judges lack statutory guidance and case law directing them as to whether and how immigration status should be considered when unaccompanied alien minors children are placed in the custody of Child Protective Services.[143]

Potential Solutions

Unaccompanied alien minors with detained immigrant parents present a unique problem to state juvenile courts. Juvenile court judges are unfamiliar with immigration law and policy, and social workers are unequipped to help reunify children with parents detained or deported due to the immigration system.[144] Studies of child welfare departments and local courts indicate a wide prevalence of system bias against placing children with undocumented caregivers, in spite of the fact that that the potential caregiver is a member of the child's extended family.[145]

Potential solutions do not come without risks and drawbacks.[146] For example, one possibility is to transfer unaccompanied alien minors to ORR custody once their parents have been detained. Not only is this what current immigration law requires, ORR is experienced in working with unaccompanied alien minors and offering resources specific to this group.

However, sending the minors to ORR also presents serious issues. In federal custody, the children are not only separated from their parents, they are at risk of deportation, and most likely uprooted from their community and transferred to an unfamiliar location.

The best option is to completely avoid this situation from occurring in the first place through prosecutorial discretion. Fit and capable parents, who are not "top priority", should not be separated from their children solely because an immigration enforcement agent refused to properly exercise prosecutorial discretion. To prevent the need for ORR or CPS to take custody of the minor, ICE officers should grant the release of parents of minors on bond or humanitarian parole.[147]

Laws and policy must be developed to recognize these issues and create protocol favorable to keeping families together. The Help Separated Families Act of 2012 would have alleviated many concerns by prohibiting a state "from filing for termination of parental rights in foster care cases in which an otherwise fit and willing parent or legal guardian has been deported or is involved in (including detention pursuant to) an immigration proceeding."[148] However, this bill died in a Congress full of political divide over immigration issues. Additional reform options are discussed below.

IV. Suggested Reforms

Unaccompanied alien minors require a broad range of resources, legislation, and advocacy on their behalf. There is no one simple solution to solve the issues outlined above. Admittedly, allocating additional efforts to protect unaccompanied alien minors will come with significant expense. However, this vulnerable population deserves more procedural and substantive safeguards.

Guardian Ad Litems

Unaccompanied minors in federal custody and in state custody should be appointed culturally competent, bilingual guardian ad litems. Although the Unaccompanied Alien Child Protection Act included a provision requiring implementation of a guardian ad litem program, it was not adopted into the Homeland Security Act.[149] In 2008, TVPRA granted the federal government the authority to appoint guardian ad litems.[150] Despite this, the government has failed to implement a national advocacy program for unaccompanied minors.

When unaccompanied alien minors face immigration court, like in Lilliana's case, lawyers fill a void by advocating to the court appropriate forms of relief and defenses on behalf of the child. However, a guardian ad litem is necessary as an additional resource.[151] A few local advocacy programs have been established, but a widespread permanent solution is needed. In 2012, only one child advocate program existed in the U.S, the Young Center for Immigrant Children's

Rights, which serves unaccompanied alien minors in Chicago and Harlingen, Texas.[152] Essentially the same as a guardian ad litem, bicultural and bilingual child advocates visit with their appointed child each week, investigate the child's situation in the child's home country, accompany the child to court hearings, and draft written reports with recommendations based on the child's best interests.[153] The advocate is able to develop a relationship with the unaccompanied minor in order to understand the child's needs and express those needs in a way the child may not be able to. The Young Center's program should serve as a model for a national program.

In the case of minors in ORR facilities, another rationale for implementing a guardian requirement is to ensure the unaccompanied minor's safety after release from federal custody to a sponsor. Inevitably, some unaccompanied alien minors in federal custody are released to relatives or adult sponsors they have never met. Without visiting the sponsor's home and learning more about the relationship between the child and the sponsor, the ORR takes a risk that the minor may be placed in an neglectful or abusive home environment. If the ORR establishes additional procedures to confirm a sponsor's suitability, it would undoubtedly prolong an unaccompanied minor's detention.[154] A guardian ad litem would alleviate this problem by conducting visits and assessments post-release to ensure the placement is a safe one.

If the unaccompanied alien minor is ultimately deported, the guardian ad litem would fulfill another gap in government protocol. There is little known about what happens to minors after deportation. Few, if any, safeguards ensure the child returns to a safe home environment.[155] This is especially concerning considering the risks the children took to leave their country and enter the U.S. as minors, an indicator of the desperation some felt in their home country.[156] The ORR fails to follow-up with deported unaccompanied minors in part due to the lack of a clear framework to guide the ORR.[157] The guardian ad litems would help ensure the children arrive safely in their home country and maintain contact with the minors until they are settled.[158]

In the state court system, all minors are automatically assigned a guardian ad litem. However, the law should require guardians of unaccompanied alien minors be specifically trained and experienced to deal with the child's unique situation. Here, guardian ad litems would serve both the unaccompanied alien minor and the minor's detained parent. As previously mentioned, the government did not design CPS and juvenile courts to accommodate parents in immigration detention centers. Guardians would initially assist by locating the detained parent and serving as an intermediary between the parent, the juvenile court, and CPS. The guardian would identify family members willing to care for the minor and advocate for the minor's placement with them. In addition, guardians would address a significant need in coordinating between the immigration court handling the parent's case, and the child's juvenile dependency court. Guardians would work with the immigration detention center to allow the parent to communicate with the juvenile court judge. The guardian would ensure that the parent receives the reunification plan and would collaborate with juvenile court judges and social workers to ensure reunification plans consist of relevant and achievable goals.

If a minor's parent is deported, guardian ad litems would relay to the court the child's desires to either be reunited with his parent or stay in the U.S.

Prosecutorial Discretion

Prosecutorial discretion is defined as " the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual." Discretion may be exercised in multiple points throughout an immigrant's interaction with ICE in various forms including deciding to cancel a Notice to Appear, deciding whom to release on personal recognizance, deciding when to arrest for an administrative violation or in dismissing a proceeding.

ICE released multiple memorandums providing guidance to ICE agents on exercising prosecutorial discretion.[159] In June 2011, Director of USCIS John Morton issued a memo emphasizing the priorities of the agency for the apprehension, detention, and removal of aliens.[160] Morton stressed ICE's top priorities as enforcing immigration laws against serious felons, gang members, and individuals who pose a clear risk to national security or present an egregious record of immigration violations. The memo listed factors that should be taken into account when exercising discretion, including the "person's age, with particular consideration given to minors." Detained unaccompanied alien minors and detained parents of unaccompanied alien minors fall into a low-priority category, as long as

they do not have a serious criminal history. Therefore, unaccompanied alien minors in federal custody and parents of alien minors in the U.S. deserve a favorable exercise of discretion.

Although the Obama administration advises ICE officers to focus enforcement efforts on individuals likely to create problems in this country, apprehensions and deportations of unaccompanied alien minors and their parents continue at a steady rate. Reports show discretion is simply not being used.[161]

Prosecutorial discretion must be more consistently applied to unaccompanied alien minors detected and detained by federal immigration authorities. Forty percent of deported children attempt to re-enter the U.S. after removal.[162] The numbers provide a clear indicator that the current system is not working. These children are determined to escape their home country and enter the U.S. ICE has the authority to defer their case, and should do so more often.

Prosecutorial discretion must also be exercised when ICE detects the illegal presence of a parent of an unaccompanied alien minor. If the parent does not fall into the top priority category, the immigration authorities should not apprehend him. If necessary, ICE may proceed in taking measures to try to deport the parent without detaining him. An initial exercise of discretion prevents families from being separated and the state court system from having to get involved.

Conclusion

The varying treatment applied to two different groups of unaccompanied alien minors, legally the same, indicates the gaps in immigration law and lack of uniformity. With immigration reform becoming more of a possibility, Congress needs to include protections for unaccompanied alien minors through legislation and prevent the devastating conditions the vulnerable population currently faces.

About the Author

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Endnotes

1 Julia Preston, *Young and Alone, Facing Court and Deportation*, THE NEW YORK TIMES (Aug. 25, 2012), *http://www.nytimes.com/2012/08/26/us/moreyoungillegalimmigrantsfacedeportation.html?pagewanted=all&_r=0*.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 Elizabeth Stuart, *The Children Left Behind: Dad's Deportation Lands Son in Foster Care*, DESERT NEWS (Nov. 15, 2011 12:52 AM), *http://www.deseretnews.com/article/700197990/The--children--left--behind--Dads--deportation--lands--son--in--foster--care.html?pg=all*.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 6 U.S.C.A. §279 (g)(2).

16 Maura M. Ooi, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEO. IMMIG. L.J. 883, 884 (2011).

17 *See generally* OLGA BYRNE & ELISE MILLER, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS 4 (2012).

18 In this case, the children could have also entered the U.S. with proper documentation, then as time passed, have lost their legal status.

19 *Id.*

20 "Parent" is used here, but in general I am referring to the child's caregiver, whoever that may be.

21 *See generally* NINA RABIN, THE UNIVERSITY OF ARIZONA, DISAPPEARING PARENTS: A REPORT ON IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 1 (2011).

22 *See generally* SETH FREED WESSLER, THE APPLIED RESEARCH CENTER, SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 5 (2011).

23 *Id.*

24 *Id.* at 26. An alarming number of minors are currently in the foster care system due to the apprehension, detention, and oftentimes deportation of their caregiver. While most of these children are U.S. citizens, I will specificallydiscuss and address the undocumented children who fit into the definition of an "unaccompanied alien minor."

25 *Id.*

26 *See supra* note 8; Julia Preston, *Young and Alone, Facing Court and Deportation*, THE NEW YORK TIMES (Aug. 25, 2012), *http://www.nytimes.com/2012/08/26/us/more--young--illegal--immigrants--face--deportation.html?pagewanted=all&_r=0*.

27 *Id.*

28 *See generally* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110- 457, 122 Stat. 5044.

29 Reno v. Flores, 507 U.S. 292, 292 (1993).

30 *Id.* at 299–300.

31 Claire L. Workman, *Kids Are People Too: Empowering Unaccompanied Minor Aliens Through Legislative Reform*, 3 WASH. U. GLOBAL STUD. L. REV. 223, 229 (2004).

32 *Id.*

33 Devon A. Corneal, *On the Way to Grandmother's House: Is U.S. Immigration Policy More Dangerous than the Big Bad Wolf for Unaccompanied Juvenile Aliens?*, 109 PENN ST. L. REV 609, 644 (2004). When approved, the agreement referred to the responsibilities of the Immigration and Naturalization Service (INS), now called United States Citizenship and Immigration Services (USCIS). The Flores settlement applies to ORR, the agency currently in charge of unaccompanied alien minors. *Id.*

34 Final Test of Settlement Establishing Minimum Standards and Conditions for Housing and Release of Juveniles in INS Custody, Flores v. Meese, No. CV85-4544-RJK (C.D. Cal. 1997), available at *http://centerforhumanrights.org/children/Document.2004-06-18.8124043749* (hereinafter the Flores Agreement).

35 Byrne & Miller, *supra* note 17, at 14.

36 Flores Agreement.

37 Workman, *supra* note 31, at 229.

38 Flores Agreement.

39 *See* Corneal, *supra* note 33, at 645–48; Workman, *supra* note 31, at 230–31.

40 *See* Corneal, *supra* note 33, at 645–48; Workman, *supra* note 31, at 230–31.

41 M. Aryah Somers, et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y, 311, 334 (2010).

42 Ooi, *supra* note 16, at 887.

43 6 U.S.C. §279 (2006).

44 Homeland Security Act, §462(b)(1)(A), 6 U.S.C. §279(b).

45 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044. (codified as amended in scattered sections of 8, 18, & 22 U.S.C.).

46 Deborah Lee et al., *Legal Relief Options for Unaccompanied Alien Children: Update Since the Enactment of the 2008 Trafficking Victims Protection Reauthorization Act*, American Immigration Lawyers Association (2009).

47 Byrne & Miller, *supra* note 17, at 8.

48 Ooi, *supra* note 16, at 899.

49 Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (requiring that the it be determined that "it would not be in the [immigrant child's] best interest to be returned to [his] or [his] parent's previous country of nationality or country of last habitual residence.").

50 David B. Thronson, *Kids Will be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 1005 (2002).

51 Immigration and Nationality Act, 8 U.S.C. §1101(a)(27)(J)(i)(2012).

52 Immigration and Nationality Act, 8 U.S.C. §1101(a)(27)(J)(ii).

53 Immigration and Nationality Act, 8 U.S.C. §1101(a)(27)(J)(iii).

54 *See* Immigration and Nationality Act, 8 U.S.C. §1255(h).

55 Ooi, *supra* note 16, at 890.

56 M. Beth Morales Singh, *To Rescue, Not Return: An International Human Rights Approach to protecting Child Economic Migrants Seeking Refuge in the United States*, 41 COLUM. J.L. & SOC. PROBS. 511, 514 (2008).

57 Angie Junck, *Special Immigrant Juvenile Status: Relief for Neglected, Abused, and Abandoned Undocumented Children*, JUV. & FAM. CT. J. 48, 51(2010); Ooi, *supra* note 16, at 896.

58 Ooi, *supra* note 16, at 896–97 (mentioning differences

in age limits between federal law and state law and inconsistency in dependency determinations based on jurisdiction as problems which limit the number of unaccompanied minors granted SIJS).

59 *See* Thronson, *supra* note 53, at 896.

60 Immigration and Nationality Act, 8 U.S.C. §1001(A)(42)(A)(2003). Note that asylum is not limited to unaccompanied alien minors.

61 *See* Thronson, *supra* note 53, at 893.

62 Corneal, *supra* note 33, at 632.

63 *Id.* at 633.

64 *Id.* at 892–93.

65 Ooi, *supra* note 16, at 889.

66 *Id.* at 890.

67 *Id.* at 891. This is defined as "(1) sex trafficking involving a commercial act induced by force, fraud, or coercion, 2) sex trafficking in which an individual under age eighteen is induced to perform a commercial sex act, or 3) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery." *Id.*

68 Immigration and Nationality Act, 8 U.S.C. §1101(a)(15)(T)(i)(IV) (2003).

69 *Id.* (noting that a child applicant is not required to comply with a request for assistance in the investigation or prosecution of the trafficking, while an adult must cooperate with a request for assistance unless deemed unable due to physical or psychological trauma).

70 *Id.* Qualifying conditions include a specified period of physical presence in the U.S., good moral character, and - if the trafficking occurred after the victim reached the age of eighteen - compliance with requests to assist in the investigation or prosecution of the traffickers. *Id.*

71 *See* Ooi, *supra* note 16, at 891.

72 *Id.*

73 *Id.*

74 *Id.*

75 *Unaccompanied Alien Children*, REFUGEE COUNCIL USA, http://www.rcusa.org/index.php?page=uac (last visited Apr. 10, 2013) (noting that in recent year the number of arriving unaccompanied children average between 7,000 and 8,000 annually. However, by the end of Fiscal Year 2012, the number of unaccompanied alien minors arriving rose from 8,000 to 14,000.)

76 *About Unaccompanied Children's Services*, OFFICE OF REFUGEE RESETTLEMENT, http://www.acf.hhs.gov/programs/orr/programs/ucs/about (last visited April 1, 2013).

77 *See id.*

78 *See, e.g.,* Areti Georgopoulos, *Beyond the Reach of Juvenile Justice: The Crisis of Unaccompanied Children Detained by the United States,* 23 LAW& INEQ. 117 (2005).

79 *Id.*

80 *See* Perez- Funez v. District Director, I.N.S., 619 F.Supp. 656 (1985).

81 Byrne & Miller, *supra* note 17, at 8.

82 *Id.*

83 *Id.* In 2010, approximately eighty percent of children were apprehended within one week of entering the U.S. *Id.* A small percentage successfully make it across the border, but are later detected when coming into contact with a juvenile delinquency or criminal court proceeding and are referred to ICE. Id. Only three percent were apprehended more than two years after entry. *Id.*

84 *Id.* (noting the minors are separated from unrelated adults).

85 *Id.*

86 *Id.*

87 *Id.* at 11.

88 *Id.* at 10, 14.

89 *Id.* at 14. Eighty percent of children were placed in shelter care in 2010. Children in this setting do not have a history of contact with the criminal justice system and do not have special needs.

