KidsCounsel®

a newsletter for attorneys representing children in Connecticut

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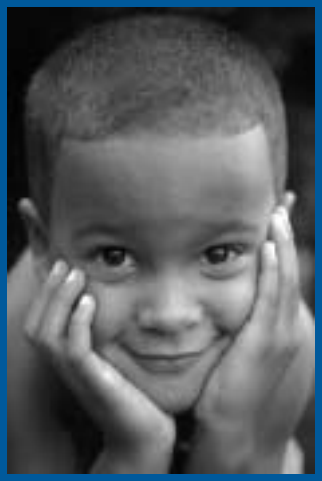

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The "Spanking" Case: Issues and Opinions

Lovan C: Should Corporal Punishment be Punished? Who Should be Listed on the Child Abuse Registry?

In *Lovan C.*, 86 Conn. App. 290 (2004), the Appellate Court broke new ground by determining that when a child suffers a non-accidental injury as a result of physical discipline, administrative hearing officers in substantiation hearings of abuse and neglect must determine whether parental corporal punishment was reasonable and whether the parent "believed the punishment was necessary to maintain discipline or to promote the child's welfare." The case raises many important questions:

• Where is the line between acceptable physical discipline and physical abuse?

• When does physical discipline warrant state intrusion, removal of a child, or placement of parents' names on the registry?

• Must mandated reporters consider reasonableness of the use of force before making a report of abuse resulting in physical injury?

These questions and more were addressed at CCA's bi-monthly training seminar at University of Connecticut School of Law on February 1, 2005. Expertise and spirited discussion of the issues were offered by Paul Chill, Assistant Dean of Academic Affairs and Professor of Law; Susan Pearlman, Assistant Attorney General, Department Head, Child Protection; and Dr. Frederick Berrien, Saint Francis Hospital & Medical Center, Connecticut Children's Medical Center, and Director of the Aetna Foundation Children's Center. Their comments follow:

Should Corporal Punishment be Part of Our Society?

Frederick Berrien, M.D.

According to Webster's Dictionary, spanking is defined as "a series of smacks, esp. on the buttocks, in punishment." The case behind the headline, *Lovan C.*, is that of a 5 year old girl whose mother hit her with a belt 3 times, leaving a one inch bruise. The mother was reported to Department of Children and Families (DCF) by the child's father, the case was substantiated by DCF and upheld in a substantiation hearing. As a result, the mother's name was placed on the DCF confidential abuse/neglect registry. Connecticut's Child Protection Statute (General Statutes 46b-120) defines an abused child as

(continued on page 2)

Should Corporal Punishment that Results in a Bruise be an Automatic Basis for Intrusive State Intervention?

Paul Chill, Esq.

(remarks edited for publication)
I have four young children of my own and NEVER use corporal punishment on them despite an occasional, almost irresistible, temptation to do so. Yet I restrain myself. I do so because I personally believe it's morally wrong to hit a child, or any other human being, in the name of "discipline". It sends the wrong message to the child: although it may "work" in the short run, in the long run trying to inculcate discipline through fear is counter-productive.

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Hearing Officers Must Assess Whether Abuse was Reasonable Corporal Punishment

Susan Pearlman, Esq.

In December, the Appellate Court reversed a ruling by Judge Driscoll upholding a decision by a DCF hearing officer to substantiate abuse on a mother who had injured her child when she hit her with a belt. The mother had no attorney during the administrative proceeding; she argued that she was only trying to discipline her daughter.

Despite undisputed evidence that the injuries were intentional, not accidental, the hearing officer was uncomfortable finding abuse and concluded that there was

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Lovan C: Spanking and Corporal Punishment vs. Abuse

Frederick Berrien, M.D. *(continued from page 1)*

one who "has been inflicted with physical injury . . . other than by accidental means" and DCF policy identifies bruises as a form of physical injury.

Placement of the mother's name on the abuse registry allows employers to access this information, with the result that employment may be denied. Once a name is entered on the registry it remains on the abuse/neglect registry indefinitely.

The mother took her case to Superior Court, which dismissed her appeal of the DCF substantiation hearing. The case was then taken to the Appeals Court which ruled: "The hearing officer's failure to hold a hearing regarding the reasonableness of the corporal punishment at issue undermines the integrity of the judgment" and ordered DCF to "reverse the substantiation of the allegation of physical abuse for lack of substantial evidence."

Connecticut criminal statutes (General Statutes 53a-18) say "the use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances: (1) A parent or guardian . . . may use reasonable physical force upon such a minor . . . when and to the extent that he reasonably believes such to be necessary to maintain discipline or to promote the welfare of such minor . . ."

Spanking and corporal punishment are pervasive in our society with estimates of 90-95 % of parents using these methods of punishment[1]. But how should we distinguish corporal punishment from abuse? Public opinion varies widely on the issue, and it appears that corporal punishment is more acceptable among some geographic and cultural groups. One study of 500 subjects found that 24% regard spanking with a hand as abusive; 74% regard spanking with an object as abusive; 95% regard spanking with an object and leaving a bruise as abusive[2].

