



Children's Rights Litigation Committee
Fall 2010

American Bar Association
Vol. 13, Issue 1

The DREAMers: America's Undocumented Youth

By Tammy Besherse

Some people call them DREAMers, so called because of their would-be eligibility for permanent residency under the Development, Relief, and Education for Alien Minors Act (the DREAM Act). They are the approximately 1.5 million undocumented youth living in the United States.¹ While in the United States, these children are able to receive free public education through high school.² Many

of these young people are class valedictorians, star athletes, and top students who want to contribute fully to the United States, but due to current immigration laws, they cannot. DREAMers who want to continue on to college after graduating from high school face many obstacles. One of the biggest barriers they face is a provision in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).³

This federal law discourages states and localities from granting undocumented students in-state tuition and many times admission to college. In addition, because of current immigration laws, they cannot legally work and are subject to deportation.

These young people typically lack legal status for one of the following reasons: their parents brought them into

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Part II: Challenging a Listing in a Child Abuse Registry

By Diane L. Redleaf and Steven L. Pick

Part I, which appeared in the Summer 2010 issue of Children's Rights, included an overview of federal constitutional litigation establishing parents' and child caregivers' due-process rights when they're listed as perpetrators of abuse or neglect in state child abuse registries and presented an overview of the Illinois child abuse registry appeal system.

The goal of any individual state child abuse registry appeal is to clear an individual's name from the registry. Lawyers handling registry

appeals can raise important legal issues and utilize a wide range of legal strategies and tactics to help clear innocent parents or caregivers from wrongfully registered reports of abuse or neglect. Substantive, procedural, and evidentiary challenges can be effective in overturning registry decisions in individual cases.

Challenging the Substantive Basis for Registry

When a child-protection agency registers a child abuse or neglect finding against a

parent or caregiver, that decision subsumes two determinations: The state has determined that "abuse" or "neglect" has occurred, and the person being registered is deemed "responsible" for the abuse or neglect. The substantive grounds for making these determinations should be set forth in the state's child abuse reporting law.¹ The state may also have administrative rules implementing its reporting law and written policies and/or procedures that clarify or amplify these rules.

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Children's Rights (ISSN 1936-9670) is published quarterly by the Children's Rights Committee, Section of Litigation, American Bar Association, 321 N. Clark Street, Chicago, IL 60654, www.abanet.org/litigation. The views expressed within do not necessarily reflect the views or policies of the American Bar Association, the Section of Litigation, or the Children's Rights Committee.

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MESSAGE FROM THE CHAIRS

Our thanks go out to Shari Shink, our outgoing chair, who has been an incredible inspiration and mentor. We are grateful that Shari will continue to guide and contribute to our work as a member of the Children's Rights Litigation Committee working group.

We are excited to welcome Franchesca L. Hamilton-Acker, who will join us as the third chair of the Children's Rights Litigation Committee. Franchesca is managing attorney of the Children In Need of Care Unit (CINC) at the Acadiana Legal Service Corporation in Lafayette, Louisiana, where she has practiced public-interest law for more than 10 years. Franchesca has been active in the ABA for many years, including participation as a member of the Young Lawyer Leadership Program for the ABA Section of Litigation, as a liaison to the Commission on Lawyer Assistance Programs for the ABA Young Lawyers' Division, and as the Young Lawyers Division District Representative for Louisiana.

Last month you learned about our new subcommittee structure. We encourage you to learn more about these committees (Content, Programming, Education, and Right to Counsel) and discover how easy and rewarding it is to get involved. Whether you have several hours to volunteer or just a few minutes, every second counts in the lives of children involved in the legal system. Please contact Committee Director Cathy Krebs to learn more about the difference you—a lawyer—can make in the life of one of these children.

We want to hear your thoughts regarding how the Children's Rights Litigation Committee can support you. To that end, we hope you will share your ideas and suggestions for upcoming programming, articles, and other resources that will enhance your ability to help children in need in the legal system.

Finally, the newsletter you are holding in your hand is the second to the last printed edition. You will receive a winter edition in print, and then the spring edition will be our first digital issue. **If you would like to keep receiving this newsletter, then we must hear from you!** To send you the digital version of the newsletter, we need your email address. Please log on to MyABA online at www.abanet.org/esubscription to make sure your email address is current or contact our committee director at krebsc@staff.abanet.org to give her your email address and keep receiving this newsletter.

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Beyond Limitations: Community Lawyering for Youth

By Lam Nguyen Ho

In the past 20 years, there has been a push in legal services for greater client empowerment and community-based practices. Scholars and practitioners have proposed numerous strategies for collaborative, community-based practice under the umbrella of “community lawyering.” Emphasizing the need for lawyers to participate in a collective fight for social change, community lawyering is based on three core principles: the integration of the lawyer into the community he or she serves; the involvement and empowerment of nonlegal community resources in the lawyering process; and the use of multifaceted approaches to problem solving.

By using a case study of a community lawyering project (the Project) at the Legal Assistance Foundation of Metropolitan Chicago (LAF), we can explore how community lawyering can be applied to the unique challenges presented by working with youth.

Combining Community Lawyering and Youth Law

The Principles of Community Lawyering

Lawyers are trained to litigate; they invest time and energy in learning to analyze cases, interpret statutes, and negotiate court systems. Consequently, they are likely to look to these traditional practices for potential solutions. Lawyers, even those committed to working with communities, often embrace “the law” as a panacea for social ills. Consequently, even well-intentioned lawyers habitually cling to the modes of traditional legal practice with which they are familiar. They can fail to listen carefully to their clients, and they often do not recognize the available nonlegal resources that can be utilized in lieu of or alongside litigation. In turn, clients who lack fluency in the law and are untrained in the operations of the judicial system feel dependent

on lawyers and vulnerable to the judicial system. “Community lawyering” is the umbrella term for the strategies, theories, and methods that address how lawyers may overcome these limitations.

Community lawyering seeks to push lawyers outside of their traditional office spaces and roles and into the communities and cultural experiences of the people served. It is based on the belief that traditional unilateral lawyering can’t serve the needs of disadvantaged communities by itself. Community lawyering shifts and expands the boundaries of legal practice with new approaches to assisting the populations served. It can range from lawyers facilitating community organization and development to providing group representation and blurring the distinctions between lawyer and layperson.

However, there are three core principles that largely define community lawyering. First, there is an emphasis on the capacity of the lawyer to immerse him- or herself into the community, taking lawyers from the traditional external office space and putting them inside the community. This requires lawyers to actively engage with a community in methods beyond providing legal services. Instead, lawyers must be able to, as much as possible, understand the unique social, political, and cultural contexts of a community from the perspective of someone living there. In doing so, community lawyers can develop insight into the needs and circumstances of residents that underlie their legal problems.

The second goal of community lawyering is community building. Community lawyers seek to effectively support disadvantaged communities by helping them create and maintain community institutions and organizations. There are many different ways that a lawyer can be involved with community building. One

common approach involves collaborating with community partners to identify ways to increase access to justice and build community resources.

Finally, community lawyering calls for attorneys to develop and sustain client-empowering relationships and think creatively about how a problem can be solved. It demands that attorneys consider strategies beyond litigation, rethink their roles, adapt their practices, and learn new skills.

The Unique Challenges of Providing Legal Services to Youth

Working with youth poses unique demands on any lawyer. For various reasons, youth rarely seek legal assistance, and when they do, the attorney-client relationship is beset with challenges that can impede its full potential. The goals of youth clients may conflict with what some lawyers may deem to be their best interests, and their age and legal status, as well as the restrictive nature of laws affecting youth, can limit how attorneys can assist them. These factors affect all attorneys working with youth, but they present meaningful challenges, and opportunities, to the aims of community lawyering. On one hand, the emphasis on collaborative decisionmaking, empowerment, and community integration requires community lawyers to negotiate not only the sociopolitical and cultural terrains of the geographic community, but also the unique circumstances of their age. On the other hand, community lawyering principles provide possible strategies to help bridge the gaps that separate an attorney from a youth client.

Unfortunately, there are many low-income youth who face problems with which an attorney can assist them; students struggling with school because of a disability, homeless or runaway youths, teenage mothers, and young adults who

have criminal records are some of the clients who have sought assistance from the Project. The sad reality is that the few youth who approach the Project represent a minuscule percentage of those who need help. For example, every year there are 15,000 youth in Chicago alone who experience homelessness.¹ The need to increase access to and the efficacy of legal services for youth is staggering and must be addressed by reaching out to youth to educate them about the possibilities and the availability of lawyers who can help them. This is a nexus at which community lawyering and youth lawyering can ideally merge. Likewise, the emphasis in community lawyering on attorneys developing an insider's perspective can be effective in working with youth, particularly where generation gaps can intimidate and deter youth from seeking assistance from or being comfortable working with an attorney. For community lawyers working with youth, integration into the community requires greater effort but also offers greater opportunities for making connections with youth clients. The crucial goal is to connect with youth in environments in which they are comfortable—at places where they regularly go and in activities in which they already participate.

It is not only lawyers who are responsible for imbalanced client-attorney relationships. Clients themselves rely upon lawyers' knowledge and authority; they accept the opinions of lawyers as presumptively superior to their own. This is especially true when working with youth. Youth are less likely to question the authority of their lawyers because they perceive an attorney as an authority figure and not as a service provider. In addition to socioeconomic disadvantages and their limited resources, youth may also lack the knowledge or capacity to articulate their interests and goals. Thus, community lawyers working with youth must overcome the tensions between the needs and expectations of youth clients to ensure client collaboration and empowerment.

As previously mentioned, partnerships between legal services organizations and community institutions are critical in understanding the community's perspective. Such partnerships facilitate the understanding of a community's youths and their perspectives, because youth do not have the same opportunity for voicing their perspectives as adults. These organizations have more direct and comprehensive access to the youth population, and frequently they are already the bridge between youth and lawyer, as they provide referrals to legal services organizations. As such, they are in a unique position to provide critical information and advice to lawyers about the youth

Community lawyering demands that lawyers extend their roles and responsibilities beyond what they consider to be "lawyering."

of a community. Youth law lawyers and community organizations can collaboratively identify the legal needs of youth, brainstorm, and plan how to address these needs.

