Juvenile Law Reader

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"In *Gault*, the Supreme Court held that 'neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.'"

Also in this issue: More Bills Than You Can Shake A Stick At, see Page 9; Book Review, see Page 28; The Justice Luncheon: *Gault at 50*, see Page 31.

Remembering *Gault*: The Place of Due Process in Juvenile Court

By Caitlin Mitchell, YRJ Attorney

May 15, 2017, marks the fiftieth anniversary of *In re Gault*, 387 U.S. 1 (1967), the United States Supreme Court decision that laid the foundation for the practice of modern juvenile law. In that case, the Supreme Court held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[1]

A brief recitation of the facts illustrates the importance of the *Gault* decision and the progress that has been made in our field since the early 1960s. On June 8, 1964, 15-year-old Gerald Gault was arrested, after a neighbor complained that Gerald and his friend called her and made "lewd or indecent remarks" on the telephone. Gerald's parents, who were at work at the time, received no notice of the arrest. The delinquency petition, which was filed the following day, was not served on Gerald or on his parents, and it made no reference to the factual basis underlying the judicial action that it initiated. The court held hearings concerning the petition on June 9 and June 12, 1964. At those hearings, no witnesses were sworn; the complaining witness was not

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present; no transcript or recording was made of the proceeding; and no memorandum or record of the substance of the proceeding was prepared. In fact, the only information that the Supreme Court had before it on review was the testimony of the juvenile court judge, Gerald's parents, and a deputy probation officer during a hearing on the petition for writ of habeas corpus that was subsequently filed by Gerald's parents.

The witnesses at the habeas proceeding differed in their recollection of what exactly had occurred at the June 9 and June 12 hearings. Some thought that Gerald had admitted to making lewd comments; others thought he had not. The habeas judge entered an order stating that Gerald was a delinquent child, and committed him to up to six years in a youth correctional facility. As a point of contrast, the statute that Gerald had ostensibly violated carried with it an adult punishment of a fine of $5 to $50, or imprisonment in jail for not more than two months. Because

no appeal of the judge's decision was permitted under Arizona law, Gerald's parents filed a petition for a writ of habeas corpus, which was subsequently denied by the trial court and affirmed by the Arizona Supreme Court. Gerald's parents petitioned for review.

The United States Supreme Court held that, under the Due Process Clause of the United States Constitution, Gerald had a right to counsel, and a right to be advised of that right; a right to notice; a right to confront adverse witnesses; and a privilege against self-incrimination. Courts since *Gault* have continued to articulate and develop Due Process rights in the context of both juvenile dependency [2] and delinquency proceedings. Yet the issues that the Supreme Court struggled with in 1967 are eerily resonant with many of our contemporary discussions concerning the proper role of the juvenile court and the application of constitutional protections to children. "There appears to be little current dissent from the proposition that the Due Process Clause has a role to play," the Supreme Court observed in 1967; "the problem is to ascertain the precise impact of the due process requirement upon [juvenile court] proceedings."[3] Can children receive all of the Due Process rights to

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which adults are entitled without compromising the unique function of the juvenile court, whose existence is premised on the idea that children are in fact different from adults? Do constitutional and procedural rights, which are a foundational feature of the adversarial system of law, lead to fairer treatment and better outcomes for children?

In *Gault*, the Supreme Court reminded its readers of the origins of the juvenile court. From its inception, the Court observed, "wide differences have been tolerated—indeed insisted upon—between the procedural rights

accorded to adults and those of juveniles."[4] The early reformers who conceived of a separate juvenile system were "appalled by adult procedures and penalties" and by the fact that children could receive long prison sentences that were served in the same facilities as "hardened criminals."[5] They believed that society's role "was not to ascertain whether the child was 'guilty' or 'innocent,'" but to help the child: "The child—essentially good, as they saw it—was to be made 'to feel that he is the object of (the state's) care and solicitude,' not that he was under arrest or on trial."[6] From the point of view of those early reformers, the rules of criminal procedure were "inapplicable:" "The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive."[7]

Gault rejected the conception of the early reformers that children and families are best served by a system that discards procedural protections. Juvenile Court history, the Court wrote, has "demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[8] The Court's articulation of that principle is powerful: "The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment;" instead, "departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness."[9] Procedural rules, the Court explained, are the key to a fair and effective system of justice, the legal counterpart to the scientific method: "the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present."[10]

The system that current juvenile

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law practitioners have inherited contains elements of the competing ideologies described above. Like the early reformers, we still aspire towards a rehabilitative, "clinical rather than punitive" approach to juvenile offenders and dependency families. Attorneys, judges, and state workers in the juvenile justice system work to connect children and families with ever-evolving treatment resources. On a systemic level, Oregon, like many other states, is adopting evidence-based systems to assess risk, recidivism, and amenability to various forms of treatment.[11] And, while the conception that "children are different" lies at the heart of the juvenile justice system, courts continue to expand and refine that concept in light of developments in neuroscience concerning the differences between the adult and juvenile brain.[12]

Yet the problem identified in *Gault* remains: Whatever the intention, the juvenile court system is functionally punitive, and results in a punitive experience, for many of our dependency and delinquency clients. Children tried in juvenile court cannot be convicted of crimes; yet the same criminal code applies to adults and children alike, and children as young as 12 can, under certain circumstances, be tried and sentenced as adults. Physical restraints are to be used on children only for their own protection and public safety, yet children in delinquency proceedings, even those who pose no articulated risk, are routinely shackled while transported to court. And as the *Gault* court observed, whether an outcome is a prison sentence or a dispositional determination, a Youth Correctional Facility is still, from the point of view of the youth, an "institution of confinement in which the child is incarcerated for a greater or lesser time," where "his world becomes a building with whitewashed walls, regimented routine and institutional hours."[13]

Similar concerns apply in the dependency context. Dependency proceedings are meant to be about child safety rather than parental culpability; yet many parents experience those proceedings, which are prosecutorial in nature, as a direct and devastating attack on their abilities and self-worth.

While DHS is legally obligated to make reasonable or active efforts to reunify families, children and their parents routinely lack the resources that they would need to extricate themselves from intergenerational cycles of poverty, addiction, and state intervention. The stakes in dependency proceedings can be as high as those in criminal proceedings: many parents would rather serve a prison sentence than have their parental rights terminated, an action that has been described in case law as a kind of "civil death penalty."[14]

We have come a long way since *Gault* in ensuring that constitutional protections are applied in juvenile court. Yet even today, juvenile court practice and procedure can be informal and flexible in a way that may compromise the integrity and efficacy of the process. For example, ORS 419B.325 and related statutes—which relax the rules of evidence in certain dependency proceedings—contain within

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them the assumption that fair fact-finding procedures are not necessarily useful in determining the correct outcome in the dependency context. As a result, a court may change the permanent plan for a child from reunification to adoption—the prerequisite to termination of parental rights—without holding the state to the evidentiary standards that apply in even the most basic of civil proceedings.

Maybe the early reformers were right. Maybe children and families do need to be treated differently, and the adversarial system is not appropriate. But the reality is that we have yet to develop a true alternative. From the perspective of our clients, and from the perspective of anyone standing in our clients' shoes, the system is too often a punitive one, and the principles articulated in *Gault* continue to resonate.

[1] *387 U.S.* at 13.

[2] See, e.g., *Department of Human Services v. T.L.*, 358 Or 679 (2016); *State ex rel Juvenile Dept. of Multnomah County v. Geist,* 310 Or 176 (1990); *State ex rel. Juvenile Dept. of Multnomah County v. Grannis,* 67 Or App 565, 574 (1984).

[3] *387 U.S.* at 13-14.

[4] *Id.* at 14.

[5] *Id.* at 15.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 18.

[9] *Id.* 18-19.

[10] *Id.* at 21.

[11] See, e.g., Oregon Youth Authority, 10-year Strategic Plan 2-3-2-4, available at here (describing the development of the "Youth Reformation System," which uses data-informed decision-making to achieve "enhanced outcomes" for youth).

[12] See, e.g., *J.D.B. v. North Carolina*, 564 US 261, 264–65 (2011); *Graham v. Florida,* 560 US 48, 68 (2010); *Roper v. Simmons,* 543 U.S. 551, 568 (2005); *State v. J.C.*N.-V., 357 Or 324 (2016); *People v. N.A.S.*, 329 P.3d 285, 292 (Colo. 2014).

[13] *387 U.S.* at 27.

[14] See, e.g., *M.E. v. Shelby County Dept. of Human Resources*, 972 So. 2d. 89 (Ala. Ct. Civil App. 2007); *Stann v. Levine*, 180 N.C. App. 1, 11 n 9 (2006); *In re K.A.W.,* 133 S.W. 3d 1, 12 (Mo. 2004); *In re N.R.C.*, 94 S.W. 3d 799, 811 (Texas Ct. App 2002); *Drury v. Lang*, 105 Nev. 430 (1989).

More Bills Than You Can Shake a Stick At

By Mark McKechnie, YRJ Executive Director

The projected $1.8 billion shortfall that has resulted from unfunded PERS liabilities and the upcoming decrease in federal match rates for Medicaid expansion under the Affordable Care Act, among other things, has not seemed to reduce the number of bills introduced in the Oregon Legislature in 2017.

