
Juvenile Law Reader

Youth, Rights & Justice

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"Federal and state laws now promote and protect school stability for foster children to minimize the negative consequences of frequent school change."

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The 2011 legislature had another very active session regarding matters related to juvenile law and issues affecting children and families in Oregon. Page 3

A Tribute to Ingrid Swenson—

Ingrid Swenson retired as the executive director of the Office of Public Defense Services at the end of July. Page 4

Getting Clients Ready for School

By Brian Baker and Lynn Haxton, YRJ Attorneys

It's that time of year again when everyone scrambles to get ready for school. Foster children often need heightened school advocacy due to their mobility; entering and exiting foster care or moves between foster homes, that frequently lead to a change in school. They require assistance with timely enrollment, records transfer between schools, particularly special education records, so as to ensure appropriate placement; or for those not in special education, requests for evaluation for special education services if one suspects emotional or learning disabilities are impacting academic progress.

Federal and state laws now promote and protect school stability for foster children to minimize the negative consequences of frequent school change. Here are some tips

for getting foster children into the right school and keeping them there. Some of this information has been published previously in the Juvenile Law Reader (see <http://www.jrp.org/Documents/jrpreaderv7i4.pdf>, <http://www.jrp.org/Documents/jrpreaderv7i5.pdf>.)

The *Fostering Connections Act*, 42 USC 629 et seq., 42 USC 670 et seq. is a federal law that ensures that foster children are enrolled in school fulltime and remain in the school they attended at the time of placement, unless it is not in the child's best interest, in which case the agency will provide immediate enrollment and the "cost of... reasonable travel" to a new school. Under the Act, child welfare agencies are required to coordinate with education agencies to ensure agreements are in place to support education stability for foster children.

Under the *Individuals with Disabilities Education Act*, transportation is a "related service" for many children on IEPs. In addition, children who are in day treatment are

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covered under a mental health statute, ORS 343.961 (2) which requires the resident school district provide transportation to and from day treatment. Day treatment programs are mental health placements and not school placements (which are often called special schools or therapeutic schools). The school component of a day treatment program is provided by the school district where the day treatment is located.

The *McKinney-Vento Homeless Assistance Act*, 42 USC 11301 et seq. helps remove barriers to education caused by homelessness, and ensures each homeless child receives equal access to education. A homeless child is an individual who: lacks a fixed, regular, and adequate nighttime residence; is sharing the housing of other persons; is living in emergency or transition shelters or similar settings; is migratory; or is awaiting foster care placement.

Under the McKinney-Vento Act:

- Homeless children are to be “immediately enrolled” in their school of origin, even if immunization or other records are not available or there is a dispute about enrollment.
- Children and youth must be provided full access to classes, be afforded transportation by the district if needed, and cannot be discriminated against, or placed in a segregated school based on their status.
- School districts are required to make special accommodations to ensure access to school.

In Oregon, *House Bill 3075*, codified at ORS

339.133 (4) and (5) also permits juvenile court judges to make a best interest finding to maintain a child’s former school district residency and attendance when the child is placed by child welfare in a foster home in a new school district. HB 3075 was enacted in 2005. It provides stability by allowing foster children to remain at the same school while moving in foster care and ensures the child welfare agency makes arrangement for school transportation. Research shows that every time a child changes schools, he or she loses 3-4 months of academic progress. This law is critical to the educational success of many children in foster care. It enables foster children to maintain critically important relationships with adults and peers at the former school. HB 3075 maintains the child’s school district residency when he or she moves into foster care or during foster care, when such moves cross school district boundaries, and allows the child to continue at that school through the highest grade when the Court has made a finding that it is in his or her best interest to do so.

DHS and the education agencies in Multnomah County have been developing a protocol for caseworkers to help them determine when it is in the child’s best interest to continue in the same school.¹ The following draft guidelines are not yet final. These guidelines are a tool meant to assist juvenile court practitioners and are not binding on the Court or any party to a case. The current draft is set out below in full.

Guidelines for investigations into the school stability needs of children in foster care and to make recommendations to the Juvenile Court regarding a child’s

best interests

Background: Congress passed the Fostering Connections to Success and Increasing Adoptions Act of 2008 (P. L. 110-351) to improve permanency outcomes for children in foster care and to increase their educational stability. Fostering Connections includes a presumption that school stability is in the best interests of children unless there are other factors which indicate that it would be better for a child in foster care to change schools. The Oregon Legislature passed House Bill 3075 in 2005, amending ORS 339.133, Oregon’s school residency statute. HB 3075 allows children in foster care to attend the same school through its highest grade level when the juvenile court makes a finding that it is in the child’s best interests to remain in the same school after moving into a foster home in another district. Funding made available through the Fostering Connections Act also includes funding for transportation for foster children to travel to and from school.

Values: Decisions should be guided by the best interest of the child in terms of school stability, the best opportunity for the child to make or maintain school progress, and the importance of maintaining stable relationships with adults and peers.

Process Guidelines for Decision-making about School Placement Recommendations

1. Talk to the child to get his or her preference, as well as to the parents.
2. If possible, contact the school before a preliminary hearing to get information

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Youth, Rights & Justice

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Youth, Rights & Justice
401 NE 19TH Ave., Suite 200
Portland, OR 97232
(503) 232-2540
F: (503) 231-4767
www.youthrightsjustice.org

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Youth, Rights & Justice is dedicated to improving the lives of vulnerable children and families through legal representation and advocacy in the courts, legislature, schools and community. Initially a 1975 program of Multnomah County Legal Aid, YRJ became an independent 501 (c) (3) nonprofit children’s law firm in 1985. YRJ was formerly known as the Juvenile Rights Project.

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Outcomes of the 2011 Legislative Session

By Mark McKechnie, YRJ Executive Director

The 2011 Legislature had another very active session regarding matters related to juvenile law and issues affecting children and families in Oregon. The following are some of the bills that were passed and signed into law in 2011, and a summary of some of the proposals that died during the session:

Child Welfare

HB 3471 creates a tuition waiver at Oregon community colleges and state universities for current and former foster children. The waiver will be available starting in the 2012-2013 academic year to individuals who are in foster care or who enroll as an undergraduate student when they are under 25 and no later than three years after leaving the care of DHS. The tuition waiver covers the difference between the total cost of tuition and fees and the aid the student receives through grants and scholarships. To be eligible, current and former foster youth must complete and submit the Free Application for Federal Student Aid (FAFSA) for each academic year. The bill also includes a requirement that recipients of the tuition waiver complete a set number of volunteer service hours.