Community lawyering also demands that lawyers extend their roles and responsibilities beyond what they consider to be "lawyering." In their struggle to alleviate the systematic problems of poverty, community lawyers have expanded their repertoire in response to these needs. This is relevant to lawyers working with youth, because the problems facing youth are often not remedied by litigation. Traditional boundaries that have defined a lawyer's identity as distinct from the activist, social worker,

educator, or community organizer need to be supplanted by more fluid identities that accommodate the needs and interests of youth clients. This work should also focus on providing resources for the entire youth population of a community. Such community building fits better into the empowerment philosophy of community lawyering, as it enables the community to develop resources that empower the community to understand and address its own problems. Moreover, such community-level work, as opposed to individual-level litigation, is arguably more sustainable when done effectively, as it does not always require lawyers to maintain the work.

LAF's Community Youth Law Project

Collaboration with Community Youth Services Providers

In the past two years, the Westside Office and the Children's Law Project of LAF have overseen a community youth law project. It has consisted of the creation of 10 legal clinics on the West Side of Chicago focused on serving youth up to the age of 21. The neighborhoods covered by the clinics—Lawndale, Garfield Park, and Austin—are among the areas with the densest concentration of poverty and highest rates of crime in Illinois. The youth growing up in these communities face daunting barriers to education, health, financial resources, and safety. The Project has partnered with a variety of community organizations in these neighborhoods to establish community-based legal clinics for youth that can provide comprehensive legal services and help them negotiate these challenges. The community partners include schools, churches, social services centers, a homeless shelter, and a grassroots juvenile justice collaborative. Nearly all the partners serve as host locations for the clinics, and each clinic is operated collaboratively with the organization. Logistical and substantive decisions, such as the time, location, and frequency of the clinics, the intake procedure, and advertising,

are made jointly with representatives of the community partner. Since 2008, the clinics have operated from a twice-weekly to an as-needed basis, depending on the interests of the organization and its client population.

For example, a partnership with a local church birthed a walk-in clinic located at the church's residential development office building. It contains a recreation space for its youth programs and an after-school computer lab. The clinic is open every Wednesday and Friday afternoon and handles most areas of poverty law practice, including family, special education, school discipline, juvenile expungement, and public benefits law.

In contrast, a partnership with a charter high school produced clinics during school hours every two to three months focused on specific areas of need: expungement of students' criminal records, orders of protection, expulsion hearings, and street law.² In between clinics, the case managers at the school make direct referrals for any student with a legal problem.

Because the clinics are coordinated collaboratively with other organizations, the resources required to operate them can be drawn from many sources. While a single attorney from LAF has generally staffed all of the clinics, with some assistance from other attorneys at LAF and other legal-services organizations, the partnering community organizations have provided the physical location, support staff, and equipment.

The organizations also offer flexibility and support to accommodate the litigation needs of the clinic and the concomitant time constraints of the Project attorney. Admittedly, for one attorney to staff four or five regular clinics per week demands careful time management. During most weeks, the time requirement is manageable. One clinic session requires three or four hours; thus, the Project attorney is at the regular clinics at least three days—between 12 and 20 hours—each week. However, on days of high litigation activity—such as a trial or day-long hearing—arrangements are made for

CLINIC EXAMPLE: FARRAGUT HIGH SCHOOL

The Children's Law Project of LAF collaborated with Farragut Career Academy High School in South Lawndale to create a multiservices clinic that provides a variety of assistance for the school's students and their families. The clinic consists of three interconnected components. The first, a drop-in help center housed in the school's law library, consists of a suite of offices, lounge area, reception area, classroom, and conference room. The center is open every Tuesday at 3:30 p.m., when classes end, until 6:30 p.m. Students and their families are welcome to come in and discuss any legal issue. The consultations may include advice or information, referrals to possible resources, brief assistance to resolve minor problems, or intake interviews to assess for legal representation.

An important part of the center is student involvement. Farragut Career Academy students serve as interns for the clinic. They earn academic credit for their time, and they acquire knowledge about the law and legal profession. The interns greet clients, have them sign in, and provide them with intake forms to complete. More importantly, the student interns are responsible for marketing the center and the "school attorney" to their classmates. Over the past two years, some of the students have raised publicity by making school-wide announcements over the school intercom; creating, hanging, and distributing flyers and posters; word-of-mouth campaigns; and speaking to classes.

The second component of the clinic is a weekly class for the Farragut Career Academy's in-school suspension program. Every Friday from 12:30 a.m.–1:30 p.m., an attorney teaches a class on the law. The attorneys, including guest attorneys from other organizations, including Cabrini Green Legal Aid and First Defense Legal Aid, have presented a curriculum of classes on interacting with the police, teen rights, law jeopardy, expungement, and working with legal aid and public defense lawyers. The class is also an opportunity to inform at-risk students about the clinic, and each session concludes with time for questions, which frequently lead to follow-up appointments at the drop-in center.

The clinic is also a part of the Farragut Career Academy's after-school, human services program, which brings in resources for students and their families. Various social service providers also regularly hold workshops, GED classes, and healthcare screenings alongside the Tuesday drop-in center.

As part of Farragut Career Academy's after-school programming, the clinic hosts special workshops and presentations on issues impacting the community. These one-time events focus on areas of law that require greater awareness and education or types of cases the drop-in center usually refers to others. These have included cases on special education, domestic violence, child support, criminal defense, and criminal records expungement and sealing. In addition, as a member of the after-school programming curriculum, the clinic has been involved with the school's community engagement committee and recently helped to draft Farragut's 2011–2012 community plan.

either a substitute attorney or alternative consultation procedure. For example, a church partner recruited two employees to meet with clinic clients, explain why an attorney was not available, obtain contact information, provide the number to LAF's main intake telephone number for any emergencies, and schedule appointments for the following week.

A key element of every clinic is that all clients have the opportunity to meet with an attorney personally. In these meetings, each client is offered, at minimum, a consultation with advice or information about his or her legal problem. Clients may also receive brief services to resolve the problem informally or an intake to evaluate the case for representation. If a problem has to be referred, the client isn't just given a telephone number. Instead, clients receive either assistance to access the referral—scheduling an appointment, forwarding the client's information to the referral agency, printing out travel directions, and/or organizing a client's information and documents—or a follow-up appointment.

The clinics are conveniently located at venues where clients may obtain other types of services and resources. This allows clients to maximize both their time and mobility, as some youth and their families on the West Side of Chicago have limited access to transportation, particularly to downtown Chicago. For example, one clinic is part of a supermarket-style food pantry where families can come and "shop" for free food. Modeled after mega supermarkets, the program offers a one-stop holistic experience that includes additional services: the legal clinic, a medical clinic, counseling services, support groups, and computer education. Finally, the clinics accept both adults—on behalf of their children in cases where a youth is incapable or law dictates, or where parents are the clients—and youths on their own behalf. In particular, homeless, transient, and unaccompanied youth are considered clients with ultimate decisionmaking authority.

Outtakes: Combining Outreach, Education, and Intake

Alongside the regular clinics are those occurring less than once a month that have taken the form of "outtakes." Outtakes combine outreach, which involves lawyers going into a community to provide information about legal rights and the availability of their services, and intakes, which typically bring potential clients into the law office to provide information about their situations.

Outreach is one of the most common techniques used in community lawyering. It allows lawyers to interact with community leaders and residents, a process that

Like at the regular clinics, the services provided at outtakes range from advice or brief services to facilitated referrals to the evaluation of a case for representation.

assists them in becoming more aware of the needs of the community while also developing relationships. At the same time, community education, as a portion of outreach, assists community members in understanding more about the law, the legal process, and important issues. Conversely, intakes relate to the internal procedures of legal practice and are used to evaluate a case—or a client—for acceptance.

An outtake is completed in one setting but in two stages. During the first portion of an outtake, the clinic attorney, either alone or with others, presents an

interactive presentation or workshop to all youths participating in a community program. After the presentation, the youths are given the opportunity to sign up for individual, confidential meetings with the attorney.

The Project has used two different models for its outtakes. The first model is the issue-based model, in which the presentation or workshop centers on a particular issue that the host organization has identified as important to the youth of its community. Typically, the consultations then relate to that legal issue. For example, since 2009, the Project has hosted a series of outtakes at a housing program for teenage mothers and pregnant youth. Prior to each outtake, the social workers at the program identify the legal issue or area of law with which many of their clients need assistance, such as child support, orders of protection, child custody, public benefits, and general family law.

The second model is the "legal aid model." Under this model, the attorney presents generally about the availability of free legal services and about the Project. Unsurprisingly, most youth on the West Side of Chicago do not realize that there are legal aid lawyers who can assist them with noncriminal issues. While many know about public defenders, the vast majority of youths at these clinics have no experience with or knowledge of attorneys outside the criminal defense context. As a result, the issues—often nonlegal problems—raised at the subsequent individual meetings vary greatly. Outtakes under the general legal aid model have occurred at organizations that offer services to a diverse group of youth, such as a transitional housing program for state wards, a church youth Bible study group, and a young men's mentoring program.

Like at the regular clinics, the services provided at outtakes range from advice or brief services to facilitated referrals to the evaluation of a case for representation. However, these outtakes also add an educational component that is essential

to working with youth. By doing an outtake, an attorney is able to simultaneously connect with youth in a familiar environment and provide knowledge about either a relevant legal issue or about the availability of free legal services. At the very least, these outtakes provide an avenue to reaching youth who are less likely to come to law offices and arguably less capable of obtaining legal resources.

The advantage for the lawyers involved with outtakes is not only the increased access to youth but also access to the community resources that provide services to them. Consequently, lawyers can better and more comprehensively evaluate the nature and scope of services needed by youth in the community. Also, outtakes can result in receiving cases at earlier stages in the legal process, allowing for better planning, more time, and the possibility of affirmative litigation. This can be a significant advantage in youth law, where the age of a child and the timing of a case are vital. Finally, one of the advantages of outtakes is the time value. Unlike the regular clinics, the Project's outtakes for five community partners usually require less than 15 hours each month, as each organization usually requests an outtake once every one to three months. However, the gain from them can be immense.