In another study teachers, lawyers, mental health professionals, physicians and parents were asked to rank the variables which would distinguish abuse from appropriate corporal punishment. There was consensus that acts which have potential or actual physical or psychological harm, are performed with high frequency, and appear "serious" were features that would distinguish abuse. However, there was little consensus that intent, legal definition, or cultural acceptability should be considered in determining abuse [3].

However, it is most important to understand the effects of spanking/corporal punishment on children. Two recent meta-analyses show small negative effects of corporal punishment[4] [5]. An example of such studies includes research on 4888 Canadian adult subjects which found that those who were spanked during childhood had higher rates of anxiety, alcohol abuse and other externalizing problems in comparison with those never spanked or slapped [6].

A criticism leveled at many of the studies relates to the notion that children with primary behavioral problems are more likely to experience corporal punishment; in follow-up studies, these children are likely to have behavioral problems later in life regardless of the corporal punishment. A longitudinal study, undertaken to look at this issue, controlled for the level of behavioral problems prior to the period of reported corporal punishment. The results of the study showed that the more use of spanking, the higher the level of behavior problems 2 years later [7].

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The literature clearly acknowledges that corporal punishment will arrest a specific behavior in the short term, however, it is not demonstrated that there a positive change in behavior in the long term.

In my professional experience, corporal punishment communicates to a child that violence is okay. I also find that corporal punishment emanates more from parental anger than from a thoughtful disciplinary strategy. Furthermore, I have seen corporal punishment inadvertently cause serious unintended injury or escalate into obvious abuse. In my experience, this is particularly common among school age children and adolescents.

Alternative disciplinary measures have positive outcomes without the risks. The American Academy of Pediatrics (AAP), in the context of "effective discipline" states, "Corporal punishment is of limited effectiveness and has potentially deleterious side effects. The AAP recommends that parents be encouraged and assisted in the development of methods other than spanking for managing undesired behaviors."

In my opinion, the mother in this case, *Lovan C.*, was abusive. She is not a criminal and did not belong on the "life-long" registry, but she does need some guidance in disciplining her children.

Children (and adults) should not be hit. The state should identify corporal punishment as unacceptable behavior, and provide behavior management training for parents who use it; this should not be interpreted as criminalizing corporal punishment.

There are challenges for such a policy change. Some of these challenges include community acceptance, the appearance of cultural or ethnic biases, and the burden on existing resources to address parents' needs. Open discussion, mutual understanding and willingness to consider differences of opinion will help to address these challenges. In the meantime, we can respond by increasing our capacity to respond to the needs of parents for training and exposure to safe and effective disciplinary measures. ■

[1] Straus, MA, Stewart, JH Corporal punishment by American parents. Clinical Child and Family Psychology Review (1999) 2: 55-70

[2] Besnley L, et al General population norms about child abuse and neglect and associations with childhood experiences.
Child Abuse and Neglect (2004) 28: 1321-1337.

[3] Portwood, SG Coming to terms with a consensual definition of child maltreatment. Child Maltreatment (1999) 4: 56-68.

[4] Gershoff, ET Psychological Bulletin 128:4

[5] Paolucci EO, Violato C. Journal of Psychology
(2004) 138: 197-221.

[6] McMillan HL et al. Slapping and spanking n childhood and its association with lifetime prevalence of psychiatric disorders in a general population sample. Canadian Medical Association Journal (1999), 161: 805 -809.

[7] Straus MA, et al. Spanking by parents and subsequent antisocial behavior of children. Archives of Pediatric and Adolescent Medicine (1997) 151: 761-767.

Paul Chill, Esq. *(continued from page 1)*

But even if I thought corporal punishment did work, I'd still think it wrong. It's just not right to hit people who are smaller and weaker than you are. In the name of their own good. Because you know you can get away with it. Ultimately, I think, it's cowardly. And so I staunchly oppose it.

But the question is not whether corporal punishment is a bad thing. Rather, the question is whether it is good public policy to make any minor skin bruise on a child, inflicted by a parent in the name of discipline, an automatic basis for intrusive state intervention in the family by the child protection machinery. And my answer to that question is a resounding "no." And the *Lovan C.* court's answer was a resounding "no." And so that's why, in the first instance, I think the decision is a good one.*(note: I do not find the decision particularly well-reasoned. Indeed, upon several reads, the reasoning seems murkier and murkier. However, I do believe the result could be better justified given the language of the statutory definition of abuse. That language seems to me facially overbroad and at the root of the statutory interpretation problem in this case.)*

People tend to think of risk one-sidedly in the world of child welfare. The focus is almost exclusively on the danger posed by the biological parent to the child. Yet for a child whose parent is substantiated as a perpetrator of abuse by DCF, there are serious new dangers that arise out of that status – call them "systemic" risks – to which public policy ought not be blind.