HB 2272 amends 419A.170(7) to clarify that CASAs may consult with various officials and health care providers regarding a child whose case the CASA is appointed on. The previous statute indicated that CASAs could inspect and copy records regarding the child or children in the case.

HB 2183 creates a new offense of knowingly making a false report of child abuse to DHS or law enforcement or knowingly makes a false report with the intent that a mandatory child abuse reporter will report the abuse to DHS or law enforcement. The final version of the bill was narrowed to apply only to cases in which the intent of the false report is to influence a custody, parenting time, visitation or child support decision. The offense is a Class A Violation. The original version of the bill would have made the offense a Class A Misdemeanor.

Bills related to child welfare that did not make it through the legislative process included those to: enact the new Interstate Compact on the Placement of Children (ICPC); require that CPS workers have bachelors or higher degrees in specified fields; add volunteers at camps or scout groups to the list of mandatory child abuse reporters; make grandparents parties to child dependency cases; to allow legislators and others to view confidential child welfare records; create a presumption in certain cases that grandparents will be designated as permanent guardians; or limit the time a child may be in DHS custody to 18 months.

Commercial Sexual Exploitation of Children

SB 425 amends the statute regarding the crime of compelling prostitution ORS 167.017. It adds to the offense the element of aiding or facilitating the commission of prostitution by a person under 18 years of age, however, a person who is 15, 16, or 17 years of age is not subject to prosecution under Measure 11 when charged under this new element of the crime, ORS 167.017(1)(c). This legislation also changes the statute to remove the requirement that the state prove that the accused knew the person was under 18 years of age.

HB 2714 creates a new crime of patronizing a prostitute (purchasing), separate from the crime of prostitution (selling) in ORS 167.007. In addition, a person who is convicted of patronizing a prostitute when the other party is a minor child is subject to a mandatory minimum \$10,000 fine upon the first conviction. Upon a second conviction, the person is subject to a \$20,000 fine and a minimum of seven days in jail. Third and subsequent convictions carry a mandatory \$20,000 fine and a minimum 30 days of incarceration.

Bills related to the commercial sexual exploitation of children (CSEC) that did not make it through the legislative process included bills intended to: dedicate funding to support shelter and other services for minor victims of CSEC, or to allow juvenile courts to detain juveniles when they are charged with misdemeanor prostitution offenses.

Juvenile Justice

SB 408 amends state statutes regarding

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juveniles adjudicated as sex offenders. The bill removes the requirement that youth adjudicated of misdemeanor sex crimes be required to register as sex offenders. SB 408 also expands opportunities for juveniles adjudicated of felony sex offenses.

HB 2707 addresses juveniles who are charged with adult offenses under an automatic or juvenile court waiver. The bill creates a presumption that minors charged as adults will be detained in juvenile detention facilities, rather than adult jails. The bill allows counties to detain youth in adult jails when an agreement to do so is made by the Sheriff and Juvenile Department Director of the county.

Bills that did not make it through the legislative process include legislation intended to: remove minors involved in "sexting" from Measure 11 and Measure 73 mandatory minimum sentences; prohibit registered sex offenders, including juveniles, from living within 1,000 feet of a school; require public schools to expel students who are registered sex offenders; post adult and juvenile registered sex offenders on the internet, regardless of risk level; add "second look" provisions for individuals sentenced under Measure 11 for crimes committed when they were under 18 years of age; or allow the expungement of lower level sex offenses for juveniles and young adults when the lack of consent was solely due to age and difference in age was less than five years.

Education

HB 2939 for the first time creates stan-

dards for the use of restraint or seclusion of students in public school settings. The bill expressly prohibits the use of mechanical, chemical or prone restraints on students in Oregon public education programs. The bill also limits the use of physical restraint by staff members to incidents in which the student's behavior poses a imminent, serious threat of serious bodily injury and in which less restrictive interventions would not be effective. It further stipulates that physical restraint may not be used to discipline or punish a student, nor may it be used for the convenience of school personnel. The bill includes several additional requirements related to the care of students who are subject to physical restraint or seclusion, reporting requirements and requirements regarding training for school staff in evidence-based methods of behavioral intervention.

Public Defense

HB 5540 The 2011-13 Legislatively Approved Budget (LAB) of \$223,733,178 included the following amounts to the Office of Public Defense services for the following programs:

Appellate Division: \$12,174,792 (compared to \$10,510,764 in the 2009-11 LAB)

Public Defense Services Acct.: \$208,292,730 (compared to \$209,723,415 in the 2009-11 LAB)

Contract and Business Services Division: \$3,265,656 (Compared to \$3,216,956 --2009-11 LAB). ●

Ingrid Swenson Retires as OPDS Director

Thank You, Ingrid, for your Contributions to Juvenile Law

**By Mark McKechnie, YRJ Executive
Director**

Ingrid Swenson retired as the executive director of the Office of Public Defense Services at the end of July 2011. With her retirement, Ingrid ends a remarkable career of public service and service to Oregon's most vulnerable citizens.

Youth, Rights & Justice wants to recognize Ingrid's particular contributions to the practice of juvenile law. Prior to becoming OPDS general counsel in 2003 and director in 2006, Ingrid was well-known in Multnomah County for zealously and effectively representing her clients at Metropolitan Public Defenders, where she practiced both criminal and juvenile defense.

During her tenure at OPDS, Ingrid focused on improving the quality of juvenile representation, in particular, and spearheaded efforts to reduce the number of juvenile defendants who waive their right to counsel. OPDS found that juvenile delinquents are much more likely to waive their right to counsel than are adult criminal defendants

in Oregon. As a result of these efforts, Chief Justice DeMuniz issued a model colloquy to circuit court judges statewide so that they can better assess each youth's understanding about his or her right to counsel before accepting a waiver.

Youth, Rights & Justice wants to recognize Ingrid's particular contributions to the practice of juvenile law.

Paul Levy, OPDS general counsel, was also a long-time colleague of Ingrid's at Metropolitan Public Defenders, and had this to say about the impact that Ingrid had on juvenile practice in Oregon: "Before coming to OPDS, Ingrid was recognized as an outstanding advocate in her representation of parents and children in juvenile court, while also serving as a tireless and trusted lobbyist for OCDLA. She combined the knowledge and skills from those experiences at OPDS to become a highly effective champion for statewide improvements in juvenile court representation."