Outtakes allow an attorney to access large groups of youth who have been "prescreened" by professionals to need information and/or services on specific issues. In the two to five hours of an outtake, an attorney can give youth important information about their legal rights, educate them about the availability of legal and nonlegal resources, help them become more comfortable with lawyers, assess each youth's specific situation, provide brief services where appropriate, and evaluate for potential litigation. An attorney working from his or her office would require a significantly greater amount of time to perform such tasks for a large group of clients. Therefore, outtakes are a creative method for community integration and building goals,

but they also offer lawyers working with youth an effective, efficient opportunity to connect with and help more youths.

Conclusion

Not only is community lawyering possible when working with youth, but it also offers great potential for resolving some of the unique challenges that youth law attorneys face. We must embrace the possibility that, despite the gaps between us and the youth we serve, we can remain committed to the call of community lawyering for the "third dimension" of lawyering: empowering our clients and their communities to define their own problems, strategies, and identities.³ We must believe that youth can also be "empowered clients [who] can begin to speak in their own voice—and to solve their own problems—without relying exclusively on the advocacy of lawyers."⁴

In being community lawyers for youth, we must relinquish the secure identity of a lawyer's traditional roles and responsibilities, challenge the rigid border of professional distance that separates the lawyer from his or her client, seek out creative ways to work collaboratively with youth and the community organizations that support them,

break down the separation between law and education, refuse to agonize over whether our work is really legal work, and transgress geographical and institutional boundaries between our own law offices and the places where our youth live, learn, and play.

Lam Nguyen Ho is a Skadden Fellow/staff attorney at the Legal Assistance Foundation of Metropolitan Chicago. For a list of suggested works on community lawyering, contact Cathy Krebs at krebsc@staff.abanet.org.

Endnotes

1. LAKEVIEW ACTION COALITION, FACT SHEET ON HOMELESS YOUTH, available at http://www.lakeviewaction.org/fact_sheet_on_homeless_youth.htm (last visited on Aug. 2, 2010).
2. Street Law is a teaching curriculum that educates middle and high school students on the law, legal rights, and how it affects their daily lives in an accessible way. The curriculum uses interactive, hands-on methods to engage students.
3. Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLIN. L. REV. 157, 157–58 (1994).
4. Angelo N. Ancheta, *Community Lawyering*, 81 CAL. L. REV. 1363, 1385 (1993).

OUTTAKE EXAMPLE: NLJJC AND SANKOFA

After a community meeting on juvenile delinquency at a local high school, the Project partnered with three community organizations involved with preventing juvenile delinquency and providing support for juvenile offenders. The organizations identified that juvenile and criminal records expungement and sealing were simple, but critical, legal needs for youth in North Lawndale.

As a result of the collaboration, the North Lawndale Juvenile Justice Collaborative (NLJJC) and Sankofa Safe Child Initiative have organized outtakes staffed by LAF attorneys. NLJJC, the United Baptist Church, and the Project have set up a weekly expungement help desk at the church, where anyone can come and obtain assistance with their records. Finally, and most importantly, the Project has conducted training for staff members of NLJJC and Sankofa on juvenile expungement law and how to complete juvenile expungement petitions. One of the trainees is the current juvenile expungement coordinator for Sankofa, and her position now entails educating youth and parents on juvenile expungement and assisting clients in filing petitions.

The Open Adoption Option

By Annette R. Appell

Adoption creates new beginnings for thousands of children every year. These children receive a new parent or parents who commit to love, care, and nurture them throughout their lives. At the same time, adoption terminates parental rights and all relations that flow from them—ties to siblings, grandparents, cousins, nieces, nephews, aunts, and uncles. Adoption thus appears to be a simple, linear process providing for the termination of one family and the creation of another through the adoption decree. However, adoption is often a more circular process that creates and expands family networks to form concentric kinship circles around the child.

Adoption does not provide a discrete ending or beginning because in imagination, and increasingly in fact, birth relations persist throughout the lives of adoptees and their adoptive families. Nearly all adoptees wonder about their birth relations and think about them during various rites of passage. Moreover, the vast majority of adoptees lived with family members before the adoption; and most adoptees have contact with family members after adoption.¹ Based on these phenomena and child development theories, adoption professionals now recognize that adoption is a lifelong process that creates a different type of family. It's not surprising then that open adoption has become the norm, with adoption researchers viewing the adoptive family as a "kinship network" centered on the child and including the child's adopted and birth family members, even when those members are not actually known to each other or to the child.²

Changing Views of Adoption

When adoption was institutionalized 150 years ago as a child welfare service, adoptees tended to be older children. By 1980, however, when the Adoption Assistance

and Child Welfare Act became law, adoption had become synonymous with a ritualized, rigid, and symbolic rebirth of the child to the adoptive parents. This rebirth came complete with a brand-new birth certificate bearing the child's adoptive name and the new "facts" of the child's birth—that the child was born to the adoptive parents. Under this form of adoption, the law erases, severs, and nullifies the adoptee's pre-adoption history, including the birth name, identity, and familial connections, regardless of the child's age at the time of adoption.

The 1980 act brought needed reforms

Adoption does not provide a discrete ending or beginning because birth relations persist throughout the lives of adoptees and their adoptive families.

to state responses for children at risk of abuse or neglect, including providing incentives for child welfare agencies to select adoption as the preferred option for children who could not return home to their families of origin. Unfortunately, from the start, the harshness and ubiquity of the 1980s model of adoption posed barriers to the adoption of foster children. Child welfare experts raised concerns about the act's prioritization of adoption as the second-best permanency option for older children precisely because of adoption's fiction of rebirth

and the lack of options to guarantee or acknowledge the child's identity and birth connections after adoption. These concerns were not about adoption itself, but instead about applying the model of closed, anonymous adoption to older children who carried with them known connections to and experiences with birth parents, siblings, and other biological and fictive kin. Even so, the substantial revision of the 1980 act in 1997, through the Adoption and Safe Families Act, continued to endorse the rigid late-20th-century form of adoption as the permanency solution for foster children who could not return home.³

In the meantime, adoption professionals and researchers had seen the limitations of this adoption model and its impact on all members of the adoption triad (birth parents, adoptees, and adoptive parents). These experts also noted the changes in adoption practice informed by the experiences of triad members and the professionals serving them. Infant adoptions had changed drastically as a result of a variety of factors: increased autonomy for women, a decline in shame surrounding single-parent birth, rising respect for children's individuality and personhood, and an increase in adoptive parents and adoptees seeking information from adoption agencies about the facts of the adoptee's biological kinship. A new appreciation of birth connections combined with the shortage of infants available to meet the demand for adoption led to greater openness in infant adoptions, making open infant adoption the norm.

In the foster care context, child advocates and social workers were witnessing foster children's deep and persistent connections to their birth families. Some of these children resisted adoption when it meant they would have to change their names, be separated from siblings, or lose track of their parents and other kin. Foster children's resistance to this

all-or-nothing model of adoption and their desire for knowledge about, and even contact with, their birth parents or siblings made an impression on many adoptive parents, birth parents, and child welfare professionals. As a result, both infant and foster child adoption have become more open as adoptive parents, courts, lawmakers, and adoption professionals have sought to make adoption more humane and child-centered.

The Spectra of Open Adoption

Open adoption refers to a remarkably varied range of practices and constituents in the adoptive kinship network. Open relationships may involve birth parents, grandparents, aunts, uncles, or siblings. Contact might range from the exchange of letters and pictures between the birth family and the adoptive parents or the adoptee, to occasional visits, regular visits, and even partial integration of the birth and adoptive families. Members from each of these family groups might attend each other's weddings and birthday parties; siblings of adoptees might develop relationships with their siblings' birth mother; and birth grandparents might become surrogate grandparents to the adoptive family.

The social science research regarding open adoption in this country and in England, where the Children's Act of 1989 permits courts to order post-adoption contact,⁴ shows that open adoption is dynamic and fluid within the triads.⁵ The in-contact participants may change over time, and the relationships may wax and wane, often growing stronger, but also sometimes becoming strained. Remarkably, the adoptive parents and birth relatives value the openness, even when it's not completely positive or comfortable, because they view the contact as important for the child. Studies also reveal that the level of openness does not have a bearing on adoptive parents' satisfaction with the adoption or their relationships with the adoptees. These phenomena indicate both the child-centered nature of open adoption

and the subordinate role this openness plays in the adoption overall.

At the same time, open adoption does affect the adoptive parents' view of the adoptee's birth family. Adoptive parents in open adoptions tend to view the birth relatives in a more positive light. In contrast, adoptive parents in closed adoptions tend to have more negative views of the birth family. Adoptive parents have also reported that contact with the child's birth family members helped them better understand, and become closer to, their adopted children. In fact, adoptive parents actively work to facilitate their children's contact with birth relations, including birth siblings adopted into other homes.

In families with more than one adopted child, there may be differences in the type and level of openness among the adoptees. One study found that adoptive parents tended to view the most open adoption as optimal.⁶ In fact, it appeared that the more contact adoptive parents had with the birth parents, the more beneficial and less detrimental they felt that contact was. Not surprisingly, it is common for mediated and open adoptions to become more, rather than less, open over time.

Even as adoptees are happily and firmly attached to a new family, contact with the birth family appears to serve many purposes, including securing the child's support for being adopted, quelling worries the child might have about the welfare of birth family members, and satisfying curiosity about the child's origins. Although many adoptees, even in open adoptions, may wish to be with both their birth and adoptive parents and want more contact with their birth relations, these children do not appear to be confused about the roles of these families in their lives. It's not a zero-sum game; instead, adoptees view their birth parents as another parent, a relative, or a friend.