It is still early in the session, so all bills are still technically in play (as of this writing on March 27, 2017). Soon, however, hearing deadlines will thin the herd. April 7th is the deadline for bills to be scheduled for a work session. This is the proceeding in which bills are amended and/or potentially passed out of committee. Bills have to move out of committee by the end of business on April 18th in their chamber of origin. Those that do not move out of committee and onto the floor for a vote in Ways and Means, for consideration of fiscal costs, are effectively dead.

While it does not happen often, the leaders of each chamber can use their authority to grant exceptions or to move bills to designated committees that are not subject to these rules.

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Here is a list of bills that Youth, Rights & Justice has been monitoring so far this session. It includes the bill number. A bill that says "INTRO" means that the bill is still in the form in which it was introduced. Bills with a letter after them indicate that they have been amended. Bills with an A after the number, for example, have been amended, passed out of committee and re-printed in amended form once. Subsequent versions will be noted by B, C, etc.

A brief summary of each bill, determined by Legislative Counsel, is included in the chart. The tracking list also notes the last three legislative actions and the current committee assignment. In the committee assignments, H is for House, S is for Senate and J indicates a Joint Committee, most often Ways and Means. These bills generally relate to Oregon's child welfare and juvenile justice systems.

Bill Name	Bill Summary	Current Committee	Last Three Actions
HB 2170 INTRO	Establishes Office of Oregon Ombudsmen, containing Long Term Care Ombudsman, Residential Facilities Ombudsman, Foster Parent Ombudsman, Foster Child Ombudsman and Oregon Public Guardian and Conservator.	Human Services and Housing (H)	03/07/17 - Public Hearing held. 01/17/17 - Referred to Human Services and Housing with subsequent referral to Ways and Means. 01/09/17 - First reading. Referred to Speaker's desk.
HB 2171 INTRO	Requires Oregon Volunteers Commission for Voluntary Action and Service to maintain volunteer staff of court appointed special advocates sufficient to meet statutory requirement to appoint court appointed special advocate in every juvenile dependency proceeding.	Judiciary (H)	03/08/17 - Public Hearing held. 01/17/17 - Referred to Judiciary with subsequent referral to Ways and Means. 01/09/17 - First reading. Referred to Speaker's desk.
HB 2216 A	Requires Department of Human Services to adopt rules to establish Oregon Foster Children's Sibling Bill of Rights.	Human Services (S)	03/22/17 - Referred to Human Services. 03/20/17 - First reading. Referred to President's desk. 03/16/17 - Third reading. Carried by Piluso. Passed. Ayes, 59; Excused, 1--Boone.
HB 2218 INTRO	Requires that information concerning sex offenders convicted of certain offenses be released on website maintained by Department of State Police.	Judiciary (H)	02/16/17 - Public Hearing and Work Session held. 01/17/17 - Referred to Judiciary. 01/09/17 - First reading. Referred to Speaker's desk.
HB 2248 A	Extends sunset date on temporary law authorizing Oregon Youth Authority and county juvenile departments to disclose and provide copies of reports and other materials relating to child, ward, youth or youth offender's history and prognosis to Department of Corrections for purpose of exercising custody or supervising person committed to department's legal and physical custody.	Judiciary (S)	03/22/17 - Referred to Judiciary. 03/21/17 - First reading. Referred to President's desk. 03/20/17 - Third reading. Carried by Vial. Passed. Ayes, 59; Excused, 1--Boone.
HB 2249 INTRO	Authorizes Department of Corrections to enter into agreements or arrangements with counties to provide supplemental funding for reentry support and services for offenders released before attaining 25 years of age.	Judiciary (S)	03/22/17 - Referred to Judiciary. 03/21/17 - First reading. Referred to President's desk. 03/20/17 - Third reading. Carried by Gorsek. Passed. Ayes, 57; Excused, 1--Boone; Excused for Business of the House, 2--Holvey, Lininger.

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Bill Name	Bill Summary	Current Committee	Last Three Actions
HB 2251 INTRO	Provides that person under 18 years of age may not be incarcerated in Department of Corrections institution.	Judiciary (H)	02/20/17 - Public Hearing held. 01/17/17 - Referred to Judiciary. 01/09/17 - First reading. Referred to Speaker's desk.
HB 2306 INTRO	Directs Oregon Health Authority to adopt rules requiring sharing of information between entities concerning criminal defendants lacking fitness to proceed.	Judiciary (H)	03/20/17 - Public Hearing held. 01/17/17 - Referred to Judiciary. 01/09/17 - First reading. Referred to Speaker's desk.
HB 2344 A	Modifies qualifications and requirements for unmarried person who is at least 16 years of age and not older than 20 years of age to participate in independent living programs in independent residence facilities.	Human Services (S)	02/27/17 - Referred to Human Services. 02/23/17 - First reading. Referred to President's desk. 02/22/17 - Third reading. Carried by Gorsek. Passed. Ayes, 57; Excused, 2--Alonso Leon, Boone.
HB 2345 A	Extends sunset on provision authorizing Department of Human Services to appear as party in juvenile court proceeding without appearance of Attorney General.	Ways and Means (J)	03/16/17 - Referred to Ways and Means by prior reference. 03/16/17 - Recommendation: Do pass with amendments, be printed A-Engrossed, and be referred to Ways and Means by prior reference. 03/14/17 - Public Hearing and Work Session held.
HB 2360 INTRO	Modifies reporting obligation for sex offenders by requiring report within 10 days following change of residence.	Judiciary (H)	02/16/17 - Public Hearing and Work Session held. 01/17/17 - Referred to Judiciary. 01/09/17 - First reading. Referred to Speaker's desk.
HB 2451 INTRO	Establishes medical assistance eligibility for individuals under age 26 who have aged out of foster care in Oregon or another state.	Health Care (H)	02/27/17 - Public Hearing held. 01/17/17 - Referred to Health Care with subsequent referral to Ways and Means. 01/09/17 - First reading. Referred to Speaker's desk.
HB 2551 INTRO	Prohibits placement of child with intellectual disability, who is taken into protective custody, in hotel, motel, inn, hospital, Department of Human Services office or juvenile detention facility.	Human Services and Housing (H)	02/16/17 - Public Hearing held. 01/17/17 - Referred to Human Services and Housing. 01/09/17 - First reading. Referred to Speaker's desk.

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Bill Name	Bill Summary	Current Committee	Last Three Actions
HB 2579 INTRO	Requires Oregon Youth Authority to supervise person who completes Department of Corrections incarceration sentence in physical custody of authority.	Judiciary (H)	03/28/17 - Work Session scheduled. 03/13/17 - Public Hearing held. 01/17/17 - Referred to Judiciary with subsequent referral to Ways and Means.
HB 2580 INTRO	Exempts foster children and homeless youth from requirement to enroll in coordinated care organization in order to receive medical assistance.	Health Care (H)	02/20/17 - Public Hearing held. 01/17/17 - Referred to Health Care. 01/09/17 - First reading. Referred to Speaker's desk.
HB 2600 INTRO	Transfers authority over court appointed special advocates and CASA Volunteer Programs from Oregon Volunteers Commission for Voluntary Action and Service to Oregon Criminal Justice Commission.	Judiciary (H)	03/08/17 - Public Hearing held. 01/17/17 - Referred to Judiciary with subsequent referral to Ways and Means. 01/09/17 - First reading. Referred to Speaker's desk.
HB 2602 INTRO	Modifies crime of sexual abuse in the first degree by specifying location of prohibited touching constituting crime.	Judiciary (H)	01/17/17 - Referred to Judiciary. 01/09/17 - First reading. Referred to Speaker's desk.
HB 2612 INTRO	Modifies reporting obligation for sex offenders by requiring report within 10 days following change of residence.	Judiciary (H)	01/17/17 - Referred to Judiciary. 01/09/17 - First reading. Referred to Speaker's desk.
HB 2616 INTRO	Requires court in juvenile delinquency proceeding to advise youth, and parent or guardian of youth, of youth's right to counsel.	Judiciary (H)	03/30/17 - Work Session scheduled. 03/01/17 - Public Hearing held. 01/17/17 - Referred to Judiciary.
HB 2659 INTRO	Provides that youth offenders sentenced to mandatory minimum terms of imprisonment for certain crimes committed at 15, 16 or 17 years of age are eligible for conditional release hearing if they are in custody of Oregon Youth Authority on 24th birthday.	Judiciary (H)	01/17/17 - Referred to Judiciary. 01/09/17 - First reading. Referred to Speaker's desk.
HB 2698 INTRO	Allows person with other convictions within previous 10 years to file motion to set aside conviction after three years from date of judgment if other convictions were part of same criminal episode as conviction that is subject of motion.	Judiciary (H)	03/09/17 - Public Hearing held. 01/17/17 - Referred to Judiciary. 01/09/17 - First reading. Referred to Speaker's desk.
HB 2713 INTRO	Provides that evidence obtained during or as result of defendant's unlawful detention by peace officer is inadmissible in criminal proceeding against defendant.	Judiciary (H)	01/17/17 - Referred to Judiciary. 01/09/17 - First reading. Referred to Speaker's desk.