During her tenure, Ingrid was a tireless advocate for improved training and for increasing the standards of practice for juvenile court defense attorneys. Prior to her retirement, Ingrid served as a member of the editorial board of the Juvenile Law Reader and as a member of the Oregon Criminal Defense Lawyers Association education committee.

Leslie Harris, University of Oregon Law

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School professor and director of the school's Oregon Child Advocacy Project, said:

"Ingrid has done as much or more than anyone else in the state to improve legal representation for children and parents in juvenile court. She spearheaded efforts to protect young people charged with crimes against inappropriate waivers of counsel and has provided great leadership in improving the quality of representation. Her successes include founding the Juvenile Academy, which will hold its seventh annual two-day training this October, organizing peer reviews of all the attorneys who contract with OPDS to provide representation in juvenile court, helping establish a listserv for lawyers representing private parties in juvenile court, creating a back-up center of experts to help lawyers representing parents in dependency cases, and beginning the process of reviewing the bar's performance standards for attorneys in juvenile court. Most of all, every day she has been a wonderful role model with her own high standards for excellence in her work. Oregon has been incredibly lucky to have her leadership over the years."

In her distinguished career that has spanned various roles as defense attorney, lobbyist and state official, Ingrid has been a shining example of a public defender -- ethical, zealous and a model of integrity. We will miss her and wish her the best in her retirement.

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Juvenile Law Resource Center

Case Summaries

By Rochelle Martinsson, YRJ Law Clerk

Dept. of Human Services

v. N.L., ___ OrApp ___

(June 22, 2011) (Yamhill Co.)

(Schuman, P.J.)

<http://www.publications.ojd.state.or.us/A146461.htm>

Mother and father appealed from a dispositional judgment determining that the permanency plan for their six children was adoption. The Court of Appeals concluded that the judgment from which appeal was taken was void, given that in an earlier opinion regarding the same case, the Court had invalidated the jurisdictional judgment upon which the dispositional judgment was predicated. Accordingly, the Court of Appeals held that the juvenile court had not effectively taken jurisdiction over the children, and reversed the dispositional judgment.

The Court of Appeals reviewed its earlier decision beginning by noting that the juvenile court had originally failed to comply with ICWA in determining that it had jurisdiction over the children. While the juvenile court eventually made the required findings under ICWA and ORS 419B.340(7), the Court of Appeals had

earlier concluded that the juvenile court lacked authority to amend its jurisdictional judgment while an appeal of the original jurisdictional judgment was pending, and accordingly held that the amended jurisdictional judgment was “ineffective.” With regard to the original jurisdictional judgment, the Court reiterated that father’s counsel had performed inadequately and that father was prejudiced. The Court of Appeals recalled that it had reversed the original jurisdictional judgment in its entirety, and that the juvenile court had not subsequently addressed the jurisdictional defect identified in the court’s opinion. The Court also clarified that the amended judgment correcting the initial jurisdictional defect was “ineffective” because it was entered while the case was on appeal.

Finally, the Court of Appeals explained that while the juvenile court had jurisdiction pending appeal to address dispositional issues and to hold a permanency hearing, when the Court of Appeals reversed the original jurisdictional judgment and declared the amended jurisdictional judgment “ineffective,” no jurisdictional judgment remained, which in effect reversed the juvenile court’s disposition of the matter.

Dept. of Human Services

v. L.E.G., ___ OrApp ___

(June 29, 2011) (Washington

Co.) (Ortega, P.J.)

<http://www.publications.ojd.state.or.us/A146893.htm>

The Court of Appeals reversed the trial court’s judgment terminating father’s rights to his daughter, H, concluding that DHS had not demonstrated by clear and convincing evidence that reintegration was improbable within a reasonable time.

DHS took H into protective custody after H’s mother admitted to having used illegal drugs while pregnant. Mother stipulated to termination of her parental rights, and the juvenile court subsequently terminated father’s parental rights based on unfitness pursuant to ORS 419B.504 for the following reasons: “(1) his relationship with mother and lack of insight and understanding regarding mother’s serious deficits as a parent; (2) his unsuitable living situation and failure to formulate a viable plan for caring for H; and (3) his inability or lack of desire or effort to adjust his circumstances to meet [H’s] needs over his or mother’s needs even after repeated reasonable efforts by DHS.”

The Court of Appeals noted that at least some of the conditions at issue (i.e., “father’s lack of an appropriate living situation for H and his ongoing involvement with mother”) could be ameliorated within a fairly short period of time. The Court further explained that there was no evidence in the record that H had specific emotional or developmental

needs that would be negatively affected by a delay in achieving permanency, or that such a delay would be unreasonable in light of her specific needs.

Dept. of Human Services v.

C.M.P., ___ OrApp ___ (July

13, 2011) (Jefferson Co.) (Orte-

ga, P.J.)

<http://www.publications.ojd.state.or.us/A147224.pdf>

Mother appealed from a judgment terminating her parental rights as to her two young daughters, HL and CP, which had been entered two years after mother killed the children’s father during a domestic dispute. Mother was serving a sixty month sentence at the time of trial and her rights were terminated on the grounds that she was unfit due to alcohol abuse, domestic violence, and her continued incarceration. Reversing the juvenile court judgment, the Court of Appeals concluded that the record lacked clear and convincing evidence that mother’s past alcohol abuse and domestic violence history with father rendered her presently unfit, and that mother’s continued incarceration could not provide a basis for termination under the circumstances of the case.

The Court of Appeals’ opinion emphasized

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the principle that unfitness is assessed at the time of trial. The Court commented, “Although the record shows *past* incidents of domestic violence and substance abuse by mother during her teenage years, there is little to no evidence, let alone clear and convincing evidence, that mother’s past problems with those issues persisted at the time of the termination trial.” Finally, the Court of Appeals explained that while incarceration is a condition that could be sufficient to warrant a finding of unfitness, if seriously detrimental to the children, there was no evidence in the record to establish that mother’s remaining period of incarceration would be seriously detrimental to HL and CP.

Dept. of Human Services v. K.K.M., ___ OrApp ___ (July 20, 2011) (Multnomah Co.) (Nakamoto, J.)

Termination of parental rights affirmed.