The first, and most obvious such danger, is the risk that the child and his or her family will be adversely affected by the parent's permanent placement on the child abuse and neglect registry. Placement on the registry functionally disqualifies a parent from a wide range of possible jobs, from school teacher to police officer to home health aide. This state-imposed market disability may well be the straw that breaks the camel's back for the already economically marginal families most likely to become entangled in the child welfare system. Poverty, it is widely accepted, is directly correlated with an enormous increase in a range of risks to children, from malnourishment to parental substance abuse, domestic violence, etc. It seems to me indisputable that we increase these risks significantly by substantiating people as perpetrators of abuse for relatively minor acts of disciplinary violence.

We also create a risk that DCF will remove the child, thereby exposing the child to a range of palpable new and dramatic dangers. We virtually ensure that the child will experience significant and potentially long-lasting emotional trauma from the removal itself, and the subsequent separation from parents, siblings, friends, and all else familiar. Look at it through the child's eyes. Which would be a worse nightmare for most children – being hit by a parent with a belt for misbehaving, or being taken away, in the middle of the day or night, by complete strangers, with your parents standing helplessly by, grief-stricken, unable to protect you? Does anyone think that description is an exaggeration?

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Removal also exposes children to the vagaries of foster care, in which, for example, abuse and neglect occur at nearly double the rate of that in the general population, and fatal maltreatment occurs at nearly 5 times that rate. Placing a child in foster care for any significant length of time also carries with it the likelihood that the child will be moved, perhaps more than once, thereby re-creating and reinforcing the traumatic effects of the child's original removal from his or her parents. These factors, combined with the stressful effects of child removal and separation on *parents*, may intolerably strain parent-child, sibling and other relationships in families already living on the margin due to financial strains, substance abuse issues and/or mental health issues.

Last but not least, removal sets into motion what the CT Supreme Court has labeled the "snowball effect" – the tendency of temporary custody orders to become self-reinforcing and self-perpetuating in subsequent litigation, leading to needlessly lengthy separations. Since the enactment in 1997 of the federal law known as ASFA, this creates a real possibility that the most severe judicial remedy known outside the criminal law will ultimately be applied in the name of achieving "permanency" for the removed child – termination of parental rights.

Artwork by Josue B., age 12

Lest you doubt these risks are real, let me describe for you one actual case scenario which occurred a little over four years ago. The UConn Legal Clinic represented a single mother of four children ranging in age from 4-16. The children appeared happy and healthy. The mother was a poor, yet stably-employed, religiously-devout, African-American woman.No issues of abuse or neglect existed or were suspected, other than the one described below. (There had been one unsubstantiated report of medical neglect ten years earlier, concerning an unexplained vaginal discharge on the part of the eldest daughter.)

One day, one of my client's 4-year-old twins came to preschool with a bruise on back of his leg.The bruise wasn't much unlike the one in *Lovan C*. Upon questioning by the school nurse, the child disclosed that the bruise had been inflicted by his mother with a belt, and that his mother occasionally used this method of disciplining him and his brother.The other twin corroborated this story.

The mother was called to school. She arrived with her father (the twins' grandfather).Confronted with the twins' disclosures by a white social worker who proceeded to lecture my client and the grandfather in a condescending manner about appropriate disciplinary techniques, they became angry. "God said spare the rod and spoil the child," shouted the grandfather. My client strenuously defended her right to control the upbringing of her children, saying words to the effect that no one was going tell her how to raise her children, that she was a church-going woman, etc. The more my client and the twins' grandfather resisted, the more concerned and entrenched the social worker became. In the heat of the encounter, my client expressly refused to assure the social worker that she would never use the belt again.

DCF invoked a 96-hour hold and seized both twins.In its application for an order of temporary custody, DCF cited the single, ten-year-old, unsubstantiated report of medical neglect as the mother's"*history of involvement with the Department dating back 10 years concerning issues of physical neglect.*" Shades of *Lindsay P.!* Faced with that supposed "history," a Superior Court judge signed an ex parte OTC.

The twins were brought to a local "safe home." There they were supervised by poorly paid, poorly trained line staff who work 8-hour shifts. They were surrounded by strange children, many with significant emotional and behavioral problems. These twin boys, who had never slept anywhere but in their loving mother's home, now got to see her once a week in a sterile DCF office for an hour. They grew depressed and began demonstrating acting out behaviors. (All of which were suspected by DCF of resulting from undisclosed maltreatment at home, rather than from the trauma of removal and separation.) The mother, who had been under tremendous strain already, working full-time at a low-paying job trying to make ends meet for her family, now began to approach the breaking point in terms of being able to hold it all together. The situation deteriorated rapidly as children and parent struggled to cope with their new realities.

What eventually happened? Fortunately, this case had a relatively quick and positive outcome. This family was lucky. But it wasn't easy. We were appointed to represent the mother and immediately requested a trial on the necessity for the removal, which was scheduled for about 3 1/2 weeks following the removal. On the morning of the trial, at the courthouse in Middletown, we finally made contact with the twins' pediatrician, who had been on vacation at the time of the removal and hadn't responded to our phone calls upon her return.When appraised of the situation over the phone, this physician was completely aghast.