90 *Id.* Four percent of the minors in ORR's care were placed in staff-secure care in 2010. Minors residing in this type of facility have a history of nonviolent offenses or present an escape risk.

91 *Id.* Children who pose a threat to themselves or others or have a history of violent offenses are placed in secure care. In 2010, four percent of the population in ORR custody resided in this type of facility.

92 *Id.* ORR transfers minors younger than thirteen, sibling groups with one child younger than thirteen, or children presenting special needs such as pregnant and parenting teens to short-term foster care. Eleven percent of minors in 2010 resided in short-term foster care.

93 *Id.*

94 *Legal Orientation Program for Custodians of Unaccompanied Alien Children,* LEGAL SERVICES OF SOUTHERN PIEDMONT, *http://lssp.clickcom.com/services/immigrant-justice/legal-orientation-program-for-custodians-of-*unaccompanied-alien-children-lopc (last visited Apr. 1, 2013). In addition to helping identify potential sponsors, these non-profits provide other services to sponsors caring for minors, including offering legal information. Legal orientation presentations educate unaccompanied alien minors and their sponsors about the immigration court process, the importance of attending removal hearings, and available forms of relief. *Id.*

95 Byrne & Miller, *supra* note 17, at 16.

96 *Id.* at 17.

97 *Id.* at 18. Although not discussed here, scholars recognize this presents a problem for parents who are not legally present in the U.S. and fear that providing their information to release their child from ORR custody will result in their own apprehension and detention. *See generally* Thronson, Thronson, *supra* note 53, at 1012 (citing a case where a mother would not come forward to sponsor her child for fear of immigration enforcement against her).

98 Byrne & Miller, *supra* note 17, at 20.

99 Flores Agreement. *See infra* Part I.

100 Byrne & Miller, *supra* note 17, at 18. Twenty-seven percent were released to family friends and nineteen percent were released to aunts or uncles.

101 *Id.* at 17.

102 *Id.* at 27.

103 *Id.*

104 *Id.* This does not include those unaccompanied minors apprehended at the border and immediately deported, never placed in ORR custody.

105 In Re Gault, 387 U.S. 1, 36 (1967).

106 *Id.*

107 Bellotti v. Baird, 443 U.S. 622, 635 (1979).

108 8 U.S.C. §1362(2006)(" In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.").

109 *See* Corneal, *supra* note 33, at 648.

110 Perez- Funez v. District Director, I.N.S., 619 F.Supp. 656 (1985) (citing Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950)).

111 *Perez- Funez*, 619 F.Supp. at 664.

112 Linda Kelly Hill, *The Right to Know Your Rights: Conflict of Interest and the Assistance of Unaccompanied Alien Children,* 14 U.C. DAVIS J. JUV. L. & POL'Y 263, 270 (2010).

113 Byrne & Miller, *supra* note 17, at 22.

114 *Id.* Catholic Legal Immigration Network, Inc. initiated its BIA Pro Bono Project for Children in 2009, which represents minors and others who have cases before the Board of Immigration Appeals. *Frequently Asked Questions From Volunteers*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., *http://cliniclegal.org/frequently-asked-questions-* faq-volunteers (last visited April 12, 2013).

115 Hill, *supra* note 118, at 263 (suggesting that because the non-profit legal advocates receive government funding there are risks in the relationship with the minor of undermining of loyalty, breaching of confidentiality, and access being denied).

116 *Id* Some providers appoint a "friend of the court", a legal services provider, to accompany the child in court and speak on the child's behalf, but not acting as the attorney of record. This system creates many dangers and confusing expectations for the court and the child. While it may be better than a child going to court alone, many questions arise as to the qualifications of this "friend of the court" to act in a representative capacity.

117 Byrne & Miller, *supra* note 17, at 4.

118 Singh, *supra* note 61, at 514.

119 The 287g program and Secure Communities program are two examples of interior enforcement techniques. The 287(g) program allows local police departments to essentially act as ICE agents, which effectively "empowers local police officers to turn an alleged traffic violation or an arrest of any kind into an immigration enforcement violation." In 2008, Secure Communities program gave local police departments the ability to check immigration status through use of an FBI database. APPLIED RESEARCH CENTER, *supra* note 21, at 11.

120 *Id.* at 10.

121 *Id.*

122 *Id.* at 26 (finding 5,100 children who are presently in foster care have parents who have been detained or deported).

123 *See* 6 U.S.C. §279 (g)(2).

124 *See generally* APPLIED RESEARCH CENTER, *supra* note 21, at 26.

125 *Id.* at 13.

126 *Id.*

127 *Id.*

128 *Id.* at 14.

129 *Id.* (emphasis added).

130 *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children: Summary of State Laws,* CHILD WELFARE INFORMATION GATEWAY (2012), *http://www.childwelfare.gov/systemwide/laws_policies/statutes/reunify.cfm*.

131 *See generally* APPLIED RESEARCH CENTER, *supra* note 21, at 26 (citing a foster care provider who stated if the mother had not been detained, the child welfare system would never have been involved in this family's life.)

132 *Id.*

133 APPLIED RESEARCH CENTER, *supra* note 21, at 37 ("Detainees are transported an average of 370 miles from the place of their initial detention.").

134 *Id.* (noting attorneys and caseworkers describe the parents as being in a "black hole.").

135 *See* Perez-Velasquez v. Culpeper Cnty. Dep't. of Soc. Servs., No 0360-09-4, 2009 WL 1851017, at *2 (Va. Ct. App. June 30 , 2009) (blaming the parent for putting himself in this situation of separation from his children).

136 APPLIED RESEARCH CENTER, *supra* note 21, at 37. Understanding the complications of appearing in person, juvenile dependency judges usually allow for detained parents to appear by phone for their child's proceeding.

However, the detainee's access to a phone at the designated time depends entirely upon the discretion of an individual ICE officer. *Id.*

137 *Id.* at 15.

138 *Id.* at 16.

139 *See, e.g.*, Anita C. v. Superior Ct., No.B213283, 2009 Cal. Ct. App. WL 2859068 (Sept. 8, 2009) (indicating that reunification after deportation is all but impossible because the mother would be unable to prove her ability to properly care for the child), In re B &J, 756 N.W.2d 234, 242 (2008) (describing deportation as "de facto termination of [ ] parental rights").

140 *See Anita* 2009 WL 2859068, at *8 (holding that the lack of resources available to the mother in her home country did not excuse her inability to comply with the reunification plan and take parenting classes).

141 APPLIED RESEARCH CENTER, *supra* note 21, at 44.

142 *See* In re Adoption of C.M.B.R., 332 S.W.3d 793 (2011), Perez-Velasquez, 2009 WL 1851017 at *2; *See also* APPLIED RESEARCH CENTER, *supra* note 21, at 44.

143 THE UNIVERSITY OF ARIZONA, *supra* note 20, at 23.

144 *See* APPLIED RESEARCH CENTER, *supra* note 21, at 52–56.

145 *Id.* (finding 5,100 children who are presently in foster care have parents have been detained or deported).

146 For suggested reforms to address the systems dealing with unaccompanied alien minors in general see *infra* Part IV. The options mentioned here strictly apply to unaccompanied minor aliens in state custody.

147 THE UNIVERSITY OF ARIZONA, *supra* note 20, at 30.

148 H.R. 6128 (112TH): HELP SEPARATED FAMILIES ACT OF 2012, *http://www.govtrack.us/congress/bills/112/hr6128* (last visited Apr. 13, 2013).

149 Byrne & Miller, *supra* note 17, at 7.

150 See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

151 Ooi, *supra* note 16, at 899; *See* Workman, *supra* note 31, at 246–49.

152 *See* THE YOUNG CENTER FOR IMMIGRANT CHILDREN RIGHTS, *http://www.theyoungcenter.org/advocate.shtml* (last visited Apr. 8, 2013). In 2000, Arizona attempted a similar program. *See* Raju Chebium, Refugee Children Could Get Advocates Under Pilot Program, CNN, *available at http://archives.cnn.com/2000/LAW/06/30/phoenix.kids/* (last visited March 30, 2013) (planning for the volunteers to serve as "trusted adult figure[s]" for the children who would offer services "beyond those currently provided by social workers.").

153 THE YOUNG CENTER FOR IMMIGRANT CHILDREN RIGHTS, *http://www.theyoungcenter.org/advocate.shtml* (last visited Apr. 8, 2013). *Id*. In order for a judge to consider the guardian's report, laws and policies must be created that allow immigration judges to consider the child's best interests. For scholars arguing a best interest approach, *see* Rebeca M. Lopez, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1671 (2012).

154 *See* Byrne & Miller, *supra* note 17, at 19.

155 *Id.* (noting TVPRA of 2008 only requires a home study if the child is a victim of a severe form of human trafficking, has a disability under the ADA of 1990, has been a victim of physical or sexual abuse under circumstances indicating that the child's health or welfare has been significantly harmed or threatened, or the sponsor clearly presents a risk to the child of abuse, maltreatment, exploitation or trafficking).

156 *See* Ooi, *supra* note 16, at 885.

157 Although the Office of the Inspector General at HHS suggested DHS and ORR clarify which agency is responsible for post-release monitoring,160 no known agreements have been reached. Daniel R. Levinson, Division of Unaccompanied Children's Services: Efforts to Serve Children, 20 (Washington, DC: U.S. Department of Health and Human Services Office of Inspector general, March 2008).

158 *Id*.

159 Memorandum from John Morton, Director of U.S. immigration & Customs Enforcement, to Field Office Directors, Special Agents in Charge, Chief Counsel (June 15, 2011), *available at http://www.ice.gov/doclib/secure-* communities/pdf/prosecutorial-discretion-memo.pdf.

160 *Id.*

161 APPLIED RESEARCH CENTER, *supra* note 21, at 29.

162 M. Beth Morales Singh, *To Rescue, Not Return: An International Human Rights Approach to Protecting Child Economic Migrants Seeking Refuge in the United States,* PENN ST. 41 COLUM. J.L. & SOC. PROBS. 511, 516 (2008).

Reunification and Preventing Reentry Into Out-of-Home Care

by Child Welfare Information Gateway, Bulletin for Professionals February 2012

Once a child or youth has been removed from the care of his or her parents, safe and timely family reunification is the preferred permanency option. It is the most common goal for children and youth in out-of-home care as well as the most common outcome. While reunification is generally thought of as reuniting children and youth in foster care with their families and reinstating custody to their parents or guardians, a broader definition that includes living with other relatives is sometimes used, including in the measurement of State outcomes in the Child and Family Services Reviews (CFSRs) (Child Welfare League of America, 2007; Children's Bureau, 2010).

The physical return of the child or youth to parents or caretakers (*care)* may occur before the return of legal *custody*, as when the child welfare agency continues to supervise the family for some period of time, often referred to as a "trial home visit." Reunification is considered achieved when both care and custody are returned to parents or guardians, and the child or youth is discharged from the child welfare system.

The challenge for child welfare agencies is to achieve reunifications that are both timely and do not result in reentry. To help State child welfare managers support reunification and prevent reentry, this brief offers information on strategies for achieving reunification and preventing reentry and includes examples of State and local promising practices in this area.

The Benefits of Supporting Reunification and Preventing Reentry

Evidence indicates that achieving timely reunification while preventing reentry into foster care has many benefits, including:

- **Children do best when raised in a stable family setting.** Research from many fields establishes the positive effects of consistent family relationships on children's health, mental health, school achievement, and social development (Jones Harden, 2004).
- **Preventing multiple placements increases safety, permanency, and well-being.** The longer children and youth stay in out-of-home care, the more apt they are to experience multiple placements, including those in nonfamily settings. Evidence shows that placement instability is associated with attachment disorders, poor educational outcomes, mental health and behavioral problems, poor preparation for independent living, and negative adult outcomes (D'Andrade, 2005). Children lose contact with their siblings and relatives, leaving them without a natural support system once they are no longer in the care of the child welfare system.
- **State and local agencies can realize cost benefits by reducing the number of children and youth in care.** In 2006, local State and Federal spending on child welfare was $25.7 billion (Center for Law and Social Policy, 2010). In times of fiscal challenges, it is in the best interest of all levels of government to reduce the number of children, youth, and families supervised by agencies by safely returning children to their families.
- **States can avoid funding sanctions by meeting Federal outcome goals.** States risk the withholding of Federal title IV-B and title IV-E funds if they are unable to successfully complete their CFSR Program Improvement Plan (PIP) or come into substantial conformity with national standards in the review process. In two rounds of reviews, no States have been found to be in conformity with the first permanency outcome, "Children have permanency and stability in their living arrangements," which includes a measurement against a national standard regarding reunification.

Approaches That Support Reunification and Prevent Reentry

States find it challenging to help families achieve timely reunification while at the same time preventing children and youth from reentering foster care. Agencies that focus their efforts on only one aspect of the challenge (reducing time to reunification vs. reducing reentries to foster care) may find themselves succeeding in one area and losing ground in the other. Addressing both issues is difficult, but it can be done.

Agencies can minimize the challenges and pave the way for timely, safe, and stable reunification by employing a family-centered model of practice and implementing key elements at the systems and casework practice levels.

Family-Centered Practice

Family-centered practice in child welfare focuses on the needs and welfare of children and youth within the context of their families and communities. It assumes that the best place for children to grow up is in families, and family-centered practice aims to support families in protecting and nurturing their children; safely preserve family relationships; and respect the rights, values, and cultures of families. Agencies that adopt a family-centered model of practice value reunification as the most desirable permanency outcome for children and youth who have been removed from their parents' care.

States that successfully embrace family- centered practice infuse the principles and practices of meaningful family engagement and family involvement throughout their work with families, across service areas, and in partnership with collaborating agencies. Their work is built around a practice model that:

- Identifies the family unit as the focus of attention
- Emphasizes strengthening the capacity of families to function effectively
- Engages families in designing all aspects of policies, services, and program evaluation
- Provides individualized, culturally responsive, flexible, and relevant services
- Links families with comprehensive, diverse, and community-based networks of supports and services

Family-centered values and practices, along with evidence-based practices, are a foundation of frameworks that support safe, timely reunification. To learn more about family-centered practice, see Family-Centered Practice on the Child Welfare Information Gateway website at http://*www.childwelfare.gov/famcentered*, and find *Introduction to Family-Centered Practice: A Curriculum* on the National Resource Center for Permanency and Family Connections website at *http://www.nrcpfc.org/ifcpc/*introduction.html.

Two States that embrace family-centered practice with specific programs are North Carolina (*http://www.ncdhhs.gov/dss/mrs/* index.htm) and Washington (*http://www.* dshs.wa.gov/ca/about/pmintro.asp).

Key Systems Elements

Elements relating to child welfare systems and infrastructure have been identified through research and State experiences as important to achieving safe, stable reunification:

- **Agency leadership** that demonstrates a strong commitment to reunification
- **Systemwide efforts** that recognize and address the disproportionate
- representation of children of color in the child welfare system
- **Active collaboration** with the courts in working toward timely, stable reunification
- **Collaboration with related agencies and services** addressing financial need, substance abuse, mental health, and domestic violence
- **Broad-based, community-partnership involvement** by families, agencies, and community representatives
- **Systems change initiatives** and Program Improvement Plans with detailed strategies for achieving timely, stable reunification
- **Policies and standards** that clearly define expectations, identify requirements, and reinforce casework practices that support reunification
- **Trained supervisors** who explain agency policies that support safe and timely reunification, offer coaching to caseworkers, and provide support and feedback

- **Manageable caseloads and workloads** allowing caseworkers time to engage families
- **Availability and accessibility of diverse out-of-home and post-reunification services** that can respond specifically to the family's identified needs and conditions
- **Data systems** that monitor and measure system-wide and case-level data on timeliness of reunification and reentry into foster care
- **External assistance** in the form of training, consultation, and technical assistance from recognized experts

Key Casework Elements

Research has shown that meaningful family engagement, accurate and individualized assessment and case planning, and comprehensive services are key factors in achieving timely, stable reunifications (Child Welfare Information Gateway, 2011). Elements of good casework practice that contribute to effective decision-making include the following (Children's Bureau, 2000):

- **Child-focused decision making** that focuses on the safety, permanency, and well-being of children
- **Commitment to family-centered practice** and its underlying philosophy and values
- **A strengths-based approach** that recognizes and reinforces families' capabilities and not just their needs and problems
- **Individualized service planning** that goes beyond traditional preset service packages (e.g., parenting classes and counseling) and responds to both parents' identified needs, specific circumstances, and available formal and informal supports
- **A culturally responsive approach** that defines problems and solutions within the context of the family's culture and ethnicity
- **Comprehensive and concrete services** that address a broad range of family conditions, needs, and contexts
- **Outcomes-focused planning and service provision** that establishes achievable goals with the family

Specific Strategies That Support Reunification and Prevent Reentry

Strategies that support reunification and seek to prevent reentry into foster care fall into three broad categories:

- Out-of-home placement strategies
- Reunification and post-reunification strategies
- Court-agency collaborations

Out-of-Home Placement Strategies

Placement decision-making includes consideration of the child's or youth's best interest in terms of safety, permanency, and well-being in both the short and the long term. Reunification (or other permanency goal) efforts should begin with the decision to place a child or youth in out-of-home care and continue throughout the period of placement.