<http://www.publications.ojd.state.or.us/A146913.pdf>

Mother appealed from a judgment terminating her parental rights to her twins, a son and a daughter, on the ground of unfitness under ORS 419B.504. Noting that evidence

in the record indicated that mother had unaddressed emotional or mental health issues, and acknowledging that mother remained an alcoholic, the Court of Appeals concluded that the state had met its burden of proving that, at the time of trial, it was highly probable that mother was engaging in conduct or had conditions that were seriously detrimental to the twins. Additionally, the court stated, “Although mother’s alcohol-induced neglect of the children and mother’s criminal conduct making her unavailable as a parent were not current at the time of trial, mother’s current conditions [did] pose a serious detriment to the children.” The Court of Appeals also concluded that the state had met its burden of proving that it was highly probable that mother’s children could not be returned to her custody within a reasonable time due to conditions unlikely to change. The Court explained that despite having been offered services, mother had not adequately addressed her mental health problems or her alcoholism. Finally, the Court of Appeals concluded that it was in the twins’ best interests that mother’s parental rights be terminated and that they be freed for adoption.

Dept. of Human Services v. J.R.F., ___ Or App ___ (July 20, 2011) (Clackamas Co.)

(Wollheim, J.)

Visitation order affirmed.

<http://www.publications.ojd.state.or.us/A147396.pdf>

The issue in this case was whether the juvenile court could order visitation between a child who was a ward of the court, and her siblings who were not wards. The juvenile court asserted jurisdiction over father and his 15-year-old daughter, D, after father assaulted D. Father subsequently faced criminal charges and was prohibited from having contact with D, but D, who was in foster care, wished to see her siblings who remained in father’s physical custody, but who were not within the juvenile court’s jurisdiction. At a dispositional review hearing, father objected to visitation between D and her siblings so long as D did not want to see her father, and father argued that the juvenile court lacked the authority to order him to allow his other children to visit with D. The juvenile court rejected father’s argument and expressed concern about father’s interference with visitation between D and her siblings.

The Court of Appeals affirmed the juvenile court, concluding that it had properly ordered visitation between D and her siblings, and citing several provisions of the Juvenile Code (e.g., ORS §§ 419B.385, 419B.387, 419B.337(3)) to support its view that the

juvenile court had statutory authority to order visitation between the siblings. Father attempted to argue that the juvenile court order violated his constitutional right under the Fourteenth Amendment to direct the upbringing of his children, but because he had raised this argument for the first time on appeal, the Court of Appeals declined to address it.

G.J.L. v. A.K.L., ___ Or App ___ (July 27, 2011) (Multnomah Co.) (Ortega, P.J.)

Judgment denying grandparents court-ordered visitation affirmed.

<http://www.publications.ojd.state.or.us/A143417.pdf>

Grandparents appealed from a judgment denying their petition for visitation with A.L., their grandson. A.L. was removed from his mother and father’s home following an incident involving assaultive behavior by the parents in the presence of police officers, and DHS later placed A.L. in his grandparents’ care. Subsequently, relations between A.L.’s parents and grandparents became strained, and A.L.’s parents threatened to cut off any contact between A.L. and his grandparents once mother and father regained custody. Grandparents then petitioned for court-ordered visitation, which

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was stayed after the case was consolidated with the juvenile court case.

A.L. was eventually returned to his parent's custody, and the stay of his grandparents' visitation petition was lifted several months later. In support of their petition, A.L.'s grandparents argued the following: that A.L. would suffer serious detriment from the loss of his relationship with his grandparents and other family members if visitation was denied; that A.L.'s parents had (at least initially) consented to the relationship between A.L. and his grandparents; that ordering visitation between A.L. and his grandparents would not interfere with the custodial relationship between A.L. and his parents; that if the court declined to order visitation, mother would unreasonably deny or limit contact between A.L. and his grandparents; and that visitation would be in A.L.'s best interests.

Engaging in de novo review of the record and considering the text of ORS 109.119, the Court of Appeals concluded that there was "no dispute" that A.L.'s grandparents had established a child-parent relationship with him. However, the court concluded that A.L.'s grandparents had not rebutted the presumption under ORS 109.119(4)(a) that A.L.'s mother - and legal parent - was acting in his best interest in opposing A.L.'s grandparents' petition for court-ordered

visitation. The court commented:

"Although we share the trial court's view that a relationship with grandparents can be a positive element in A.L.'s life, the statutory presumption accords parents significant freedom to make decisions on behalf of their children, even when the wisdom of those decisions may be arguable—as in this case, where the circumstances detrimental to A.L. are not sufficiently imminent and where the relief sought has the potential to significantly interfere with mother's relationship with A.L."

***Dept. of Human Services
v. H.L.R., ___ Or App ___
(August 3, 2011 (Lane Co.)
(Nakamoto, J.)***

Termination of parental rights reversed.

<http://www.publications.ojd.state.or.us/A143417.pdf>

Mother and father met in prison, where mother was serving a sentence for robbery and assault in the first degree, and father was serving a sentence for sex abuse in the first degree. Mother and father maintained their relationship – for approximately 10 years leading up to the termination trial – but mother initially denied to DHS that

father was the biological parent to their three children, as DHS considered father to be a threat to the children in light of his sex offender status and directed mother to have no contact with him. During the course of several years, DHS removed all three children from mother's care at various times, due to concerns about mother's mental health, and because mother resisted compliance with DHS directives, was dishonest about her relationship with father, and maintained ongoing contact with father. Following the most recent removal of the children, mother acknowledged father's paternity, but openly disagreed with DHS that he was a threat to the children.

Evaluations of mother showed her to be a suitable parent, but her hostile relationship with DHS and dishonesty regarding her relationship with father, in addition to concerns about her mental health, caused DHS to oppose reunification. Psychological evaluations of father showed him to be at low risk for sex offender recidivism with respect to either his own children or others, but did indicate certain mental health issues that could interfere with his parenting abilities. During father's involvement with DHS following the establishment of his paternity, father voluntarily engaged in a parenting class and he was considered to be a good participant by the instructor. Father also sought an evaluation for group therapy on his own initiative, and attended all visits

allowed by DHS and acted appropriately during those visits. The record indicated that all three children were bonded with both mother and father, and there was an absence of any evidence that either of the parents' conditions had caused any actual harm to the children.

