JUVENILE RIGHTS PROJECT

JUVENILE LAW READER

April 2009

Volume 6, Issue 2

CASELOAD SIZE AFFECTS QUALITY OF REPRESENTATION IN JUVENILE COURT

By Paul Levy, General Counsel OPDS

Representation in juvenile court across Oregon by public defense providers appears to be improving, according to the second annual Statewide Public Defense Performance Survey conducted earlier this year by the Office of Public Defense (OPDS). While not a scientific survey, the responses to the recent survey also show conflicting views about the quality of representation in juvenile dependency and delinquency cases, with most respondents calling the work "good" but relatively few saying that the representation is "always" satisfactory. The survey also confirms that caseloads continue to be viewed as too large. Comments by survey respondents also highlight specific concerns in some jurisdictions.

The online survey was sent to all of Oregon's circuit court judges, each elected district attorney, all juvenile department directors, and the coordinators for each Citizen Review Board. A total of 136 persons answered the survey, which asked about the quality of representation by public defense providers in adult criminal and juvenile court cases, and provided an opportunity for open-ended comments, concerns and suggestions. OPDS has provided public defense contractors with a summary of responses for the judicial districts where they provide representation.

Continued on page 12

DHS Puts Hold on International Adoptions

On March 10, 2009, the Department of Human Services (DHS) placed an immediate hold on all planned, international placements of children in DHS custody, pending agency efforts to make Oregon fully-compliant with the Hague Convention on Intercountry Adoptions ("the Convention").

This announcement came amidst recent *Oregonian* coverage of the tragic story of Adrianna Romero Cram, a four-year-old U.S. citizen sent from Oregon foster care to relatives she had never met in Mexico in 2004. Adrianna was still under the state's jurisdiction when she was murdered in 2005. Her aunt and uncle, both selected by Oregon authorities to adopt the girl, were later convicted of aggravated murder.

In *Oregonian* articles published March 15th and 16th, investigative reporters Susan Goldsmith and Michelle Cole, revealed the State's limited and ineffective monitoring of Adrianna while in Mexico. DHS monitored Adrianna's welfare with only limited phone calls – mostly to her abusers – and unquestioning dependence on welfare workers in Mexico. Adrianna's teachers in Mexico told The *Oregonian* that they'd tried to find help for Adrianna once it became obvious she was suffering from serious abuse. After she was murdered, it was discovered that she had extensive bruising on her legs and back, a chunk of hair was pulled from her head, and she had burns on her palms.

Continued on page 8.

Inside this issue:

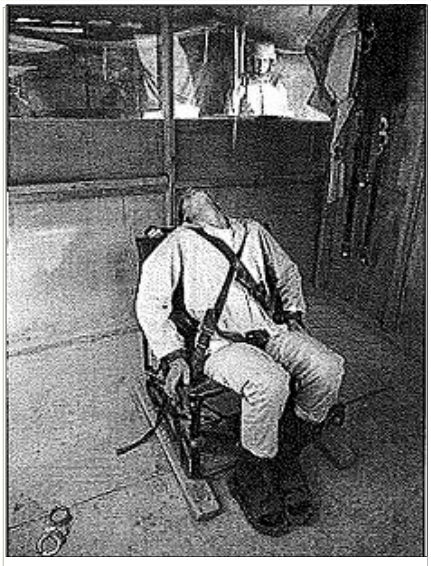
Juvenile Law Reader
is published by Juvenile Rights Project, Inc.

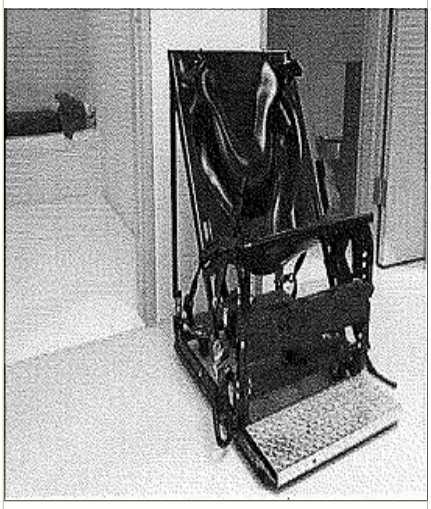
NEWS BRIEFS

JDAI Issues Standards on Use of Fixed Restraints in Juvenile Detention

Moving Away From Hardware: The JDAI Standards on Fixed Restraint is a February 2009 report that was prepared for the Annie E. Casey Foundation Juvenile Detention Alternative Initiative (JDAI). The Report discusses the necessity of eliminating the practice of using fixed restraints in juvenile facilities.

In the preface the author includes the two photos to the right, showing the striking similarity between a prison chair used in Abu Ghraib and a restraint chair used in a US juvenile detention facility. (Ed. Note: This chair may look familiar to those who have visited a certain Oregon juvenile detention facility.)





As the author points out: "As the world gave a collective cry of "torture" upon seeing a 2005 *Newsweek* cover photo of an Abu Ghraib, Iraqi prison detainee in a restraint chair, some of us had a more personal response. All I could think of was that the restraint chair in the photo was almost exactly like the one we had recently seen in a juvenile detention facility in the United States."