- **Placement with relatives.** Federal law requires States to give preference to relatives when placing children in care. Benefits of placing children and youth with relatives (or others with whom they have an existing relationship) are extensive and include increased ability to stay connected to siblings and other family.
- **Family search and engagement** efforts, including efforts to involve nonresident fathers and both paternal and maternal relatives, contribute to placement with relatives. They also facilitate ongoing connections with kin that may lead to long-term permanency and well-being benefits for children, youth, and families.
- **Placement to retain family, neighborhood, and cultural connections.** When relative care is not an option, workers can seek other placement options that still work to maintain family, neighborhood, and cultural connections. The recruitment and retention of foster families who live in the same communities as children and youth in care, as well as those who are able to care for sibling groups, is essential to the agency's ability to make good placement decisions. Children and youth who experience such placements are more apt to have outcomes similar to those in kinship care than children who are placed far from home and in less familiar settings (Usher, Wildfire, Webster, & Crampton, 2010).

- **Regular visits with parents and siblings.** Frequent and regular parent- child visits help children, youth, and parents maintain continuity of their relationships, build more positive relationships, and help them prepare to reunite. Visits can provide parents with opportunities to learn and practice parenting skills and give caseworkers opportunities to observe and assess family progress. Children and youth who have regular, frequent contact with their families are more likely to reunify and less likely to reenter foster care after reunification (Mallon, 2011).
- **Frequent and substantive caseworker visits.** States where caseworkers have regular and well-focused visits with the child and parent have demonstrated improved permanency and well-being outcomes in the CFSRs. Frequent
- visits with parents also are positively associated with better client-worker relationships; better outcomes in discipline and emotional care of children; placement stability; timely establishment of permanency goals; and stronger performance in the areas of reunification, guardianship, or permanent placement with relatives (Lee & Ayón, 2004; Children's Bureau, 2009).
- **Family group decision-making (FGDM)** is an umbrella term for various processes in which families are brought together with agency personnel and other interested parties to make decisions about and develop plans for the care of their children and needed services. Engaging families in decisions about where children and youth should be placed in order to ensure their safety while working toward reunification gives them a stake in working with the agency toward successful outcomes.
- **Foster parent-birth parent partnerships** increase the ability of parents to stay in touch with their children's development, improve parenting skills, increase placement stability, and lead to more timely reunifications. Partnership strategies being employed in States include icebreaker meetings and visit coaching.
- **Parent education programs** that enhance the parent-child relationship and teach both specific parenting and general problem-solving skills can strengthen families and prevent abuse or neglect which might lead to reentry.
- **Parent Partner Programs** engage parents who were once involved with the child welfare system to serve as mentors to currently involved parents, providing support, advocacy, and help navigating the system. Parent Partners also use their birth parent experience to influence changes in policy and protocol, encourage shared decision-making, strengthen individualized plans, and educate the community. Two States with parent partner programs are Iowa (*http://www.dhs.state.ia.us/cppc/networking/Parent%20Partners.html*) and Minnesota (*http://www.ncsacw.samhsa.gov/files/MN_ParentPartnerHandbook.pdf*).
- **Intensive family services** such as Homebuilders (*http://www.institutefamily.org*) and Intensive Family Reunification Services (*http://www.nfpn.org/reunification.html*) have been linked to the achievement of timely, stable reunification.
- **Solution Based Casework** (*http://www.cebc4cw.org/program/solution-based-casework/detailed*), which is built on a theoretical foundation of solution- focused family therapy, family life cycle theory, and relapse prevention, has shown promise as a practice model that helps families, including those with a history of recidivism in child abuse and neglect, achieve outcome goals (Antle, Barbee, Christensen, & Martin, 2008).

Reunification and Post-Reunification Strategies

Safe and stable reunification does not begin or end with the return of children's care to their parents. Careful consideration must be given to assessing a family's readiness to reunify and the family's capacity for keeping the child or children safe, as well as planning for post-reunification services and contingencies for family actions in the event of future safety concerns. Strategies include:

- **Use risk tools and reintegration assessments.** Comprehensive family assessments, initially completed when a CPS case is opened, must be updated at key decision-making points. Two standardized tools that show promise of improving the practice of reunification assessments are the North Carolina Family Assessment Scales for Reunification (NCFAS-R) (*http://www.cebc4cw.org/assessment-tool/north-carolina-family-assessment-scale*) and the Structured Decision Making Reunification Reassessment (*http://www.cebc4cw.org/*

program/structured-decision-making).

- **Plan for aftercare services** to continue for at least 12 months after the child or youth returns to the family. Needs should be identified and matched with appropriate community services before reunification occurs.
- **Ensure an adequate network of support** to provide a safety net for parents experiencing stress after reunification and help prevent reentry. Helping parents strengthen their individual support network and building a community partnership for child protection provide informal and formal opportunities for families to deal with stresses that could lead to maltreatment.
- **Provide post-reunification services to address the needs of children and youth.** Families experience stress when children and youth have health, mental health, educational, developmental, behavioral, and substance abuse issues that are not being adequately addressed. Even youth with severe emotional disturbance can successfully achieve permanency if they receive intensive, individualized, coordinated services and the family can access community supports after the youth returns home (Madden, McRoy, Maher, & Ward, 2009).

Court-Agency Collaboration

Courts have an essential role in determining if and when parents are reunited with their children. When the court and agency approach reunification collaboratively, they present a single, coherent path for families to follow in order to regain custody of their children. Some strategies for such collaboration include:

- **Cross-system, joint, and multidisciplinary training**, with trainers from both systems, helps staff in both systems understand their roles in achieving shared outcomes, expands communication, builds respect and trust, and breaks down resistance to working together. Implementation projects of the **Court Improvement Project** (*http://apps.americanbar.org/abanet/child/natsum/nationalcat. cfm?catid=15&subid=46*) reveal a wide range of subjects being pursued through collaborative training efforts.
- **Sharing data** enables both systems to understand roadblocks to timely reunification and allows managers and court personnel to work creatively to overcome those challenges. Other benefits are described in a New York Court Improvement Project report at *http://www.courts.state.ny.us/ip/cwcip/Publications/BuildingBridges-TheCaseForDataShare.pdf*).
- **Permanency mediation,** adopted by many agencies and courts, allows agency representatives and families to work with a neutral facilitator to arrive at a mutually acceptable plan.
- **Competent legal representation for parents** is associated with the achievement of timely reunification.
- Collaboration among courts, agencies, and parent groups can improve outcomes for children and families, as they have in States including Washington (*http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/prp_social_worker_practice_standards_final.pdf*) and New York (*http://www.cfrny.org/new_legal.asp*). The National Project to Improve Representation for Parents in the Child Welfare System (*http://www.americanbar.org/groups/child_law/projects_initiatives/parentrepresentation.html*) is seeking to improve parent representation.

For more on this subject, see Maine's *Collaboration With the Courts: Trainer's Guide* at *http://muskie.usm.maine.edu/asfa/pdf/Court_Collaboration.pdf*.

State and Local Examples of Strategies That Support Reunification and Prevent Reentry

State and local agencies throughout the country are at various stages of implementing and strengthening efforts that support reunification and prevent reentry. The following are selected examples of such initiatives. (The examples are presented for information purposes only; inclusion does not indicate an endorsement by Child Welfare Information Gateway or the U.S. Department of Health and Human Services, Children's Bureau.)

- California: Tamar Village
- Iowa: Family Interaction Guidelines
- Nevada: Family drug court
- Oregon: Family Involvement Team for Recovery
- Utah: Support for kinship caregivers
- Wisconsin: Redesign of service delivery

Los Angeles County, CA: Tamar Village

In 2008, an employee of Shields for Families, a nonprofit agency in Los Angeles, was doing substance abuse assessments with women in the county jail and was struck by the requests she received from mothers concerning their children in the child welfare system. The plight of these women, who simply wanted to know how their children were doing, led to a multisystem collaboration. Designed in 2007 to house women leaving the criminal justice system, Tamar Village now also provides services in lieu of jail time for mothers serving sentences for substance abuse.

Incarcerated mothers with a case plan of reunification are eligible for participation in this program, which provides housing for them in individual apartment units. The Los Angeles Sheriff's Department and Public Defender's office make referrals to Tamar Village, which provides onsite assessments at the jail and arranges transfer to the residential services complex. Intensive and comprehensive services, including substance abuse treatment, case management, education and vocational services, criminal justice and child welfare advocacy, and counseling are provided. Children receive age-appropriate services and treatments, including:

- A child development center with services for children through age 5, including parent advocacy, a parenting class, early literacy skills, and developmental assessments
- Services for older children (to age 17) such as tutoring, physical education, computer skills, mental health services, and individual and group therapy

The County Department of Child and Family Services (DCFS) has co-located two social workers at the treatment facility. Monitored visits between mothers and children quickly lead to reunifications at the site. The initial group of five mothers went from monitored to unmonitored visits within 45 to 60 days. As of early 2010, the program was serving 85 children; 31 already reunified, 38 moving toward reunification, and only 16 under supervised visitation. Families may continue in their apartments for up to a year after treatment is completed.

Tamar Village is a collaboration between the Compton DCFS office, the county sheriff and public defenders offices, Shields for Families, the Los Angeles County Alcohol and Drug Program Administration and the Corporation for Supportive Housing. Women participating in the program have developed a client council, which meets weekly and brings issues to the staff and director, giving them a voice in their services.

For information about the collaboration between DCFS and other agencies supporting Tamar Village, contact Da-Londa Groenow, Substance Abuse Administrator, at 323.242.5000, extension 4138, or Dr. Kathryn Icenhower at 323.242.5000, extension 1268. Also, visit the Shields for Families website for more information: *http://www.shieldsforfamilies.org/index.php?p=249&t=30*

Iowa: Family Interaction Guidelines

The Iowa Department of Human Services (DHS) has committed itself to supporting family interaction as essential to achieving timely permanency, providing "the best chance for reunification as the child/parent relationship is enhanced and maintained" (Iowa Department of Human Services, 2009). Its Family Interaction Guidelines provide a clear model for how all members of the child and family team – caseworker, parent, foster parent, and provider – contribute to maximizing family interaction in order to reduce the child's sense of loss while in substitute care, resolve threats of harm, maintain relationships, learn new patterns of interaction, and assess progress and needs. Underlying the initiative is a simple idea: Parents and children have a right to spend time together.

Recognizing the importance of family interaction to successful reunification, DHS entered into a public/private partnership initiative with private providers, foster parents, and Iowa's Children's Justice. Together they developed a plan to increase the quantity and quality of parent-child interaction in child welfare cases, undertaking steps to assess the readiness of staff, providers, and foster parents and then identify "champions" for change in each service area. These champions received the first training in the new guidelines and then were responsible for training their peers as well as parents and county attorneys.

The heart of the initiative is the development of family interaction plans that spell out the goals of parent-child visits while children are in out-of-home care, with an emphasis on progress along established guidelines. Phases of interaction are identified:

1. Two to four weeks of supervised visits in the most homelike setting possible, focusing on natural interactions that maintain parent-child ties and

allowing for assessment of the parent's capacity to parent

2. Several months of semi- or partially supervised visits, moving toward overnights, focusing on allowing the parent to learn and practice new skills and behaviors
3. Transition to reunification, providing maximum opportunities for parent-child interactions

These phases are spelled out in a written family interaction plan that, ideally, is developed in a family team meeting, with input from the family, children, foster parents, relatives, and providers. The plan is revised as necessary, but interaction is only denied or limited if the child's health, safety, or well-being is jeopardized. The plan details the frequency, location, and activities of visits with parents, siblings, and other important persons.

Family Interaction was initiated statewide in July 2009. The agency and stakeholders identified this initiative as a promising practice in the State's efforts to improve the timeliness and stability of reunification in the 2010 CFSR Statewide Assessment. For more information, see the *Family Interaction Practice Bulletin: http://www.dhs.state.ia.us/docs/10.09_Family_Interaction_Practice_Bulletin.pdf*

Washoe County, Nevada: Family Drug Court

Family drug courts have evolved to deal specifically with cases in which parental rights are at issue due to a parent's substance abuse. Their goal is to intervene in a way that will prevent removal of the child from the home or will lead to safe reunification. Elements that distinguish these courts include immediate and continuous supervision of the family by the judge, treatment and rehabilitation services that address the needs of the family, judicial oversight and coordination of treatment services, immediate response to noncompliance, and judicial leadership in developing a cross-system collaboration to achieve the court's goals (Office of Justice Programs Drug Court Clearinghouse and Technical Assistance Project, 1998).

Washoe County, NV, operates the oldest family treatment drug court, accomplishing its work through a collaboration between the Court, child welfare, substance abuse treatment providers, and community nonprofit agencies. Participants, who are substance-abusing parents accused of child maltreatment, and their children may be referred to the Family Drug Court by child protective services or substance abuse treatment providers. Candidates for participation must admit to the allegation bringing them before the court, be willing to abstain from drugs and alcohol, and actively participate in treatment and abide by rules and procedures. Parents receive information and preparation to help them decide whether to participate, including an orientation given by Mentor Moms (graduates of the program with long-term sobriety), observation of a Family Drug Court session, and meeting with a case manager for a full orientation. A referral team consisting of court staff, district attorney, public defender, treatment representatives and a case manager meet to recommend or deny approval to the judge. Participation in Family Drug Court lasts at least 15 months and requires all of the following:

- Abstinence from drugs and alcohol
- Attendance at bi-weekly Family Drug Court hearings
- Compliance with the social services case plan and with an individual treatment plan
- Submission to regular drug testing
- Aftercare planning

A multidisciplinary team approach includes the judge as team leader, bringing court personnel, defense and prosecution attorneys, treatment staff, and social services together. The program serves about 40 participants at any given time. The Washoe County Department of Social Services brings intensive family reunification, maintenance, and supervision services to Family Drug Court participants. A permanency social worker is assigned to handle cases assigned to the program, providing case management and service coordination to all family members.

Support services are provided by three community groups:

- Foster grandparents are senior volunteers who are appointed by the court to mentor participants and their families. They participate in family decision-making team meetings and have almost daily contact with participants, acting as role models and surrogate grandparents.
- Mentor Moms act as peer mentors and recovery coaches for all Family
- Drug Court participants. In addition to conducting mini-orientation sessions for potential partici-

pants, they attend protective custody hearings to accept referrals and attend Drug Court hearings as part of the multidisciplinary team.

- They provide individual peer counseling and teach a 6-week Life Skills training course.
- Tru-Vista is a nonprofit agency founded specifically to fund and strengthen collaborations that support prevention, intervention, and treatment services for parents and children involved with the Family Drug Court. The agency provides an orientation to the program, administers scholarship and family needs programs, supervises and trains foster grandparents, and coordinates and supervises the Mentor Moms program.

A 2007 evaluation of four family treatment drug courts (Worcel, Green, Furrer, Burrus, & Finigan) found that at the Washoe site, in families participating in the drug court compared to nonparticipants:

- Mothers spent nearly three times as long in treatment and were more apt to complete at least one treatment.
- Children spent significantly more time in parental care, as opposed to out-of-home care.
- Children were twice as likely to achieve reunification and significantly less likely to experience termination of parental rights or other permanency outcomes.
- There was not a substantial difference in foster care reentry, but many cases remained open at the end of the study period, making the data on recidivism difficult to analyze.