While acknowledging that both mother and father had engaged in conduct or had conditions that *could* adversely affect their children, the Court of Appeals concluded that the state had not proven by clear and convincing evidence that the conditions and conduct of the parents were seriously detrimental to the children at the time of trial. The court explained that "[f]ather's failure to establish his legal relationship to the children in the face of DHS's opposition to his parental relationship [did] not establish legal grounds for unfitness," and that "[w]ith regard to mother's antisocial personality diagnosis, such a condition does not make a parent automatically unfit." The court also explained that there was an absence of evidence that father's mental health issues or sex offender status posed a risk of harm to the children. In reaching its decision, the court relied on Oregon Supreme Court precedent holding that "ORS 419B.504 contains a legislative assumption that parents can change their conduct, and that if change is genuine and lasting, the state may not terminate their parental rights." ●

Breakdown in the Language Zone

Summary and Discussion

By Henry Miller, Psy.D.

www.nwfamilyandforensic.com

Abstract

The following is a summary and discussion of the article **Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why it Matters** by LaVigne, Michele, et.al. U.C. Davis Journal of Juvenile Law & Policy, Winter 2011. LaVigne, et.al. address how language disorders and poor language skills are closely associated with conduct disorders, academic deficits, social incompetence, impulsivity, and aggression, and these language disorders are substantially present in the juvenile and adult correctional institutions. Because of impact of these language deficits on the individuals' abilities to process information, their ability to competently negotiate the criminal justice system is severely compromised and has implications for justice, rehabilitation, and community safety. The article is summarized here and readers are encouraged to read it in its entirety.

Attorney Julie McFarlane sent me the above named article after we worked together regarding a young adolescent with problems similar to the ones mentioned in the article. The information in the LaVigne, et. al. article offers a good understanding about language deficit problems, how they affect an individual's information processing, and how they directly impact your work with them in the criminal and juvenile justice systems. A deprived environment, brain dysfunction, and trauma all affected this boy's ability to make decisions and to express himself appropriately.

LaVigne, et. al., contend that this "impacts defendants' ability to understand the criminal or juvenile justice process, to communicate with counsel, to understand and comply with terms of bond or probation or parole, to complete programming successfully, and ultimately, to lead productive lives. Moreover, the language/behavior link provides much-needed insight into why some crimes are committed in the first place." The rate of severe language disorders is four to five times greater in adult prison populations than in the general population and much higher within juvenile prisons. A language disorder may include problems with grammar, syntax, vocabulary, and the social use of language. This will cause them to have *difficulty with sequencing ideas, describing events, following directions, understanding the speech of others, and socializing.*

When language acquisition fails, there are implications for *Pragmatics, Cognitive and Emotional Effects, Social Development and Self-regulation, and Aggression:*

Pragmatics are the behavioral effects of communication, the basic tangled web of cultural and contextual rules. Failure to acquire pragmatic competence can occur in tandem with other language deficits or on its own. This affects social development and can include:

1. Difficulty answering questions or requesting clarification
2. Difficulty initiating or maintaining conversations, or securing a conversational turn
3. Inability to tailor the message to the listener or repair communication breakdowns
4. Inappropriate topics and off-topic comments
5. Ineffectual or inappropriate comments
6. Difficulty with stylistic variations and speaker-listener rules
7. Narrative difficulties

"As these children grow older, they will be unable to read social situations, social cues, body language, or conform to the rules of social engagement, and may appear uncooperative at the least, or more seriously, rude or insulting."

Cognitive and Emotional Effects.

Language is how we acquire and process information, "the stuff of thought" and "the stuff of emotional development." There is a strong association between language and learning disabilities with a range of behavioral and emotional disturbances. If language development is delayed or stunted, it can inhibit the individual's creation of

an internal life. In the article, an attorney asked his client what he thought, and the client looked at him like he was crazy. "He had no internal life whatsoever." Without this internal life, there are no tools to process information. This possibly provides a clear path from impulse to behavior with no intermediary of thinking, deciding, choosing, or judgment.

Social Development and Self-Regulation

is the ability to assess social situations and consider the perspective of others. "Self regulation is inextricably linked with language...(and leads to) 'inner' and 'private' speech." "The operation of inner speech facilitates the rehearsal of rules, the ability to consider and modify ongoing behavior with respect to its consequences, and the ability to form appropriate plans for the future." Self regulation is dependent on inner speech. If these skills are not developed, the individual may appear impulsive, foolish, irresponsible, or aggressive. "While such behavior may seem deliberate or premeditated to the *outside viewer*, it may in fact be partially driven by the inability to access alternatives."

Aggression. There are volumes of research that show the frequent co-occurrence of physical aggression and low language skills in children, adolescents, and adults. This is the result of a lack of tools to control impulsive behavior, flawed social information processing which leads to an inability to accurately read and respond to social situations, a resulting tendency to perceive hostile intent in ambiguous situations, and

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an impaired ability to understand another persons' perspective. Aggression can be treated by addressing the individual's communication and social deficits.

So What? These deficits impair your client's constitutional rights to be *competent*, to *assist with his defense*, to comply with *due process*, and to make *knowing and intelligent decisions* about which rights to waive and which to assert.

The Dusky standard links language competency and **Competency to stand trial**. This requires the defendant to:

1. Understand the legal process
2. Process information and acquire knowledge
3. Appreciate the significance of legal circumstances as they apply to the defendants' own life
4. Communicate accurate, relevant information about the allegations, social background, and personal feelings
5. Understand another person's perspective
6. Reason both abstractly and concretely, and make decisions based on a rational perception and assess the consequences of the alternatives presented.

Ability to Assist Counsel. Linguistic deficits limit their ability to aid and assist. The language compromised client will have limited ability to give the attorney *vital background information*, *factual information* about the allegations, to *recall* details, or to *tell a story*.

Waiver of Rights. Given the client's lan-

guage deficits, can the client act "knowingly, intelligently and voluntarily?" A record of the client "being told" does not equal "comprehension." The real question is, did the defendant actually understand?

Reliability and Admissibility of Confessions. "An individual's language deficit may undermine the validity of a Miranda waiver or the voluntariness of a confession, and may even place an individual at increased risk for making a false confession." "the waiver [of Miranda] must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Many Miranda warnings are written above the client's reading level and are so complex that even those with adequate language skills have difficulty comprehending. Individuals with language deficits are more at risk, have increased vulnerability, and are more susceptible to suggestion. They are more likely to confess and to confess to crimes they *did not commit*.