Regulation of Open Adoption

The vast majority of open adoption—particularly ongoing contact adoption—is

unregulated. Most post-adoption relationships are based solely on the parties' agreement to openness and their good will and ability to work through conflicts. The law has slowly begun to absorb and reflect these new views and practices of adoption, and there are now several methods for regulating post-adoption contact: one equitable and two statutory. The equitable method is rare. It occurs when judges, without specific statutory authority, utilize their equitable power to order post-adoption contact with a birth family member, such as a sibling

Adoptive parents have reported that contact with the child's birth family members helped them better understand, and become closer to, their adopted children.

or parent. Massachusetts has the most developed and active jurisprudence in this area.⁷

The most common type of statutory open adoption regulation comprises state statutes that allow judges to impose on the adoptee post-adoption contact with third parties, usually birth relatives, even over the adoptive parent's objection. These statutes, enacted in most states, vary greatly, but the vast majority applies only in stepparent and related adoptions and afford visitation to grandparents.⁸

A newer statutory mechanism, and perhaps the most family-centric, is adoption-with-contact or cooperative

adoption. These statutes apply to consensual agreements, entered into before or at the time of the adoption, between the adoptive parent and a third party (almost always a birth family member) for enforceable post-adoption contact between the adoptee and the third party. Most

states require the court to approve of or otherwise accept the agreement before entering the final decree. Some statutes require the decree itself to include or reference the written agreement.⁹ Here, the openness is a part of the adoption itself.

Twenty states have enacted these consensual open adoption statutes in the past two decades: Arizona, California, Connecticut, Florida, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, Oregon, Rhode Island, South Dakota, Vermont, Washington, and West Virginia.¹⁰ These remarkably similar statutes provide that any subsequent breach of the contact agreement will not invalidate the adoption or any previous parental rights relinquishment. Instead, the only breach remedy is enforcement, modification, or termination of the contact agreement.¹¹ The statutes vary according to which family members are included, which children the statutes apply, and how the agreements are enforced and modified. Most of these statutes apply to all children, but some, including California, Connecticut, and Nebraska, apply only to foster children.

It appears that public child welfare agencies and adoption advocates were behind these statutes.¹² They were motivated by a number of factors, including preserving the children's identity and other interests through open adoption, recognizing the utility of such regulation for permanency planning, and acknowledging the perception that enforceable open adoption would increase the number of adoptions. Another leading rationale was to protect the parties involved, primarily birth parents, who were consenting to open adoptions with a largely mistaken belief that they retained a right to enforce written and oral post-adoption contact agreements when no such right existed. Through their very existence, these adoption-with-contact statutes make clear when agreements for post-adoption contact are enforceable and when they are not. Simply put, agreements entered into pursuant to the

statute are enforceable, and other agreements are not.¹³

The value of openness has also produced statutory innovations for instances when there is no adoption on the horizon after the termination of parental rights. Massachusetts and Florida have enacted statutes that enable courts to order family contact during the period after the termination of parental rights and before adoption.¹⁴ These statutes help address the gaps that so many foster children experience before an adoptive family is found or an adoption finalized. For some children, there may be no adoption, so these statutes have particular utility to help preserve these important and durable relationships.

Lessons Learned

Studies of open adoption and observations of the practice suggest that open-adoption families are very similar to the other blended families that increasingly characterize family life today. These are families formed through various collaborative methods of conception, divorce and remarriage, and informal kinship care, all of which push against the notion of the mythic stalwart nuclear family. Adoptive families, particularly adoptive families with ongoing contact, fit right into this array of family forms. In fact, open adoption illustrates that adoptive-parent exclusivity may not be the defining aspect of adoption at all. Instead, as two open-adoption experts concluded, it is the "phenomenology of parenthood" that creates the parental bond.¹⁵

Conclusion

The phenomenology of parenthood includes the authority to determine with whom children will have contact. Ideally, birth and adoptive families should be enabled and encouraged to negotiate pre- and post-adoption contact themselves, with minimum legal regulation, except to resolve subsequent disputes, as in the statutory form of adoption with contact. However, there is also a role for courts to impose such contact when logistical

FAST FACTS ABOUT ADOPTION

There are nearly 1.8 million adopted children in the United States.

- Thirty-seven percent are adopted from foster care.
 - Twenty-three percent are adopted by relatives.
 - Sixty-nine percent are adopted by foster parents.
- Thirty-eight percent are adopted privately.
 - Forty-one percent are adopted by relatives.
- Twenty-five percent are adopted internationally.

Many adoptees are in contact with their birth family after adoption.

- Thirty-nine percent in foster adoptions.
- Sixty-eight percent in private adoptions.
- Six percent in international adoptions.

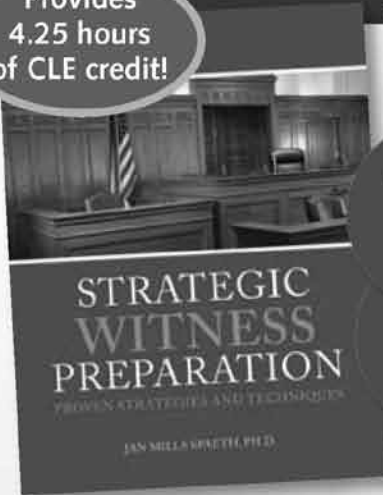
Forty-three percent of adoptees lived with a birth-family member before adoption.

- Fifty-nine percent in foster adoptions.
- Thirty-nine percent in private domestic adoptions.
- Twenty-five percent in international adoptions.

Sharon Vandivere, et al., *Adoption USA: A Chartbook Based on the 2007 National Survey of Adoptive Parents 45* (2009), available at <http://aspe.hhs.gov/hsp/09/NSAP/chartbook/index.pdf> (last visited July 11, 2010).

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impediments preclude such agreements and when contact would be best for the child. In any event, even when the court is empowered to order contact without the explicit consent of the adoptive parents, these adoptions will be most successful when all parties are involved in discussions and decisions regarding their interactions. Lawyers and social workers are well positioned to make these processes work to meet children's needs.

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Endnotes

1. Sixty-eight percent of children adopted privately and 39 percent of children adopted from foster care have had post-adoption contact with their birth families. SHARON VANDIVERE, ET AL., *ADOPTION USA: A CHARTBOOK BASED ON THE 2007 NATIONAL SURVEY OF ADOPTIVE PARENTS* 45 (2009), available at <http://aspe.hhs.gov/hsp/09/NSAP/chartbook/index.pdf> (last visited July 11, 2010).

2. Harold D. Grotevant, et al., *Many Faces of Openness in Adoption: Perspectives of Adopted Adolescents and Their Parents*, 10 (3-4) *ADOPTION Q.* 79, 80 (2007).

3. At the time, the federal government did develop guidelines that recommended open adoption, especially for older children. DONALD N. DUQUETTE AND MARK HARDIN, DEP'T OF HEALTH AND HUMAN SERVS., *GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN II-4 through II-8* (1999), available at <http://www.archive.org/details/guidelinesforpub00duqu> (last visited July 26, 2010).

4. 1989, c. 41, §§ 8-11 (Eng.).

5. For a discussion of these studies, see Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 *Wis. J. L. GENDER & Soc'y* 73, 119-129 (2010), draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1575612 (last visited July 19, 2010) at 121-131; Annette R. Appell, *Reflections on the Movement Toward a More Child-Centered Adoption*, 32 *W. NEW ENG. L. REV.*

1, 19-23 (2010), also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579638 (last visited July 19, 2010).

6. Deborah H. Siegel, *Open Adoption of Infants: Adoptive Parents' Feelings Seven Years Later*, 48 *Soc. WORK* 409 (2003).

7. See, e.g., *Adoption of Rico*, 905 N.E.2d 552, 560 (Mass. 2009) (holding that a judge is "obligated to enter" an order for post-adoption visitation or contact between a boy and his father who have a strong bond); *Adoption of Vito*, 728 N.E.2d 292, 300-304 (Mass. 2000)

Even when the court orders contact without the explicit consent of the adoptive parents, these adoptions will be most successful when all parties are involved in discussions regarding their interactions.

(courts have equitable authority to order post-adoption contact); *Adoption of Lars*, 702 N.E.2d 1187, 1192 (Mass. App. Ct. 1998) (post-adoption contact is part of the best interests of the child assessment).

8. Annette R. Appell, *Enforceable Post Adoption Contact Statutes, Part II: Court-Imposed Post Adoption Contact*, 4(2) *ADOPTION Q.* 101, 102-3 (2000). Some statutes apply in foster-care settings to siblings and situations in which a visiting order was in place before the adoption. *Id.*

9. E.g., *IND. CODE ANN.* §§ 31-19-16-1 to -8 (LexisNexis 2007); *MASS. ANN. LAWS CH.* 210 §§ 6C-E (LexisNexis 2003 & Supp. 2009); *NEV. REV. STAT. ANN.* §§ 127.187 to 127.1895 (LexisNexis 2004 & Supp. 2007); *N.M. STAT. ANN.* § 32A-5-35 (LexisNexis 2009); *R.I.*

GEN. LAWS § 15-7-14.1 (2003).