Information about the Family Drug Court can be found on the Second Judicial District Court website: *http://www.washoecourts.com/index.cfm?page=specialty#*

Oregon: Family Involvement Team for Recovery

Since 2000, the Multnomah County Department of Human Services has collaborated with the Family Dependency Court along with other State, county, and nonprofit agencies in operating the Family Involvement Team (FIT) for Recovery program, which moves substance-addicted parents into treatment quickly, helping them avoid loss of custody or achieve reunification faster. FIT has reduced the time from initial screening to assessment at the treatment site to approximately 17 days.

Annually, approximately 1,408 parents with children enter FIT Triage, which includes screening for alcohol and/or drug issues, determination of eligibility, and outreach worker services to connect with the treatment agency for an expedited intake/ assessment appointment. Of the 1,408 clients who enter Triage, approximately 620 enter alcohol and drug treatment annually. Referral to FIT may be made by the child welfare caseworker, judicial officer, attorney, or the client. FIT team members (working out of the court) work with parents and children until the parents enter treatment; additional team members located at treatment provider agencies continue that work, providing case management, family therapy, and wraparound services. Clients move through the following process:

- A member of the FIT team contacts the parent at the preliminary hearing when there is an alcohol or drug allegation, offering alcohol and drug screening and other services.
- Clients then may be referred to outpatient or residential treatment programs, receiving support services as needed.
- Parent mentors who have completed their own child welfare cases support clients throughout their involvement with child welfare.

The program is one of 53 grantees of the "Targeted Grants to Increase the Well- Being of, and to Improve the Permanency Outcomes for, Children Affected by Methamphetamine or Other Substance Abuse" program funded by the Children's Bureau in 2007. The 5-year grant will be used to expand the number of child welfare clients who can access these services, and provide previously unavailable aftercare and parent mentoring services. It also will create a replicable model for Family Treatment Drug Courts. Performance indicators developed for the grant program include both timeliness of reunification and re-entries to foster care placement, which will provide outcome data as the grant cycle proceeds.

For more on FIT for Recovery, see the program's website at *http://fitforrecovery.com* or contact John Pearson at *john.f.pearson@co.multnomah.or.us*.

Utah: Support for Kinship Caregivers

After its 2003 CFSR indicated that Utah needed to improve on foster care reentries, the State examined its data and found that over half of its reentries into foster care involved children who had been cared for

by relatives. Practice had been to place children with kin immediately if they came forward during the initial shelter hearing, with the Division of Child and Family Services (DCFS) providing in-home services to work toward reunification. Kin caregivers were eligible for a small monthly Specified Relative Grant for the care of the child, as well as Medicaid, but caseworkers were generally unaware of the available supports. Relatives, receiving little financial or other supports, were overwhelmed and unable to retain custody and often requested that their relative children be placed back into State custody (reentry) and placed with unrelated foster families.

Working with the courts and attorneys, the agency succeeded in the passage of 2008 legislation that allowed children to be placed in foster care with a noncustodial parent, relative, or licensed friend after background screening, a limited home inspection, and safety and reference checks. Practice guidelines were developed that included application for the Specified Relative Grant and ensuring that caregivers received financial and medical benefits. In June 2011, a specialized kinship team was created in collaboration between DCFS and the Department of Workforce Services (DWS) to expedite Specified Relative Grant and/or Medicaid applications by DWS for DCFS relative families.

Utah is unique in having a State Kinship Program Administrator and Kinship Experts housed in each of its five regions. Kinship Experts provide education and supports for relative families throughout the life of a case. Now relatives and licensed friends are made aware of the options of custody and guardianship or becoming licensed "child- specific" foster parents who are able to receive the full range of supports available to all foster parents.

The percentage of child-specific foster homes has risen from 25 to 43 percent in the 5 years between 2005 and 2010. More kinship caregivers are opting to become licensed, with 34 percent of children in foster care in FY 2010 being placed with relative caregivers (up from 22 percent in FY 2005). In FY 2010, 27 percent of the children removed from their homes were placed initially with a relative; this has risen from 13.5 percent in FY 2005.

Since the implementation of this initiative, which entails working longer with kin at the beginning of placement to ensure that services and supports are sufficient, relative children are now spending an average of three additional months in custody since FY 2005; however, the percentage of children reentering foster care who were previously discharged to a relative has dropped from 54 to 24 percent.

In its 2010 CFSR Final Report, Utah received a rating of "strength" on item 5, foster care reentries.

For more information about Utah's support of kinship caregivers, contact Judy Hull at DCFS at 800.556.5246 or email at *judymiller@utah.gov.*

Bureau of Milwaukee, Wisconsin: Service Delivery Redesign

Milwaukee child welfare has been operated directly by the Wisconsin Department of Children and Families since 1998 as a result of a class action suit filed in 1993. The agency has satisfied most of the requirements of the Settlement Agreement under which it has been operating, but one of the two remaining enforceable provisions requires an increase in the percentage of children who are reunited with their parents within 12 months of entry into foster care. In addition to implementing permanency consultation, a new model of family teaming, and therapeutic visitation, the agency is taking steps to redesign its service system, using a model that holds providers accountable for meeting performance goals.

Under the redesigned system, contracted child-placing agencies will be responsible for providing ongoing case management, support services, foster family recruitment, licensing, permanency services, intensive in-home services, registered nursing services, and supervised family interaction for children in out-of-home care. In addition, agencies must provide 1 year of ongoing support services to reunified families.

This initiative is being implemented beginning with a Request for Proposals issued in July 2011 and a projected date for contracts to begin in January 2012. For more information on the service redesign as it proceeds, see the Wisconsin Department of Children & Families website: *http://dcf.wi.gov/bmcw/index.htm.*

Acknowledgment: This bulletin was developed by Child Welfare Information Gateway, in partnership with Susan Dougherty.

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Examining the impact of prosecuting and incarcerating kids in Michigan's criminal justice system

Youth Behind Bars - Executive Summary

by Michelle Weemhoff and Kristen Staley, Michigan Council on Crime and Delinquency

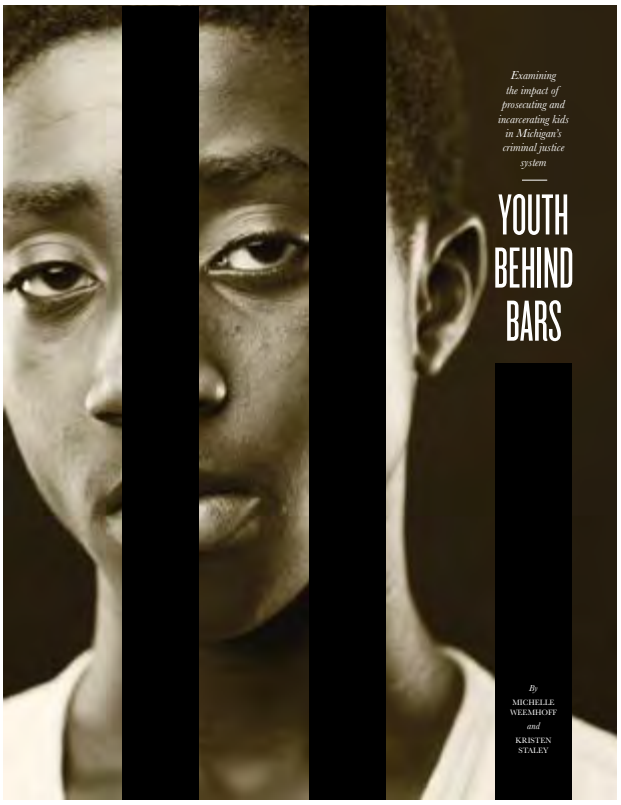
In the mid-1990s, Michigan became part of a national trend to get tough on youth crime. Although crime rates were steadily declining, the state passed a series of harsh laws that funneled thousands of youth into the adult criminal justice system. In addition to automatically considering all 17-year-olds as adults, Michigan broadened juvenile prosecutors' discretion to automatically file in criminal court, expanded the number of juvenile offenses requiring an adult sentence, and allowed children of any age to be criminally convicted and sent to prison.

Most youth in the adult system are there for non-violent offenses. From 2003 to 2013, over 20,000 Michigan youth were placed on adult probation, detained in jail, or imprisoned for a crime committed when they were younger than 18 years old.[1] The majority of these cases included non-violent offenses. Some were as young as 10 years old and a disproportionate number were youth of color.

Processing youth in the adult system is harmful to them and bad for public safety. The trend to criminalize children was quickly met with the reality that processing youth in the adult system is detrimental to public safety and youth well-being. Youth in prison face extreme risk of violence, sexual assault, and self-harm.[2] Without access to rehabilitative services, young people exiting adult prison are more likely to reoffend and reoffend more violently compared to their counterparts in the juvenile justice system.[3]

Michigan's adult probation and prison systems are not equipp ed to address the unique needs of youth. The majority of the youth sent to adult court in the past decade never received an education higher than the 11th grade or completed a GED. Over half entered the system with known drug or alcohol abuse issues and mental health concerns, and approximately 1,500 young people had at least one dependent.

A small number of youth tried as adults are girls, who often enter the system with histories of violence and sexual victimization. Because so few girls are on probation or in prison, there are essentially no services for this vulnerable population.



Young people leave the adult system without adequate supp ort to keep them from returning. Once youth leave the corrections system, the lifelong consequences of an adult conviction are devastating. Nearly all youth in prison will eventually return to the community but will find significant barriers to employment, education, housing, and public benefits—the key elements to a successful future. Without effective reentry and support services, young people may find themselves in a revolving door to prison.

Contrary to sentiments of the mid-1990s, public opinion in Michigan and across the country has shifted toward becoming "smart on crime."

In an effort to protect public safety, improve child outcomes, and save money, leaders nationwide are re-evaluating previous policy decisions and making significant changes to youth transfer laws. It is time for Michigan to join them.

Keeping in line with contemporary research and opinion, Youth Behind Bars offers a series of "smart" recommendations to safely reduce the number of young people exposed to the adult criminal justice system.

Recommendations for Safe Reduction of Youth in the Adult System

1. Raise the age of juvenile court jurisdiction to 18. This alone would impact 95 percent of the children currently being sent into adult corrections
2. Remove youth from adult jails and prisons.
3. Require oversight and public reporting on youth in the adult system.
4. Require judicial review of all transfer cases.
5. Develop policies to reduce the overrepresentation of youth of color in the adult system
6. Provide effective legal representation to youth.
7. Offer developmentally appropriate and rehabilitative alternatives to youth in the community.
8. Restrict the use of segregation.
9. End the option to sentence youth to life without the possibility of parole.
10. Effectively partner with families and victims at all stages of the criminal justice system.

Endnotes

1 Michigan law considers a youth to be younger than 17; however, for the purposes of this report, youth are considered under age 18 based on lines drawn by the U.S. Supreme Court, U.S. Federal Legislation, and the United Nations.

2 Robert Hahn, et al., Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, 56 MMWR RECOMMENDATIONS & REP. RR-9 (2007); MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE ADULT CRIMINAL COURT (2006).

3 *Id.*

Editor's Note: This report can be found, in its entirety, here.

Report to the Michigan Supreme Court Task Force on the Role of the State Bar of Michigan

REPORT TO THE MICHIGAN SUPREME COURT
TASK FORCE ON THE ROLE OF THE STATE BAR OF MICHIGAN

Summary of Recommendations

Recommendation 1. The State Bar of Michigan should remain a mandatory state bar.

Recommendation 2. To better protect State Bar members' First Amendment rights:

- All State Bar advocacy outside the judicial branch should be subject to a rigorous *Keller* process and the State Bar should emphasize a strict interpretation of *Keller*
- Funding of Justice Initiatives activities should be subject to a formal *Keller* review during the annual budget process
- State Bar Sections that engage in legislative advocacy should do so only through separate entities not identified with the State Bar.

Recommendation 3. The State Bar's regulatory services should be better integrated with the activities of the other attorney regulatory agencies.

Recommendation 4. Governance of the State Bar through the Representative Assembly and the Board of Commissioners should be modified.

Recommendation 5. Membership dues for inactive State Bar members should be reduced, inactive member reinstatement should be made more accessible and rational, and the Supreme Court should convene a special commission to review active and inactive licensing, *pro hac vice*, and recertification issues.

BACKGROUND

The State Bar of Michigan was created in 1935 as a mandatory bar association.[1] On January 23, 2014, Senate Bill 743 was introduced in the Michigan Senate to make membership in the State Bar of Michigan voluntary. On February 6, 2014, the State Bar requested the Supreme Court to initiate a review of how the State Bar operates within the framework of the United States Supreme Court's decision in *Keller v State Bar of California*, 496 US 1; 100 SCt 2228; 110 LEd 2d 1 (1990), (hereafter *Keller*).[2] On February 13, 2014, the Supreme Court entered Administrative Order 2014-5[3] establishing the Task Force on the Role of the State Bar of Michigan.

TASK FORCE WORK

Meetings

In the 74 working days between the issuance of the administrative order establishing the Task Force and the June 2 deadline for the submission of the report, the Task Force held one organizational teleconference and 10 in-person meetings.

Outreach

The Task Force solicited input from members of the State Bar through an email to each member of the State Bar who has an email address on file with the State Bar: 515 members responded with written comments. State Bar members were also advised by individual email of a public hearing on the issues, and notice to the public was posted. During an all-day hearing at the Hall of Justice on May 2, the Task Force heard testimony from 27 speakers. Of the written and public hearing comments, a clear majority supported the continuation of the mandatory state bar. The Task Force also received unsolicited comments from State Bar Sections and local and affinity bar associations, all supporting continuation of the mandatory State Bar.[4]

Materials Reviewed

First Amendment Jurisprudence. The Task Force reviewed the history of First Amendment challenges against the State Bar, with particular attention to *Falk v State Bar of Michigan*, 411 Mich 63; 305 NW2d 201 (1981) and 418 Mich 270; 342 NW2d 504 (1983) (hereafter *Falk*);

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[1] See Appendix I for enabling statute, accompanying court rules, and the current statute and court rules.
[2] See Appendix II for the State Bar letter.
[3] See Appendix III for AO 2014-5.
[4] Local and affinity bars: Calhoun County Bar Association, Grand Rapids Bar Association, Grand Traverse-Leelanau-Antrim Bar Association, Michigan Retired Judges Association, Oakland County Bar Association, Women Lawyers Association. Sections: Alternate Dispute Resolution Section, Criminal Law Section, Health Care Law Section, Masters Law Section, and Negligence Law Section.

Keller; the administrative orders issued by our Supreme Court in response to those cases;[5] and other pertinent U.S. Supreme Court and federal appellate opinions issued after *Keller*.[6]

State Bar Information. To understand the scope and detail of the State Bar's current operations, the Task Force reviewed: the 2012-13 Annual Report of the State Bar of Michigan; detailed descriptions on the State Bar's programs; the State Bar's interaction with the other Michigan attorney regulatory agencies; and the procedures for compliance with Supreme Court administrative order 2004-1 (the Michigan Supreme Court's current *Keller* order). The Task Force also reviewed historical documents, including the report of the Committee on State Bar Activities appointed in January to report to Michigan Supreme Court in 1984, included in Appendix IV.

Other Mandatory State Bars. The Task Force reviewed primary source material on the policies and procedures relevant to *Keller* of the 31 other mandatory state bars.[7]

Board of Commissioners' Proposed Changes to Supreme Court Rules. The Task Force received rule changes proposed by the State Bar Board of Commissioners at the Board's April 25 meeting.[8]

Comments from the Representative Assembly of the State Bar. The Task Force received comments on the role of the State Bar and of the Representative Assembly compiled from the meeting of the Representative Assembly on April 26, 2014.[9]

State Bar Programs. The Task Force reviewed all of the State Bar programs, identified below in 15 categories. Some categories include activities that are wholly supported by non-mandatory dues revenue.