Compliance. These individuals have a difficult time understanding the rules and regulations of the governing authority including probation and parole. Their difficulty with understanding and processing may be seen as a *lack of compliance*, a *failure of will*, or *moral shortcoming*. Rules can be densely worded, written in small type, and can lead to missing critical components and can leave the person feeling overwhelmed.

Language deficits can also lead to *negative judgments* by others of behavior, character, credibility, and remorse.

Character, conduct, and rehabilitation.

Character is often considered in regards to capacity to be rehabilitated. The language impaired individual does not present well in connection with attitude, personality, and social traits. Compromised is the ability to make "the countless adjustments that speakers make to avoid the equally countless ways that their listeners might be put off. They do not have the ability to "lubricate the social interactions." It is important to advocate that self-regulation is not simply a characteristic of a "good person," but rather the product of skill and knowledge.

Credibility is influenced by the ability to narrate or to describe in a manner that is internally and externally consistent. This results in emitting non-verbal signals that are interpreted as "demeanor" which includes "the witnesses' dress, attitude, behavior, manner, tone of voice, grimaces, gestures, and appearance." The language impaired individual is likely to be seen as lying because of the inability to conform narratives and demeanor to the rigid expectations of the courtroom.

Remorse. "Courts have distinguished remorse from sorrow, admission of wrongdoing, shame, and regret in statements by defendants, without recognizing that for less fluent individuals, those are distinctions without a difference. An appropriate expression of remorse also requires an equally high level of pragmatic skills."

What Can You Do? (as suggested in LaVigne, et.al.)

1. Recognize language impairment. Do you have concerns about your client's ability to comprehend adequately, self-

regulate, or read social cues? Do they report having ADHD or other learning disorders? Have they received special education services or have an IEP? Is their Verbal IQ lower than their Non-verbal IQ? If so, request a comprehensive psychological or neuropsychological evaluation.

2. When communicating with the language impaired client, use role-play, diagrams, and storytelling. How they communicate with their mothers will give you some clues on how to reach them. Walk through courtroom scenarios. Have them practice affect, tone, and to use words acceptable by the court.
3. Use an interpreter such as a counselor or teacher. Educate the court about your client's limitations and requirements. Make timely objections to complicated language by the prosecution, and request more time and breaks to monitor comprehension.
4. Explain or mitigate non-compliance.
5. Counter allegations or findings of "no remorse" or "lying."
6. Do not use or accept from others the "do you understand?" question of comprehension. It is essentially a leading question that demands an affirmative answer, especially where there is a power imbalance and the defendant is aware of his/her limitations.
7. Assessment and treatment. These conditions are treatable. The brain has

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a lifelong capacity to reshape itself, "the functions of the brain can be strengthened just like a weak muscle."

If you would like more information about these matters, have questions, or would like to comment, please go to the website www.nwfamilvandforensic.com or the blog at blog.nwfamilvandforensic.com. Also, I encourage you to read the entire article by LaVigne, et. al. which is referenced in the abstract above. ●

Case Summaries

By Paul Grotzinger, YRJ Law Clerk

State v. Bahmatov, ____ OrApp ____ (6/29/11)

<http://www.publications.ojd.state.or.us/A140266.htm>

In *State v. Bahmatov*, the Oregon Court of Appeals held that inculpatory statements made by a defendant after a police officer's threat are inadmissible. The court also held that without physical evidence, an expert witness' diagnosis of sexual abuse is inadmissible, because such a diagnosis constitutes an impermissible comment on complainant's credibility.

Defendant, a fifteen-year-old Russian immigrant, was convicted of various sexual

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« Ready for School continued from page 2

about a child's functioning at school and the teacher's and other school staff's opinion about placement.

3. Complete this checklist to aid in assessing whether or not a shelter order for school enrollment is, or is not, still in the child's interests.
4. Provide a copy of the checklist to the Juvenile Court and any parties.
5. Get updates from the child, foster parents, and parents about school on a regular basis and make a new assessment as the end of each school year approaches OR when there is a substantial change in circumstances.

In summary, advocates have a number of federal and state statutory avenues to assist foster children to gain timely access to school, obtain appropriate school services, and to maintain school placement while in substitute care. Juvenile court advocates must participate in school planning meetings, at enrollment and beyond; advise school officials of their role in the child welfare case; and request that school officials include them in all future school meetings on behalf of the child so as to ensure holistic, inter-agency planning, designed to maximize the child's academic success and emotional well-being. ●

ⁱ There are new procedures for transportation in Multnomah County, as well. DHS has instituted a new procedure for getting school transportation set up for foster children when the court has made a best interest finding. Caseworkers must complete the required form for every foster child who needs transportation to school *even* if they received transportation last year, and send it to the transportation coordinator.

Criteria to consider when discussing the best interests of a child related to school stability and school success

√	State and federal laws emphasize the importance of school stability for children in foster care. The federal Fostering Connections Act of 2008 creates a presumption that foster children are better served by remaining in the same school when possible and provides funding to make school stability feasible for states and school districts. Some of the reasons why school stability should be maintained include:	√	There will be circumstances when children are better served by changing schools. These transitions should be discussed with both the current and prospective school staff whenever possible. Situations in which it may be better for a child to change schools may include:
	The child's preference is to remain in the same school		The child is not safe at the current school and his or her safety cannot be addressed through safety planning
	To minimize changes during a traumatic event in order to protect the child's emotional health		The travel time/distance from the placement to his/her school is unreasonably long, given the child's age and developmental level
	Trauma and/or attachment is a primary issue for the child		The child does not already have a well-established placement in the school of origin due to length of attendance or grade level, and the new foster placement is expected to be a long-term placement
	To avoid disruption of school progress when a child cannot stabilize in a placement and has frequent moves		The child expresses that he/she wants to attend school closer to home or where the other children in the home attend
	The child has already experienced other school disruptions		The child wants to participate in local neighborhood/school activities but is unable to do so due to travel time
	The child is in a specialized program which meets his/her educational needs and an equivalent program would not be available in the local school of residence		The child is in his/her permanent placement and there is a natural transition point for a school change
	The child will be returning home after a brief stay in substitute care or a change in placement is anticipated		The child's attendance at the school of origin is suffering and the child would prefer to attend a new school closer to the placement
	Siblings, cousins or other family members attend the same school		The child is not prospering academically and there is reason to believe that performance will improve with a change in schools due to more appropriate services and supports in the new school
	The child is participating in afterschool sports or activities that would be disrupted		The child is not prospering socially or emotionally and, after discussing the circumstances with the prospective
	The school of origin feels the child's academic standing or social emotional well-being would be negatively impacted by a change in schools		
	The need for educational continuity would be impeded by a change in curriculum or classroom structure		
	The child would likely lose high school credits due to a change in schools mid term		
	The new district has a different school calendar and the child would have to start at the new school during a grading period that has already begun		
	The parent preference is for the child to remain in the same school		

« *Case Summaries continued from previous page* offenses. Before his arrest and without receiving *Miranda* warnings, two police officers questioned defendant at his family's home about allegations that he had committed various sexual offenses against a five-year-old girl. During the investigation, one of the officers told defendant, "Don't wanna to go to jail--tell me the truth . . ." Both before and after that remark, defendant made inculpatory statements in response to the officers' questions. The trial court suppressed defendant's statements after the officer's threat, but otherwise denied the motion to suppress.