The article addresses significant concerns regarding the use of fixed restraints, including violations of due process standards, accepted standards of professional practice, core JDAI values, and the potential for harm to youth or staff, which can lead to lawsuits and bad press. "Fixed restraints" as defined by the paper, refers to "the attaching of a child's hands, feet, or other body parts to a fixed object such as a bed, chair or bolt in the floor or wall." A central feature of a fixed restraint is that the individual is attached to the fixture by the facility staff.

The most recent study is from 1994, which found that in the preceding 30 days 32% of facilities had used some form of mechanical restraints, but that only 15% of those facilities employed fixed restraints (which means that overall fewer than 5% reported using fixed restraints). This study has not been repeated, so recent evidence is largely anecdotal.

The freedom from bodily restraint is part of the liberty right that the Fourteenth Amendment Due Process Clause protects.

Continued on page 3.

NEWS BRIEFS
Continued from page 2

Objections to fixed restraints have resulted in litigation where courts have rejected the use of fixed restraints without the existence of safeguards. The use of fixed restraints increases the risks of injury, both physical and psychological. Concerned organizations have published policies regarding the appropriateness of the use of fixed restraints. While no consensus has developed, most organizations would ban or significantly restrict the situations they could be used in.

The JDAI Standards prohibit the use of fixed restraints. The Standards reject the limited exception, promoted by proponents, for authorization by a physician or psychiatrist for four reasons. First, the restraints are hardly ever applied by mental health professionals. Second, the consensus of the mental health world is moving away from the use of mechanical restraints, because of a lack of therapeutic value. Third, fixed restraints, if needed, should be administered in a hospital setting where there are trained personnel. And finally, the use of fixed restraints is harmful and may make situations worse, not better, especially with children who had previously experienced trauma.

The article discusses the best ways for facilities that are currently using fixed restraints to move away from their use. This includes developing a transition plan which includes engaging the assistance of qualified mental health professionals, having adequate staffing and maintaining reasonable populations, encouraging a change in perception that restraints are being used because of a failure on the part of the child, and giving the staff the tools they need to change. For the report, go to: http://www.jdaihelpdesk.org/Documents/MovingAwayFromHardware.pdf

Summary prepared by:
Amber Nordling, Law Clerk

MORE NEWS BRIEFS ON PAGE 9

RECENT CASE LAW
Summaries Prepared by Kevin Ellis, Attorney, Amber Nordling, Law Clerk and Katharine Edwards, Law Clerk

State ex rel Juv. Dept. v. S.L.M., ___ Or App ___ (April 15, 2009). http://www.publications.ojd.state.or.us/A139258.htm

At issue in this case is whether a mother's search of her daughter's purse, at the suggestion of the police, produced unlawfully obtained evidence because the mother was acting as an agent of the police. The COA determined that the evidence was unlawfully obtained and that the motion to suppress should have been granted.

The youth, a 16-year-old runaway, was picked up by the police at a residence where it was known that drug users lived while the police were there with a warrant for another individual. The girl was taken into custody, and refused permission for the officer to search her purse. When her mother arrived to pick her up, the police officer stated his concerns that the refusal to allow the search might indicate that there were illegal substances in the purse, and suggested to the mother that she could search the purse by dumping the contents of it on the backseat of the patrol car, which the mother did. A used methamphetamine pipe was discovered. The youth was charged with unlawful possession of methamphetamine, and the juvenile court denied her motion to suppress evidence. On appeal, the state conceded that the mother's actions had triggered Article 1, Section 9 of the Oregon Constitution, in regards to state action. The court ruled that while parents have authority over their children, that is not at issue here because the mother acted as an agent of the state, and did so without a search warrant or where an exception to the warrant requirements applies.

Bellevue School District v. E.S., 148 Wash.App. 205, 199 P.3d 1010 (2009).

Children in Washington must now be afforded counsel at the initial truancy hearing under Washington's **Becca Bill** after the Court of Appeals determined that without counsel, the initial truancy proceeding provided no procedural safeguards to protect the child's rights. In *Bellevue School District v. E.S.,* the juvenile court issued a truancy order against a 13-year-old girl who appeared in the initial truancy hearing with her mother. The girl was later found in contempt for continued absences and ordered to complete work crew hours, write an essay, and change schools.

The Court of Appeals used the three factors set forth in *Mathews v. Eldridge*, 424 US 319 (1976) to hold that due process demands that the child be represented in the initial truancy hearing. Representation is required to ensure the child understands her rights and the consequences of a truancy finding, that the district is held to its statutory duties and standard of proof, and to ensure that the child can explain her circumstances and respond to any suggested changes in her education program.

Regarding private interests in particular, the court found that the child's liberty, privacy, and educational interests were all adversely affected by this procedure. Liberty interests were implicated because truancy orders serve as predicates for contempt findings that can lead to detention. However, the child cannot challenge the validity of the underlying truancy finding during the contempt hearing. The court

Continued on page 11.

The New ICPC: Better Recognition of Parents' Rights?