1. State Bar Governance. Operate and support the 31 member Board of Commissioners and the 150-member Representative Assembly.
2. Governmental Relations. Analyze and support the development of public policies concerning the legal profession, the provision of legal services, and the courts, including non-lobbying public policy support for State Bar Sections. Provide State Bar member education and advocacy on court rules and legislation within the constraints of AO 2004-1 (*Keller*).
3. Outreach, Committees, Sections and Local and Affinity Bars. Operate and support the State Bar committee infrastructure; develop and coordinate services to Sections; and build relations with, develop resources for, and support the work of local and affinity

[5] See Appendix IV for the relevant orders.
[6] See Appendix V for the relevant case law.
[7] A compendium of the material from the other mandatory state bars has been provided to the Court along with this Report.
[8] See Appendix VII for the rule changes submitted by the Board of Commissioners.
[9] See Appendix VIII for the comments from the Representative Assembly.

bars. Provide direct subsidy to assist programs and projects of Young Lawyers, Master Lawyers, and Judicial Sections.

4. Justice Initiatives Programs. Develop proposals for effective delivery of high quality legal services and programs to benefit underserved populations; encourage and coordinate free or discounted civil legal services (*pro bono*); promote increased resources for civil legal aid programs; examine issues concerning adequate legal representation in the criminal justice system; promote improved diversity and inclusion in the legal profession; and review and make recommendations concerning proposed court rules and legislation affecting these matters.
5. Ethics and Ethics Helpline. Operate and support ethics programs, including call-in helpline, and attorney and judicial ethics committees; develop and analyze ethics content and ethics programming; and coordinate with the discipline system.
6. Unauthorized Practice of Law. Investigate complaints about the unauthorized practice of law and support the work of the Unauthorized Practice of Law Committee which makes recommendations on litigating unauthorized practice matters, and engages in public education about the risks of hiring a non-lawyer to do legal work.
7. Character and Fitness. Provide staff support and resources to process character and fitness issues for state bar applications, including investigation where appropriate; and support the work of the district and standing committees and the Board of Law Examiners.
8. Judicial Qualifications. Provide confidential evaluations of judicial candidates to the Governor.
9. Client Protection Fund. Administer the Client Protection Fund and investigate claims and make recommendations on Client Protection Fund payments to claimants.
10. Lawyer Referral Service. Administer the voluntary lawyer-subscriber program that provides callers with contact information about attorneys based on the subject matter and geographic location.
11. Lawyers and Judges Assistance Program. Provide referral information, assessments, and monitoring services to attorneys, judges, and law students who face issues with substance abuse, mental health or stress management.
12. Member and Endorsed Services and Events. Operate the member center and member affinity programs and events such as the Annual Meeting, Upper Michigan Legal Institute, 50 Year Golden Celebration, and Bar Leadership Forum.
13. Practice Management Resource Center. Provide practice management resources and assistance to attorneys, including basic skills and technology training; when appropriate, partner with the attorney discipline system.
14. Publications and Website. Produce the Bar Journal, Member Directory, e-Journal, and other publications on topics of interest and value to attorneys; and manage the State Bar website.
15. Media Relations, Civic Education and Public Outreach. Provide news releases, media training, and information to State Bar members and the public.

RECOMMENDATIONS

MANDATORY VERSUS VOLUNTARY

The Task Force was charged with examining "existing State Bar programs and activities that are germane to the compelling state interests recognized in *Falk* and *Keller* to justify a mandatory bar."[10]

RECOMMENDATION 1: CONTINUE THE STATE BAR AS A MANDATORY BAR.
RATIONALE: The traditional emphasis of a bar association is on the professionalism and competence of its members and service to the public. The theory of a mandatory bar is that combining the emphasis on professionalism and competence with the governmental regulation of attorneys can be a more efficient and effective way to serve the public purpose of regulating attorneys than the regulation used for other professions and trades. An examination of the State Bar's programs and cost to members compared to other state bars, mandatory and voluntary, shows that the State Bar supports compelling state interests ("regulating the legal profession and improving the quality of legal services"[11]) cost-effectively. In Michigan, the cost of regulating the legal profession is born entirely by attorneys licensed to practice law, at a cost below the national average. Through a long-established infrastructure of volunteer-attorney driven programs, the State Bar delivers a variety of services to the public at no cost to taxpayers[12] and provides benefits to its members that would not be available on the same scale or quality, if at all, through a voluntary bar.[13]

State Bar member input suggests that the most valued intangible benefit to the members is a voice in their own professional regulation. This is a privilege justified by attorneys' unique governmental responsibilities as officers of the court. But this benefit comes with unique

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[10] AO 2014-5. Of the 15 State Bar programs described on pages 3 and 4, the Task Force's principal focus was the State Bar's Governmental Relations Program (Program 2), with a secondary focus on the activity of State Bar Sections and on the State Bar's Justice Initiatives Program (Program 4). The programs on Ethics and Ethics Helpline, Unauthorized Practice of Law, Character and Fitness, Judicial Qualifications, Client Protection Fund, Lawyer Referral Service, Lawyers and Judges Assistance Program, Practice Management Resource Center, and Publications and Website programs carry out duties and functions that are germane to the most restrictive interpretations of compelling state interests recognized in *Falk* and *Keller*, have no ideological content, and thus are not intrusive on State Bar members' First Amendment rights. The Member and Endorsed Services and Events program offers benefits to members, does not involve ideological activity, and thus is not intrusive on members' First Amendment rights. In addition, member affinity programs are not funded by State Bar member dues.

[11] *Keller*, 496 US 13-14, quoted in AO 2014-5.

[12] Examples include programming to enhance ethics and professionalism, civic education, pro bono services, assistance to lawyers and judges dealing with alcohol and drug problems, administration of the client protection fund, investigation of the unauthorized practice of law, and promotion of improvements in the justice system and the practice of law.

[13] Examples include free or low-cost practice aids and practice management resources such as the e-Journal, Casemaker, the Practice Management Resource Center, and the ethics helpline. The inclusive nature of a mandatory bar also provides the benefit of leadership opportunities for all lawyers, and a forum for the exchange of all points of view.

restrictions. At times, the State Bar is precluded from taking actions favored by a majority of its members that it would be free to take but for its mandatory status. The member input received by the Task Force indicates that this distinction is not fully appreciated by the membership. As a mandatory bar, the State Bar is neither a trade association nor a union, and it is not free to act solely, or even primarily, in the self-interest of its members.

We urge the Court to use this moment of heightened attention to clarify the role of the State Bar by emphasizing that its primary role is to serve the public good. To underscore this role, we recommend that the Supreme Court amend Rule 1 of the Supreme Court Rules for the State Bar to remove language that could be construed to authorize a broader role for the State Bar than is compatible with *Keller*:

> "The State Bar of Michigan is the association of the members of the bar of this state, organized and existing as a public body corporate pursuant to powers of the Supreme Court over the bar of the state. Under these rules and administrative orders of the Supreme Court, the State Bar of Michigan shall aid in promoting improvements in the administration of justice and advancements in jurisprudence, within constitutional limitations on a mandatory bar, and in improving relations between the legal profession and the public ~~and in promoting the interests of the legal profession in this state~~."

This change, accompanied by a new *Keller* administrative order explaining the State Bar's duties and constraints, will send a clear signal to Michigan attorneys that the State Bar cannot advocate for issues primarily devoted to attorneys' own economic self-interest. Instead, on those specific issues, attorneys must use existing voluntary entities, including the voluntary Sections of the State Bar, or create new ones.

First Amendment Issues

The Task Force was charged with determining whether the State Bar's duties and functions "can be accomplished by means less intrusive upon the First Amendment rights of objecting individual attorneys."[14]

After some twelve weeks of research and debate, three things became clear: (1) how mandatory state bars should apply the constitutional standard of *Keller* is unsettled throughout the country, (2) the only way to be absolutely certain that a mandatory state bar will never violate members' First Amendment rights is to have no advocacy program whatsoever, and (3) if the State Bar of Michigan is to continue to engage in advocacy, the Supreme Court must provide clearer and more rigorous standards under which it may do so.

Although the Supreme Court's procedure for challenging the State Bar's activities as a violation of members' First Amendment rights under *Keller* has been invoked by only two members since *Keller* was decided in 1990, the Task Force unanimously believes that ***any*** infringement on

[14] *Id*; brackets omitted.

constitutional rights, even unasserted, is a concern. Three Task Force members[15] believe, based on the State Bar's inconsistent, and increasingly expansive reading of *Keller*, that a total ban on State Bar advocacy within the executive and legislative branches should be implemented. Nine members of the Task Force reject this option, believing that the State Bar's advocacy within the executive and legislative branch is essential to its core mission. If the Supreme Court decides to allow some public policy advocacy, all 12 Task Force members support the following recommendation, and support the First Amendment recommendations as a necessary precondition of the continuation of the State Bar's public policy advocacy program:

RECOMMENDATION 2. PROVIDE BETTER PROTECTION OF THE FIRST AMENDMENT RIGHTS OF STATE BAR MEMBERS THROUGH MORE RIGOROUS PROCESSES AND A NEW SUPREME COURT ADMINISTRATIVE ORDER.

Specifically,

1. All State Bar advocacy outside the judicial branch should be subject to a new, rigorous *Keller* process and the State Bar should emphasize a strict interpretation of *Keller*. (The full *Keller* process and clarification recommendations are on pages 7-9.)
2. State Bar Sections that engage in external advocacy should do so only through separate entities not identified with the State Bar. (The full Section recommendation is on pages 13-14.)
3. Funding of Justice Initiatives activities should be subject to a formal *Keller* review. (The full Justice Initiatives recommendation is on page 14.)

GOVERNMENTAL RELATIONS PROGRAM RECOMMENDATIONS

A substantial percentage of the work of the Governmental Relations Program does not implicate State Bar members' First Amendment rights, and we make no recommendations for change as to that work. Specifically, the Governmental Relations program should continue to 1) review, analyze, and disseminate content-neutral information about pending legislation and court rules, and 2) advocate within the judicial branch on court rules and other issues affecting the legal profession.

Recommendations:
The following *Keller* requirements should apply to non-judicial branch advocacy by the State Bar:

1. An independent *Keller* review panel should be created. The panel should be composed of seven members – two appointed by the Board of Commissioners, two appointed by the Representative Assembly, two appointed by the Supreme Court, and one appointed jointly by the Supreme Court and the Board of Commissioners. The *Keller* analysis will

[15] Peter H. Ellsworth, Colleen A. Pero and Hon. Michael J. Riordan.

be written by legal counsel, who will be selected by the State Bar and who shall be approved by the Supreme Court. The panel should have exclusive responsibility for determining the *Keller*-permissibility of issues on which State Bar advocacy is proposed. Their decision must be based on a formal, thorough *Keller* legal analysis made available to the panel in advance of their consideration. The operation of the panel, including the written *Keller* analysis, should be transparent. Five of the seven panel members must vote in favor for an issue to be considered *Keller*-permissible and eligible for further consideration. The vote must be on the record and forwarded to the Board of Commissioners along with the written *Keller* analysis.

2. Michigan should adopt a narrow interpretation of *Keller*, bounded within the two purposes endorsed by *Keller*—regulating the legal profession and improving the quality of legal services.

3. The State Bar should not be permitted to advocate a public policy position outside the judicial branch unless:
    a) the independent *Keller* panel has approved the position for consideration
    b) a formal *Keller* analysis has been published on the State Bar website
    c) the State Bar has provided notice of the published *Keller* analysis to any member who requests notice on that issue or specific legislation
    d) the State Bar publishes the dissent of any member who so requests as soon as practicable after receiving the dissent.

4. The standard for State Bar advocacy should be set out in a new *Keller* administrative order signaling a "reboot" of the rules of State Bar advocacy.

    a) The order should specifically provide that the following are *Keller*-permissible:
        i. positions on legislation, policies, or initiatives that regulate or directly affect the regulation of the legal profession
        ii. positions on legislation, policies, or initiatives that improve or diminish the quality of legal services, such as by providing or impeding legal services for the poor or disadvantaged, or by affecting the delivery of legal services by lawyers, other legal service providers, or the courts
        iii. the provision of technical expertise at the joint request of the Speaker and Minority Leader, the Senate Majority and Minority Leaders, or a Committee Chair and Minority Vice Chair of the Committee to which the legislation has been referred.[16]

[16] By requiring a request to come from bipartisan leadership, the State Bar is assured that the assistance is not being requested for partisan purposes.

b) The order should specifically identify the following as impermissible areas for State Bar advocacy:[17]

i. Ballot issues
ii. Election law
iii. Judicial selection
iv. Issues that are perceived to be associated with one party or candidate, and endorsements of candidates
v. Matters that are primarily intended to personally benefit lawyers, law firms, or judges
vi. Issues that are perceived to be divisive within the bar membership

5. The Supreme Court Rules Concerning the State Bar should be amended to eliminate provisions that might be construed to convey authority separate from the new administrative order.

Rationale: *Keller* makes clear that advocacy by a mandatory state bar is constitutional but does not clearly define the boundaries and procedures required to regulate a mandatory bar's legislative advocacy. As did the Michigan Supreme Court in grappling with these issues in *Falk*, the *Keller* Court recognized that determining precisely what is and is not an appropriate use of mandatory dues can be difficult. "Compulsory dues may not be expended to endorse or advance a gun control or nuclear freeze initiative; at the other end of the spectrum petitioners have no valid constitutional object to their compulsory dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession."[18] In the face of that ambiguity, the Michigan Supreme Court issued AO 1993-5, the basic framework of which was reaffirmed eleven years later in AO 2004-1,[19] and which remains in effect today.

Michigan's current *Keller* boundaries and procedures are similar to those established in a plurality of other mandatory bar states, but the Task Force recommends a more rigorous standard and greatly strengthened procedural safeguards that would go beyond the safeguards imposed on any of the mandatory state bars that engage in legislative advocacy.

In arriving at our recommendation, the Task Force reviewed four decades of State Bar legislative activity. Although a definitive assessment was hindered by the lack of written *Keller* analyses, it appeared that most legislative positions have been based on the impact to court operations, judicial independence, court funding, or on a conflict (or need for) coordination with court rules. In many cases the State Bar's advocacy has been an effective complement to the Supreme Court's own advocacy on administrative issues affecting the court system. However, even

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[17] Members Butzbaugh, Reed, Rombach, Welch, and Williams recommend that the Supreme Court's order explicitly state that these restrictions apply unless State Bar advocacy is authorized by the Supreme Court.

[18] *Keller v State Bar of California*, 496 US 1, 16 (1990).

[19] AO 1993-5 and 2004-1 are at Appendix IV.

though the scope of the State Bar's advocacy overall appears to have narrowed since *Keller*, our review demonstrates why more rigorous procedures, further clarification, and a narrower interpretation are essential.

The State Bar has a robust public policy website that promotes transparency and broad-based involvement. At the same time, however, its decision-making processes are imprecise and informal. Rather than a rigorous *Keller* analysis as a starting point, the decision-making process sometimes has evolved into a more casual last-minute approach. If there is a consensus among some in State Bar leadership that it is important for the State Bar to take a position on some issue, matters can move through the process in a variety of ways, at times with only a quick indication that a staff member has determined that an issue is *Keller*-permissible. A formal, written *Keller* analysis is not required and is rarely done, and there is no separate consideration or vote required on the question of the *Keller*-permissibility of a proposed position.

As a result, there have been instances of the State Bar promoting or opposing legislation that falls outside a strict reading of *Keller*. Representative examples include: opposing legislation allowing a trial court to award costs and actual attorney fees to a party who prevails in an action against the Department of Environmental Quality (2007); supporting a bill to provide compensation of up to $60,000 per year for each year a person wrongfully convicted of a crime is imprisoned (2013); opposing in principle that the circuit court family divisions notify the secretary of state about truancy dispositions (2005); and opposing a constitutional amendment that would prohibit a trial court's granting of bail to a person charged with a felony who is in the United States illegally (2008). In some instances, the State Bar has promoted legislation based on an "historic" position rather than on a reasoned *Keller* analysis, while in others, it took positions based on attenuated, speculative reasoning. The reasoning that a position is permissible because it would increase or diminish public confidence in the court system appears to be the rationale for the most dubiously *Keller*-permissible positions.