10. *ARIZ. REV. STAT. ANN.* § 8-116.01 (2007); *CAL. FAM. CODE* § 8616.5 (West 2004 & Supp. 2010); *CONN. GEN. STAT. ANN.* § 45a-715 (West 2009); *FLA. STAT. ANN.* § 63.0427 (West 2009); *IND. CODE ANN.* §§ 31-19-16-1 to -8 (West 2005); *LA. CHILD. CODE ANN. Arts.* 1269.1-7 (West 2008); *MD. CODE ANN., FAM. LAW* §§ 5-308, -3a-08, -3b-07 (2006); see also *MD. CODE ANN., FAM. LAW* §§ 5-331, -345; *MASS. ANN. LAWS CH.* 210 §§ 6c-E (LexisNexis 2003 & Supp. 2009); *MINN. STAT. ANN.* § 259.58 (West 2007); *MONT. CODE ANN.* § 42-5-301 (2007); *NEB. REV. STAT. ANN.* §§ 43-162 to -165 (LexisNexis 2005); *NEV. REV. STAT. ANN.* §§ 127.187-127.1895 (LexisNexis 2004 & Supp. 2007); *N.M. STAT. ANN.* § 32a-5-35 (LexisNexis 2009); *N.Y. DOM. REL. LAW* § 112-B (McKinney 1999 & Supp. 2010); *N.Y. Soc. SERV. LAW* § 383-C(5)(B)(ii) (McKinney 2003 & Supp. 2010); *OR. REV. STAT.* § 109.305 (2009); *R.I. Gen. Laws* § 15-7-14.1 (2003); *S.D. Codified Laws* § 25-6-17 (2004); *VT. STAT. ANN. Tit.* 15a § 4-112 (2002); *WASH. REV. CODE ANN.* § 26.33.295 (West 2005 & Supp. 2010); *W. VA. CODE ANN.* § 48-22-704(e) (LexisNexis 2009). For comparison of the statutes, see Appell, *Reflections, supra* note 5, at 27-32.

11. *But see, C.O. v. Doe*, 757 N.W.2d 343, 345 (Minn. 2008) (suit to enforce a statutory post-adoption contact agreement).

12. Annette R. Appell, *Survey of State Utilization of Adoption with Contact*, 6(4) *ADOPTION Q.* 75, 79 (2003).

13. *Id.* at 79; see also, *Birth Mother v. Adoptive Parents*, 59 P.3d 1233 (Nev. 2002) (post-adoption contact agreement not entered into pursuant to statute providing for enforcement of such agreements is not enforceable).

14. *FLA. STAT. ANN.* § 39.811(7) (West 2003); *MASS. ANN. LAWS CH.* 210, § 3(d) (LexisNexis 2003, Supp. 2009).

15. CAROLE SMITH & JANETTE LOGAN, *AFTER ADOPTION: DIRECT CONTACT AND RELATIONSHIPS* 105 (2004).

The DREAMers

(Continued from page 1)

the United States without inspection (permission), their parents brought the entire family into the United States with fraudulent documents, or the family entered legally on visas but violated the visa terms by remaining in the United States after the visas expired. A fourth way, which is less common now due to the Child Status Protection Act but used to be common, is "aging out." This is where a parent sponsors his or her child's legal status, and the child loses immigration status through the parent by turning 21 before completing the process and no longer being considered a "child." Aging out was typically caused by backlogs in the immigration system in the past.

DREAMers are a generation of youth that do not fit neatly into society. Their parents are typically a first generation of immigrants, arriving in the United States for a better life. DREAMers' siblings born in the United States are considered to be of the second generation because they are U.S. citizens by birth. Undocumented youth who came to America with no choice in the matter are a middle layer that has virtually no way to obtain legal status, despite the fact that they grew up in the United States and consider themselves American citizens.

Virtually No Options for Legal Status

Undocumented youth do not have a realistic chance at legal status. Under current immigration laws, once these children become adults, the fact they are here illegally is held against them. This means that they are subject to illegal presence bars and a host of other legal impediments.⁴ Even if these youth marry U.S. citizens or have children who are U.S. citizens, they are not guaranteed legal status. Many times, when a spouse who is a U.S. citizen or an adult child who is a U.S. citizen (he or she must be

21 and unmarried to apply for a parent's legal status⁵) applies for their legal status, the undocumented person has to return to the country in which they were born and wait to see if they are allowed to come back to the United States. Some immigrants, due to immigration regulations, are not allowed back into the United States and can be subject to unlawful presence bars that ban them from the country for three to 10 years, or sometimes their lifetime.⁶ The only way around these types of bars and the requirement to return to the home country is a hardship waiver⁷. A hardship waiver requires extreme circumstances affecting the spouse or child who is a U.S. citizen, such as a severe illness where the spouse or child needs the spouse or parent to remain in the United States. For undocumented youth, there is no hardship waiver to which they can apply on their own.

The youth's only option for avoiding a myriad of legal impediments is to go back to the home country after graduating from high school and before turning 18½ years of age. DREAMers can then apply to legally come to the United States through a college visa. This is difficult and there is no guarantee the youth will be able to re-enter the United States. They may have to complete college in their birth country and then apply for a U.S. visa for graduate school or employment. This leaves youth in the precarious situation of returning to a country that they may not know at all, where it may not be suitable for them to live, and they will be away from their parents. These new high school graduates must find a way to support themselves while there and save money for school in a country that may be foreign to them.

Alternatively, they can stay in the United States, a place that many of these youth consider home, knowing that they can never work legally and

where many could end up being taken advantage of by unscrupulous employers. DREAMers cannot obtain Social Security Numbers and in almost all states are ineligible for driver's licenses and state identification cards. In addition, in almost all states, these young people are barred from obtaining federal and state financial aid for college or in-state tuition. Many of these youths have invaluable skills that can be used in advanced fields. They are bicultural and bilingual, have talents the United States can use in a global economy, and are deeply loyal to the United States, yet youth in this situation have no suitable employment options and no way to truly support themselves. This can cause the youth to suffer from severe depression and possible suicide or turn to criminal activities to support themselves. The DREAMers can also have feelings of resentment toward their parents, who placed them in this situation, and their American-born siblings, who have all the privileges they want.

These young people truly have no options, as the "choice" of going to a country they do not know or staying in a country where they cannot fully contribute and function is a draconian and unfair one where children pay for the sins of their parents.

The DREAM Act and the American Dream Act

The solution to this legal limbo for undocumented youth is sitting in Congress, where it has been for the past several years. Congress can fix this problem by changing the law. Multiple bills have been introduced in the past that address the undocumented student population by taking the stance of repealing prior immigration laws and adding provisions that allow some undocumented youth to obtain temporary legal status.

Two pending bills in Congress propose

this solution. The Senate version is the DREAM Act,⁸ while the House version is called the American Dream Act.⁹ Essentially, both of these bills provide undocumented youth a path to legal status if they meet certain criteria. The basic criteria are¹⁰:

1. The youth must have entered the United State before age 16.
2. The youth must have had continuous presence in the United States for five years prior to the bill's enactment. This typically means one has been physically present in the United States for at least half of the continuous residence period. For youth in the United States, that means that they need to have been present for 30 months during the five years prior to filing.
3. The youth must have received a high school diploma or its equivalent, such as a GED.
4. The youth must demonstrate good moral character. An applicant cannot be a person of "good moral character" if they have ever been convicted of murder or an aggravated felony. In addition, a person is not considered to be of good moral character if they commit certain acts and/or crimes, such as drunk driving or being drunk most of the time, illegal gambling, prostitution, lying to gain immigration benefits, failing to pay court-ordered child support, committing terrorist acts, or persecuting someone because of race, religion, national origin, political opinion, or social group. A conviction is not required; engaging in the activity is enough to bar a person from good moral character.

In the end, these proposed bills allow undocumented immigrant youth the ability to obtain legal status through a two-stage process. DREAMers who are granted cancellation of removal, which prevents them from being deported,

can apply for conditional permanent resident status. This status would be valid for six years. After six years, if the undocumented youth has still met and maintained all of the criteria, including either completing at least two years of a four-year college degree or serving at least two years in the United States military and obtaining an honorable discharge, they can become a legal permanent resident (green card holder). Green card holders can live and work in the United States as long as they follow all rules. It is the last step before becoming a U.S. citizen¹¹.

Arguments for and Against the DREAM Act

Those who favor the DREAM Act recognize that undocumented youth had no choice in coming to the United States and should therefore not be held responsible for the choices their parent(s) made for them. In addition, advocates point out that the students have spent most of their lives in the United States and typically have few ties to their birth country. DREAM advocates further realize that these youth have grown up here and deserve an opportunity to attend college while making substantial contributions to the U.S. economy.

People opposed to the DREAM Act offer various reasons for their views. Some advocates for immigration reform are opposed to the DREAM Act because they fear all the undocumented youth would have to enlist in the military based on poverty and the inability to pay for college. In addition, they argue that there are no provisions preventing parents from being deported once the youth applies for the DREAM Act. Those opposed to immigration reform argue that it's not fair to provide a path for young people to obtain legal status because later, they will try to obtain legal status for their parent(s), who willfully violated U.S. immigration laws. Finally, other anti-DREAMers claim it's not fair to subsidize these young peoples'

education through allowing them to qualify for in-state tuition when American-born children need scholarships and places in college.

Conclusion

The young people eligible under the proposed DREAM Act did not willfully violate any laws. They are a significant part of America's future, but until America's immigration laws are reformed, we will continue to have brilliant young minds graduating from high school that are unable to contribute fully to the economy. The DREAMers deserve a chance to not only continue to feel like "Americans," but also contribute to society as Americans.

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Endnotes

1. PEW HISPANIC CENTER, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES (2009), available at <http://pewhispanic.org/files/reports/107.pdf> (last visited June 25, 2010).
2. *Plyler v Doe*, 457 U.S. 202 (1982).
3. Pub. Law No. 104-208, Effective Sept. 30 1996.
4. Immigration and Nationality Act (INA) § 212
5. Immigration and Nationality Act (INA) § 201
6. Immigration and Nationality Act (INA) § 212
7. Immigration and Nationality Act (INA) § 216
8. The Development, Relief, and Education for Alien Minors Act (the DREAM Act), S. 729.
9. The American Dream Act, H.R. 1751.
10. As of July 15, 2010.
11. All of this is outlined in both the Senate and House version of the DREAM Act.

Challenging a Listing

(Continued from page 1)

These sources of substantive law must be reviewed when undertaking any registry appeal to assess whether the agency applied the correct application of the definition of abuse or neglect, including having evidence on all essential elements of the allegation that is registered and whether the agency correctly determined that the named individual is responsible for the alleged abuse or neglect.