By Jennifer Pike, Attorney

In March, *The Oregonian* reported on the Washington County case of Stephanie Johnston, a licensed foster parent who was caring for three of her siblings until social services officials from Virginia came to Oregon without any warning to take two of the children, Connor, age 12, and Tavvi, age 9, back to Virginia for placement in the foster care system. Mystery surrounds the urgency of the Virginia agency's highly unusual trip to remove two of the three children from the home, and Oregon officials have expressed frustration that their agreement that contact with the children would be safe, orderly and calm was disregarded. [For *The Oregonian* series on this case go to: http://www.oregonlive.com/special/index.ssf/2009/03/adriannas_story.html]

Placement of dependent children across state lines in such situations is governed by the *Interstate Compact on Placement of Children* (ICPC) [ORS 417.200-260]. The ICPC was drafted nearly fifty years ago to aid in the safe movement of foster and adoptive children between states. Over the years, inadequacies in the ICPC have been exposed, including the lack of methods to hold the member states accountable and enforce the policies of the compact. The shortcomings of the current compact have resulted in children who await out-of-state placements, spending more time in the foster care system than children who are placed within state borders.

A new ICPC has been proposed to address the problematic issues that have surfaced under the current ICPC. The new ICPC is designed to narrow the applicability of the compact to the interstate placement of children for purposes of foster care and adoption, require the development of time frames for completion of placements, establish rulemaking authority, create enforcement mechanisms, clarify the responsibilities of member states, and provide procedures for states to obtain home studies from licensed agencies to expedite the approval process. However, the new ICPC has received mixed reviews, with critics contending that the proposed changes do not sweep widely enough to solve the problems presented by the current ICPC.

PROBLEMS WITH THE CURRENT ICPC

The ICPC in place today does not set timelines within which the home study and placement decision must be completed. As noted above, the current ICPC provides no mechanism for holding states accountable or enforcing the requirements of the compact. Accordingly, cases awaiting assessment become backlogged and many children wait far too long for placement decisions. Six weeks is the recommended processing time for achieving an out of state placement. Harry Gilmore, Oregon's Deputy Compact Administrator, reports that in 2007, DHS requested and was granted funding from the legislature to hire seven full-time and two part-time dedicated social service specialists to exclusively handle incoming ICPC requests. So far, all of the ICPC requests processed by the new ICPC specialists have been in compliance with the federal time deadlines. However, not all receiving states are currently able to comply with the recommended processing time guidelines.

In an attempt to mitigate this shortcoming, the Safe and Timely Interstate Placement of Foster Children Act of 2006 was signed into law, creating a new overlay of federal requirements on the ICPC. As of September 30, 2008, states are required to complete home studies within 60 days. If a state fails to meet these time requirements, it risks having its Title IV-E federal funding reduced. States are also now eligible for a $1,500 incentive payment for each home study completed within 30 days.

The current ICPC also does not provide the criteria that agencies must consider when deciding whether to agree to a proposed placement. Furthermore, the compact does not define the interests of a child. As a result, each state has developed its own interpretation of the compact and accordingly developed its own placement procedures. Some states have no procedure for administrative challenges to decisions because the ICPC does not expressly grant the right to a hearing.

A further problem with the current compact is that it does not differentiate between placement decisions involving parents and other caregivers. The compact also fails to incorporate the constitutional presumption that children remain placed with their parents absent a finding of parental unfitness. Recently, the Supreme Court of New Hampshire ruled that the ICPC was not intended to apply to placements with natural parents. *In re Alexis O.*, 2008 NH Lexis 122 (NH Oct. 29, 2008). However, jurisdictions are split on this issue, and the Association of Administrators of the Interstate Compact on Placement of Children has criticized the reasoning of an earlier case, *McComb v. Wambaugh*, which reached the same result as *In re Alexis O.*

Continued on next page

THE NEW ICPC

The new ICPC, promulgated by the American Public Human Services Association, will take effect once 35 states have adopted the compact. So far, only eight states have enacted the new ICPC: Alaska, Delaware, Indiana, Maine, Minnesota, Missouri, Ohio and Oklahoma.

Once the 35th state has adopted the compact, no state will be a party to the current compact and contractual relationships will be limited to those states who have adopted the new ICPC. After the new ICPC goes into effect, states that have not joined the new compact will have twelve months to place children under the rules of the old compact. After the twelve-month period expires, states that have not joined the new compact will not have a way to place children in new compact states or prevent non-member states from sending a child to another non-member state.

The new ICPC would narrow its scope, applying only to:

- A child within the jurisdiction of the state
- An adjudicated child subjected to ongoing jurisdiction, if placed in a residential facility and not covered by another compact
- The placement of any child when placement is a preliminary step to possible adoption.

The ICPC would not be required when:

◊ A child is under continuing jurisdiction of the state and is placed into a residential facility (notice required only)

◊ There is a custody placement of a child, if not intended to result in adoption

◊ A child is placed by a relative to another relative

◊ A child is placed by a parent into a residential facility

◊ A child is placed with a non-custodial parent, as long as the non-custodial parent proves a substantial relationship, the sending court makes a written finding that the placement is in the best interests of the child, and the sending court dismisses its jurisdiction

◊ A foreign child enters or leaves the US for adoption

◊ A child is removed from an overseas armed services family for placement in a state

◊ A child visits a family for up to 30 days.

The new ICPC would also allow a sending state to voluntarily end jurisdiction, which would have avoided the placement interruption for Stephanie Johnston and her siblings Connor and Tavvi, if Oregon had been allowed to take jurisdiction of the case at an earlier date.