In 2006, the State Bar opposed the Michigan Civil Rights Initiative, but specifically refrained from any advocacy, concluding that it was not allowed to spend resources to promote its position. The Board of Commissioners found that the substance of the initiative was reasonably related to the regulation of the legal profession, including the education, ethics, competency, and integrity of the profession. Under a more restrictive reading of *Keller*, the State Bar would have declined to take a position regardless of the spending of resources.

The following year, the State Bar waged a campaign in opposition to a proposed sales tax on services on the basis that imposing a sales tax on legal services would reduce the availability of legal services to society. Mandatory state bars have been divided on whether *Keller* permits advocacy on the issue of a sales tax on legal services. A revised *Keller* order directing a more restrictive application of *Keller's* boundaries would put Michigan in the camp that does not allow advocacy on matters primarily based upon lawyers' economic self-interest.

The processes we recommend will go a long way toward preventing "mission creep" in State Bar advocacy, but to be fully effective they must be accompanied by clearer direction from the Supreme Court about *Keller* boundaries.

As directed by the Court, the Task Force considered whether the state interests advanced by the State Bar's non-judicial branch advocacy could be carried out in a less intrusive manner. Specifically, the Task Force considered whether voluntary associations of attorneys would be able to replicate the State Bar's limited, but unique, role in public policy advocacy if the State Bar is prohibited from legislative advocacy. The Task Force concludes that other associations might become more prominent in their lobbying on such issues, but individually or collectively, they would not perform the same function served by the State Bar's advocacy.

The current voluntary bar entities in Michigan – local, affinity, and special purpose bar associations, judges' associations, and Sections funded by voluntary dues – all play an important role in providing the views of subsets of the legal community on proposed legislation and court rules. But none of these entities offers a broad-based, apolitical forum for the consideration of all viewpoints of the legal profession in determining their public policy positions.

Two recent examples of the State Bar's role as a conduit for innovation and consensus are instructive.

Custodial Interrogation

In the spring of 2005, the State Bar's Criminal Jurisprudence and Practice Committee identified concerns about wrongful convictions and the amount of time spent at trial and on appeal litigating what was said and done during an interrogation. The committee drafted a resolution for consideration by the Representative Assembly based on research into other states' practices. The Assembly unanimously supported the appointment of a State Bar custodial interrogation recording task force to develop and promote legislative, court rule, and funding changes to advance the use statewide of audio and video electronic recording of custodial interrogations. The Custodial Interrogation Recording Task Force created in response to the resolution was comprised of defense attorneys, prosecutors, members of the judiciary, and law enforcement officials from around the state. The task force met for over two years, forging consensus and securing funding for a pilot project from the Michigan State Bar Foundation and Criminal Law Section. The task force wrote a model policy for recording audio/visual interrogations that became the basis for legislation adopted unanimously by the Legislature more than seven years after the task force was first conceived.

Judicial Crossroads Task Force

Recognizing that a sustained and ongoing economic crisis and an antiquated court system threatened the system of justice in Michigan, in 2009 the State Bar convened a task force consisting of 28 prominent lawyers and judges to address how Michigan's justice system should respond to the changes underway in the state's economy. Ultimately, the task force and its four subcommittees involved over 150 lawyers, judges and stakeholders meeting over the course of

10 months to develop recommendations in four areas: judicial resources and structure; use of technology; access to justice; and business impact. The consensus that developed during the work of the task force was a crucial factor in the task force's report becoming an influential blueprint for change. The Report's recommendations, many building upon reports and ongoing work of the State Court Administrative Office, were influential in several significant legislative changes, most notably on downsizing courts, court consolidation, problem-solving courts, and business courts. Nationally, the task force report and the advocacy that followed are pointed to as one of the most effective responses to the court funding crisis in any state.

Against the potential loss of successes like these, the Task Force weighed the burden that the State Bar's advocacy imposes on dissenting members. The reality is that even a State Bar public policy position falling squarely within the subject matter allowed by *Keller*, and widely supported by the State Bar members, is likely to be opposed by at least one member. Some State Bar members told the Task Force that they think this is a negligible concern. We do not. Our concern for the rights of dissenting State Bar members drives our recommendation that the State Bar provide advance notice by email or text message to any member who requests it about an impending State Bar position on a particular issue, and post the dissenting statement of any member who so requests on the State Bar's public policy webpage.

Current technology permits the State Bar to implement these innovative changes without undue expense or unduly burdening the State Bar's deliberations. The adoption of this recommendation would put Michigan at the forefront of First Amendment protections by mandatory state bars without silencing the State Bar altogether. Coupled with a requirement that the State Bar base all advocacy positions outside the judicial branch on a written explanation available to members of why the position falls within *Keller* boundaries, this change would increase members' understanding of why the State Bar can and cannot take positions on issues of interest to lawyers and decrease pressure from members for the Bar to take inappropriate positions.

Other States

As invited to do by the order creating the Task Force, we examined the approaches taken by each of the other 31 mandatory state bars to conforming their activities to the constitutional standard defined by *Keller*.

No Advocacy Program. A few mandatory state bars do not have any governmental relations program. In those states, it is typical for a voluntary bar association, representing only one type of practice, to become the voice of the state's legal profession. Although the no-advocacy approach is the ultimate safeguard of First Amendment rights, it deprives the state's policymakers of the only broad-based, statewide voice on legal issues that does not also have an ideological or partisan agenda.

No Advocacy Restraints, but Strict Accounting. A few mandatory bar associations do not attempt to confine their activities exclusively to subject-matter falling within *Keller* boundaries. Instead, they have adopted elaborate procedures to measure the cost of non-*Keller* compliant

activities to ensure that non-*Keller*-based activities are not financed by member dues. Those procedures comply with *Keller*'s requirements and so far have withstood constitutional challenge. The Task Force does not favor this approach or the resumption of the opt-out and diversion for legislative advocacy activities that were in place between 1985 and 1993.

Nebraska. The Task Force also looked closely at a third option—the recent decision of the Nebraska Supreme Court to reduce the mandatory dues of Nebraska's attorneys to the costs of regulatory functions. Attorneys are still required to belong to the Nebraska State Bar Association in order to be eligible to practice law in the state, but the bar's annual dues are voluntary and the bar association is no longer subject to *Keller* restrictions in its activities, including advocacy. The Nebraska approach has the attraction of structural simplicity (once the transitional problems are worked out) and the assurance that members' dues are not used to support any ideological activity with which the members might disagree. In the Task Force's view, however, the Nebraska model compounds First Amendment concerns rather than alleviates them, because Nebraska attorneys are forced to belong to an association that can take divisive, politically-based positions—but with no recourse for dissenting members.[20]

We believe that the State Bar's public policy advocacy provides a resource for the state's decision-makers that cannot be accomplished by a less intrusive means. We also believe that our recommendations are superior to any other states' *Keller* accommodation requirements. Concern for members' First Amendment rights should be at the forefront of the State Bar's decision-making even when the use of mandatory dues are not at issue. This is a moment to make clear to State Bar members, to legislators, and to the public that there are boundaries to the State Bar's advocacy, and that the State Bar does not have, nor can it have, a political agenda.

Section Advocacy Recommendations

As voluntarily-funded entities, Sections of the State Bar are not subject to the same constraints as the State Bar itself, but the Task Force nevertheless makes several recommendations concerning Section advocacy.

Recommendations:

1. Sections should be allowed to engage in ideological, but not partisan, activities using voluntary dues money.
2. Sections should be free to engage in legislative or executive branch advocacy, but must do so by creating a separate entity not identified in any way with State Bar.

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[20] We note that both the Nebraska approach and the strict accounting approach may require adjustment in response to the U.S. Supreme Court's pending decision in *Harris v. Quinn*, 656 F.3d 692, 191 LRRM 2545 (7th Cir. 2011), cert. granted Oct. 1, 2013. The case was argued January 21, 2014.

3. Legislative advocacy done by the Section's separate entity should not be subject to the current elaborate reporting requirements of AO 2004-1, but the separate entity must still report its positions to the State Bar, to ensure compliance with the requirements of the Supreme Court rules and orders and the State Bar bylaws.
4. The State Bar should not subsidize any non-*Keller*-permissible activities of Sections.
5. The State Bar may collect voluntary dues for Sections' legislative or executive branch activities as long as the Sections pay the cost of collection activities.
6. Section advocacy information hosted on Section webpages on the State Bar website should be accessible only to Section members.
7. Sections should be allowed to use the State Bar building and facilities on the same terms as all other lawyer groups, but should reimburse the State Bar for special services that may support non-*Keller*-permissible activities provided by the State Bar.
8. The State Bar should conduct annual mandatory training for Section officers on compliance with these requirements.

Rationale: Sections of the State Bar enhance the quality of legal services in Michigan by providing members with educational and networking opportunities in specific practice areas. The State Bar provides the administrative infrastructure for all Sections – collecting dues and maintaining membership databases – and offers other support services at cost. Three sections – the Young Lawyers Section, the Judicial Section, and the Master Lawyers Section – are supported by mandatory State Bar dues. The operations of all other Sections are funded through voluntary member dues. There are approximately 35,000 voluntary paid Section memberships. If their membership is voluntary, Sections are not subject to the restrictions of *Keller* in the use of their members' dues. But because of the risk that Sections' advocacy will be mistaken for the advocacy of the State Bar itself, Michigan and other mandatory bar states subject sections to requirements intended to distinguish the Sections' activities from those of the State Bar itself. These requirements have not been sufficiently successful in eliminating confusion or preventing the misidentification of Section advocacy with the advocacy of the State Bar. We believe the approach we recommend can overcome the problem of misidentification.

JUSTICE INITIATIVES PROGRAM RECOMMENDATION

Recommendation: For the Justice Initiatives program, there should be heightened *Keller* scrutiny and review during the annual budget process.

Rationale: The Justice Initiatives program is grounded in the ethical obligation of attorneys to promote improvement of the law, the administration of justice, and the quality of legal services, and to render public interest legal service. Accordingly, this program is germane to the compelling state interests recognized in *Falk* and *Keller*. The subject matter of the Justice Initiatives program, however, can involve ideological content. To ensure that the Justice Initiative activities fall within *Keller* boundaries, during the annual budget process a formal *Keller* analysis of the Justice Initiatives programs to be funded in the upcoming fiscal year should be prepared, and funding for the Justice Initiatives program should be approved by a three-fourths supermajority of the Board of Commissioners.

REGULATORY ROLE OF THE STATE BAR

The Supreme Court invited the Task Force to examine what other programs the State Bar of Michigan ought to undertake to enhance its constitutionally-compelled mission. This inquiry led the Task Force to make recommendations concerning the State Bar's integration with the other attorney regulatory agencies.

RECOMMENDATION 3. PROVIDE BETTER STATE BAR INTEGRATION WITH THE ACTIVITIES OF THE OTHER ATTORNEY REGULATORY AGENCIES.

1. The intake for grievances and inquiries about the discipline system should be either centered exclusively in the State Bar or coordinated so that the public's needs are addressed more efficiently, consistently, and effectively.
2. The status of attorney discipline employees as State Bar employees should be clarified, and the State Bar should be the central provider of personnel services. The terms and conditions of employment, however, should continue to be controlled by the Attorney Grievance Commission and the Attorney Discipline Board.
3. The State Bar should have a formal consultation role in the selection process for appointments to the Attorney Grievance Commission and the Attorney Discipline Board.
4. The State Bar should have a formal consultation role in the selection process for the grievance administrator and deputy, and for the executive director of the Attorney Discipline Board.
5. The State Bar should have a formal role in the budgeting process for both the Attorney Grievance Commission and the Attorney Discipline Board, and should assist both agencies in preparation of their budgets. The budgets should be presented for approval to the Supreme Court as a single attorney discipline system budget, noting ancillary State Bar functions.
6. The State Bar's communications, financial and facilities management, insurance, printing, reception, and legal counsel resources should be available to the Attorney Grievance Commission and the Attorney Discipline Board.
7. The State Bar should establish a discipline system advisory committee as a standing Committee.
8. The State Bar should undertake an examination of services offered in other states to determine whether they would enhance the effectiveness of the Michigan discipline system: mandatory arbitration of fee disputes, voluntary arbitration of attorney malpractice claims and other grievance-related disputes, and mediation of disputes.
9. Intake services (questions and complaints) for admission to practice and *pro hac vice* should be coordinated by the State Bar and the Board of Law Examiners.
10. The selection, evaluation, and retention of the Executive Director of the State Bar should continue to be under the authority of the Board of Commissioners, but the appointment of

the Executive Director should be subject to confidential review and approval of the Supreme Court.

RATIONALE. The suggested changes will reduce confusion, create greater efficiencies by eliminating duplicate services, and will reinforce the State Bar's primary identity as a regulatory agency. Better coordination between the State Bar and the disciplinary system is especially desirable for programs involving *pro hac vice* motions; lawyers and judges assistance programs and monitoring; ethics helpline and related ethics seminars; IOLTA trust account issues; issuance of certificates of good standing; disposition of attorney files in the event of death, disappearance or incapacity; and the State Bar's practice management resource center consultations.

The change concerning the selection of the State Bar Executive Director would also underscore the regulatory and governmental identity of the State Bar. The Supreme Court has a role in the selection of the heads of the other attorney regulatory entities – the Grievance Administrator and the executive directors of the Attorney Discipline Board and the Board of Law Examiners – but currently has no formal role concerning the Executive Director of the State Bar.

GOVERNANCE

The Supreme Court order invited the Task Force to include proposed revisions of administrative orders and court rules governing the State Bar of Michigan in order to improve the governance and operation of the State Bar.

RECOMMENDATION 4. MODIFY STATE BAR GOVERNANCE FOR GREATER CLARITY AND EFFICIENCY.

The policy-making functions and relationship of the Board of Commissioners and Representative Assembly should be clarified by:

1. Eliminating the ambiguous designation of the Representative Assembly as the "final policy-making body of the State Bar."
2. Designating the Board of Commissioners the exclusive decision-maker on management issues of the State Bar, and the Representative Assembly the exclusive decision-maker on dues recommendations to the Supreme Court.
3. Requiring the agendas and schedule of meetings of the Board of Commissioners and the Representative Assembly to be established by a majority of the State Bar officers and a majority of the officers of the Representative Assembly, meeting jointly.
4. Providing that although the Board of Commissioners is exclusively responsible for adopting positions on proposed court rules published for comment and on pending proposed legislation, both the Board of Commissioners and the Representative Assembly must approve all other policy positions.

RATIONALE: Michigan is one of only a few states to maintain two governing bodies of its state bar association. The dual governing structure broadens the diversity of voices contributing to the State Bar's decision-making, but at a cost. The Task Force's recommendations are intended to

reduce the cost in confusion and efficiency by establishing clearer coordination between the two bodies.

OTHER

RECOMMENDATION 5. REDUCE INACTIVE DUES AND CONVENE A SPECIAL COMMISSION TO EXAMINE ACTIVE AND INACTIVE LICENSING, PRO HAC VICE, *AND RECERTIFICATION ISSUES*.

RATIONALE: Among the State Bar members whose comments to the Task Force supported a voluntary bar, a disproportionate number are inactive, retired, or out-of-state members. Although Michigan's active dues are below the national average, Michigan's inactive dues are among the highest in the nation. The issues of admissions, certification, and the costs of licensing are outside the charge of this Task Force, but we observe that the increasingly cross-border nature of the practice of law, particularly in certain types of practice, warrants a closer examination of attorney licensure. A special commission consisting of representatives of the State Bar, the Board of Law Examiners, the discipline system, and Michigan's law schools holds the potential for placing Michigan at the forefront in adapting its regulatory system to best meet the needs of the public in a changing legal marketplace.

SUBMITTAL

June 2, 2014

The members* of the Task Force thank the Justices of the Supreme Court for the opportunity to address the important issues with which we were charged.

Respectfully submitted,

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* Each member served in their individual capacities and not as a representative of any organization or entity with which they may be associated.

Editor's Note: This report can be found, in its entirety, here.

Legislative Update

by William Kandler, Cusmano Kandler & Reed
Lobbyist for Children's Law Section

As the calendar rolls into summer, the state budget process is picking up steam. Within days of this writing, all appropriation bills will have cleared their chamber of origin. Very soon, they will clear the opposite chamber and then be sent to conference committees where the final agreements are hammered out. Revenues are expected to be higher for the coming fiscal year (which begins October 1, 2014), and legislators will be able to make more "spending" decisions, as opposed to "cutting" decisions.