The child-protection system often sweeps with a very broad brush when it labels parents' and caregivers' actions or inactions as "abuse" or "neglect." Allegations of abuse or neglect can include "inadequate supervision" due to a child being outside for a few minutes or "injurious environment" due to parents having a messy house, all the way up to "torture" or "sexual molestation." The broad sweep of potential allegations against parents and caregivers coupled with potentially lengthy registry periods if an appeal is unsuccessful make it essential for advocates to carefully study the governing definitions in developing arguments for overturning the registry. In our offices, we have repeatedly won appeals challenging the state's decision to register for such actions as a parent allowing a nine-year-old child to walk to the park with her sister, a one-time slap on a child that left a red mark briefly but no bruise, and a "risk of harm" case involving a mother who threw cookies at her husband. We have also won numerous appeals involving more serious accusations, such as fractures, head injuries, and sexual abuse, where the evidence points to accidental causes or to the conclusion that the alleged perpetrator is being wrongly and unfairly targeted.

Unlike child-protection cases in juvenile/dependency courts, registry appeals do not turn on considerations of "best interests of the child." Instead, they focus on whether the conduct of the parent or caregiver meets the specific definition of abuse or neglect adopted by the state.²

These appeals can thus afford advocates the opportunity to argue for limiting registry to the confines of the state or local child-protection agency's definitions and sometimes force change to the practices under which these definitions are ignored by the investigators deciding to register their findings. For example, if the state's rules provide that medical neglect requires showing a failure to follow a

The broad sweep of potential allegations coupled with potentially lengthy registry periods if an appeal is unsuccessful make it essential for advocates to carefully study the governing definitions.

prescribed course of treatment, the mere opinion of a caseworker that the parent delayed seeking treatment will not meet this definition unless it is first shown that there was a prescribed treatment that the parent failed to follow.

As noted in Part I of this series, the Illinois child abuse registry and appeal scheme is an example of a relatively well-developed state system of rules and procedures adopted pursuant to its Abused and Neglected Child Reporting Act (ANCRA). Illinois has promulgated detailed administrative rules and procedures defining each abuse or neglect allegation that may be investigated and

registered. But while there is a carefully delineated schema setting forth dozens of different allegations, the specificity of these definitions ranges from very clear to extremely open-ended. An example of an open-ended allegation is "substantial risk of physical injury," which authorizes the registry of a finding against a parent or caregiver if "the type or extent of harm is undefined but the total circumstances lead a reasonable person to believe that the child is in substantial risk of physical injury."³ This definition is circular and effectively authorizes investigators to apply their own judgment on a case-by-case basis to determine what constitutes abuse or neglect.⁴

Because the authority to investigate child abuse and neglect is conferred upon state and local agencies by state law, child-protection authorities are not free to issue rules that contradict or are unauthorized by the governing state law.⁵ However, in some situations, the child-protection authorities have not conformed to their own child abuse and neglect rules or to state statutes. For example, Department of Children and Family Services (DCFS) in Illinois continues to issue indicated findings for "risk of harm" due to an "injurious environment," even though the Illinois General Assembly (i.e., the Illinois legislature) specifically removed the phrase "injurious environment" from the definition of "neglect" under the Illinois child abuse reporting statute (ANCRA) on the ground that the term is unduly vague.

A number of other allegations in the Illinois system are also open-ended but call upon investigators to make a nuanced assessment of "factors" to determine whether abuse or neglect occurred. For example, the definition of "Cuts, Welts, Bruises, Abrasions and Oral Injuries" states that "not every cut, bruise, welt, abrasion or oral injury constitutes an allegation of abuse or neglect" but rather, the investigator is directed to

consider, inter alia, “the child’s age, . . . medical condition, . . . pattern or chronicity of similar incidents, . . . and location of the injury.”⁶ Similarly, the definition of “inadequate supervision” anticipates that investigators will canvass a long list of “child factors,” “incident factors,” and “caregiver factors” to reach a conclusion as to whether a child “has been placed in a situation or circumstances that was likely to require judgment or maturity greater than the child’s level of maturity, physical condition, or mental abilities would reasonably dictate.”⁷ In many cases, advocates have been able to show that the parents’ assessment of these factors is more reasonable than the investigator’s, because parents know their own children’s maturity, physical condition, and mental abilities, while the investigator has not fully considered these factors.

Finally, some allegations are simply very poorly defined, in a manner contrary to common sense and common usage. The most serious of these problems in the Illinois child abuse registry system is the definition of sexual penetration—an offense in Illinois that carries with it a registry for 50 years. The definition of sexual penetration is extremely open-ended, for it includes “any contact” or “any intrusion,” “however slight, between the sex organ or anus of one person” and the body parts of another person (including a hand). On its face, this definition of sexual penetration could include putting diaper cream on a baby; the definition sets forth no requirement of sexual intent. The procedures issued to interpret the definition authorize the registry of any person who “allows” such “contact” or “intrusion.”⁸ While broad definitions of offenses may be appropriate in a criminal context in which proof of criminal intent is required beyond a reasonable doubt, such broad definitions under abuse reporting statutes have opened the door to a large number of registered findings against caregivers who bathe children, administer medication/ointments, or otherwise touch children in innocent

ways. For example, the child of the lead plaintiffs in *Dupuy I*, and a named plaintiff herself, was initially indicated for sexual penetration when she was just 10 years old based on actions that had been misconstrued while changing a child’s diaper in her parents’ daycare home.⁹

“Eligible Perpetrators” and Jurisdiction

The child abuse registry system established under the Child Abuse Prevention and Treatment Act (CAPTA) and state

Children themselves may be the victims of erroneously registered findings against them, when they had no responsibility for the care of the child victims involved in the allegations.

law is not intended to cover the gamut of all offenses against children. Rather, the system is intended to provide protections for children against abuse committed by the people who have special responsibility to care for them—i.e., parents, guardians, and professional care providers. When children are hurt by a stranger, for example, that is the proper concern of the police and the criminal justice system, not the child welfare authorities.

Despite the clear conceptual framework that makes the investigation of child abuse or neglect turn on whether the individual under investigation bears responsibility for the care of a child or is subject to the state’s *parens patriae*

authority, child protection investigators frequently confuse their authority and register findings against persons who have no such responsibility. The question of who is an “eligible perpetrator” of abuse or neglect thus arises far too often in child abuse registry appeals. People who should never have been subjected to an investigation by child welfare authorities too often go through intensive and traumatic investigations only to be compelled to appeal registries that the agency never had jurisdiction to render.

The Family Defense Center has litigated several cases in which the threshold question of whether an individual was actually an “eligible perpetrator” with legal responsibility for the care of the child or if he or she was merely a household member at the time of the alleged abuse or neglect. In a majority of these cases, the investigators failed to make the required threshold inquiry to establish that the individual had legal responsibility for the care of the child by being, for example, a designated babysitter. One case involved a claim of abuse during weekend visits between a child victim, who was six or seven years old at the time of the allegation but who is now 17, and his older cousin. While the alleged victim contended that the older cousin “babysat” for him during the visits, none of the adults confirmed this claim and the agency failed to gather any evidence showing a babysitting relationship when they registered the older cousin for the offense.

Children themselves may be the victims of erroneously registered findings, and they are too often the victims of registered findings when they had no responsibility for the care of the child victims involved in the allegations. For example, one of the cases presented to the federal court in the *Dupuy I* case concerned a teenager named A.D. He was accused of sexually molesting a three-year-old girl who attended his mother’s home daycare program. The allegation against A.D. was dubious from the start because A.D. had never been alone with

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the child, and the family making the allegation had an ongoing dispute with the daycare home at the time the hotline call was made. Additionally, A.D. was never responsible for the care of the child; his mother was. Therefore, a case against A.D., if one were to be made, should have been left to the police, not child-protection authorities. A.D. was never an “eligible perpetrator” under the governing law, but this did not stop the investigators from issuing an indicated report against him, traumatizing him and his family. The agency also forced the teenager to leave his home during the day while he appealed to have the registry removed. While he succeeded in his appeal, the damage of an erroneous registry to him and his family was never satisfactorily remedied.

The appeal rights of children named as perpetrators are important to consider. In Illinois, for example, children as young as 10 may be registered for the abuse of a sibling or household member. When the *Dupuy* suit was filed in 1997, children as young as six could have their names registered as abuse perpetrators for as long as 50 years! Sexual abuse allegations against children are commonplace in the child-protection system, but the registry appeal system is not designed to be accessible to children who are named as perpetrators. Fortunately, Illinois amended its registry periods for juveniles so that even the most egregious allegations can only be maintained in the register for five years. Even so, children who have registered, indicated reports may be severely traumatized by the allegations against them, and they may be affected in their own employability during the registry period, as well as in their future career plans. To date, to the authors’ knowledge, the right of children to appeal a registry decision against them during their minority after they reach the age of majority has not been litigated in Illinois or in reported decisions elsewhere.¹⁰

Similar jurisdictional issues arise when child-protection investigators overreach

and register individuals for allegations that occurred not only in the distant past but in foreign jurisdictions, including foreign countries. In another recent Family Defense Center case, a 19-year-old was accused of abusing his sister in Europe years before the family emigrated to the United States. Obviously, when an allegation of abuse or neglect arises many years after the fact, both the state and the appellant encounter serious difficulties in preparing their cases for trial—a concern that was front and center in the *Dupuy* court’s decision that registry appeals must be concluded on fast-track time frames.

Sexual abuse allegations against children are commonplace, but the registry appeal system is not designed to be accessible to children who are named as perpetrators.

Recurring Procedural Issues *Notice of Registry Decisions*

A common concern that arises in registry appeals is the adequacy of notice of the registry decision itself. Prior to the 2003 injunction order in *Dupuy*, notices of indicated findings were hopelessly confusing and misleading, failing, *inter alia*, to inform individuals of the offense for which they had been registered, that the registry had consequences for their careers, and how long the registry period would last if they did not appeal. As late

as 2010, despite a commitment in the *Dupuy* class-action litigation, notices to most registered persons lack information as to the basis for the decision against them, though recent negotiations prospectively will redress this deficiency in Illinois. Therefore, even in Illinois where the rights to clear and adequate notices have been fully litigated and won, potential appellants may still be unable to make fully informed decisions as to whether they should file a registry appeal.¹¹ Notices in many jurisdictions may continue to suffer from the same inadequacies as those that prevailed in Illinois prior to the *Dupuy* court’s injunction requiring amendments to the form of notice.