The doctor told us that she thought our client a wonderful but over-burdened mother. She said that the twins presented some challenging behavioral issues, and that she and our client had spoken frequently and frankly about coping techniques for preventing her frustration from reaching the point where she would take out the belt. In any event, the doctor went on to say, removing the children and placing them in a group setting struck her as the very worst possible response to the challenges facing this family.

I asked the doctor if she would say the same things to the assistant attorney general, and she agreed. The AAG came away

from his conversation with the doctor convinced it would be safe to return the twins to my client's care. Yet DCF wouldn't budge, refusing to voluntarily return the children home even if the mother pleaded no contest to neglect, which she was prepared to do in her desperation.

For more than two hours DCF wouldn't budge. The AAG went up the chain of command – I don't recall exactly how far he had to go – and finally got the Department to yield. We ultimately reached an agreement whereby the twins were returned home that day in exchange for my client not opposing the entry of a neglect adjudication, as well as agreeing to undergo various forms of individual and family counseling.

I shudder to think how differently things might have ended up, and indeed how they have ended up in other cases I have seen. What if the twins' doctor had not been as outspokenly supportive? What if a less-determined AAG had been there that day? And what if my client and her children had been less able to cope under the added stresses and strains the child protection system placed upon them in an effort to protect the children?

My point is not that we should make policy based on one bad case. But the story demonstrates, with all due respect for my friends at DCF ,the kind of agency we are dealing with. This is an agency that not only has an impossible mandate, but one that continues to operate remarkably problematically despite more than a decade of federal-court supervision, increases in spending that dwarf those of other government agencies, and near-Herculean efforts by well-meaning people inside and outside the agency to reform it.

And when the law deems even relatively minor instances of corporal punishment "child abuse," this is the agency whose machinery lurches into gear to protect the child victims. We may wish it were otherwise, we may work hard to make it otherwise, but we must not pretend that it is something that it is not. The policy question is not whether corporal punishment is a good or bad thing for children, but whether it is *always* bad enough to warrant exposing children and families to a wide range of new and dangerous risks, including entanglement with a chronically dysfunctional child protection agency and system. We ignore such risks at our peril, and at our children's peril, when making policy.

My own prescription for the problem of corporal punishment is to continue work toward eradicating it through education and positive incentives – rather than by bringing the blunt edge of the child protection system down on families and children for whom that impact may prove far more damaging than minor instances of corporal punishment could ever be. ■

Susan Pearlman, Esq. *(continued from page 1)*

no reason to believe that the mother would do this again or would create a risk to her children or to any other children. The hearing officer believed that under DCF policy, she had no latitude to decide the case based on equitable principles – DCF policy describes abuse as an intentional physical injury of a child. The other frustration expressed by the hearing officer concerned the consequences of her ruling: she recognized that a substantiation meant that the mother's name would remain on the child abuse registry and would prevent her from getting a teaching job, probably for life. On appeal, the mother's attorney, George Springer, challenged the agency's definition of abuse, but Judge Driscoll disagreed and upheld the ruling. The case then moved to the Appellate Court.

The Appellate Court was not actually presented with the issue of the legality of corporal punishment, but decided, after oral argument, to seek further briefs on this issue and specifically asked both parties to explain whether Conn. Gen. Stats. §53-18(1) and (2) applied to the circumstances of this case. The two provisions are criminal defense provisions establishing the right of a criminal defendant who is responsible for a minor to assert reasonable physical force as a defense to an action for assault, based on the defendant's "reasonable belief that such force was necessary to maintain discipline or to promote the welfare of the minor." Although we argued that the statute didn't apply as it concerned only criminal defendants, the Appellate Court found it applied as a matter of policy, that parents maintained a common law right to use reasonable corporal punishment on their child, and that the hearing officer was bound to consider a host of factors to assess the reasonableness of the parent's actions and not merely the fact that the action led to an injury. Clearly the court was equally, if not more concerned with the consequences of the ruling, as with the ruling itself. The permanent nature of the registry and the fact that the registry could prevent employment in a field involving children was of great concern to the court.

In view of the self-critical decision by the DCF hearing officer, the court didn't even bother to send the case back to the agency, but instead ruled that the minimal injury here, the absence of malice or ill motive, and the fact that the hearing officer found the mother was not a risk to children, required DCF to remove the mother's name from the registry.

The AG's office takes the position that the Appellate Court's ruling should have little impact on our juvenile court cases or even on the substantial decisions by DCF. The court found that because parents in Connecticut have the right to use corporal punishment, hearing officers, when determining whether to place someone's name on the registry, must assess whether the abuse was reasonable corporal punishment. A bruise alone will not prove that the punishment was abusive, but a host of factors must also be considered.

We also read the decision narrowly and believe the decision doesn't apply in juvenile court cases, primarily because the

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issue in our cases is not parental fault but the condition of the child. The fact that this argument is so rarely raised now in court points to the questionable value that attorneys feel a corporal punishment defense will have in a court case. Moreover, nothing in the ruling applies to other aspects of DCF neglect petitions – such as a claim that a child is living under conditions injurious to his/her well being, or being denied proper care. *Lovan C.*does not extend the criminal defense of reasonable corporal punishment outside the context of abuse. Having said that, if the court believes the parent has acted reasonably, then it's not likely the court will believe the child was neglected.