At the first indication of revenues improving, the Capitol was awash in talk of tax cuts. However, after hearing from constituents, legislators have learned that the people of Michigan would prefer roads to be repaired rather than to receive pocket change in tax reductions. This does not make life any easier for legislators as investments in Michigan's crumbling roads is extremely expensive (Governor Snyder places the need at $1.2 billion per year for at least ten years) and involves not cutting taxes, but increasing them. The legislature does appear intent on addressing at least a part of this need.

As the budget discussions lumber on in the background, the legislature continues, through its standing committees, to work on a myriad of other issues. Bills of concern to the Children's Law Section are among those.

Each month the Legislation Committee of the Council meets just prior to the Council meeting to discuss bills of interest to the Council. As an example, at its March meeting, the Legislative committee discussed HB 5270, which would call for the requirement of an electronic recording of an interview of a child in a child abuse or neglect investigation. The legislative committee recommended that the Council take a position of "support" for this bill. The Council later, via an electronic vote, agreed with the committee's position and has taken a position of "support" for this legislation.

The Legislative committee and the Council are continuously reviewing and considering positions on legislation. If the Council takes a position on a particular bill, it often requires Council members traveling to Lansing to testify before a House or Senate Committee.

Following is a list of the bills the Children's Law Council is following:

4050 PA 0038'13	**Sponsor** Kenneth Kurtz Children; protection; children's ombudsman to investigate victims of child abuse or neglect; expand criteria to include children who have died as a result of child abuse or neglect. Amends secs. 5a, 6, 7, 8 & 9 of 1994 PA 204 (MCL 722.925a et seq.).
4060	**Sponsor** Jeff Irwin Children; adoption; second parent adoption; provide for. Amends secs. 24, 41 & 51, ch. X of 1939 PA 288 (MCL 710.24 et seq.).
4064 PA 0199'13	**Sponsor** Kurt Heise Courts; records; digital court records and electronically filing court papers; allow. Amends secs. 832, 859, 1427, 2137 & 8344 of1961 PA 236 (MCL 600.832 et seq.); adds secs. 1426 & 1428 & repeals 1949 PA 66 (MCL 780.221 - 780.225).
4199	**Sponsor** Sean McCann Children; protection; mandatory reporting requirements for child abuse or child neglect; expand to include coaches and school volunteers. Amends sec. 3 of 1975 PA 238 (MCL 722.623).
4206	**Sponsor** Harvey Santana Criminal procedure; youthful trainees; eligibility criteria for youthful trainee program; modify. Amends sec. 11, ch. II of 1927 PA 175(MCL 762.11).

4294	**Sponsor** Harvey Santana Criminal procedure; youthful trainees; assigning youthful trainee status; allow multiple times. Amends sec. 11, ch. II of 1927 PA 175 (MCL 762.11).
4356	**Sponsor** Rudy Hobbs Family law; child custody; factors determining best interest of the child for permanency decisions by agency and court; provide for. Amends 1939 PA 288 (MCL 710.21 - 712A.32) by adding sec. 19d to ch. XIIA.
4366	**Sponsor** Fred Durhal, Jr Labor; fair employment practices; job applications; eliminate reference to felony conviction. Creates new act.
4385	**Sponsor** Dian Slavens Human services; foster parents; foster care parents bill of rights act; create. Creates new act.
4388	**Sponsor** Al Pscholka Human services; services or financial assistance; family independence assistance program group's compliance with compulsory school attendance; require in order to receive assistance. Amends sec. 57b of 1939 PA 280 (MCL 400.57b).
4524	**Sponsor** Gail Haines Occupations; health care professions; health care professionals to wear identification cards; require, and regulate advertising. Amends sec. 16221 of 1978 PA 368 (MCL 333.16221) & adds sec. 16221a.
4583 Oppose	**Sponsor** Joel Johnson Children; parental rights; immediate termination of parental rights and visitation rights for parent or legal guardian upon sentencing for criminal sexual conduct or other sex crimes; allow. Amends sec. 19b, ch. XIIA of 1939 PA 288 (MCL 712A.19b).
4584 Oppose	**Sponsor** Joel Johnson Family law; parenting time; immediate termination of a grandparenting time order upon sentencing for certain criminal sexual conduct; allow. Amends sec. 7b of 1970 PA 91 (MCL722.27b).
4589	**Sponsor** Kurt Heise Children; adoption; adoption of children in foster care by foster parents; clarify. Amends secs. 41, ch. X of 1939 PA 288 (MCL710.41) & adds sec. 42 to ch. X.
4606	**Sponsor** Gail Haines Juveniles; truancy; family division of the circuit court to notify secretary of state of truancy disposition; provide for. Amends 1939 PA 288 (MCL 710.21 - 712A.32) by adding sec. 2f to ch. XIIA. TIE BAR WITH: HB 4607'13"
4646 Support	**Sponsor** Mike Shirkey Children; adoption; temporary placement, consent, and release; provide for general revisions. Amends secs. 23d, 29 & 44, ch. X of 1939 PA 288 (MCL 710.23d et seq.).
4647 Support	**Sponsor** Margaret E. O'Brien Children; adoption; supervisory period for infants less than 1 year of age placed for adoption; modify. Amends sec. 56, ch. X of1939 PA 288 (MCL 710.56).
4648 Oppose	**Sponsor** Kenneth Kurtz Children; adoption; termination of rights of putative father; clarify. Amends sec. 39, ch. X of 1939 PA 288 (MCL 710.39).

4649	**Sponsor** Kevin Cotter Human services; foster parents; resource families bill of rights; create. Amends sec. 3 of 1994 PA 203 (MCL 722.953) & adds sec. 8a.
4650	**Sponsor** Ben Glardon Children; other; children's ombudsman to investigate violations of resource families bill of rights law; require. Amends secs. 2, 5a & 6 of 1994 PA 204 (MCL 722.922 et seq.). TIE BAR WITH: HB 4649'13
4659 Oppose	**Sponsor** Robert L. Kosowski Family law; paternity; responsible father registry; create. Amends1978 PA 368 (MCL 333.1101 - 333.25211) by adding secs. 2892, 2892a, 2892b, 2892c, 2892d & 2892e.
4660	**Sponsor** Mike Shirkey Children; adoption; process by which putative fathers are identified or located in adoptions; revise. Amends secs. 22, 31 & 36, ch. X of 1939 PA 288 (MCL 710.22 et seq.). TIE BAR WITH:HB 4659'13
4661 Oppose	**Sponsor** Cindy Denby Children; adoption; registration with the responsible father registry in order to receive notice of certain proceedings; require. Amends sec. 33, ch. X of 1939 PA 288 (MCL 710.33). TIE BAR WITH: HB 4659'13
4662 Oppose	**Sponsor** Eileen Kowall Children; parental rights; notice to putative father regarding certain hearings; revise. Amends sec. 37, ch. X of 1939 PA 288(MCL 710.37).
4701	**Sponsor** Eileen Kowall Criminal procedure; probation; probation and youthful trainee status revocation; require for violation of the ferrous metal and nonferrous metal regulation and scrap metal offenders registration act. Amends sec. 12, ch. II & sec. 4a, ch. XI of 1927 PA 175(MCL 762.12 & 771.4a). TIE BAR WITH: HB 4699'13""
4719	**Sponsor** Sean McCann Crimes; other; leaving minor children without appropriate supervision; provide penalties. Amends sec. 135a of 1931 PA 328 (MCL750.135a).
4720	**Sponsor** Sean McCann Criminal procedure; sentencing guidelines; description of crimes involving leaving child unattended; amend. Amends sec. 16g, ch. XVII of 1927 PA 175 (MCL 777.16g). TIE BAR WITH: HB 4719'13
4806	**Sponsor** Joe Haveman Criminal procedure; sentencing; life offense where accused is a minor; revise factors to consider. Amends 1927 PA 175 (MCL 760.1- 777.69) by adding sec. 33 to ch. IX.
4807	**Sponsor** Al Pscholka Juveniles; criminal procedure; criteria for waiving jurisdiction over juvenile to adult court or disposition; revise. Amends sec. 18, ch. XIIA of 1939 PA 288 (MCL 712A.18). TIE BAR WITH: HB 4806'13
4808	**Sponsor** Margaret E. O'Brien Crimes; penalties; mandatory life imprisonment for certain crimes; eliminate to reflect United States supreme court decision in Miller v Alabama. Amends secs. 16, 18, 200i, 204, 207, 209, 210, 211a, 316, 436, 520b & 543f of 1931 PA 328 (MCL 750.16 et seq.). TIE BAR WITH: HB 4806'13
4893 Support	**Sponsor** Margaret E. O'Brien Children; protection; central registry records; require certain notifications to recipients regarding expungement, limit maintenance of records to 10 years, and add certain individuals to the list of those who may receive the confidential record. Amends secs. 2, 7 & 8d of 1975 PA 238 (MCL 722.622 et seq.).
4927 Oppose	**Sponsor** Andrea M. LaFontaine Children; adoption; licensure of child placing agency that objects to placements on religious or moral grounds; allow. Amends 1939 PA 280 (MCL 400.1 - 400.119b) by adding sec. 5a.

4928	**Sponsor** Kenneth Kurtz Children; adoption; objection to placements by child placing agency based on religious or moral convictions; allow. Amends secs. 23b, 23d, 23e & 46, ch. X of 1939 PA 288 (MCL 710.23b et seq.).
4940	**Sponsor** Kenneth Kurtz Children; protection; provision related to compensation for members of task force on prevention of sexual abuse of children; eliminate. Amends sec. 12b of 1975 PA 238 (MCL 722.632b).
4991	**Sponsor** Tom Leonard Children; adoption; objection to placements by child placing agency based on religious or moral convictions; allow. Amends1973 PA 116 (MCL 722.111 - 722.128) by adding sec. 14e. TIE BAR WITH: HB 4927'13, HB 4928'13
5004	**Sponsor** Pam Faris Crimes; homicide; second degree child abuse; include in felony murder statute. Amends sec. 316 of 1931 PA 328 (MCL 750.316).
5007	**Sponsor** Sam Singh Tobacco; retail sales; electronic cigarettes; prohibit sale to or use of by minors. Amends title & secs. 1, 2 & 4 of 1915 PA 31 (MCL722.641 et seq.).
5012	**Sponsor** Eileen Kowall Crimes; prostitution; minors engaged in prostitution; create presumption of coercion under certain circumstances. Amends sec. 451 of 1931 PA 328 (MCL 750.451). TIE BAR WITH: HB 5026'13
5018	**Sponsor** Tom Leonard Criminal procedure; expunction; requirement for attorney general review of a set-aside application; eliminate. Amends sec. 1 of1965 PA 213 (MCL 780.621).
5019	**Sponsor** Joel Johnson Juveniles; criminal procedure; requirement for attorney general review of a set-aside application; eliminate. Amends sec. 18e, ch. XIIA of 1939 PA 288 (MCL 712A.18e).
5026	**Sponsor** Kurt Heise Juveniles; other; court jurisdiction over dependent juveniles in danger of substantial physical or psychological harm; allow. Amends sec. 2, ch. XIIA of 1939 PA 288 (MCL 712A.2). TIE BAR WITH: HB 5012'13
5038	**Sponsor** Kenneth Kurtz Children; services; child welfare caseloads; codify. Amends 1939 PA 280 (MCL 400.1 - 400.119b) by adding sec. 18f.
5039	**Sponsor** Kenneth Kurtz Children; protection; duties of children's ombudsman; expand. Amends secs. 4, 5a, 6 & 10 of 1994 PA 204 (MCL 722.924 et seq.).
5153	**Sponsor** John J. Walsh Courts; judges; salary formula for judges; modify. Amends secs. 304, 555, 821& 8202 of 1961 PA 236 (MCL 600.304 et seq.).
5154	**Sponsor** Tom Leonard Criminal procedure; preliminary examination; certain rules and procedures for conducting a preliminary examination; revise. Amends secs. 4, 7, 11a, 11b & 13, ch. VI of 1927 PA 175 (MCL 766.4 et seq.). TIE BAR WITH: HB 5155'13
5155	**Sponsor** John J. Walsh Courts; district court; probable cause conferences in felony and misdemeanor cases; clarify district court's jurisdiction. Amends secs. 8311 & 8511 of 1961 PA 236 (MCL 600.8311 & 600.8511) & repeals sec. 2167 of 1961 PA 236 (MCL 600.2167). TIE BAR WITH: HB 5154'13

5156 PA 0205'13	**Sponsor** Mike Shirkey Courts; judges; court of claims exceptions to trial by court without jury; provide for under certain circumstances. Amends sec. 6421 of 1961 PA 236 (MCL 600.6421).
5158	**Sponsor** Kurt Heise Law enforcement; other; human trafficking commission; create. Creates new act.
5190	**Sponsor** Dan Lauwers Criminal procedure; habitual offenders; use of certain prior juvenile offenses for purposes of determining status as habitual offender; allow. Amends secs. 10, 11, 12 & 13, ch. IX of 1927 PA 175 (MCL 769.10 et seq.).
5198	**Sponsor** Michael D. McCready Labor; mediation; access to certain case files for use in human services employee disciplinary proceedings; allow without a court order. Amends sec. 7 of 1975 PA 238 (MCL 722.627).
5208	**Sponsor** Andy Schor Juveniles; truancy; family division of the circuit court to notify secretary of state of truancy disposition; require. Amends 1939 PA 288 (MCL 710.21 - 712B.41) by adding sec. 2f to ch. XIIA. TIE BAR WITH: HB 5209'14
5209	**Sponsor** Andy Schor Traffic control; driver license; issuance of driver license to students not in compliance with school district truancy policy; prohibit. Amends secs. 303 & 319 of 1949 PA 300 (MCL 257.303 & 257.319). TIE BAR WITH: HB 5208'14
5238	**Sponsor** Eileen Kowall Criminal procedure; expunction; set-aside of certain criminal records for victims of human trafficking; provide for. Amends secs. 1, 2 & 4 of 1965 PA 213 (MCL 780.621 et seq.).
5239	**Sponsor** Kenneth Kurtz Children; protection; department of human services to report suspected child abuse or child neglect involving human trafficking to law enforcement; require. Amends sec. 3 of 1975 PA 238 (MCL 722.623).
5272	**Sponsor** Tom Hooker Children; protection; videorecorded statements; allow to be used in child protective services hearings, increase fines for improper release of, and require to retain for certain period of time. Amends sec. 17b, ch. XIIA of 1939 PA 288 (MCL 712A.17b). TIE BAR WITH: HB 5270'14, HB 5271'14
0044 PA 0002'13	**Sponsor** Rick Jones Criminal procedure; sex offender registration; placement on the public registry; remove certain exceptions. Amends sec. 8 of 1994 PA 295 (MCL 28.728).
0074	**Sponsor** Glenn Anderson Education; discipline; cyberbullying to be defined and addressed in anti-bullying policy; require, and require certain reporting. Amends sec. 1310b of 1976 PA 451 (MCL 380.1310b).
0135	**Sponsor** Rick Jones Crimes; criminal sexual conduct; age of consent for sexual contact between school employee and student; revise. Amends secs. 520d & 520e of 1931 PA 328 (MCL 750.520d & 750.520e).
0144	**Sponsor** Glenn Anderson Mental health; guardians; guardianship petitions for developmentally disabled minors; allow the court to schedule certain hearings before the minor turns 18 years of age. Amends secs. 609, 614 & 618 of 1974 PA 258 (MCL 330.1609 et seq.).
0165 PA 0057'13	**Sponsor** James Marleau Health facilities; hospitals; policy regarding life-sustaining or nonbeneficial treatment; require policy be disclosed in writing upon request and provide to parent or guardian if it applies to a minor or ward. Amends 1978 PA 368 (MCL 333.1101 - 333.25211) by adding pt. 204.