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Bill Name	Bill Summary	Current Committee	Last Three Actions
HB 2718 INTRO	Requires youth to consult with legal counsel in person, by telephone or by video conference prior to custodial interview with peace officer, and before waiver of constitutional rights.	Judiciary (H)	03/22/17 - Public Hearing held. 01/17/17 - Referred to Judiciary. 01/09/17 - First reading. Referred to Speaker's desk.
HB 2903 INTRO	Modifies definition of "abuse" occurring in child-caring agencies.	Human Services and Housing (H)	02/16/17 - Referred to Human Services and Housing. 02/13/17 - First reading. Referred to Speaker's desk.
HB 3078 INTRO	Modifies eligibility for Family Sentencing Alternative Pilot Program.	Judiciary (H)	03/06/17 - Referred to Judiciary with subsequent referral to Ways and Means. 02/27/17 - First reading. Referred to Speaker's desk.
HB 3266 INTRO	Provides that no person may use mechanical restraint, chemical restraint, prone restraint, physical restraint or seclusion on student in public education program.	Judiciary (H)	03/09/17 - Referred to Judiciary. 03/02/17 - First reading. Referred to Speaker's desk.
HB 3267 INTRO	Directs school districts and public charter schools to waive high school diploma requirements that are not established by state law if student is in foster care, homeless or runaway.	Education (H)	03/09/17 - Referred to Education. 03/02/17 - First reading. Referred to Speaker's desk.
HB 5033 INTRO	Appropriates moneys from General Fund to Public Defense Services Commission for certain biennial expenses.	Ways and Means (J)	03/30/17 - Public Hearing scheduled. 03/29/17 - Public Hearing scheduled. 03/28/17 - Public Hearing scheduled.
SB 20 INTRO	Updates references to federal education law to reflect passage of Every Student Succeeds Act.	Education (S)	02/02/17 - Public Hearing held. 01/17/17 - Referred to Education. 01/09/17 - Introduction and first reading. Referred to President's desk.
SB 49 INTRO	Prohibits removal of youth from current placement for purpose of receiving fitness to proceed evaluation.	Judiciary (S)	03/27/17 - Public Hearing held. 01/17/17 - Referred to Judiciary. 01/09/17 - Introduction and first reading. Referred to President's desk.

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Bill Name	Bill Summary	Current Committee	Last Three Actions
SB 64 INTRO	Renames "mental disease or defect" to "qualifying psychiatric or developmental condition" in criminal and certain juvenile statutes.	Judiciary (S)	02/13/17 - Public Hearing held. 01/17/17 - Referred to Judiciary. 01/09/17 - Introduction and first reading. Referred to President's desk.
SB 82 INTRO	Sets forth state policy specifying that sanctions and punishment for violation of rules regulating conduct of youth offenders and other persons placed in physical custody of Oregon Youth Authority may not include placing youth offender or others in custody of youth authority alone in locked room.	Judiciary (H)	03/03/17 - Referred to Judiciary. 02/27/17 - First reading. Referred to Speaker's desk. 02/23/17 - Third reading. Carried by Manning Jr. Passed. Ayes, 29; excused, 1--Dembrow.
SB 101 A	Authorizes child abuse investigation on school premises.	Judiciary (S)	02/27/17 - Recommendation: Do pass with amendments and be referred to Judiciary by prior reference. (Printed A-Eng.) 02/22/17 - Work Session held. 02/06/17 - Public Hearing held.
SB 103 INTRO	Requires court to make specific findings of fact following receipt of certain reports in juvenile proceedings.	Human Services (S)	02/06/17 - Public Hearing held. 01/17/17 - Referred to Human Services, then Judiciary. 01/09/17 - Introduction and first reading. Referred to President's desk.
SB 105 INTRO	Requires independent residence facilities for minors to be licensed, certified or authorized by Department of Human Services under laws regulating child-caring agencies.	Human Services (S)	02/06/17 - Public Hearing held. 01/17/17 - Referred to Human Services. 01/09/17 - Introduction and first reading. Referred to President's desk.
SB 126 INTRO	Authorizes juvenile offender subject to mandatory minimum sentence to be eligible for conditional release after serving at least one-half of sentence imposed.	Judiciary (S)	01/17/17 - Referred to Judiciary. 01/09/17 - Introduction and first reading. Referred to President's desk.
SB 140 INTRO	Appropriates moneys from General Fund to Oregon Youth Authority for gang intervention services in Multnomah County.	Human Services (S)	03/27/17 - Work Session scheduled. 03/22/17 - Public Hearing held. 01/17/17 - Referred to Human Services, then Ways and Means.

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Bill Name	Bill Summary	Current Committee	Last Three Actions
SB 241 INTRO	Establishes Task Force on Children of Incarcerated Parents.	Human Services (S)	04/03/17 - Public Hearing and Possible Work Session scheduled. 01/17/17 - Referred to Human Services, then General Government and Accountability, then Ways and Means. 01/09/17 - Introduction and first reading. Referred to President's desk.
SB 242 INTRO	Appropriates moneys from General Fund to Oregon Department of Administrative Services for YWCA of Greater Portland, to be expended for Family Preservation Project.	Human Services (S)	04/03/17 - Public Hearing and Possible Work Session scheduled. 01/17/17 - Referred to Human Services, then Ways and Means. 01/09/17 - Introduction and first reading. Referred to President's desk.
SB 243 A	Expands definition of "child in care" to include children receiving care and services from certified foster homes and developmental disabilities residential facilities.	Ways and Means (J)	02/20/17 - Referred to Ways and Means by order of the President. 02/20/17 - Recommendation: Do pass with amendments and be referred to Ways and Means. (Printed A-Eng.) 02/13/17 - Work Session held.
SB 244 A	Establishes notification requirements of Department of Human Services regarding reported or suspected abuses, deficiencies, violations or failures of child-caring agency to comply with full compliance requirements and regarding reports of suspected or substantiated abuse of child in care.	Human Services and Housing (H)	03/03/17 - Referred to Human Services and Housing. 02/27/17 - First reading. Referred to Speaker's desk. 02/23/17 - Third reading. Carried by Gelser. Passed. Ayes, 28; excused, 2--Dembrow, Girod.
SB 245 INTRO	Modifies definitions of "child" and "child-caring agency." Declares emergency, effective on passage.	Human Services and Housing (H)	03/03/17 - Referred to Human Services and Housing. 02/27/17 - First reading. Referred to Speaker's desk. 02/23/17 - Third reading. Carried by Knopp. Passed. Ayes, 29; excused, 1--Dembrow.
SB 246 INTRO	Sets forth circumstances under which Department of Human Services may immediately suspend, revoke or place conditions on license, certification or other authorization of child-caring agency.	Human Services (S)	03/13/17 - Public Hearing held. 01/17/17 - Referred to Human Services. 01/09/17 - Introduction and first reading. Referred to President's desk.
SB 263 INTRO	Limits school district's ability to require students to participate in abbreviated school day program.	Human Services (S)	04/03/17 - Work Session scheduled. 02/22/17 - Public Hearing held. 01/17/17 - Referred to Human Services.

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Bill Name	Bill Summary	Current Committee	Last Three Actions
SB 267 INTRO	Provides that victim of sexual assault or domestic violence crime has right to obtain law enforcement records relating to crime.	Judiciary (S)	01/17/17 - Referred to Judiciary. 01/09/17 - Introduction and first reading. Referred to President's desk.
SB 395 INTRO	Requires Higher Education Coordinating Commission to, on annual basis, work with Oregon Health and Science University, each public university and each community college to determine number and graduation rates of former foster children and current foster children at each college or university.	Education (S)	03/23/17 - Public Hearing held. 02/27/17 - Recommendation: Without recommendation as to passage and be returned to Pres. for referral. Referred to Education by order of the President and then Ways and Means by prior reference. 02/22/17 - Work Session held.
SB 396 INTRO	Directs Higher Education Coordinating Commission to establish foster youth success centers in each public university.	Education (S)	03/23/17 - Public Hearing held. 02/27/17 - Recommendation: Without recommendation as to passage and be returned to President. Referred to Education by order of the President and then Ways and Means by prior reference. 02/22/17 - Work Session held.
SB 414 INTRO	Directs Department of Education to establish school-based student threat assessment system to support school personnel in conducting threat assessments of students who are at risk of engaging in violence or destructive behavior or committing self-harm or suicide.	Education (S)	02/16/17 - Public Hearing held. 01/17/17 - Referred to Education, then Judiciary, then Ways and Means. 01/09/17 - Introduction and first reading. Referred to President's desk.
SB 497 INTRO	Defines "arrest," for purposes of procedures to file motion to set aside record of arrest, to mean action by law enforcement officer or prosecuting attorney that results in official record that person is alleged to have committed offense.	Judiciary (S)	02/16/17 - Public Hearing held. 01/17/17 - Referred to Judiciary. 01/09/17 - Introduction and first reading. Referred to President's desk.
SB 525 INTRO	Extends sunset on provision authorizing Department of Human Services to appear as party in juvenile court proceeding without appearance of Attorney General.	Judiciary (S)	01/17/17 - Referred to Judiciary. 01/09/17 - Introduction and first reading. Referred to President's desk.
SB 551 INTRO	Directs Higher Education Coordinating Commission to develop and implement pilot program to assist foster youth transitioning from community college to public university.	Education (S)	03/23/17 - Public Hearing held. 01/17/17 - Referred to Education, then Ways and Means. 01/09/17 - Introduction and first reading. Referred to President's desk.