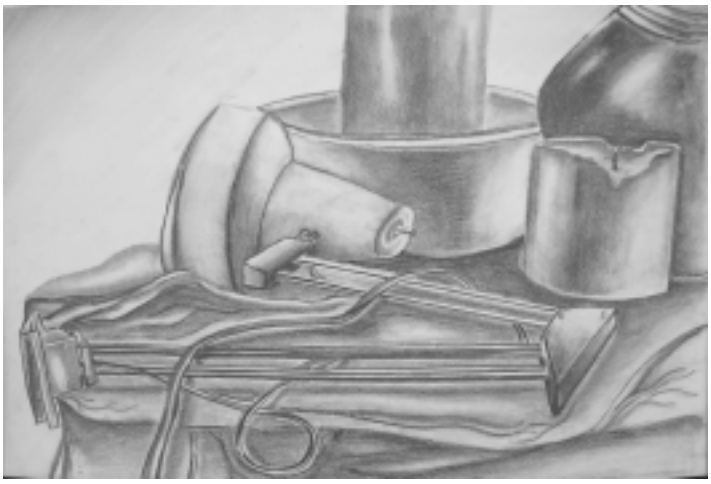
As a practical matter, we don't expect to see the defense of corporal punishment present serious problems in our court cases. First, many parents refuse to admit they were responsible for the injuries, or blame others who don't come under the *Lovan C.* protection. Second, our court cases typically involve more serious injuries than the injuries discussed in *Lovan C.*, or a pattern of injuries coupled with a child expressing fear of the parent. In *Lovan C.*, the main concern of the DCF investigator was ongoing domestic violence, not physical abuse, but only physical abuse was substantiated. The investigator didn't pay any attention to the bruise or how it happened so it was no wonder that the hearing officer concluded that the mother's name should be removed from the registry. Furthermore, *Lovan C .* wasn't the first time the parent's right to use corporal punishment was considered as a defense in juvenile court, but the other judges who have considered the issue have uniformly found that the parent's actions were abusive and not reasonable punishment. In our view, any parent who believes that they can legally hit their child with a belt will find little support for their belief by the juvenile courts.

Artwork by Bryant J., age 17

The agency administrative cases may be more affected by the ruling and in fact, DCF has now issued an internal policy requiring staff to assess and document whether the actions of a parent who inflicts an injury on a child in the process of disciplining the child were reasonable and necessary. In assessing the discipline, the investigators must consider the child's misbehavior and surrounding circumstances, including the parent's motive, the type of punishment administered, the force applied and the child's age, size, and ability to understand the punishment. Even if the investigator concludes that the child was abused, the parent will not be substantiated as an abuser unless the assessment indicates the discipline wasn't reasonable or necessary.

The practical import of this policy is that DCF may determine the child was abused, open a case, offer services to the family, and possibly even file a petition in court, even without substantiating the parent as abusive and listing them on the registry. An example: a parent has hit their child, an adolescent, on the face for talking back, leaving bruises on the youth seen the next day in school. The parent may have believed the youth required immediate discipline and the discipline might well have been within the bounds of legal corporal punishment. However, the family still needs services, the youth has clearly been injured, and the discipline is likely ineffective in dealing with a teenager. DCF would likely open a case and offer services to the family but the parent would not be listed on the registry. ■

Artwork by Elisa S., age 16



In re: Lindsey P. Prompts New DCF Policies on OTCs

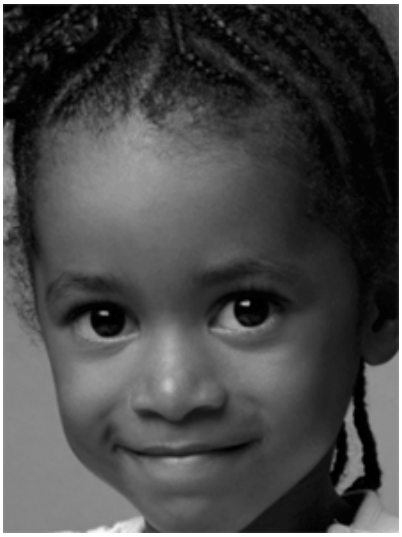
DCF Issues New Policies regarding Procedures for Orders of Temporary Custody

In response to *In re: Lindsey P.* 2004 WL 2095400 (Conn.Super.)(Lopez, J.), the Department of Children and Families (DCF) recently issued several new policies regarding procedures for orders of temporary custody (OTCs).

The case of *In re: Lindsey P.* began when DCF sought and obtained an ex parte order of temporary custody (OTC) based upon an affidavit that indicated that Lindsey, a four-year-old girl, had sustained a fractured clavicle as a result of physical abuse. Significantly, the affidavit stated that Dr. Frederick Berrien examined the child and "'concluded that Lindsey [P.] sustained a displaced fracture at the distal third of the right clavicle.The injury is consistent with Father throwing said child into a wall.'" Id. at 1. At the hearing on the OTC, however, Dr. Berrien testified that he never conducted an exam of the child and that the injuries appeared to be accidental. Id. This testimony was consistent with a written report provided by Dr. Berrien to DCF prior to the filing of the request for an OTC. Id. After vacating the OTC, the Court ordered DCF to show cause why it should not be held in contempt for the failure to provide accurate information in its affidavit.Id. at 2.