Other notable changes include allowing for a sending state to request a determination of whether a relative can be a provisional placement, providing for standing to appeal to any interested party, and clarifying that states may contract with outside licensed agencies to conduct assessments and provide supervision. The new ICPC provides for some enforcement measures including alternative dispute resolution, suspension, termination, and legal action with fees and costs awarded to the prevailing party.

However, adoption of the new ICPC has become a source of controversy because of the problems with the current compact that are not addressed by the proposal. The new compact attempts to set criteria for states to consider in home assessments, but falls short of creating objective, defined standards that would standardize decision making among the states. The constitutional presumption that children are placed with their parents absent a showing of parental unfitness is not included in the proposed compact. A further point of criticism is that the new compact postpones setting specific time limits under which assessments must be completed until after the compact is enacted. Importantly, the proposed compact fails to create any new appellate rights for individuals in states that do not offer administrative appeals procedures.

Deputy Compact Administrator Gilmore reports that DHS intends to introduce Oregon legislation to adopt the new ICPC in 2011.

For more information on the new ICPC, please visit http://icpc.aphsa.org/Home/home_news.asp

ENGAGING FATHERS IN JUVENILE CASES

By Dover Norris-York, Attorney

Attorneys representing fathers can make a critical difference not only in the case, but in the lives of clients and their children by helping fathers engage in social services and legal proceedings. This article explains the many reasons why involvement of fathers is so important. Part two of this article in the next issue of the Juvenile Law Reader will provide specific ways attorneys can help fathers engage in the process. Two additional resources on this topic are a series of articles in the ABA's *Child Law Practice* beginning in November 2008 (www.childlawpractice.org), and an ABA project on fathers in the welfare system (www.abanet.org/child/fathers). Some fathers haven't, or appear to not be capable of, effectively interacting with their children and/or case workers, yet many are primarily in need of encouragement and empowerment, both of which attorneys help provide.

Exposure to Caseworkers and the Court

Increasing exposure of fathers to the decision makers in a case will provide fathers with a better opportunity to demonstrate their ability to participate appropriately in their children's lives. Explain to fathers the importance of efforts to form a cordial relationship with each caseworker assigned to the case. The more father is perceived as cooperative, the more DHS will strive to help provide him with the social services he needs and, possibly, increased time with his children during the case. Caseworkers are father's gateway to involvement with children in foster care, and he needs to understand that he will get much farther being friendly.

Similarly, courts want face-to-face time with father to make their determinations of his credibility on issues of genuinely wanting to improve himself and to provide for his children. Just by appearing in court at each opportunity, father demonstrates his interest in his children. Through establishing credibility with the court, father can ask for the court's assistance in obtaining services and visitation rights when caseworkers have been hesitant or too busy to work with father.

Promotes Father's Desired Outcome

Whether father seeks full or shared custody or just ongoing contact with his children, his involvement with social services and court proceedings will result in progress towards his desired outcome. As discussed above, caseworkers and the court are more likely to step up to assist a father who demonstrates both motivation and follow-through in his involvement in classes and visitation. That alone will go a long way towards father being in the best position possible to obtain the outcome he wants. Additionally, participating in classes serves to improve father's ability to parent effectively, which not only helps him in the present case, but also helps prevent future potential cases with DHS. Finally, involvement with his children will promote father's short and long-term goals of being a positive person in his children's lives. Through visitation and counseling, fathers can assess the needs of each child and whether he is the right person to parent. Even if father's rights are terminated, the relationship he developed with his children during the case is important groundwork for a continuing connection with them throughout their lives.

May Lead to Additional Placement Possibilities

Children often are placed temporarily or permanently with relatives of either parent. It is common for children to be as close to grandparents as to their parents. DHS looks to grandparents, aunts and uncles for placement when children are removed from their parents. Fathers can take an active role in recruiting relatives as placement possibilities and demonstrating that such a placement facilitates their ability to stay involved in their children's lives. A father can also advocate for reunification with relatives as an integral part of his plan for adequately caring for his children.

Working with Your Father Client

For these reasons, it is important to encourage father clients to be as involved in the juvenile dependency case as possible. Participation hopefully will empower fathers to take more initiative in obtaining services, visitation and custody. Father clients' actions will make a difference both in the case and the relationship between the father and his children. In the next Reader, Part Two of this article will provide specific suggestions for involving parent clients. Feel free to provide suggestions you have based on what has worked in counseling your clients by sending an email to **jlrc@jrplaw.org**.

Helping Parents Find Affordable Housing

By Dover Norris-York, Attorney

Inability of parents to find safe and affordable housing often results in their children being placed in foster care. A recent study indicates that one third of foster children were removed because of inadequate housing. *Bridging the Gap between Affordable Housing and Child Welfare*, Child Law Practice, Vol. 27, No. 12, p. 187 (Feb. 2009). Helping parent clients move into decent housing is an important step towards reunification for many families. A new resource is available for those in the child welfare system, including parent attorneys and caseworkers working with their clients. The National Center for Housing and Child Welfare (NCHCW) works at both a national and local level to facilitate coordination of information and efforts among housing and child welfare groups. An available resource is **Section 8 housing vouchers** (NCHCW's efforts contributed an additional $20 million for 2008). These vouchers can be used by families to obtain better housing thereby allowing them to keep their families intact or to seek reunification. Other resources such as the Low Income Housing Tax Credit Program and the HOME funding program, work to supplement local programs. Find more information about NCHCW and housing resources at www.nchcw.org.