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Bill Name	Bill Summary	Current Committee	Last Three Actions
SB 636 INTRO	Defines finding of unsubstantiated report of abuse of child in care.	Human Services (S)	02/01/17 - Public Hearing held. 01/17/17 - Referred to Human Services, then Judiciary. 01/09/17 - Introduction and first reading. Referred to President's desk.
SB 749 INTRO	Requires Department of Human Services to, upon request, reassign caseworker to child, ward, youth or youth offender who is 12 years of age or older and in legal custody of department.	Human Services (S)	04/05/17 - Work Session scheduled. 03/08/17 - Public Hearing held. 02/08/17 - Referred to Human Services.
SB 830 INTRO	Changes definition of foster parent who is "current caretaker.".	Human Services and Housing (H)	03/24/17 - Referred to Human Services and Housing. 03/22/17 - First reading. Referred to Speaker's desk. 03/21/17 - Third reading. Carried by Gelser. Passed. Ayes, 27; excused, 3--DeBoer, Frederick, Thatcher.
SB 846 INTRO	Prohibits use of physical restraints in juvenile court proceedings on youth, youth offender or young person with exceptions.	Judiciary (S)	03/28/17 - Public Hearing and Work Session scheduled. 02/27/17 - Referred to Judiciary. 02/23/17 - Introduction and first reading. Referred to President's desk.
SB 894 INTRO	Modifies eligibility for Family Sentencing Alternative Pilot Program.	Judiciary (S)	03/03/17 - Referred to Judiciary, then Ways and Means. 03/02/17 - Introduction and first reading. Referred to President's desk.
SB 932 INTRO	Limits certain circumstances when child may be taken into protective custody to when there is reasonable cause to believe child is in imminent danger of serious bodily injury.	Human Services (S)	03/03/17 - Referred to Human Services, then Judiciary. 03/02/17 - Introduction and first reading. Referred to President's desk.
SB 967 INTRO	Provides that youth offenders sentenced to mandatory minimum terms of imprisonment for certain crimes committed at 15, 16 or 17 years of age are eligible for conditional release hearing if they are in custody of Oregon Youth Authority upon attaining 24 years and six months of age.	Judiciary (S)	03/03/17 - Referred to Judiciary. 03/02/17 - Introduction and first reading. R eferred to President's desk.

Re-Examining the Conditions of Probation to Decrease Technical Violations In Umatilla County

By Digna Moreno, Supervisor for Umatilla County, Oregon, Juvenile Division

In 2008, Umatilla County set out to revise the standard Judgment and Disposition order, concerned by high rates of youth detained for technical violations of probation. The project started by reexamining the standard probation order in an effort to increase youths' success while on probation and decrease violations of probation that resulted in incarceration. This was a joint effort that included the Honorable Judge Ronald J. Pahl (retired), the Juvenile Department, local defense counsel, and the District Attorney's office.

There were many problems identified in the standard order of probation. Youth and families found it difficult to read and understand. It included 30 separate conditions, which were, in many ways, setting the youth up for failure and giving their parents false expectations.

Another problem was the provision that allowed probation officers to impose other conditions at their own discretion. This category allowed Probation Counselors to order youth and families into services that may not have been discussed with the court. Because they did not buy-in to these services, youth and families might not participate in the services ordered by the probation officers, which would result in a technical violation.

This also set up a dynamic in which some youth and their parents would attend services simply to comply with the order. When this occurs, youth may comply with the ordered services without really engaging or benefitting from them.

In 2011, Umatilla County implemented the first version of the restructured Judgment and Disposition court order. After the revision, the order went from 30 items to eight items, and the revised order initially eliminated the "other" category. The revised order was

written at the sixth-grade reading level, making it far easier to read and understand than the previous version, which was written at a 12th-grade reading level.

The new version combined many conditions of probation under the requirement that the youth, "Shall follow safety plan, case plan, and/or agreements as prepared and signed by Probation Counselor, youth and parent/guardian to maintain and monitor offense-free behavior for the duration of probation." This allowed for a more tailored approach that placed more emphasis on case planning and case management, rather than on compliance monitoring alone. The case plan process promotes opportunity for skill-building and promotes long-term change for the youth and his or her family. The changes focused on improving the case planning process and the approach to community supervision and support. Following these reforms, Umatilla County saw a 95% decrease in detention admissions for technical violations and a virtual disappearance of detention admissions for new-offense violations.

One of the keys to success in this process was the understanding that every youth and family are unique. They come with their own set of strengths and needs. Umatilla County addresses this in the Judgment and Disposition order by ordering youth and families to participate in the development of

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an individualized case plan, with the assistance of their Probation Counselor.

The case plan addresses the youth's risk factors (needs) based on the Juvenile Crime Prevention Assessment (JCP), a validated risk assessment tool that is initially completed during intake. Reassessments using the JCP occur based on the needs of each individual case. For the duration of supervision, the youth and family come up with short-term and long-term goals, rewards, and consequences that target the youth's criminogenic risk factors.

About the author. *For the past 13 years, Digna Moreno has been employed by Umatilla County Community Justice Juvenile Division as a Probation Counselor II. In November of 2016, Digna Moreno became the Supervisor for Umatilla County Juvenile Division. In June 2003, Digna obtained her Bachelor's Degree from Western Oregon University with a double major in Criminal Justice and Spanish. Digna currently has a specialized caseload consisting of youth with sexually offending behaviors. She is passionate about youth and families being treated with equity and dignity, no matter what the circumstance.*

The following Issue Brief is partially reprinted here with the permission of the National Juvenile Defender Center. You can see the entire Issue Brief **here**.

PROMOTING POSITIVE DEVELOPMENT

The Critical Need to Reform Youth Probation Orders

The Issue

Probation is the most common disposition in juvenile court when youth are adjudicated delinquent.[1] In 2013, formal probation was ordered in 64% of adjudicated delinquency cases. [2] Though intended to lead youth toward success, unwieldy conditions of probation can lead to technical violations and cause lasting harm in the lives of children, including removal from their communities and incarceration. [3] Probation orders often make it difficult for youth to succeed while on probation, despite the fact that probation agencies are focused on achieving positive youth development and accountability. [4] In some places, youth are required to manage over thirty conditions of probation-a near impossible number of rules for children to understand, follow, and even recall. Overly broad and unclear orders that are not tailored to the strengths, interests, and challenges of an individual youth can result in significant numbers failing on probation, ultimately leading to costly and unnecessary out-of-home placement. In 2013, 17% of youth in residential placement facilities were being held for technical violations of probation. [5]

The Number of Conditions on Juvenile Probation Orders

Juvenile probation orders should have a limited number of conditions, and they should be individually tailored to achieve community safety and accountability by helping the youth develop skills necessary to contribute as a positive member of the community. In a brief survey conducted by the National Juvenile Defender Center, juvenile defenders reported that their juvenile court probation orders include anywhere from five to over thirty conditions of probation. Further, a study from Washington State, the Washington Judicial Colloquies Project, found that youth recall and understand very little of what is said during the court hearing when the conditions of probation are ordered. [6] Project staff reported, "Youth were interviewed minutes after the hearings, and most of them were confused and mistaken about what the judge had stated and ordered just moments before. Overall, the youth surveyed recalled only 1/3 of the conditions that were ordered."[7] By reducing the number of probation conditions and ensuring that each condition correlates to the youth's interests and goals of probation, youth will be more likely to understand the expectations and be more able to comply with the conditions of probation. Further, this will enable probation officers to address the unique and individualized characteristics of youth outside the realm of compliance and punishment. Goals identified for the youth should be youth-centered, strengths-based, and developed as the probation officer builds a relationship with the youth. Engaging the youth to identify and prioritize these goals will help achieve the youth's buy-in and thus increase the likelihood of success and compliance.[8]

You can see the entire Issue Brief **here**.

Juvenile Law Resource Center

JLRC Contact Information

Natalie O'Neil at Natalie.o@youthrightsjustice.org is the contact person for trainings and other JLRC services.

To receive a call-back within two business days from a JLRC attorney for advice, email JLRCWorkgroup@youthrightsjustice.org and please include your name, telephone number, county and brief description of your legal question.

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CASE SUMMARIES

By Amy S. Miller, Deputy General Counsel, Office of Public Defense Services

Dept. of Human Services v. A. I. W., 283 Or App 89 (2016)

On December 21, 2016, the Court of Appeals issued an opinion in *Dept. of Human Services v. A. I. W.*, 283 Or App 89 (2016) in which the Court reversed and remanded the juvenile court's judgment denying DHS' petition to change the designation of paternity as to A. ORS 109.070(5)(b)(c). The petition sought to disestablish paternity as to the legal father (who signed a voluntary acknowledgement at the time of A's birth) and establish paternity as to the biological father.