0170	**Sponsor** Bert Johnson Criminal procedure; youthful trainees; eligibility criteria for youthful trainee program; modify. Amends sec. 11, ch. II of 1927 PA 175(MCL 762.11).
0176	**Sponsor** David Hildenbrand Mental health; guardians; guardianship petitions for developmentally disabled individual; allow the court to schedule a hearing before the individual turns 18 years of age. Amends secs. 609, 614 & 618 of 1974 PA 258 (MCL 330.1609 et seq.).
0177	**Sponsor** David Hildenbrand Probate; guardians and conservators; guardianship petitions; allow probate judges to schedule certain hearings prior to minor turning 18 years of age. Amends secs. 5303 & 5306 of 1998 PA 386 (MCL 700.5303 & 700.5306).
0254	**Sponsor** David Robertson Children; parental rights; process for judicial waiver of parental consent requirement; clarify. Amends secs. 3 & 4 of 1990 PA 211(MCL 722.903 & 722.904).
0304	**Sponsor** Tonya Schuitmaker Education; attendance; local truancy policies; require adoption and implementation by schools and prosecutors. Amends sec. 1599 of 1976 PA 451 (MCL 380.1599) & adds sec. 1590.
0305	**Sponsor** Tonya Schuitmaker Juveniles; truancy; family division of the circuit court to notify secretary of state of truancy disposition; provide for. Amends 1939 PA 388 (MCL 710.21 - 712A.32) by adding sec. 2f to ch. XIIA. TIE BAR WITH: SB 0306'13
0306	**Sponsor** Tonya Schuitmaker Traffic control; driver license; certain school attendance requirements to maintain driver license; establish. Amends secs. 303 & 319 of 1949 PA 300 (MCL 257.303 & 257.319). TIE BAR WITH: SB 0305'13
0318	**Sponsor** Rick Jones Corrections; parole; parole of certain juvenile offenders; allow under certain circumstances. Amends sec. 34 of 1953 PA 232 (MCL791.234). TIE BAR WITH: SB 0319'13
0319	**Sponsor** Rick Jones Criminal procedure; sentencing; procedures for determining whether juvenile convicted of murder should be sentenced to imprisonment without parole eligibility; provide for. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding secs. 32 & 33 to ch. IX. TIE BAR WITH: HB 4808'13, SB 0318'13
0457	**Sponsor** Rebekah Warren Children; adoption; second parent adoption; provide for. Amends secs. 24 & 51, ch. X of 1939 PA 288 (MCL 710.24 & 710.51).
0519	**Sponsor** John Proos Civil procedure; other; fines, costs, and other indebtedness to courts; require SCAO to establish a database, and require civil litigants to check database before paying or collecting on a judgment. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 1477.
0520	**Sponsor** Judith Emmons Crime victims; restitution; restitution orders for crime of nonpayment of support; clarify. Amends sec. 165 of 1931 PA 328 (MCL 750.165).
0521	**Sponsor** Judith Emmons Family law; child support; authority of friend of the court to issue subpoenas for show cause and notice to appear; allow, and provide for other general amendments. Amends secs. 31, 32, 33, 37, 44 & 45 of 1982 PA 295 (MCL 552.631 et seq.) & adds sec. 36.
0522	**Sponsor** Bruce Caswell Family law; child support; certain fees; repeal. Repeals secs. 14a & 23 of 1952 PA 8(MCL 780.164a & 780.173).

0523	**Sponsor** Mike Nofs Family law; child support; qualified individual retirement accounts; include in financial institutions data match. Amends sec. 2 of 1982 PA 295 (MCL 552.602). TIE BAR WITH: SB 0524'13, SB 0525'13
0524	**Sponsor** Mike Nofs Civil procedure; garnishment; retirement accounts; subject accounts that are levied upon for child support to garnishment. Amends sec. 6023 of 1961 PA 236 (MCL600.6023). TIE BAR WITH: SB 0523'13, SB 0525'13
0525	**Sponsor** Mike Nofs Family law; child support; qualified individual retirement accounts; include in financial institutions data match. Amends sec. 1 of 1971 PA 174 (MCL 400.231). TIE BAR WITH: SB 0523'13, SB 0524'13
0526	**Sponsor** Bruce Caswell Family law; child support; assignments of support process; modify. Amends sec. 5d of1982 PA 295 (MCL 552.605d).
0527	**Sponsor** Bruce Caswell Civil procedure; costs and fees; fees for actions involving child custody, support, or parenting time; require payment at time action is filed. Amends sec. 2529 of 1961 PA 236 (MCL 600.2529).
0528	**Sponsor** Mike Nofs Gaming; lottery; distribution of lottery winnings for child support arrearages; update to reflect payment to the state disbursement unit. Amends sec. 32 of 1972 PA 239(MCL 432.32).
0529	**Sponsor** Bruce Caswell Family law; child support; allocation and distribution determination authority; modify. Amends sec. 3 of 1971 PA 174 (MCL 400.233).
0530	**Sponsor** Bruce Caswell Family law; friend of the court; powers and duties of office of child support; modify, and provide other general amendments. Amends secs. 9, 12, 13, 15, 22 & 26 of 1982 PA 294 (MCL 552.509 et seq.).
0537	**Sponsor** Glenn Anderson Health; occupations; tattooing, branding, or body piercing of minors; prohibit under the age of 16 and require body art facility maintain signed consent forms for at least 1 year. Amends sec. 13102 of 1978 PA 368 (MCL 333.13102).
0584	**Sponsor** Judith Emmons Criminal procedure; indictment; statute of limitations for child sex trafficking or commercial sexual exploitation of children offenses; eliminate. Amends sec. 24, ch. VII of 1927 PA 175 (MCL 767.24).
0585	**Sponsor** Mike Nofs Crimes; prostitution; minimum age of person committing certain prostitution-related crimes; increase, and prohibit local units of government from enacting or enforcing ordinances that establish a lower minimum age except under certain circumstances. Amends title & secs. 448, 449 & 450 of 1931 PA 328(MCL 750.448 et seq.) & adds secs. 451b & 451c. TIE BAR WITH: SB 0586'13
0586	**Sponsor** Tory Rocca Courts; probate court; jurisdiction of probate court over individuals less than 18 years of age who commit certain prostitution-related crimes; provide for. Amends sec. 2, ch. XIIA of 1939 PA 288 (MCL 712A.2) & adds sec. 11a to ch. XIIA. TIE BAR WITH: SB 0585'13, SB 0587'13
0587	**Sponsor** Vincent Gregory Children; services; counseling program for children found to be victims of human trafficking; provide for. Amends sec. 4c of 1994 PA 203 (MCL 722.954c).
0588	**Sponsor** Mark Jansen Criminal procedure; defenses; affirmative defense for victims of human trafficking; provide for in certain criminal prosecution. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding sec. 21d to ch. VIII.

0589	**Sponsor** Bruce Caswell Children; parental rights; grounds for termination of parental rights; expand to include certain victims of human trafficking. Amends sec. 19b, ch. XIIA of 1939 PA 288 (MCL 712A.19b).
0590	**Sponsor** John Proos Civil procedure; civil actions; human trafficking; allow victims to sue violators for damages. Creates new act.
0591	**Sponsor** John Proos Criminal procedure; expunction; setting aside criminal conviction on grounds of being a victim of human trafficking; allow under certain circumstances. Amends secs. 1, 2 & 4 of 1965 PA 213 (MCL 780.621 et seq.).
0592	**Sponsor** John Proos Human services; medical services; victims of human trafficking to receive medical and psychological care; establish. Amends 1939 PA 280 (MCL 400.1 - 400.119b) by adding sec. 109m.
0593	**Sponsor** Rebekah Warren Children; foster care; consideration within foster care system for minors who may be victims of human trafficking; allow. Amends 1994 PA 203 (MCL 722.951 - 722.960) by adding sec. 4e.
0594	**Sponsor** Judith Emmons Local government; other; local regulation of adult entertainment business employees act; create. Creates new act.
0595	**Sponsor** Michael Green Taxation; other; adult entertainment tax act; create and impose. Creates new act.
0596	**Sponsor** David Robertson Law enforcement; other; human trafficking board; create. Creates new act.
0597	**Sponsor** Rebekah Warren Health; occupations; training requirements for medical professionals regarding human trafficking; implement. Amends secs. 16148 & 17060 of 1978 PA 368 (MCL 333.16148 & 333.17060).
0598	**Sponsor** Thomas Casperson Crimes; definitions; definition of racketeering; include enticing away a female under 18 years of age. Amends sec. 159g of 1931 PA 328 (MCL 750.159g).
0599	**Sponsor** Goeffrey Hansen Crimes; criminal sexual conduct; use of internet or computer system to solicit prostitute less than 21 years of age; prohibit. Amends sec. 145d of 1931 PA 328 (MCL 750.145d).
0600	**Sponsor** Rick Jones Criminal procedure; warrants; installation, placement, monitoring, and use of wiretapping or electronic monitoring device; allow in execution of search warrant. Amends sec. 1 of 1966 PA 189 (MCL 780.651) & adds sec. 1a. TIE BAR WITH: SB 0601'13
0601	**Sponsor** Rick Jones Criminal procedure; warrants; request by prosecutor to use wiretapping or electronic monitoring device; allow. Amends sec. 539d of 1931 PA 328 (MCL 750.539d). TIE BAR WITH: SB 0600'13
0602	**Sponsor** Joseph Hune Criminal procedure; sex offender registration; definition of tier II offender; revise to include crime of soliciting prostitute. Amends sec. 2 of 1994 PA 295 (MCL 28.722).
0628	**Sponsor** Tonya Schuitmaker Crime victims; statements; delivery of victim statement by parents of a minor; allow under certain circumstances. Amends sec. 2 of 1985 PA 87 (MCL 780.752).

0705	**Sponsor** Rick Jones Courts; records; recording of hearing involving minor; require to be maintained pursuant to supreme court rules. Amends sec. 17a, ch. XIIA of 1939 PA 288 (MCL 712A.17a).
0717	**Sponsor** Rebekah Warren Property; other; property owners associations; prohibit from adopting rules prohibiting child care centers. Amends title of 1973 PA 116 (MCL 722.111 - 722.128) & adds sec. 16a.
0736	**Sponsor** Rick Jones Children; protection; in child protection cases with a parent or guardian who has certain prescribed medication; revise determination process of whether the parent or guardian is competent to continue custody of the child. Amends sec. 13a, ch. XIIA of 1939 PA 288 (MCL 712A.13a).
0743	**Sponsor** Arlan Meekhof Occupations; attorneys; voluntary membership in state bar; establish. Amends sec. 901 of 1961 PA 236 (MCL 600.901).

Attorneys Making a Difference: Featuring Shayla Blankenship

by Stephanie Cardenas

Three years ago, Genesee County realized it needed to make a change regarding how its juvenile docket worked. Attorneys were not present for preliminary hearings or family team meetings. Substitutions of counsel were prevalent occurrences due to how the hearings were scheduled. The county requested ideas in an effort to improve the system.

A new idea implemented over the past two years currently allows contracted attorneys to create their own legal teams to represent each respondent parent in a child welfare proceeding. Shayla Blankenship is the lead attorney for one of the parental teams. She has created the "Advocacy Team for Indigent Fathers ("ATIF"). Ms. Blankenship and the attorneys that comprise her team specifically represent fathers in abuse and neglect cases.

There are five judges in Genesee County that handle juvenile cases. One attorney from ATIF is appointed to each judge. Ms. Blankenship handles the representation of all fathers in front of Judge Kay Behm. Ms. Blankenship requires all attorneys on her team to attend every hearing, including the preliminary hearing, and all family team meetings. The scheduling for the hearings is decided by all parties in the case. Substitutions of counsel are now a rare occurrence.

In the past two years, Ms. Blankenship has seen a drastic improvement to the juvenile system in Genesee County. She has observed a decrease in petitions that are authorized by the court because parties are being adequately represented. The parents are more engaged in their cases because they know their attorney and feel like they are now a part of the process. There has also been a reduction in termination of parental rights cases and a decrease in children entering and/or remaining in foster care.

Ms. Blankenship is happy with the changes that she has observed and she believes the changes have been positive for all parties involved. She loves to see a family reunified after overcoming barriers such as mental problems or drug addiction- problems that seem insurmountable at the time. In her words: "parents want to parent, they just sometimes need help." In Genesee County they have Ms. Blankenship to help them. By representing only fathers she can identify and specialize in the needs and resources available to fathers. She is devoted to making sure her clients get the services they need and does it because "when the system works, then it works really, really well."

Shayla Blankenship has been a licensed attorney in Michigan since 2002. She is a board member of the Center for Juvenile Justice, executive member of the American Inns of Court, Vice-President elect of the Genesee County Bar Association, former Chair of the Family Law Committee of the Genesee County Bar Association and is still an active member. Shayla is a member of the State Bar of Michigan Domestic Violence Committee, the State Bar of Michigan Children's Law Committee, and the Representative Assembly of the State Bar of Michigan. She is state and nationally trained in domestic violence and is a frequent classroom lecturer on domestic violence issues. She obviously doesn't have a lot of spare time and any time she has, she spends with her wife and two children. She makes it a goal to be home at night to put her six year old and eleven-month old to bed at night.

Upcoming Events

The Children's Law Section invites all members to actively participate in our events and meetings. We also welcome members to notify us of announcements and items of interest to our membership. If you would like something included in future editions, please notify the section chairperson.

Council Meetings

Meetings are held on the third Thursday of each month.

All meetings are held at the State Bar of Michigan, 306 Townsend, Lansing, MI unless otherwise announced. Changes will be posted on the State Bar of Michigan Children's Law Section website in advance when made.

Meetings start at 5:00 p.m.

Children's Law Section members who are not Council members are welcome to attend all Council meetings. If you are not a Council member and wish to attend, please contact the Chairperson, Christine Piatkowski, at *piatkowski.law@chartermi.net*, in advance so that appropriate accommodations can be made for space and food.

Annual Meeting

The Children's Law Section will be hosting its annual business meeting with guest speaker, Supreme Court Justice David Viviano, on Thursday, September 18, 2014 at the State Bar Annual Meeting in Grand Rapids. Everyone is invited to attend. The event is currently scheduled from 9:00 a.m. until 11:00 a.m. Please refer to the State Bar of Michigan website for more details.

Competency Manual and List of Providers for Evaluations

The Children's Law Section co-sponsored a training with the Michigan Council on Crime and Delinquency regarding the issue of juvenile competency for legal professionals. The event was held at the Forensic Center and featured guest speaker Kimberly Larson, an attorney that has worked extensively with Thomas Grisso, a leader in the field of juvenile competency. The Children's Law Section developed a manual for legal professionals that will be available on the Children's Law Section member website. A list of providers that attended the training will also be made available on the website.

Upcoming Events Around Town

- **August 21, 2014—**Child Development and Responses to Child Sexual Abuse. For more details and registration visit the Supreme Court Administrative Office website.
- **August 18-20, 20144—**National Association of Children's Counsel is holding its annual conference in Denver, Colorado. For more details and registration visit the NACC website.
- **October 24, 20144—**The Children's Law Section is planning its Annual Conference. The conference will feature guest speakers on a variety of child welfare and juvenile delinquency topics. The event promises to be the best yet with new information, tips, trends and items of interest. Watch for announcements in the next few months and plan to join us in the fall.

Join a Subcommittee

Members are invited to participate in a number of standing subcommittees. The Children's Law Section has the following standing subcommittees for your consideration:

1) Legislative 2) Amicus 3) Education and 4) Bylaw. Additional subcommittees are in the process of being developed. If you are interested in participating in a subcommittee, please contact the Chairperson, Christine Piatkowski, at *piatkowski.law@chartermi.net*.

The Michigan Child Welfare Law Journal Call for Papers

The editorial board of *The Michigan Child Welfare Law Journal* invites manuscripts regarding current issues in the field of child welfare. The *Journal* takes an interdisciplinary approach to child welfare, as broadly defined to encompass those areas of law that directly affect the interests of children. The editorial board's goal is to ensure that the *Journal* is of interest and value to all professionals working in the field of child welfare, including social workers, attorneys, psychologists, and medical professionals. The *Journal's* content focuses on practice issues and the editorial board especially encourages contributions from active practitioners in the field of child welfare. All submissions must include a discussion of practice implications for legal practitioners.

The main text of the manuscripts must not exceed 20 double-spaced pages (approximately 5,000 words). The deadline for submission is September 30, 2014. Manuscripts should be submitted electronically to *kozakiew@msu.edu*. Inquiries should be directed to:

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