9th Circuit Rules on CA Child Abuse Registry Removal

Humphries v. County of Los Angeles, 547 F.3d 1117 (9th Cir. 2008), http://www.ca9.uscourts.gov/datastore/opinions/2009/01/30/0556467.pdf

The primary question in this case is whether California's maintenance of the Child Abuse Central Index violates the Due Process Clause of the Fourteenth Amendment because identified individuals are not given a fair opportunity to challenge the allegations against them. Craig and Wendy Humphries were accused of child abuse by an unruly child, but it was found that they were "factually innocent" of the allegations and that the charges were "not true." They were cleared of civil and criminal charges of child abuse, but were still identified as "substantiated" child abusers and placed on the California's Child Abuse Central Index (CACI). They brought a 1983 action against officials of the State of California challenging their continued listing in CACI, as required by the Child Abuse and Neglect Reporting Act (CANRA), as a violation of their due process rights. Parents erroneously listed on CACI face burdens on their legal rights because California law effectively requires agencies to check the registry, and because the structure of the laws encourages checking the registry even when not specifically required. Being erroneously included in the registry can cause various harms, including detrimental effects in child custody cases and difficulties when trying to get certain types of jobs or volunteer positions. The plaintiffs showed that there were inadequate procedural safeguards in place to protect their liberty interest, and that the remedies that existed to challenge inclusion were insufficient. The Ninth Circuit Court of Appeals found that the initial and continued inclusion of the Humphries on the CACI deprived them of due process rights, in violation of 42 U.S.C. § 1983. They held that both prongs of the "stigma-plus" test (from *Paul v. Davis*), which gives them a liberty right, were satisfied, with the erroneous listing in CACI as a child offender satisfying the "stigma" criteria, and the statutory scheme requiring consultation of CACI by state agencies satisfying the "plus" criteria. They applied the three-part test from *Mathews v. Eldridge* to evaluate the dispute process California provided, and determined that the governmental interest factor did not excuse the state from having to furnish additional processes for correction of erroneous CACI listings (and that, in fact, it was in California's best interest to have a database that was accurate), that the risk of erroneous deprivation weighed against a finding of adequacy of existing safeguards against erroneous listings in CACI (neither of the potential remedies were sufficient), and that CANRA violated procedural due process. Additionally, they found that individual officers of the county sheriff's department were entitled to qualified immunity, and the issue of whether the county violated the Humphries constitutional rights when they failed to create an independent procedure to challenge their listing on the Index was not clear and it was remanded to the district court.

CONFERENCES

NATIONAL JUVENILE AND FAMILY LAW CONFERENCE Aug. 19-22

The National Association of Counsel for Children's 32 Annual Conference will be held at the New York Marriott at the Brooklyn Bridge, August 19-22, 2009. NACC is calling for abstracts from potential presenters. For information go to: www.NACCchildlaw.org

****

Building on Family Strengths Conference

This national conference will be held in Portland, June 23rd—25th, 2009, and will provide the latest research and best practice information on inclusion of youth voice and philosophies of wraparound in mental health care and social services. The keynote speakers will present a Call to Action to address gaps in, and propose improvements to, youth-focused services and research. For more information and to register online go to: www.rtc.pdx.edu/conference/pgRegistration.php.

****

2009 CENTER ON CHILDREN AND THE LAW BIANNUAL NATIONAL CONFERENCE

The ABA's Biannual Children's Law Conference is scheduled for May 14-16, 2009 in Washington, DC. Plan to start this Conference on May 13th to attend a special program on representing parents in child welfare cases. Send an e-mail to: childlaw2009@abanet.org if you would like to receive a program brochure. Advance registration is open at: www.abanet.org/child

****

JRP Law Clerk Receives Fellowship

Whitney Hill, who clerked for JRP in the summer of 2008 and will graduate this spring from the University of Texas at Austin School of Law, has received a George M. Fleming Fellowship in Health Law to work with JRP to assist low-income children with disabilities to obtain appropriate services in schools, something JRP currently lacks sufficient funding to provide. The overarching goal of Whitney's project is to prevent the flow of underserved children with disabilities from school into the juvenile justice system, where their disabilities tend to worsen.

Hold on International Adoptions - continued from page 1

Adrianna's school made desperate efforts to make the Mexican child welfare agency pay attention to the young girl's abuse. Teachers took daily pictures to document her bruises and wounds, they visited Mexican agencies, and the principal wrote a letter to the head of the welfare office in the region. The principal even sent two teachers to Xalapa, the state's capital, to see whether the state's welfare officials might help. Despite these efforts, news of the American girl's regular beating never reached Oregon officials.

It was while *The Oregonian* was preparing to publish Adrianna's story that DHS announced its moratorium on international adoptions from state foster care. According to the agency, it plans to confer with the U.S. State Department about what Oregon needs to do to meet the requirements of the Convention. This Convention, which took effect in July 2008, outlines federal requirements for international adoption placements intended to protect children from abuse and exploitation.

Oregon lawmakers have also vowed to write legislation that would better protect Oregon foster children sent to live with relatives in other countries and could include mandatory investigation and review of the home and family before placement and regular reports after placement. Meanwhile, the DHS moratorium has been lifted, but improvements remain uncertain.