After a hearing on the issue of paternity, the court denied the agency's petition and held that although legal father signed the VAP due to a material mistake of fact, setting aside the VAP would be "substantially inequitable" because although bio father had a relationship with A, there are other factors [which were not described] which do not support setting aside the VAP.

The Court of Appeals found the lack of explanation by the trial court insufficient. Under ORS 109.070(5)(f), a VAP "shall" be set aside "[i]f the court finds by a preponderance of the evidence that the acknowledgment was signed because of fraud, duress or material mistake of fact, ** * unless, giving consideration to the interests of the parties and the child, the court finds that setting aside the acknowledgment would be substantially inequitable." When the trial court exercises discretion, its explanation must, "at a minimum, comport with the applicable legal framework and describe the basic reasons for the court's decision." Because the record was insufficient for the Court to determine which factors the trial court relied on in denying the petition, the Court is unable to determine whether the trial court properly exercised its discretion.

Dept. of Human Services v. S. S., 283 Or App 136 (2016)

On December 29, 2016, the Court of Appeals issued an opinion in *Dept. of Human Services v. S. S.*, 283 Or App 136 (2016) in which the Court reversed and remanded the juvenile court's permanency judgment changing the plan for M from guardianship to adoption because the juvenile court failed to conduct the statutorily required "child-centered" determination when it decided there was no compelling reason to change the plan to something other than adoption.

M was born drug-affected in

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October 2012 and placed in stranger foster care with White at 8 days old. Jurisdiction was established in December 2012 based on use of controlled substances by both parents and father's criminal activity. Both parents were eventually convicted of felonies and incarcerated. Mother's expected release date was August 2016. DHS filed an amended petition alleging inability to serve as a parenting resource while incarcerated. While in custody at Coffee Creek, mother had regular contact with M, engaged in the programs available to her as an inmate including parenting classes and AA/NA, obtained work outside of the facility, and planned to enter drug treatment during the final 6 months of incarceration.

At the 2013 permanency hearing, the court changed the plan to guardianship (with mother's agreement) because of M's bonds with family and foster mom and mother's progress in custody. In 2014 M was removed from White and placed in Kansas for 7 months where her contact with family was limited. She was returned to Oregon after the Kansas relatives decided they didn't want to be a permanent resource and was returned to White's home where regular visits and contact with grandmother and mother resumed.

At the 2015 permanency hearing, the court changed the plan to adoption, concluding there was no compelling reason under 419B.498(2)(b) to preclude DHS from filing a TPR petition. The court's opinion indicated that M had bonded with White and with mother, that mother had rehabilitated herself in prison, and suggested mother "would be a worthy parent to which to return her child, including during the process of a TPR and competition of an adoption plan." However, the court noted that 419B.498 makes adoption the "priority" when reunification is not an option.

On appeal, mother argues the juvenile court failed to make a child-centered determination regarding M's permanency plan given her existing bonds and relationships as required by ORS 419B.476(5) and 419B.498(2). Father and M join mother's assignments of error of appeal. DHS argued that the "22 month rule" of 419B.498(1)(a) requires pursuing termination unless an exception in ORS 419B.498(2) applies.

The Court of Appeals agreed with mother, that the juvenile court is required to evaluate, in light of M's specific circumstances (including bonds with family and foster parent), whether the plan of guardianship would better meet her health and safety needs than the plan of adoption.

Dept. of Human Services v. S. M. H., 283 Or App 295 (2017)

On January 5, 20167, the Court of Appeals issued an opinion in *Dept. of Human Services v. S. M. H., 283 Or* App 295 (2017) in which the Court reversed and remanded the juvenile court's March 2016 judgments changing the permanency plans for three children from reunification to guardianship due to DHS's failure to make reasonable efforts.

This case involves mother's three children, D (age 9), B (age 2), and S (age 1). Jurisdiction with respect to mother was established in October 2014 based on substance abuse and that mother is currently incarcerated and unable to parent. The court ordered mother to comply with DHS letters of expectation which included completion of D&A evaluations and recommendations, maintain contact with DHS, engage with the ART team, attend court hearings, and sign releases.

In spring 2015, all three children were placed with family in Colorado and shortly thereafter, DHS assigned a new caseworker, Moles,

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to work with the family. When Moles took on the case, the last face to face contact with mother was documented as occurring in April 2015. Moles was a graduate student who worked two days per week for DHS but carried a full-time caseload. Mother was incarcerated in June 2015 (after spending time both on house arrest and in custody) and, in October 2015, started serving a prison sentence at Coffee Creek. Before starting her prison sentence, mother was attending drug treatment and having daily phone contact with her children in Colorado.

In December 2015, Moles contacted mother's prison counselor for the first time and sent mother a DHS action agreement which listed the court-ordered services in which mother was required to participate. For the first eight months of mother's incarceration, DHS failed to provide financial assistance to mother for video or phone contact with her children, despite mother's requests. DHS had no face to face contact with mother from June 2015-January 2016.

At the March 29, 2016 permanency hearing, DHS moved to change the plan to guardianship. All three parents objected and argued lack of reasonable efforts. Moles testified that DHS provided no assistance for mother to have phone or video visits with the children for the first eight months of the case and failed to get an updated psychiatric evaluation even though it would have been helpful. Moles acknowledged her schedule was a barrier to getting things done on time, that she had had regular contact with mother only in the past few months, and that she had not formed a plan with mother as to how to meet DHS's expectations upon mother's release which was scheduled to occur later in the year. Mother testified about her participation in substance abuse and parenting programs at Coffee

Creek and about frequent contacts with the children which were paid for by her mother and aunt. The juvenile court found DHS made reasonable efforts and changed the permanency plan to guardianship.

On appeal, mother argued DHS made no efforts from her date of incarceration (summer 2015) until DHS contacted her counselor in December 2015, DHS failed to assist with maintaining contact with the children until just before the permanency hearing, and Moles had limited contact with mother until the last couple of months before the permanency hearing. DHS argued its efforts were reasonable and relied on *Dept. of Human Services v. S. W.*, 267 Or App 277 (2014) which held reasonable efforts were made for an incarcerated parent in spite of lengthy periods of inaction by DHS.

The Court of Appeals distinguished this case from S. W.: in this case mother maintained regular contact with the children throughout the case and demonstrated a willingness to engage in services in spite of

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DHS lack of assistance. Unlike in S. W., the trial court lacked sufficient evidence to support a conclusion that mother would not have benefited from additional services or that DHS had done all that it can do with respect to mother. The Court also relied on *Dept. of Human Services v. S. S.*, 278 Or App 725 (2016) where the Court found even if DHS made reasonable efforts in the four months leading up to a permanency hearing, the failure to make adequate efforts for the preceding six months indicated a lack of reasonable efforts.

Reasonable efforts is a fact-specific determination which must be made in light of the jurisdictional bases. Furthermore, DHS's efforts are reasonable only if DHS has given parents a reasonable opportunity to demonstrate their ability to adjust their conduct and become minimally adequate parents.

When assessing DHS's efforts, a juvenile court properly considers "the length and circumstances of a parent's incarceration," see *Dept. of Human Services v. S. W.,* 267 Or App 277, 293-94, 340 P3d 675 (2014), and "evidence specifically tied to [a parent's] willingness and ability to participate in services," see D*ept. of Human Services v. J. M.,* 275 Or App 429, 449, 364 P3d 705 (2015), rev den, 358 Or 833 (2016). At the same time, the reasonable-efforts inquiry focuses on DHS's conduct, and a parent's resistance to DHS's efforts does not categorically excuse DHS from making meaningful efforts toward that parent. *Dept. of Human Services v. R. W.,* 277 Or App 37, 44, 370 P3d 543 (2016).

The Court will not readily excuse DHS's failure to engage with parents simply because they are incarcerated or fail to immediately respond in a desirable manner to DHS's efforts. Because there is insufficient evidence to support the determination that DHS made reasonable efforts with respect to mother, the permanency judgments must be reversed.

Dept. of Human Services v. C. L. H., 283 Or App 313 (2017)

On January 5, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. C. L. H.*, 283 Or App 313 (2017) in which the Court reversed and remanded the juvenile court's permanency hearing judgment changing the plan for father's child M from reunification to adoption due to DHS's failure to make reasonable efforts.

M, a medically fragile child, was born in June 2014 and remained in the hospital until October 2014 when she was placed in foster care. DHS attempted to contact father and was unsuccessful after an absent parent search. Jurisdiction was established by default in January 2015 based on M's specialized medical needs, father's anger control problem, and father's failure to provide adequate food for M. Father was arrested and incarcerated in March 2015, convicted of burglary and unlawful possession of methamphetamine, and sentenced to prison with a release date of April 2017. Although DHS was aware of father's arrest and location in March 2015, DHS did not have contact with father until a phone conversation in November 2015. DHS provided father with some information about M's significant medical needs, but did not provide sufficient information to help father meet M's day-to-day needs. DHS spoke with father's prison counselor for the first time in late 2015 and later determined an in-person visit with M would not be in M's best interests given M's medical needs.