Appellants’ failure to actually receive the registry notice, regardless of the adequacy of the contents of the notice, is a second issue that is far too prevalent. Until 2009, Illinois law allowed registry decisions to be issued by regular mail. Fortunately, this law was amended by H.B. 1132 (P.A. 0385), legislation drafted by the Family Defense Center, so that certified mail notice is now required in addition to regular mail. The state agency possesses mistaken addresses or no addresses at all for a large number of alleged abuse or neglect perpetrators, including a substantial number of persons who were not located for interviews during the investigations that led to registered findings against them. When these individuals learn of the registry years later (if, for example, they happen to apply for a child-care position, even volunteer work with children), they naturally want to appeal that decision, secure review, and obtain expungement of their record from the register.

Unfortunately, securing a hearing in these circumstances can be a time-consuming ordeal. The state agency usually asserts that their appeal is “untimely.” The would-be appellant must then seek judicial review of the agency’s dismissal order through an administrative review action. While our offices routinely secure remands requiring hearings on the

merits in these circumstances, this time-consuming administrative review process delays review and prevents appellants who lack access to counsel from securing relief from registry decisions of which they were never properly informed.

Preclusion and Estoppel Issues

Proceedings in child abuse registry appeals are often complicated by other proceedings in which the question of whether an alleged perpetrator abused or neglected a child is part of the litigation. In Illinois, administrative law judges automatically issue “stays” of proceedings in registry appeals when the same alleged acts of abuse or neglect are the subject of a criminal, juvenile, or family court case. The stay is arguably a due-process violation for any person who works with children, for during a stay, the abuse or neglect registry remains intact and the appellant cannot secure a decision within 90 days of the filing of their appeal for reasons beyond their control. (This was discussed in Part I.) However, when the plaintiff class attempted to secure an injunction against the “stay rule” in *Dupuy*, the federal court found insufficient class-wide evidence of harm to plaintiffs and refused to enjoin the rule. In practice, stays prevent numerous registry appeals from ever proceeding to a hearing on the merits because, if a criminal or juvenile court issues a final decision against the appellant concerning the same set of operative facts, a preclusion rule requires that the registry appeal be dismissed.

Application of this preclusion rule is not always as straightforward as it might appear, however. For example, adjudications under the Illinois Juvenile Court Act of 1987 rely on differing definitions of abuse and neglect than do registries of allegations under the reporting statute and rules. Further, the juvenile court action may not have adjudicated personal responsibility for abuse or neglect at all; in many jurisdictions, the juvenile court act does not require a determination of which parent committed “abuse” or “neglect” but merely determines the “status” of the

child as “abused” or “neglected.”¹² Even if the juvenile court has found a child to be abused or neglected under a similar set of facts, whether the registry appeal can proceed may remain a matter of dispute, requiring briefing and argument.

Appellants can present affirmative preclusion arguments in registry appeals if they have won exoneration in a juvenile court case, although in Illinois, the application of preclusion in favoring appellants is not embodied in any agency rules. If a registry appellant has been a party to a juvenile court case based on

Proceedings in child abuse registry appeals are often complicated by other proceedings in which the question of whether an alleged perpetrator abused or neglected a child is part of the litigation.

the same operative facts as the registry decision, and that case is dismissed on the merits (for lack of probable cause or lack of a preponderance of evidence at trial), common-law preclusion principles prevent the state from litigating again (in a registry appeal) whether there is abuse or neglect. If a court has already found for the appellant, the agency cannot possibly show a preponderance of the evidence against that person. The Family Defense Center has prevailed in these sorts of affirmative preclusion arguments in several cases, albeit not without extensive briefing and rulings by administrative law judges. In one

particularly egregious recent case involving exemplary parents (including a mother who had an outstanding career as a social worker working with disabled children), the agency put her name in the register for abuse just two weeks after a juvenile court found “no probable cause” to believe her child’s fracture was due to abuse. High-level administrators refused to change the registry. An appeal, full briefing, and oral argument to an administrative law judge were necessary before the administrative law judge issued an opinion applying the straightforward principles of preclusion law and directed the removal of the registry against the mother.

Handling Registry Appeal Hearings

At hearings on the merits of expungement appeals, some of the common limitations of child-protection investigations themselves come to the fore, as the too-frequent failures of the agency to conduct adequate forensic investigative interviews with children, identify key witnesses providing either inculpatory or exculpatory evidence, secure relevant documents (especially medical records), and consider the context of an allegation, including whether there has been a prior history of allegations by the same victim or a history of custodial conflict that potentially taints the allegations, are often fodder for extensive direct- and cross-examination and argument in favor of removal from the registry.

Required Witnesses and Preparing for Hearings

In Illinois, both the investigator and the mandated child abuse reporter, if any, are required to testify in support of the decision to register a child abuse finding. Moreover, DCFS bears the burden of proof at the hearing. (This burden is a due-process requirement that *should* prevail nationally, in light of the federal courts’ decisions in *Dupuy* and *Valmonte*. Part I of this series discusses these cases.) Agency attorneys may have little time to

prepare for these hearings and may simply regurgitate the names of the persons the agency interviewed in the investigation. Appellants' counsel who are able to review all the deficiencies in the investigation, identify witnesses who should have been contacted for exculpatory evidence, and prepare their direct- and cross-examinations have a substantial strategic advantage over the agency in registry appeals.

Children's Testimony

Registry appeals fairly often turn on an ultimate credibility determination between a child's out-of-court statements concerning alleged abuse and an adult's denial of wrongdoing, but such credibility determinations frequently do not represent a fair fight for either side of the dispute. The child's statements may be incomplete; his understanding of events can be affected by his age or memory, confusion about what happened, a lack of context from which to understand the alleged offense, and deficiencies in the interview. These factors can affect potential fact-finding so significantly that, in some cases, genuine abuse will seem doubtful, and in other cases, entirely innocent conduct by a parent or caregiver is misconstrued as an allegation of a heinous act causing serious harm.

On the adult's side, a lack of information as to what the child actually said, poor documentation of the investigative questions asked of the child, and lack of access to the child (where the child is not a relative to the perpetrator or has been removed from contact with the alleged perpetrator) prevent the registered person from accessing potentially highly exculpatory information that would demonstrate reasons not to credit the child's statements at face value.

Furthermore, the child's statements themselves may be ambiguous or not necessarily conclusive of abuse. A statement such as, "He touched my booty," might reference either a sexual touching or an innocent touching that is being interpreted incorrectly by an adult

interviewer as connoting a sexual touching. Context and detail in these cases are everything.

Judges in registry appeals struggle with how to handle children's testimony and children's statements to investigators just as they struggle with these questions in family court, juvenile court, and criminal court proceedings, but statutes and rules governing registry appeals may stack the deck too much in favor of the agency and against the appellant. In Illinois, for example, a draconian

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evidentiary rule effectively precludes offering any testimony by any child under the age of 14, including an appellant's own child testifying that abuse did not occur and that the investigator "got it wrong." In a case in which the sole sexual abuse accuser against a father was a 12-year-old babysitter who made the accusations after being fired for stealing from the father and his wife, attempts to call the babysitter as a witness for cross-examination were rejected by the administrative law judge. Instead, a lengthy, friendly interview by a so-called victim-sensitive interviewer, who simply asked the girl to elaborate on the allegations with no hard questions

about the curious timing of the accusations, was admitted into evidence over strenuous objections. On further judicial review in the state circuit court under the Illinois Administrative Review Act, the appellant pressed the argument that the exclusion of the girl's testimony under the "under age 14 exclusion rule" and the simultaneous allowance of the video testimony into evidence violated the appellant's due-process rights. The court agreed.¹³ However, DCFS has yet to amend its exclusionary rule and continues to liberally allow children's statements to investigators to come into evidence without affording the appellant any meaningful opportunity to cross-examine the child.

Discovery and Exchange of Information

Registry appeals, being sharply expedited and subject to strict deadlines under the constitutional mandates of *Dupuy* and *Lyon*, cannot permit extensive discovery processes, otherwise the basic right to timely adjudication would be effectively meaningless. Moreover, few appellants can afford extensive discovery even if it were available under the governing administrative rules. In practice, discovery consists of providing the appellant the DCFS investigative file, hopefully not too heavily redacted,¹⁴ and an exchange of witness and exhibit lists and documents to be used at the hearing.

Attendance of Witnesses, Parties, and Experts

Registry appeals can be a very effective way to secure a review of whether a decision to register a caregiver is based on reliable evidence, but in order for the review to be effective, the judge must have the opportunity to evaluate the agency's and caregiver's credibility. In our experience, most judges who hear registry appeals are conscientious and fair, operating without a preconceived bias that just because a person has been registered as a child abuser or child neglecter, the decision should stand. Indeed, the Family Defense Center and

the Legal Assistance Foundation of Metropolitan Chicago win the substantial majority of their respective registry appeals, and they would not do so if the deck were unfairly stacked against them with judges who rule for the agency even when the facts and the law do not support such rulings. The need for in-person testimony is great, therefore, and judges have, on occasion, taken that requirement to an extreme by barring witnesses, including appellants themselves, from testifying by telephone even when there is an extreme hardship to them in attending the hearing in person.

Expert testimony is oftentimes vital to success in a registry appeal.¹⁵ Doctors are frequently called to testify that an injury is due to abuse or that it may be due to an accident. Pediatricians and family practitioners may be called either as expert or as character and occurrence witnesses to establish that the parent was generally attentive to the child's needs. These witnesses are usually accommodated and may testify by phone, but some judges carefully limit this permission to medical doctors alone.