Following a show cause hearing, the court concluded that DCF "intended to manipulate the facts to obtain an order that it knew the facts could not justify" and "did not include information and evidence that was favorable to the respondent father when pursuing an OTC more than two months after its own reviewing physician stated his belief the that the injuries to Lindsey were 'accidental'Id. at 10-11. Rather than issuing a finding of contempt, however, the Court used its supervisory authority to order DCF to "include in its materials all information which is exculpatory and/or favorable to the parents or guardians."Id. at 11.

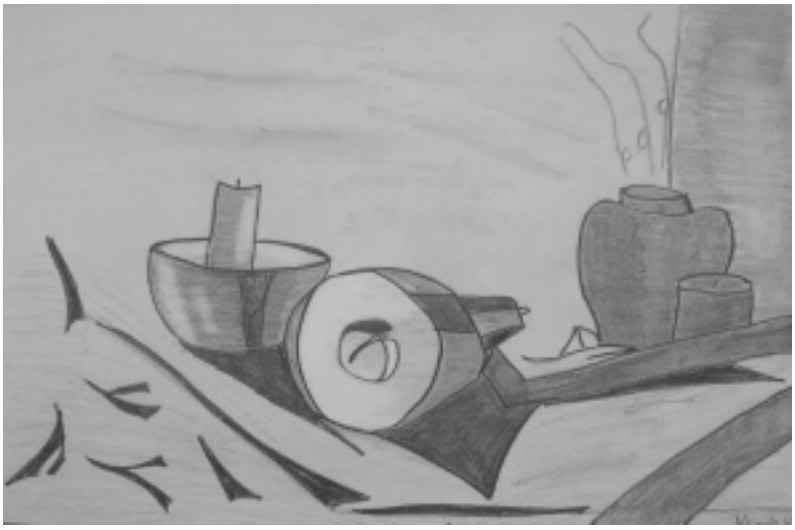
Subsequent to the decision, DCF amended its policies to reflect the Court's decision. DCF Policy 46-3-19.1 states that "[b]ecause an ex parte OTC is granted in an emergency situation, without giving the parents an opportunity to present their side of the issue, it is important that the affidavit fairly discloses all relevant facts, including those facts that support the parents' position. All relevant exculpatory evidence must be included, as well as relevant information favorable to the parent." In addition, DCF Policies 46-3-5 and 46-3-19 now state that DCF must bring all relevant DCF records to the first OTC hearing so that parents and counsel may review any pertinent documents to the case.



The new rules should ensure that the Juvenile Court receives complete information prior to issuing an ex parte OTC. Attorneys for parents and children should request to see all relevant documentation at initial OTC hearings, including reports prepared by service providers, investigation protocols, and running narratives. If that information is not available, attorneys should move to dismiss the request for an order of temporary custody or seek an order that the documents be immediately produced.

– Christina D. Ghio, Senior Staff Attorney, Child Abuse Project, Center for Children's Advocacy

Artwork by Marvin W., age 13



Martha Stone was recently named winner of the Judge John T. Downey Award, presented February 23, 2005 by Children In Placement – CT/CASA.

The award honors a member of the legal community who has demonstrated extraordinary committment to helping abused and neglected children find placement in permanent homes.

CCA - Sponsored Pending Legislation 2005

Reduction of Disproportionate Minority Contact (DMC) in the Juvenile Justice System
Raised Bill No. 6848

Minority youth account for 2 out of every 4 youth in Connecticut detention centers, even though they account for less than 25% of the general population. Connecticut has not addressed this staggering problem, even though 1988 Amendments to the Federal Juvenile Justice and Delinquency Prevention Act required states to determine the extent of and assess the reasons for DMC, and develop and implement intervention strategies and evaluate the effectiveness of those strategies. These provisions have actually reduced DMC in other cities throughout the United States.

Proposed Connecticut legislation includes a community mapping pilot program which would create and implement a system to track juvenile offenses and services for youth in one selected municipality. The legislation includes development of a neutral decision-making criteria by which the municipality, in conjunction with the Judicial Department, DCF, Public Defenders Office and other agencies, would be charged with the development and implementation of objective criteria for decisions made at each stage of juvenile justice.

This Bill would charge the Judicial Department and DCF with development of culturally-competent alternatives to incarceration that focus on familial involvement and the strengths of the child. A continuum of appropriate services would include community service, mentoring, respite homes, truancy prevention and reduction programs, and mediation.

The legislation would require development of a semi-annual report to identify race, ethnicity and gender of children involved in all stages of the juvenile justice system.

Quality of Legal Representation
Raised Bill No. 6871

In the abuse and neglect system, the future of children's lives is often decided in the court. This proposed legislation would ensure that every child in Connecticut's legal system has access to adequate legal representation, creating a Commission on Child Protection which would assume the responsibility of appointing legal counsel in abuse, neglect and dependency proceedings.