At the March 2016 permanency hearing, DHS testified that incarceration was a barrier to DHS providing services and that father had participated in services available to him in custody including anger management. DHS was unaware of the details of the anger management

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class and whether it would satisfy the court's dispositional order. Father testified that he wanted to learn how to care for M and that he would be permitted to travel for special programming provided by doctors that would focus on preparing him to meet M's needs. DHS argued the agency made reasonable efforts based on father's lack of engagement early in the case and that even if DHS had provided more services, it would not have improved his chances of reunification because he would not be able to demonstrate his ability to sufficiently care for M until his release from custody which was over a year away. The juvenile court found DHS's efforts lacking, but determined that more efforts by DHS would not have made a significant difference in the outcome of the case, and made a reasonable efforts finding. The juvenile court, relying on *Dept. of Human Services v. S. W.*, 267 Or App 277 (2014), determined additional efforts would be of no benefit to DHS because nothing DHS could do would change the fact that father would continue to be incarcerated for a year following the permanency hearing,

Before analyzing the case, the Court of Appeals discusses the legal framework for a reasonable efforts determination:

- The juvenile court is authorized to change a permanency plan away from reunification only if DHS proves by a preponderance of evidence "that (1) it made reasonable efforts to make it possible for the child to be reunified with his or her parent and (2) notwithstanding those efforts, the parent's progress was insufficient to make reunification possible." *Dept. of Human Services v. S. M. H.*, 283 Or App 295 (2017) (citing ORS 419B.476(2)(a)).
- DHS's efforts are reasonable within the meaning of ORS 419B.476(2)(a) only if DHS has given a parent a fair opportunity to demonstrate the ability to adjust his or her behavior and act as a "minimally adequate" parent. Id.
- DHS's efforts are assessed in the totality of circumstances with reference to the adjudicated bases for jurisdiction. *Dept. of Human Services v. M. K.*, 257 Or App 409 (2013).
- The juvenile court must evaluate DHS's efforts over the entire duration of the case, "with an emphasis on a period before the hearing sufficient in length to afford a good opportunity to assess parental progress." *Dept. of Human Services v. S. S.*, 278 Or App 725 (2016)
- A reasonable efforts determination requires the juvenile court to engage in "something resembling a cost-benefit analysis," considering both the burdens that the state would shoulder in providing that service and the benefit that "might reasonably be expected to flow" from that service. *Dept. of Human Services v. M. K.*, 257 Or App 409 (2013).

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- When the court considers whether to change the permanency plan, it must root its decision in considerations of the child's health and safety. ORS 419B.476(2)(a)

In assessing the potential benefit of additional efforts, the court must consider the benefit in terms of its importance to the case plan and the potential impact on the jurisdictional bases. The court may also properly consider evidence tied to a parent's willingness and ability to engage in and benefit from a particular service that was not provided. However, an assessment of the benefit does not hinge on whether the service will ultimately make reunification possible. The question is whether DHS provided the parent with an opportunity to demonstrate improvement regarding the jurisdictional bases.

DHS may not withhold a potentially beneficial service to a parent simply because, in DHS's estimation, reunification is unlikely even if the parent successfully engages in the service. ORS 419B.476(2)(a) requires two separate inquiries: whether the efforts provided by DHS were reasonable and whether the parent has made sufficient progress to make reunification possible.

The circumstances and duration of a parent's incarceration may impact whether the parent is able to make sufficient progress. However, these circumstances do not absolve DHS of its obligation to make reasonable efforts over the life of the case. "Consequently, a juvenile court properly assesses the agency's efforts, and particularly the "benefit" of services that were not provided, in terms of their potential effect upon the jurisdictional bases, not in terms of whether, in light of all the surrounding circumstances, reunification will ultimately be possible." (emphasis added)

In this case, DHS failed to provide services directly related to the jurisdictional bases, failed to maintain regular contact with father once his whereabouts became known, and therefore had little evidence concerning father's ability and willingness to engage in and benefit from services. DHS also failed to present evidence that providing additional services for father, particularly programming which would help him understand M's medical needs, would be particularly burdensome. The record is insufficient to support a conclusion that DHS made reasonable efforts toward father for a sufficient period of time in which the juvenile court could evaluate father's progress.

Dept. of Human Services v. M. L. M., 283 Or App 353 (2017)

On January 11, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. M. L. M.*, 283 Or App 353 (2017), in which the Court affirmed the juvenile court's judgment in an ICWA case terminating the parental rights of mother and father to child L. On appeal, parents challenge the sufficiency of the evidence as to nearly every requirement for termination including whether DHS made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. Many of the facts of this case are described in *Dept. of Human Services v. J. M.*, 266 Or App 453 (2014), the case which affirmed the trial court's change of the permanency plan to adoption.

In this opinion, the Court, on de novo review, walks through the elements required for termination of parental rights and the evidence supporting each. The primary focus of this opinion is on active efforts. ICWA requires DHS must prove, beyond a reasonable doubt, that "active efforts have been made

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to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 USC § 1912(d).

Father argues DHS failed to make active efforts because some services intended to addresses the father's conditions and conduct ended years before trial. According to father, if the TPR decision requires present unfitness, then the efforts to ameliorate the conduct which renders the parent unfit must also be present. The Court disagreed, finding that the active efforts requirement depends on the particular circumstances of the case including the nature of the parent's problems and whether the parent has rejected services. Although terminating services could be indicative of failure to make reasonable efforts, timing is not the only relevant consideration.

In this case, DHS provided services to parents years before L was born and, shortly after L's birth provided extensive mental health and parenting services. DHS made active efforts with regard to mental health services: DHS referred father to three counselors, all of whom father engaged with for some period of time before terminating his involvement in the services. His last counseling session was two months before TPR trial. DHS made active efforts regarding parenting services with respect to parents' problems: parents engaged with two different parent trainers, both of whom reported an inability of parents to make progress, and consistent visitation coaching for two years. The DHS worker supervised visits herself until the time of the TPR trial and provided significant guidance to the parents. Parents also argue additional services could have been provided—such as housing assistance, house-cleaning assistance, and job placement assistance. However, the Court agreed with DHS, that because parents had a history of failing to follow-through and made so little progress in addressing the jurisdictional bases, it did not make sense to provide services focused on the home to which L would return. Thus, in view of the nature of parents' problems, DHS made active efforts.

The Court concluded, as required by ICWA, that the active efforts "have proved unsuccessful" and that parents' continued custody of L "is likely to result in serious emotional or physical damage."

25 USC § 1912(d). The Court also concluded DHS met its burden of proof under the state law standard for termination, "that the parent or parents are unfit by reason of conduct or condition seriously detrimental to the child," ORS 419B.504, that "integration of the child or ward into the home of the parent or parents is improbable within a reasonable time due to conduct or conditions not likely to change," and that termination of parental rights is in the best interests of the child. ORS 419B.500.

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Dept. of Human Services v. S. J. M., 283 Or App 367 (2017)

On January 11, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. S. J. M.*, 283 Or App 367 (2017), in which the Court reversed and remanded the juvenile court judgment changing the permanency plan to adoption for A.

The issue was whether, before the court may change the plan from reunification adoption under ORS 419B.476, a juvenile court must first determine, under ORS 419B.498(2)(b), that there are no compelling reasons not to file a termination petition. The Court of Appeals concluded the juvenile court must first make a compelling reasons determination before changing the plan to adoption.

On appeal, mother argued two compelling reasons for the court to forego the change in plan: her participation in services would make it possible for A to return home within a reasonable time and the bond she shared with A.

In this case, the juvenile court made two determinations relevant to the Court of Appeals' holding. First, the order stated "The Court finds that the child cannot be safely returned to Mother's care in a reasonable time." Second, the court checked the boxes on the judgment form which indicate "None of the circumstances in ORS 419B.498(2) applies because * ** there is not a 'compelling reason' within the meaning of that term in ORS 419B.498(2)(b) for determining that filing a petition to terminate the parent's/parents' parental rights would not be in the child's best interests[.]" Although the juvenile court made these findings, there is insufficient evidence in the record to support them. Nothing suggests A's stay in care would be unacceptably long given her age, the time she spent in care, or her unique need for permanency. And there is no evidence of how long mother would have to remain in services before she could safely parent A or how a delay would impact A's best interests.

"Because the record does not support the determination that mother's successful participation in services would not make it possible for A to return home within a reasonable time—given A's particular needs and circumstances and any barriers that mother might face—the court's determination under ORS 419B.498(2)(b) was erroneous. As a result, the court's corresponding decision to change A's permanency plan was likewise in error."

Dept. of Human Services v. S. P. R., 283 Or App 419 (2017)

On January 11, 2017, the Court of Appeals issued an opinion *Dept. of Human Services v. S. P. R.*, 283 Or App 419 (2017), in which the Court affirmed the juvenile court's jurisdiction judgment with respect to two allegations (mental health problems which interfere with mother's ability to safely parent and refusing to cooperate with a CPS assessment) and reversed the third allegation (domestic violence in mother's home creates a harmful environment for the child).