At trial, there was no eyewitness testimony or forensic evidence. However, an expert witness testified that "her diagnosis was that [complainant] had been the victim of sexual abuse." This diagnosis was not based on any physical findings, but on a series of factors, including: (1) complainant's use of "age-appropriate language," (2) "convincing details" in complainant's testimony, (3) consistency of complainant's disclosures, (4) complainant's disclosures concerning the abuse of others, and (5) the lack of any reason for the complainant to lie. The expert witness also testified that the confession obtained by the police was an "important piece towards the diagnosis." Defendant denied the allegations, testifying that he made the inculpatory statements so the police would leave him alone because, "he couldn't take it anymore." The trial court found defendant guilty, and noted that, "the evidence in

this case is very, very strong."

The appellate court affirmed the trial court's suppression of defendant's post-threat inculpatory statements. The court reasoned that the officer's threat placed the defendant in compelling circumstances, which necessitate *Miranda* warnings. The appellate court also affirmed the trial court's admission of inculpatory statements made before the officer's threat.

In addition, the appellate court held that admission of the medical expert's testimony was plain error. The court reasoned that an expert's diagnosis of sexual abuse without physical evidence is necessarily based on the child's believability, and therefore constitutes impermissible vouching. This ruling follows precedent holding that an expert's diagnosis of sexual abuse without physical evidence amounts to impermissible vouching, and should be excluded. See *State v. Lupoli*, 348 Or 346, 234 P3d 117 (2010);

The appellate court exercised its *Ailes* discretion to correct the errors, reversing and remanding the case to the lower court. Although the trial court noted that the evidence in the case was "very, very strong," under these circumstances, the appellate court could not conclude that there was "little likelihood" that the erroneously admitted evidence affected the verdicts.

***State v. Kelly*, ____ OrApp
____ (6/29/11)**

<http://www.publications.ojd.state.or.us/A139810.htm>

In *State v. Kelly*, the Oregon Court of Appeals held that admission of an expert witness' diagnosis of sexual abuse was error, because absent any physical evidence, such a diagnosis constitutes impermissible vouching.

Defendant was convicted of several counts of first-degree sex abuse and sodomy against his granddaughter. Complainant's father's girlfriend had herself been a victim of sexual abuse, and asked the victim if "anything was being done to her." After reassurances from the victim's father's girlfriend, complainant eventually alleged that her grandfather had sexually abused her. At trial, there was no physical evidence of abuse. However, the court admitted an expert witness' medical diagnosis that complainant had been sexually abused. Absent physical evidence, the diagnosis was based on the expert's interview with the child and a review of the child's social and medical history.

On appeal, defendant assigned error to the trial court's admission of the expert's diagnosis that complainant had been sexually abused. The court agreed, reversing the convictions and remanding the case for a new trial. Writing for the Court, Judge Sercombe reasoned that because the expert's diagnosis was based on an assessment of the complainant's credibility, the diagnosis was impermissible vouching. The state argued that even if the expert's diagnosis should not have been admitted, it was harmless error and did not affect the verdict. The court disagreed, and refused to rule that there

was "little likelihood" that the admission of the expert's testimony affected the verdict.

This ruling follows precedent holding that an expert's diagnosis of sexual abuse without physical evidence amounts to impermissible vouching, and should be excluded. See *State v. Lupoli*, 348 Or 346, 234 P3d 117 (2010); *State v. Bainbridge*, 238 Or App 56, 59, 241 P3d 1186 (2010); see also *State v. Davilia*, 239 Or App 468, 475-76, 244 P3d 855 (2010) (following *Bainbridge*); *State v. Cordova-Contreras*, 239 Or App 279, 282-83, 245 P3d 147 (2010) (same).

Defendant also assigned error to the trial court's denial of his motion to exclude the victim's testimony, arguing that suggestive interviewing techniques by victim's father's girlfriend and the investigating officer led complainant to make the allegations. This was not a challenge to the complainant's competency, only the reliability of her testimony. The court ruled that this was a question for the trier of fact, and therefore, the trial court had properly denied defendant's motion to exclude the complainant's testimony.

***State v. Davis*, ____ OR
____ (6/30/11)**

<http://www.publications.ojd.state.or.us/S058572.pdf>

Davis was informed by police that he was the subject of a sex abuse investigation. Davis retained counsel who sent a letter

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« *Case Summaries continued from previous page*

to the police invoking Davis' right to remain silent and directing police to not talk to Davis except through counsel.

Months later, the police conducted an undercover operation in which they indirectly contacted Davis on the victim's cell phone via instant messaging (IM) and phone conversations with the victim. The intent of the conversations was to elicit potentially incriminating statements from Davis. The police detective monitored three instant messaging conversations and two phone conversations. Davis made several incriminating statements.

At trial, Davis' motion to suppress the statements was granted, and the state appealed. The Court of Appeals affirmed, holding that under Article I Section 12 of the Oregon Constitution: "[w]hen a person not in a compelling setting, unequivocally invokes the right to remain silent as to an ongoing investigation. . . . the police officer must respect that assertion . . ." *Davis*, 234 Or App at 113.