For *The Oregonian* series go to: http://www.oregonlive.com/special/index.ssf/2009/03/adriannas_story.html

Update: Judges Jail Kids for $$ -Take Plea Deal—100s of Sentences Overturned!

Developments continue in the unbelievable story of Judges Ciavarella and Conahan. (See **Juvenile Law Reader**, Volume 6, Issue 1.) Berks County Senior Judge Arthur Grim was appointed to review the cases that had been handled by the judges. On March 26, 2009 the Pennsylvania Supreme Court followed his recommendations and overturned the convictions of hundreds of low-level offenders. The State Supreme Court ruled that former Judge Mark Ciavarella violated the constitutional rights of juveniles who had appeared in his courtroom without lawyers. Judge Grim reported that a "very substantial number" of the juveniles had appeared without counsel and that they had not knowingly and intelligently waived their right to counsel. Judge Grim will continue reviewing cases, focusing next on cases involving more serious juvenile offenses.

On February 12, 2009 both Ciavarella and Conahan pled guilty in Federal Court to charges of fraud resulting from taking more than 2.6 million dollars in kickbacks in return for sending children to private detention facilities. According to the terms of the plea agreement, they will serve 87 months in federal prison, with sentencing to be done at a later date.
http://www.pennlive.com/midstate/index.ssf/2009/03/court_overturns_luzerne_county.html

US Supreme Court Hears Argument on Warrantless Search of Minor at School

On April 21st, the Supreme Court heard argument on the issue of a warrantless search of a minor on school grounds during school hours. Initially, the 9th Circuit affirmed the district court's holding that the search did not violate minor Redding's Fourth Amendment rights. *Redding v. Safford*, 504 F.3d 828 (9th Cir. 2007). Based on student reports that Redding had handed out prescription medication, the vice principal acquired permission for a body search, which occurred in the nurse's office with the presence of two females, the nurse and an administrative assistant. Redding was asked to remove her clothes down to her underwear and to shake her underwear out. The search revealed nothing and Redding later sued the school officials. On *de novo* review, the Ninth Circuit applied case law governing student searches and requiring that a search "be justified at its inception" and "reasonably related in scope." *Redding*, 504 F.3d at 832 [quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)]. It held both standards were met. A dissent viewed the strip search as unjustified at its inception because it was based solely on information gathered from other students, and also believed the search was too broad in scope. En banc, the Ninth Circuit agreed with the dissent. *Redding v. Safford*, 504 F.3d 828 (9th Cir. 2008). Five of the eleven judges dissented in two opinions, one concluding the search was reasonable at its inception, and the other concluding the search was both unreasonable at its inception and in scope.

Sexting: Kids being Kids or Child Pornography?

Kids across the country are facing child pornography charges for **"sexting"** – or sharing revealing images of themselves or others via cell phone. In Oregon, a 17-year-old girl faces years in prison after using her cell phone at a drunken party in Newport to record and transmit a short video of a 16-year-old involved in crude sexual activity. The girl has been charged with Measure 11 crimes (one count of sexual abuse and one count of using a child in a display of sexually explicit conduct) that carry a mandatory sentence of years in prison and could lead to registration as a sex offender.

In New Jersey, a 14-year-old girl faces child pornography charges after uploading thirty explicit images of herself to the social networking site, *MySpace*, "because she wanted her boyfriend to see them." These images would have been viewed by anyone who "friended" her on *MySpace*. Countless other similar cases involving sexting or social networking sites have cropped up throughout the country since the advent of new means of communication and image transmission.

The increase in these cases raises challenging and divisive questions over whether charging kids for child pornography is a good idea. As both the Oregon and New Jersey cases indicate, the repercussions of using the criminal justice system to punish children for this behavior are significant. Children face lengthy prison sentences, court-ordered services, and indefinite registration as sex offenders. Is the criminal justice system the appropriate vehicle to punish such behavior?

The prosecution of minor-to-minor child pornography also raises interesting First Amendment issues. Child pornography is not protected as free speech under the First Amendment because of the state's compelling interest in protecting children. Yet in these cases, the alleged perpetrators are children themselves. Does the state have a responsibility to protect these children from the severe punishments facing adults charged with child pornography? Or, will the threat of criminal punishment reduce the number of these incidents, and in turn, protect more children from future "sexting" scandals? For more on sexting:
http://www.thebostonchannel.com/news/19043324/detail.html
http://msnbc.msn.com/id/28679588/

RESOURCES

Summaries prepared by Theresa Happ, Social Work Intern

Online Resource for Delinquency Practitioners

The Future of Children, a collaboration of the Woodrow Wilson School of Public and International Affairs, has published a compilation of articles that will be useful to the juvenile delinquency practitioner. The compilation, entitled Juvenile Justice, can be found at Vol. 18, No. 2, Fall 2008 of ***The Future of Children***, available at the following link: http://www.futureofchildren.org/pubs-info2825/pubs-info_show.htm?doc_id=708717

Articles in the volume include:

- Adolescent Development and the Regulation of Youth Crime *by Elizabeth S. Scott and Laurence Steinberg*
- Improving Professional Judgments of Risk and Amenability in Juvenile Justice *by Edward P. Mulvey and Anne-Marie R. Iselin*
- Disproportionate Minority Contact *by Alex R. Piquero*
- Juvenile Crime and Criminal Justice: Resolving Border Disputes *by Jeffrey Fagen*
- Understanding the Female Offender *by Elizabeth Cauffman*
- Adolescent Offenders with Mental disorders *by Thomas Grisso*
- Juvenile Justice and Substance Use *by Laurie Chassin*
- Prevention and Intervention Programs for Juvenile Offenders *by Peter Greenwood*

As the introduction to the volume, by Laurence Steinberg notes, in the early 1900's, authorities took an attitude of lenient paternalism towards young offenders, an attitude which changed to the other extreme, of youth frequently being treated as adults: "adult time for adult crime." The legal reforms of the 80's and 90's had a flavor of moral panic, with the media, politicians, and the public reinforcing one another in perceiving juvenile offenders as "super-predators."

The first article in this journal collection addresses developmental psychology research that shows adolescents possessing traits that should be mitigating factors in their prosecution. The research shows that adolescents have diminished decision-making capacity when compared to adults, and unformed characters. This is a fantastic series of articles, recommended for practitioners working with juveniles.

Equal Protection and Juveniles

The article, *The Rights of Delinquents in Juvenile Court: Why Not Equal Protection?,* considers the justifications for the lack of application of the Equal Protection Clause to juveniles. Historically, the United States Supreme Court has avoided relying on the Equal Protection Clause in juvenile cases, and instead has often relied on Due Process, or occasionally, on explicit guarantees in the Bill of Rights. This law review article discusses the appropriate scrutiny standards when invoking Equal Protection, and how the situations differ where strict or heightened scrutiny is applied. The Court has never found age to be a suspect or semi-suspect class, which means that a rational relationship test would likely be used.

The article suggests applying heightened or strict scrutiny as has been applied when considering juvenile curfew laws, and suggests that a similar treatment should be used when considering the incarceration of juveniles. The article disagrees with the argument that denying statutory and constitutional rights to juveniles is appropriate because of the parens patraie function of the state, where focus is on treatment and rehabilitation, especially the recent trend of states amending their juvenile codes to include punishment. The article argues that when you look at the conditions that children are in, it is hard to accept the *parens patraie* argument as a reason for the denial of Equal Protection to juveniles.

You can find a draft of Professor Irene Merker Rosenberg's law review article at: http://www.law.uh.edu/center4clp/downloads/Rosenberg-The-Rights-of-Delinquents-in-Juvenile-Court.pdf

ABA Resource: Child Victim Advocacy in Criminal Cases

The American criminal justice system is traditionally structured as a battle between two adversaries: the prosecution and the defense. But what about the victim? Should the victim have a more formalized and represented voice in a matter that affects them so deeply? Are child victims even more in need of representation?

In the February 2009 issue of *Child Law Practice*, author Russell P. Butler, Executive Director of the Maryland Crime Victims' Resource Center (MCVRC), urges that child victims in particular benefit from legal representation in criminal proceedings.

The interests of child victims in criminal cases go largely ignored unless trained attorneys can assist these victims as they navigate the fearful and confusing environment of criminal proceedings. In particular, attorneys can protect child victims in 5 areas: attorneys can inform child victims of their rights, prepare child victims to testify, address familial conflicts of interest, determine if privacy and privilege of nondisclosure should be waived, and access court documents.

The article also provides practical tips for attorneys who do represent child victims, including legal authority for appointment of counsel, organizations that specialize in victim rights advocacy, and additional resources. For more information, please refer to the February 2009 issue of the ABA *Child Law Practice* website: www.abanet.org/child/clp/

Case Law—Continued from page 3

distinguished truancy hearings from child support proceedings, which can also serve as predicates for jail time, on the grounds that children are fundamentally different from adults. Whereas adults are presumed capable of understanding proceedings, children "lack the experience, judgment, knowledge, and resources to effectively assert their rights." 199 P.3d at 1014. The court also noted that the child has privacy and educational interests at stake due to potential drug and alcohol monitoring and the order to change schools.

Under the second factor in the *Mathews* test, the court found a high risk of error caused by the procedures, as nothing in the present truancy procedures provides for meaningful exploration of, and attempts to address, the causes of the child's truant behavior. The consequences of such high risk of error can be devastating – including lasting stigma, potential incarceration, and deepened alienation on the part of the child. Finally, the court rejected cost as a legitimate countervailing government interest under the third *Matthews* factor.

State ex rel. DHS v. K.C. , _____Or App ____ (April 1, 2009).
http://www.publications.ojd.state.or.us/A139211.htm

The Court of Appeals (COA) agreed with the trial court's termination of the mother's parental rights after finding that she was unfit by reason of extreme conduct. The trial court found that, when the child was six months old, the mother shook the child and caused serious injury. An extreme conduct finding allows the court to terminate parental rights even if the parent is "fit" at the time of the termination proceeding and even if the court determines that the conduct will not reoccur. The COA also agreed that it was in the child's best interest to be adopted and that the trial court had properly exercised its authority to deny the mother's pretrial request for a continuance that was based on the discovery of an expert who wasn't available during the dates of trial, had not reviewed the medical evidence, and who the mother's attorney was unsure as to the opinion or testimony the expert would provide.