Mother argued insufficient evidence to support any of the asserted jurisdictional bases. The Court concluded that two of the allegations properly served as jurisdictional bases. As to the domestic violence allegation, evidence in the record indicated that although mother and father had engaged in domestic violence, their relationship terminated 10 months before the jurisdictional hearing. Furthermore, there was no evidence that mother

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continued to engage in domestically violent relationships or in other patterns common to domestic violence situations. Because there is no evidence of a current threat of serious loss or injury reasonably likely to be realized, the juvenile court erred in taking jurisdiction based on the DV allegation.

Dept. of Human Services v S.J. M. , 283 Or App 592 (2017)

On February 1, 2017, the Court of Appeals issued an opinion *Dept. of Human Services v. S. J. M.,* 283 Or App 592 (2017), in which the Court reversed and remanded the juvenile court's permanency hearing judgment changing the plan to adoption for L. This case is a companion case to *Dept. of Human Services v. S. J. M.,* 283 Or App 367 (2017) (hereafter S. J. M. I); L is the half-sister of A.

The facts of this case are described in S. J. M. I, a short summary follows. At the time of the permanency hearing, mother had engaged in court-ordered services and had shown some improvement in parenting skills but still exhibited signs she was not ready to safely parent her children and continued to prioritize her relationship with the man who physically abused L over the best interests of her children. L was doing well in foster care but had special needs.

Dept. of Human Services v. S. E. K. H./J. K. H., 283 Or App 703 (2017)

On February 15, 2017, the Court of Appeals issued an opinion *Dept. of Human Services v. S. E. K. H./J. K. H.,* 283 Or App 703 (2017), in which the Court affirmed the juvenile court's judgment of jurisdiction and disposition. In this case, the primary issue is whether the court erred when it concluded that it did not have the authority to order DHS to place the two children, who were wards of the court in the legal custody of DHS, with great-grandmother who had intervened in the case.

On appeal, father, mother and the children argued that the intervenor statute, ORS 419B.116(11)(a), provides authority for the court to order DHS to place a ward with a person who has been granted intervenor status. DHS argued that although the court had the authority to review DHS placement decisions under ORS 419B.349, the court did not have the authority to make placement decisions for DHS. Applying the principles of statutory construction, the Court of Appeals agreed with DHS.

Dept. of Human Services v. A. B., 283 Or App 907 (2017)

On February 23, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. A. B.,* 283 Or App 907 (2017), in which the Court dismissed mother's appeal of the juvenile court's jurisdictional judgment as moot. While the appeal was pending, the juvenile court dismissed jurisdiction and terminated wardship as to mother's son, J. Mother argued the appeal was not moot because she continues to suffer collateral consequences from the existence of the jurisdictional judgment even after dismissal of the case. The Court of Appeals

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disagreed and stated "we are not persuaded that the circumstances establish the kind of collateral consequences that prevent this appeal from being moot."

Dept. of Human Services v. M. L. B., 283 Or App 907 (2017)

On February 23, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. M. L. B.*, 283 Or App 907 (2017), in which the Court granted reconsideration to correct a mistake in its opinion *Dept. of Human Services v. M. L. B.*, 282 Or App 203 (2016). In *M. L. B.* the Court held that mother's TPR trial counsel was not inadequate for failing to mount a defense because mother did not attend the trial.

In her petition for reconsideration, Mother points out that the Court erred because it cited the summons statute for jurisdictional proceedings (ORS 419B.815(8)) rather than TPR proceedings (ORS 419B.819(8)). The Court agreed, corrected the opinion, and adhered to its original holding, that mother's attorney was barred by statute from taking action on mother's behalf at the TPR trial when mother herself failed to appear.

Dept. of Human Services v. A. F., 284 Or App 162 (2017)

On March 1, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. A. F.*, 284 Or App 162 (2017), in which the Court affirmed the juvenile court's denial of parents' motion to dismiss jurisdiction as to their child C, age 2.5. The issue was whether, at the time of the hearing, DHS met its burden of proof by preponderance of the evidence that:

1. The facts upon which jurisdiction was based continue,
2. Those facts continue to expose the child to a risk of serious loss or injury, and
3. The risk will likely be realized if the court were to dismiss jurisdiction

In this case, parents presented with cognitive limitations which continued at the time of the hearing. Service providers testified to specific, non-speculative, examples where parents had failed to recognize circumstances which exposed C to serious loss or injury and then resisted advice on how to eliminate the risk. Service providers also identified common and specific situations which are likely to occur which expose C to risk. There was also some evidence that the parents were not likely to seek parenting assistance from external supports unless required to do so by DHS.

The Court explains that this is a "record-dependent decision" and should not be construed to suggest parents with cognitive impairments are unable to parent. The Court distinguishes this case from *Dept. of Human Services v. S. P.*, 249 Or App 76 (2012), where the Court reversed the jurisdictional judgment based on allegations that mother's developmental delays impeded her ability to safely parent.

Dept. of Human Services v. M. A. H., 284 Or App 215 (2017)

On March 8, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. M. A. H.*, 284 Or App 215 (2017), in which the Court affirmed the juvenile court's order changing the permanency plan for mother's three children from reunification to adoption.

The procedural history in this case is complex: initial dependency petitions were filed in 2014 and the court took jurisdiction in January 2015 based on mother's criminal activities, lack of parenting skills,

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substance abuse and leaving children with unsafe care providers. In June 2015, DHS filed new petitions alleging mental health, and jurisdiction was established as to those petitions in August 2015. A permanency hearing was held in fall 2015 where the plan was changed to adoption. However, the two sets of cases were never consolidated, separate permanency plans were maintained, and the Court of Appeals vacated the permanency judgment due to error resulting from two different permanency plans for the same child (see *Dept. of Human Services v. M.J.H.*, 278 Or App 607 (2016)). While the appeal was pending, in March 2016, a TPR trial occurred, parents' rights were terminated, and DHS stopped providing services to mother. In July 2016, the court consolidated the 2014 and 2015 dependency cases and a permanency hearing was held that was the subject of this appeal.

At the permanency hearing, the court changed the plan to adoption. On appeal, mother argues DHS failed to make reasonable efforts to ameliorate one of the jurisdictional bases – mental health issues and, that this failure rendered DHS reunification efforts unreasonable as a matter of law.

DHS acknowledged that no reunification efforts had been made since the March 2016 TPR trial (approximately 3 months), but that over the life of the case, 20 months the children were in care, the efforts were reasonable.

At the permanency hearing, the caseworker testified that she referred mother for a psychological evaluation, made multiple mental health assessment referrals, and maintained ongoing contact with mother's mental health provider. During the period in which DHS failed to provide services, mother was independently engaged in mental health counseling.

The Court, applying the standard for reasonable efforts, has the mother been given a ""'a fair opportunity to demonstrate the ability to adjust her behavior and act as a 'minimally adequate' parent," found the record was legally sufficient to support the juvenile court's determination that DHS made reasonable efforts.

Dept. of Human Services v. C. M., 284 Or App 521 (2017)

On March 22, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. C. M.*, 284 Or App 521 (2017), in which the Court affirmed the juvenile court's order establishing jurisdiction over 4-year old D. On appeal, Father challenged the sufficiency of the evidence establishing jurisdiction and argued the court erred in admitted

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hearsay testimony from the DHS caseworker. The jurisdictional bases were: 1. Mother placed D under a threat of harm through domestic violence exposure, 2. Mother failed to engage in services to help ensure D's safety and continued to allow contact between father and D and 3. Father exposed D to DV, placing D at a threat of harm.

The relevant facts are as follows: In January 2016, father came home, tackled and attempted to choke mother in front of D (who was asleep on the recliner), mother's daughter K (age 14), and K's 19-year old friend. K attempted to call the police, but father interfered and hit K in the face. That same evening DHS and police arrived at the home and interviewed mother on the porch because mother refused to allow DHS or the police to enter the home. Mother reluctantly agreed to leave the home with D, allow no contact between D and father, and meet at shelter the following day. Mother did not keep D away from father and she avoided contact with DHS. After receiving community reports that the children were at the home with father, DHS obtained a protective custody warrant and, upon arriving at the home, found D at home with father and mother. D was removed and placed in stranger foster care.

At the jurisdictional hearing 6.5 weeks after the initial altercation, the court heard testimony from a number of witnesses including K's friend who witnessed the incident, grandmother, a neighbor, and the DHS worker who provided hearsay testimony regarding D's and K's statements.

Father first argued that, because D was asleep at the time of the altercation, he was not exposed to DV. The Court disagreed, concluded that a child doesn't have to be awake to be "exposed" and that there was no dispute D was in a physically threatening environment. The Court relied on the caseworker's testimony that "the threat of harm to children is significant whenever they are present for domestic violence." Next, Father argued that the single DV incident did not establish a current threat of harm. The Court disagreed, finding the single incident sufficient to support the juvenile court's determination that the DV endangered D's welfare both immediately and in general. In addition, Mother's behavior over the 6.5 weeks between the incident and trial where she avoided DHS, violated the safety plan, and returned to the home with D established a current threat of harm to D.