On the petition for review, the state argued that Article I, Section 12 only applies when a suspect is in custody or in compelling circumstances, and that Davis was in neither during the conversations with the step-daughter. Reversing and remanding, the Oregon Supreme Court agreed with the state's analysis, concluding that there was no basis to hold that Davis' statements violated Article I, Section 12. ●

Save the Date

NACC 34th National Child Welfare, Juvenile, and Family Law Conference

August 29 - September 1, 2011
Hotel Del Coronado, San Diego, CA

<http://www.naccchildlaw.org/event/id/152584/34th-National-Child-Welfare-Juvenile-and-Family-Law-Conference.htm>

Sex Cases: When a Child Is Involved

September 16–17

Agate Beach Inn, Newport

http://www.ocdla.org/seminars/shop-seminar-2011-sex_cases.shtml

NCJFCJ Evidence in Juvenile and Family Court

September 19-23, 2011
Reno, NV

<http://www.ncjfcj.org/content/view/1393/315/>

Juvenile Law Training Academy

October 17–18
Valley River Inn, Eugene

<http://www.ocdla.org/seminars/shop-seminar-2011-juvlawtraining.shtml>

Shoulder to Shoulder Conference

November 1, 2011
Oregon Convention Center, Portland ●

Resources

By Sean Worley, YRJ Law Clerk

Running Away From Foster Care

Youths' Knowledge and Access of Services

Michael R. Pergamit, Ph.D., Michelle Ernst, Ph.D., and The National Runaway Switchboard have produced *Running Away from Foster Care; Youths' Knowledge and Access of Services*, a report which constitutes the third part of a study on runaway youths. The study was conducted to "give youth a voice" by interviewing a sample of foster care youth in Chicago and Los Angeles who ran away from their placements at least once. The report provides a review of literature examining indicators for foster care runaways, youths' reasons for running away, and other statistics. Findings from the study are then discussed including the sample's foster care experiences and how they contributed to the

decision to run away, runaway experiences in regards to number of episodes and why the youth returned to care, most recent runaway episodes, the runaways' knowledge, use, and barriers to the use of services when away from foster care, how to communicate with runaway foster youth, and suggestions from the runaway foster youth for preventing runaways and improving the foster care system.

The report is available on the National Runaway Switchboard website at: <http://www.1800runaway.org/media/research.html>

Immigration Consequences of Criminal Convictions

Padilla v. Kentucky

The US Supreme Court's ruling in *Padilla v. Kentucky* held that the Sixth Amendment requires defense counsel to advise a noncitizen client of the immigration consequences of a guilty plea in a criminal case. 130 S. Ct. 1473, 1483 (2010). The Office of Immigration Litigation (OIL) within the U.S. Department of Justice has produced *Immigration Consequences of Criminal Convictions: Padilla v. Kentucky*, a monograph to assist attorneys in obtaining the basic understanding of immigration law needed to meet *Padilla's* requirement. The monograph is organized into convenient sections which enable it to be used as an introduction to immigration consequences of criminal convictions

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and delinquency adjudications, as well as a resource when specific issues arise.

An overview of the removal process is provided, followed by discussions of the more common criminal grounds of removal, eligibility for discretionary relief from removal, when such relief may confer lawful status, as well as potential bars to such relief. Immigration consequences of guilty pleas other than removability or ineligibility for relief, such as restrictions on readmission and bars on naturalization are also discussed. If courts apply *Padilla* retroactively, the monograph will be a valuable starting point for research on the legislative history of the Immigration and Nationality Act.

Furthermore, the monograph contains helpful appendices including a glossary of terms, a list of key immigration law resources, an explanation of what constitutes a conviction for immigration purposes, and explanations and examples of the methods for evaluating immigration consequences of criminal convictions.

The monograph is available on the U.S. Department of Justice website at: http://www.justice.gov/civil/docs_forms/RE- VISED%20Padilla%20v.%20Kentucky%20Reference%20Guide_11-8-10.pdf

ICPC Advocacy Resources

Professor Vivek S. Sankaran, with the University of Michigan Law School, has compiled a website with links to resources for advocates interested in learning more about the Interstate Compact on the Placement

of Children (ICPC), and efforts to reform the process. The website contains links to articles, publications, presentations, and sample briefs and motions. These resources highlight several problems with the current ICPC, the effect on families and children in foster care, discussions of current reform efforts, suggestions for further reform, and tips for effective advocacy when dealing with the ICPC, including constitutional arguments and creative suggestions for challenging denial of approval from a receiving state.

The ICPC Advocacy resource list is available at: <http://www.law.umich.edu/CENTERSANDPROGRAMS/CCL/SPECIAL-PROJECTS/Pages/ICPCAdvocacy.aspx>

Portland Vet Center Services for Veterans and Families

The **Portland Vet Center** was created in 1979 when Congress established the Vet Center Program to assist Vietnam era veterans experiencing readjustment problems. Today, war zone veterans of all eras are eligible for services, as well as surviving parents, spouses, children, and siblings of Armed Forces personnel who died on active duty (for bereavement counseling). The Portland Vet Center focuses on assisting veterans with post-traumatic stress disorder as a result of war zone encounters and/or sexual trauma directly related to active duty service. Several of the services offered include: individual counseling, group counseling, marital and family counseling, sexual trauma counseling, and referrals to

community and local Department of Veterans Affairs resources. For appointments or further information, the Portland Vet Center can be reached at:

503-688-5361 or
1505 NE 122nd Ave.
Portland, OR 97220

More information is also available online at: www.vetcenter.va.gov

Misguided Measures

The Outcomes and Impacts of Measure 11 on Oregon's Youth

The Partnership for Safety and Justice and the Campaign for Youth Justice has released a comprehensive report about the impact of Measure 11 on Oregon's young people.

<http://www.safetyandjustice.org/spotlight/2373>

National Practice Advisory

Understanding Immigration Detainers: An Overview for State Defense Counsel

This national practice advisory provides important background information and advocacy strategies on immigration detainers to help defense counsel effectively represent a noncitizen client who is or may be subject to an immigration detainer.

http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Understanding_Immigration_Detainers_05-2011.pdf ●

We Would Love to Hear From You

If you have any questions about who we are and what we do, please email Janeen Olsen at: JaneenO@jrlaw.org.



“The great enemy of the truth is very often not the lie – deliberate, contrived and dishonest—but the myth—persistent, persuasive and unrealistic.”

– John F. Kennedy

MAKE A DIFFERENCE FOR OREGON'S VULNERABLE YOUTH

Purchase a table or tickets to The Knowledge Universe Wine & Chocolate Extravaganza on November 12th.

www.youthrightsjustice.org

Youth, Rights & Justice
ATTORNEYS AT LAW