State ex rel. DHS v. D.A. , _____Or App ____ (April 1, 2009).
http://www.publications.ojd.state.or.us/A139693.htm

In this case, the Court of Appeals (COA) reversed the trial court's change in the permanency plan from reunification to "another planned permanency living arrangement" (APPLA) because it was plain error for the trial court to fail to make specific findings required by ORS 419B.476(5)(a) and (f). The trial court failed to include a description of DHS's efforts to reunify the family and a "compelling reason" why it was not in the best interest of the children for them to be returned home or placed in another permanency option. The court "heard from the parties" and took "judicial notice" of the court report prior to changing the plan to APPLA but this does not meet the requirement for findings under ORS 419B.476(5)(a) and (f). The court order must contain a "compelling reason" why it is in the children's best interest to move to a permanency plan of APPLA. This stringent requirement is because APPLA is the least permanent and least preferred of the permanency plans.

Relief from Sex Offender Registration: Less Common than the Giant Squid?

If a sex offender in Oregon is hoping to obtain relief from registration, s/he faces twelve years of troubling statistics that suggest success is unlikely. Since relief became available in Oregon in 1996, a total number of 399 people have received relief, either through petitions or juvenile set-asides. [Data provided by Oregon State Police]. Given that Oregon has over 15,000 registered sex offenders statewide as of December 2008, ***only approximately 2%*** of people required to register since 1996 have obtained relief.

2008 saw the highest number of people receive relief from registration since 1996. Eighty-seven people obtained relief and twenty juveniles received set-asides statewide. Even in a year that saw the most relief granted in Oregon's history, this number only equates to roughly .5 to 1% of the total number required to register. [Furthermore, OSP estimates that only 5% of those required to report as sex offenders are classified as Predatory Sex Offenders. This translates to approximately 750 to 800 individuals statewide, or a number twice as large as the number of people afforded relief from registration in the past twelve years.]

Finally, in Multnomah County, besides these statistics that suggest the odds of obtaining relief are slim, a juvenile sex offender must surmount another hurdle in the path to relief: juvenile sex offenders must pay a non-waiveable $300 filing fee with juvenile court when filing the petition to terminate sex offender reporting. It is in fact more expensive for juveniles to file their petitions for relief than it is for adults, whose filing fee is only $189. Thus, although relief is available, these figures and fees demonstrate that for most juvenile sex offenders registration is a lifetime requirement, absent extraordinary odds and resources.

- By Katharine Edwards, Law Clerk

OPDS Survey—Continued from page 1

Of the 82 respondents who rated their "overall impression of the quality of public defense in juvenile dependency cases," 61% rated it as "good," 24% said "excellent," and 15% said "fair." None rated it as "poor." For delinquency representation, the numbers are 63% "good," 22% "excellent," and 14% "fair."

Asked whether the quality of representation changed in the past year for dependency cases, most respondents (64%) said it had "remained about the same," but 28% said it had "improved somewhat," and 5% said it had "improved significantly." A small number (4%) responded that representation had "worsened somewhat." For delinquency representation, the numbers are 68% "remained about the same," 27% "improved somewhat," 1% "improved significantly," and 4% "worsened somewhat."

By comparison, for adult criminal representation more respondents said the representation had remained the same, with only one person saying it had improved significantly and 10% responding that it had worsened somewhat.

The survey makes clear that quality concerns continue to exist with individual public defense providers. Only 34% of the respondents said attorneys "always" provide satisfactory representation of clients in dependency cases, with 49% saying it happens "often," and 17% saying "sometimes." The numbers were about the same for delinquency cases, but for criminal representation only 22% of respondents said representation was "always" satisfactory. Asked whether they question the competence of any attorney providing public defense representation, for dependency cases 22% said "yes," for delinquency cases 21% said "yes," and for criminal cases a very concerning 44% said "yes."

The overwhelming weight of comments on the survey last year identified high caseloads as a barrier to quality representation in all case types. Asked about this on the survey this year, the concerns were most evident with criminal cases, where most respondents (61%) said caseloads were "somewhat too large," 9% said they were "significantly too large," and 30% said they were "about right." For dependency caseloads, the responses were 44% "about right," 43% "somewhat too large," and 11% "significantly too large." For delinquency caseloads there were fewer concerns with most (63%) saying "about right," 31% "somewhat too large," and 5% "significantly too large."

The open-ended comments on the surveys provided a wealth of useful information, with most expressing either concerns or praise for particular providers. As with the survey last year, comments also addressed concerns about the low rate of compensation for some providers, and challenges for attorney recruitment and retention. Other comments elaborated on concerns about workload, case preparation, quality control and oversight. OPDS will use all of the information from the survey for system-wide planning, and to address specific concerns that were identified.

For more information about the survey, contact Paul Levy, OPDS General Counsel, at paul.levy@opds.state.or.us.

Juvenile Rights Project

401 NE 19th Avenue
Suite 200

www.jrplaw.org

Eat, Drink and Support JRP

Pour Wine Bar and Bistro is doing it again!

Join us at Pour between 7:00 and 10:00 on Wednesday, May 20, 2009. 50% of all purchases of food and beverages will be donated to support JRP's programs serving vulnerable and at-risk children and youth .

Pour features wines by the glass and by the bottle to fit every taste and budget and small plates of local and seasonal cuisine to complement their fine wines.

Address: 2755 NE Broadway, Portland