Last, Father argued that the court erred by not excluding hearsay testimony from the DHS worker regarding a statement D made to the caseworker about his parents fighting a lot and the police coming to the home. The Court concluded that, even if the juvenile court erred in admitting the statement, the error was harmless because the testimony was cumulative and similar to other evidence presented at the hearing.

BOOK REVIEW

Pushout: The Criminalization of Black Girls in Schools (2016)

By Monique W. Morri

Report by Addie Smith, YRJ Attorney

> *"A powerful indictment of the cultural beliefs, policies, and practices that criminalize and dehumanize Black girls in America, coupled with thoughtful analysis and critique of the justice work that must be done at the intersection of race and gender."*
> ~ Michelle Alexander "

"Black girls' educational lives are dynamic and complex, and too often follow a school-to-confinement pathway. They are affected by school-based decisions and practices that reinforce negative stereotypes about Black femininity and facilitate pushout, and their vulnerabilities increase once their connection with school has been harmed or severed. But pathways to criminalization are clear, often eminently clearer than any other pathway." (*Pushout,* page 177)

Although Black girls are just 16 percent of female students, they make up more than one-third of all girls in school-related arrests. Monique Morris' book was crafted after four years of conversations with students in schools and detentions centers nationwide. Through these narratives, she weaves together the insights of young Black women with stunning statistics and critical analysis to explain how the American education and juvenile justice systems, which are intended to elevate black girls, uniquely fail them.

Using the lens of a race-conscious gender analysis—"the process of acknowledging that Black women never stop being Black people, nor do they stop being women"—the author hopes that the book will, "inspires us all to think about the multiple ways in which racial, gender, and socio-economic inquiry converge to marginalize Black girls in their learning environments." (*Pushout*, pages 13 & 180)

The book, therefore, starts with the premise that the "school to prison pipeline" framework has been predominately crafted based on the experiences of young men of color, arguing that young women of color, and specifically young Black women, are differently affected by school surveillance and disciplinary policies. Through numerous examples from dress codes to attendance to teacher interactions to zero-tolerance policies the author describes how the perception and understanding of Black girls affects their treatment in educational settings. This, in turn, she argues leads to different pathways to confinement, contact with the juvenile system, and pushout—a term used to illuminate the reality about "dropping out" for many Black girls.

Understanding these unique experiences and pathways is key to crafting solutions tailored to the actual challenges Black girls face in educational settings. The book closes with a discussion of tangible solutions, including creating and implementing healing-informed responses to problematic student behavior that move away from punishment to supportive transformation.

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The book asks each of us as parents, attorneys and concerned community members to examine the ways that our educational system institutionalizes harm against young Black women by favoring punishment and order over learning and rehabilitation, and to be a part of the larger solution.

If this is a topic of interest and you desire to learn more, the author also recommends these resources:

The African American Policy Forum, Black Girls Matter: Pushed Out, Overpoliced, and Underprotected (2015)

NAACP Legal Defense and Education Fund and National Women's Law Center, Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity (2014).

The African American Policy Forum and Monique W. Morris, Race Gender, and the "School to Prison Pipeline": Expanding our Discussion to Include Black Girls (2012).

CASE SUMMARY

By Maggie Carlson, YRJ Law Clerk

Endrew F. v. Douglas County School District Re-1, 580 U.S. ____ (2017).

In *Endrew v. Douglas County School District Re-1*, the Supreme Court of the United States answered a question held open for the last 35 years; how adequate must the educational benefits provided to a student be to fulfill the district's obligations under the IDEA? Under the IDEA, school districts are required to provide every eligible child with a "free and appropriate public education" (FAPE) through an individual education program (IEP). 20 U.S.C. §§ 1401(9)(D), 1412(a)(1). In *Rowley*, the Court held that the district has fulfilled this obligation if the IEP provided is "reasonably calculated to provide educational benefit to the child." *Board of Ed. of Hendrick Hudson Central School Dist., Weschester Cty v. Rowley, 458 U.S. 176, 207 (1982).* The Court, in *Rowley,* declined to set a standard as to how adequate this educational benefit must be. Id. at 202. The Court did offer guidance, stating that if an IEP was reasonably calculated to allow a child who is fully integrated into a mainstream classroom to progress from grade to grade, the district's obligations would be fulfilled. Id. at 207. However, the Court declined to offer guidance as to when a district has fulfilled its obligation to a child who is not fully integrated. In *Endrew*, the Court answers this question. The Court held that to meet its obligations under the IDEA, a school district must provide an educational program that is appropriately ambitious in light of the child's circumstances.

The student in *Endrew* was diagnosed with autism at age two. As a child with autism, he qualified as a student with a disability under the IDEA. His parents enrolled him in the local school in Douglas County School District. While enrolled in the district, he progressed from grade to grade. Each year, the school district would propose and implement an IEP for that school year. However, by the time the student reached fourth grade, the student's parents were no longer satisfied with the IEPs presented by the district. The parents felt that the IEPs presented by the district remained largely unchanged from year to year, and that their child was making no meaningful progress.

In fifth grade, the parents decided to remove their child from the public school, and enroll him in a private school that specializes in educating autistic students. At the private school, the student progressed both behaviorally and academically. Six months after enrolling their child in

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the private school, the parents met with the district and were presented a new IEP. The parents felt this new IEP was not substantially different from the IEPs presented by the district previously. The parents were specifically concerned that the new IEP did not incorporate any different approaches to their son's behavior, despite the progress when using the techniques implemented by the private school.

The parents filed a complaint, seeking reimbursement for the private school tuition. In the complaint, the parents alleged the IEPs offered by the district were not reasonably calculated to provide enough educational benefit to their son to constitute a FAPE.

An Administrative Law Judge disagreed with the parents, finding the IEPs were reasonably calculated to provide the student enough educational benefit. On appeal, the Tenth Circuit held that so long as the IEP was calculated to provide an educational benefit that was "more than de minimis," it satisfied the district's obligations under the IDEA. The Supreme Court granted certiorari. Id. at 8.

On appeal to the Supreme Court, the district argued it had fulfilled its obligations because the IEP presented was reasonably calculated to provide some educational benefit. The district argued it should only be found to have failed its obligations if the IEP presented would provide no educational benefit to the student.

The parents argued that a district should only be found to have fulfilled its obligations if the district offers a plan that is reasonably calculated to provide the child the opportunity to "achieve academic success, attain self-sufficiency, and contribute to society" in a manner that is "substantially equal to the [opportunity] afforded to children without disabilities." Id. at 15.

The Supreme Court chose a middle ground. The Court held that a district has fulfilled its obligation when the IEP is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. at 11. In other words, a district's obligation is fulfilled when a student is placed in a mainstream classroom and advancing from grade to grade. If the child is unable to be mainstreamed, an IEP must be "appropriately ambitious in light of the circumstances." Id. The fact that a child is unable to be in a mainstream classroom does not mean the district's obligations are satisfied "with barely more than *de minimis* progress." Id. at 14.

SAVE THE DATE

ABA 5th National Parent Attorney Conference
Valuing Dignity & Respect for All Families
April 25-26, 2017
Tyson's Corner, Virginia

ABA 17th National Conference on Children and the Law
April 27-28, 2017
Tyson's Corner Virginia

http://www.americanbar.org/groups/child_law/2017-conferences.html

Youth, Rights & Justice

Promoting and Fulfilling the Promise of In re Gault since 1975

An Invitation from the Executive Director

I'd like to invite you to join us in marking the 50th anniversary of the landmark U.S. Supreme Court Decision, *In re Gault,* with a lucheon and continuing education workshop on Monday, May 15, 2017 at the Hilton Portland. Our speaker, Dr. Emily Murphy, PhD, JD, is one of the brightest minds in neuroscience and the law today. We've applied for both CLE and CEU credits for Dr. Murphy's workshop.

Developmental neuroscience has repeatedly reinforced the wisdom of having a juvenile court system for young people. Our growing knowledge about brain development should force us to reconsider policies, enacted over the last three decades, that punish kids as adults and which have led us astray from the path created over a century ago and reinforced by *Gault* in 1967.

I look forward to welcoming you to The Justice Luncheon on May 15. Thank you for all you do to support Oregon's children.

Mark McKechnie

The Justice Luncheon

In Commemoration of the 50th Anniversary of *In re Gault* *

"A Look at Neuroscience, the Juvenile Brain, and the Law"

With Dr. Emily Murphy, PhD, JD

Monday, May 15, 2017

Hilton Portland

Lunch $75

Noon - 1:30pm

Continuing Education Workshop $49

2 CLE/CEU Credits Applied For

2:00 - 4:00pm

Lunch and Workshop $99

Tickets at youthrightsjustice.org

Sponsorships & Scholarships Available

More Info: Janeen A. Olsen, 503.232.2540 x231, Janeen.O@youthrightsjustice.org

Dr. Emily Murphy, PhD, JD, is a neuroscientist and law professor. She currently teaches Law and Neuroscience at UCLA School of Law and will join the faculty of UC Hastings College of the Law in the fall of 2017. Dr. Murphy earned her A.B. magna cum laude in Psychology from Harvard University, her Ph.D. in Behavioral Neuroscience and Psychopharmacology from University of Cambridge, Trinity College, and her J.D. from Stanford Law School.