Legislation would establish standards necessary to improve the quality of representation of Connecticut's children, ensuring proper training for lawyers who represent children; establishing oversight of attorneys who represent children to assure that they make key decisions after consultation with their clients; and, focus on quality of representation rather than assignment of an unworkable number of cases to each attorney.

Establishment of Programs for Families with Service Needs (FWSN): Juvenile Offenders who are Truant or Beyond Control
Raised Bill No. 6980

Juvenile offenders who are truant or "beyond control" need programs that are different from those provided for the juvenile justice population. This legislation would provide screening procedures, assessment and services for FWSN youth, rather than incarceration.

Specific provisions include culturally competent, gender-specific screenings and assessments; enhanced community-based services, including intensive crisis counseling, multidimensional treatment foster care, mentoring, alternative education and truancy reduction programs, family mediation, and respite care and reintegration services.

The legislation requires use of alternative sanctions to incarceration for FWSN youth, unless the youth is arrested for a new juvenile offense; allows FWSN violators to be placed in a secure setting other than a juvenile detention center; and, provides for independent evaluation of assessments and services to assure that they are gender-appropriate, culturally-competent, and designed to reduce recidivism, incarceration and truancy.

Open Courts: Public Access to Proceedings in Certain Juvenile Matters
Raised Bill No. 6812

Every day, children suffer significant trauma, including physical abuse, sexual abuse, neglect, and removal from their homes. Systems that are supposed to be there to protect these children often fail them, and, to the public, the children are nameless and faceless. Permitting the public to attend abuse and neglect proceedings is a way to give these vulnerable children a voice, and hold the system accountable for assuring the children the best possible outcome in each circumstance.

This legislation requires that the court consider, on a case-by-case basis, whether members of the public should be excluded from child protection matters. The court would have leeway to determine whether public attendance might cause disruption; is objected to by any of the parties involved; would inhibit testimony; or, would violate the privacy interest of the individuals involved, to assure protection of the child and other parties from any undue harm.

Further information on this legislation is available by contacting the Center for Children's Advocacy at 860-570-5327, or email: bberk@kidscounsel.org.

Social Security Administration Adds 2 New Categories for Childhood Disability

Skin Disorders and Malignant Neoplastic Diseases Acknowledged as Childhood Disabilities

The Social Security Administration (SSA) recently established two new categories of disability for child Supplemental Security Income (SSI) eligibility. "Skin Disorders" and "Malignant Neoplastic Diseases" are now included in the Listing of Impairments (Listing) – Part B, that define disability under the Social Security Act.[1] Children with severe skin diseases, such as excema, dermatitis, genetic photosensitivity disorders and burns are now evaluated under the new Listing, which is Listing 108.00. The SSA will evaluate the severity of the skin disorder and will request information regarding onset, duration, flare-ups, location, size, and number of lesions in order to establish eligibility for SSI. As usual, the effects of medication, therapy and surgery, and other prescribed treatments factor into the duration and severity of the impairment. This category went into effect on July 9, 2004.

The SSA also revamped its malignant disease listing by establishing a new category entitled "Malignant Neoplastic Diseases." This category, under Listing 113.00, evaluates all malignant neoplasms except certain impairments associated with the HIV virus.[2] Specific listings include lymphoma, leukemia, malignant solid tumors, brain tumors, and retinoblastoma.[3] When evaluating neoplastic diseases for SSI eligibility, the SSA considers the origin of the malignancy, the extent of involvement, duration, frequency, and response to treatment, as well as the residual effect of any therapy (such as chemotherapy or radiation treatment).

As with other impairments, the SSA does not provide an exclusive list of diseases or infirmities in the Listings. The eligibility evaluation considers not only the severity of the impairment, but also whether the impairment results in marked and severe functional limitations that render a child unable to function in a manner that is equivalent to his peer age group.

For more information about SSI disability, please call Jay Sicklick at (860) 570-5327, or e-mail *jsicklic@kidscounsel.org*.

– Jay Sicklick, Esq., Director, Medical-Legal Partnership Project, Center for Children's Advocacy

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[1] The Listing of Impairments may be found at 20 C.F.R. § 404, Subpt. P, App. 1, or on line at *www.ssa.gov/disability/professionals/bluebook/2005%20Part%20B.pdf*.

[2] HIV and AIDS are evaluated under Listing 114.00.

[3] Retinoblastoma is a form of eye cancer.

IDEA Reauthorization Includes Numerous Changes

On December 3, 2004, President Bush signed the Individuals with Disabilities Education Improvements Act of 2004 into law. The changes to the law are numerous. This article will briefly review those changes that impact children (and their parents) who receive special education and related services from Local Education Agencies (LEAs).

Congressional findings

The congressional findings (Congress' articulation of the need for IDEA) were amended. At least two additional uses of the phrase "to the maximum extent possible" were added when discussing special education students' access to general education in the regular classroom, meeting the goals established for all children, and being prepared to become productive and independent citizens. This section also expressly states that IDEA should be coordinated with NCLB (No Child Left Behind), and that scientifically-based practices should be used to reduce the need for referral to special education and to improve the overall performance of children identified as being in need of special education and related services.