The difficulty most appellants have in paying for expert testimony, and for counsel as well, puts a serious limitation on their ability to gain access to justice and a level playing field, even when they navigate all of the hurdles to perfecting their appeals. The state or local child abuse agency ordinarily has access to doctors, social workers, forensic interviewers, and other experts, as well as its own investigators who have conducted an investigation, while appellants may lack even the most basic of information as to the context in which an accusation against them has been made. Leveling the playing field for people who have had their names placed in the child abuse registry is especially important, and having effective counsel for appellants is probably the single best means available to enable appellants to establish weaknesses in the agency's case and strengths in the appellants' claim for exoneration.

Conclusion

Sometimes, defects in investigations that are revealed through the registry appeal process are so glaring that attorneys who handle these appeals commonly express shock at what passes for an investigation of something as serious as a determination of abuse or neglect. Registry appeals provide expedited mini-trials on the merits in very interesting and compelling cases that affect the real lives of children and families. The Family Defense Center has found registry appeals to be outstanding vehicles for pro bono involvement of attorneys in major law firms and for individual volunteer attorneys looking for discrete but meaningful litigation opportunities. Clinical law professors who have supervised students handling these appeals have similarly found them to be excellent opportunities for intensive and meaningful clinical experience. (For more information about the Family Defense Center Pro Bono Program, please go to www.familydefensecenter.net and click Our Programs.)

The basic goal of a registry appeal is to remove wrongfully registered person's names from the child abuse and neglect registry. At the same time, advocates who represent wrongly accused parents or caregivers provide a check on arbitrary agency decisions and bad child protection practices. By ensuring that the law is properly applied and expanding the procedural rights of those subjected to child protection investigations to challenge wrongfully issued registry decisions, advocates handling these appeals significantly advance the cause of justice for children and families in the child welfare system.

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Endnotes

1. A summary of state laws concerning the challenges to remaining on a child abuse and neglect registry can be found in U.S. DEPT. OF HEALTH AND HUMAN SERVICES, REVIEW AND EXPUNCTION OF CENTRAL REGISTRIES AND REPORTING RECORDS: SUMMARY OF STATE LAWS (Nov. 2008), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/registryall.pdf.

2. While juvenile court acts routinely require that alleged child victims have a guardian ad litem and procedural rights in court actions, the Child Abuse Prevention and Treatment Act (CAPTA) has no similar requirement for proceedings to secure an amendment to child abuse registry and does not contemplate any specific role for the child or any child advocate in these proceedings. 42 U.S.C. 5101 *et seq.*; 42 U.S.C. 5116 *et seq.*; 45 CFR 1340.

3. 89 ILL. ADMIN. CODE 300 App'x B 10/60 (allegation 10 is "abuse," 60 is "neglect"). Many allegations, including this one, have both abuse and neglect versions, depending on whether the person's direct action causes the harm or a failure to act causes the harm. Some allegations of neglect require a showing of "blatant disregard," but this threshold standard is often disregarded by investigators and only scrutinized for the first time in a registry appeal.

4. In *Skilling v. United States*, 130 S. Ct. 2896 (2010), the Supreme Court addressed the vagueness of a statute whose application is arguably clearer than the "substantial risk" rule in setting for what prohibited conduct includes.

5. See, e.g., *In re Dependency of D.F.*, No. 6324-3-1 (Washington App. Aug. 2, 2010) at 12 (regulation cannot expand scope of statute

To read Part I of this series, view the Summer 2010 issue of *Children's Rights* online at www.abanet.org/litigation/committees/childrights.

in context of Interstate Compact on Children).

6. 89 ILL. ADMIN. CODE 300, App'x B 11/61; DCFS Procedures, Procedure 300, App'x B 11/61 (*available at* <http://dcfswebresource.dcf.illinois.gov/procedures>).

7. 89 ILL. ADMIN. CODE 300, App'x B 74; DCFS Procedures, Procedure 300, App'x B 74.

8. 89 ILL. ADMIN. CODE 300, Appendix B 19; DCFS Procedures, Procedure 300, Appendix B 19.

9. *Dupuy v. McDonald*, 141 F. Supp. 2d 1090 (N.D. Ill. 2001), *aff'd in relevant part*, 397 F.3d 493 (7th Cir. 2005).

10. *See, e.g., Abramson v. Abramson*, 772 F. Supp. 395 (N.D. Ill. 1991).

11. Of course, advocates should counsel potential appellants that "when in doubt, file an appeal," because it can be withdrawn if it's later determined to lack merit. Given the

deadlines for filing (e.g., 60 days in Illinois), the failure to file a notice of appeal following proper notice may be permanently preclusive of challenging the register decision.

12. *See, Sankaran, Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Rights of Non-Offending Parents*, 82 TEMPLE L. REV. 55 (Spring 2009). The University of Michigan Child Advocacy Clinic, where the author of the cited article teaches, has taken a leading role in challenging the application of abuse/neglect findings to deprive non-offending parents of custody.

13. *Manley v. DCFS*, 01 CH 15589 (Ill. Chancery Div., 2003) (decision on file with the Family Defense Center).

14. Under abuse-reporting laws, the identity of the child abuse reporter will be kept confidential from the appellant in virtually all cases. In practice, this rule has led to very

heavy redaction of investigative files, which the *Dupuy* court directed to be limited to its original purpose of shielding only the reporter's identity. The information he or she provided, as well as the information from other witnesses, should be available to appellants seeking to challenge the registry decision.

15. Both of our offices have extensive experience working with medical experts to establish that injuries are not due to abuse or that the person identified should not be held responsible. Unfortunately, agency investigators often rely on a single "child abuse" expert and fail to seek out specialized medical opinions from radiologists, orthopedists, neurosurgeons, and other specialists who may be able to determine that a child's injuries are accidental or the result of medical conditions that "abuse" experts are not specialized in diagnosing or treating.

The Dignity in Schools Campaign and its partners, including the Children's Rights Litigation Committee, have released

A MODEL CODE ON EDUCATION AND DIGNITY Executive Summary: A Human Rights Framework for Education and Discipline

All people have a basic human right to a quality education. While the right to education is deeply rooted in the fabric of U.S. society, our laws and policies fail to reflect this. Human rights treaties and declarations recognize the right to education and provide us with a framework for institutionalizing principles that we hold to be fundamental, such as the:

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This Model Code offers a framework based on four fundamental principles that can shift our approach to education and school discipline: the Right to an Education, the Right to Participation, the Right to Dignity, and Freedom from Discrimination.

To view the entire document, please visit the Children's Rights Litigation Committee webpage at www.abanet.org/litigation/committees/childrights.



ABA Affirms Right to Legal Representation for Children and Parents

By Howard Davidson

At the August 9–10, 2010, meeting of the ABA House of Delegates, the association approved several policy resolutions on the involvement of children and parents in the justice system. One policy calls child custody a “basic human need” in access to justice, making it clear, in a new “ABA Model Access Act,” that there should be a right to legal representation for children in any proceedings initiated by the government “for the purposes of child protective intervention.”

According to the act, that same “right to counsel” should be offered at public expense to low-income parents when parental rights to residential custody of their children are threatened with severe limitations or supervision, or are at risk of termination. In commentary, the ABA also clarifies that in child abuse and neglect proceedings, the child’s legal representation should extend “as long as jurisdiction continues.” In a related approved policy, the ABA urged providing legal counsel to youth at all stages of juvenile status offense proceedings, also “as a matter of right and at public expense.”

In additional new policy, the ABA has called for full, prompt, and expansive implementation of the “older youth provisions” of the federal Fostering Connections to Success and Increasing Adoptions Act, including:

- extending foster care, transitional living, adoption/guardianship subsidy assistance, and dependency court jurisdiction/oversight at least until a youth turns 21;
- providing a mechanism for youth to reenter foster care between the ages 18 and 21;
- promoting active youth participation in agency planning and court proceedings affecting them, including help from client-directed attorneys;
- calling for new pro bono programs to help assure effective transitioning youth support and services, both before and after exiting foster care; and
- implementing federal policy that provides broad and expansive definitions of

eligible youth and their permissible residential settings and clarifying that court jurisdiction and youth representation should continue through age 21 as part of the Fostering Connections law’s implementation.

The ABA also approved the first set of national standards for state courts hearing child abuse and neglect civil proceedings. They focus on court organization and administration, as well as judicial selection, assignment, and education. The Judicial Excellence Standards, developed over three years by a multidisciplinary committee of leading judges, professionals, and national leaders, were endorsed by the National Council of Juvenile and Family Court Judges. They are organized as Principles and Standards, and the Principles call for:

- only “highly committed and specially trained judges” hearing abuse/neglect cases;
- judge participation in “continuing education on a wide range of identified special issues”;
- judicial leaders that “actively collaborate” with relevant external agencies and organizations; and
- judges to educate legislators on the “unmet needs” of the courts in these cases, including sharing court performance data so that necessary resources are appropriated “to make the improvements envisioned.”

The Standards call for:

- every state to have, on an equivalent level to the highest state trial court, a specialized court or division that controls its own administration and operations to hear and administer child maltreatment cases focused on child safety, permanency, and well being, as well as family rehabilitation;

- judges to also hear related proceedings governing legal guardianship, termination of parental rights, and adoption, and where appropriate, use a subpoena or join public agencies to help parents and children receive the services and benefits they need;
- judges to be selected on interest, knowledge, experience, and merit with only “highly qualified and competent judges” assigned to these cases, a rotation out only after at least three years of hearing abuse/neglect proceedings, and judges initially assigned to a case continuing with it until its final dismissal;
- the regular evaluation of judicial performance and workload, having compensation and working conditions/court support services equivalent to those of judges working at the highest level of state courts, having effective case-flow management to reduce delays, including computer technology support, and providing courts with comfortable and dignified waiting areas, children’s play areas, and private meeting rooms for parents, attorneys, and caseworkers; and
- an annual 16-hour judicial education curricula providing judges with mastery of essential knowledge, improved compliance with child welfare law, and information on best-practice standards (plus 80 instructional hours prior to hearing these cases for judges assigned to a specialized abuse/neglect court and 20 hours for others, followed by 60 hours within two years), a system of mentoring for new judges, a “resource center” for information on good practice, and opportunities to participate in national education programs, even if out of state.

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