After including updated statistics concerning children with limited English proficiency and the over-identification of African American children, Congress added an acknowledgement that increasing the participation of people of color in all aspects of the provision of services and research concerning special education is essential to the elimination of the disproportionate identification of children of color as children in need of special education and related services.

Definitions

Congress added five definitions to the law – "limited English proficient," "universal design," "ward of the state," "highly qualified," and "homeless child." In addition to the new terms, changes were made to the following four existing definitions – "assistive technology device," "parent", "related services," and "transition services."

"Assistive technology" was amended to expressly exclude surgically implanted devices or the replacement of these devices. "Highly qualified" is a new term, defined in NCLB, whose meaning, when applied to special education teachers, also requires that the teacher hold a bachelor's degree *and* either a certification in special education or, if teaching in a charter school, that the teacher meet the requirements of the state charter school law. In addition to these requirements, if a special education teacher teaches core academic subjects to students who receive other than the standard testing to assess annual progress under NCLB, the teacher is required to meet other requirements. This is also true for special education teachers that teach more than one core academic

(confined on page 10)

subject solely to students with disabilities. While it is essential that special education teachers be held to the same standard as regular education teachers, it appears from this amendment that under some circumstances special education teachers are now required to do more than their regular education counterparts in order to meet the definition of "highly qualified." This could exacerbate the already existing shortage of special education teachers.

"Homeless children" has the same meaning as the term "homeless children and youths" under the McKinney-Vento Act. "Limited English proficient" is defined in NCLB. "Parent" has been amended to expressly include natural, adoptive, and foster parents (unless prohibited by state law), guardians (excluding the State), someone with whom the child lives that is acting in the place of a parent or an "individual legally responsible for the child's welfare." The definition of "related services" was amended to include interpreting services, and school nursing services designed to help a child receive free appropriate public education (FAPE). "Transition services" was amended to emphasize that the focus is on improving the academic and functional achievement of the student to facilitate transition to post-secondary activities. "Universal design" is defined within the Assistive Technology Act, and "ward of the state" means foster child, ward of the state or a child in the custody of a child welfare agency.

Substantive Changes

Child Find: The next significant change to IDEA occurs in the section concerning "child find." Child Find is the requirement that all children who qualify for special education and related services be identified by state and local education agencies, regardless of whether they are attending public or private elementary and secondary schools. The IDEA amendments added a process for the identification of and the provision of services to children placed in private schools that requires consultation with and approval of the process by private providers within the local education agency's district.

The State is also required to have policies and procedures in place to prevent the over-identification and disproportionate representation of children of color as children with disabilities. Congress also included an express prohibition on local and state education agencies denying FAPE to students with disabilities who refuse to take medication covered under the Controlled Substances Act.

Requests for Evaluations: IDEA now expressly states who may request an initial evaluation of a child. In addition to the parent and the child, the state education agency, another state agency, or the local education agency may request that a child be evaluated. Procedures for evaluation have been amended to set a time limit for the evaluation (60 days) and to list exceptions to the time limit (if the child moves into a new district after the process has begun or if a parent repeatedly fails to make the child available for the evaluation). The local education agency is entitled to pursue the initial evaluation if the parent either refuses consent or fails to respond to the request for consent by utilizing the due process procedures as long as this action is consistent with state law. However, the LEA may not provide special education and related services to a child without parental consent. The new language states that the LEA is not required to convene a PPT or develop an IEP if the parent refuses consent for provision of special education and related services for their child.

A new section was added concerning evaluation of children who are wards of the state. In this section, LEAs are required to obtain consent for an initial evaluation from the parent of a child who is a ward of the state unless the location of the parent is unknown, the parental rights have been terminated, or the parent no longer has the right to make educational decisions because of a court order and the court has appointed someone to represent the child and exercise the right to consent to initial evaluation. Reevaluations can occur as frequently as annually but must occur at least once every three years. A requirement that school districts coordinate to avoid delays in evaluations for children who have moved from one district to another was added. Language in the section concerning evaluation procedures was added to clarify that the assessments and other evaluative material should be administered in the "language and form most likely to yield accurate information" about the child's knowledge and academic, developmental and functional capabilities. The amended IDEA now expressly permits LEAs to consider information other than a severe discrepancy between achievement and intellectual ability when considering whether a child has a specific learning disability. It also permits the consideration of whether the child responds to a research based intervention as part of the evaluation process.

IDEA was also amended to eliminate the requirement for evaluations before a child is exited from special education when that student is graduating and receiving a regular diploma, or the student is exiting due to aging out. In either instance, the LEA is required to provide the student with a summary of academic achievement and functional performance.

IEP Development: One overall descriptive change in IDEA is the switch from the use of "educational" performance to "academic achievement and functional" performance. It appears that this is an effort to clarify that both, how a child functions in the school setting and a child's academic performance, are equally important and appropriate focal points for a child's IEP.

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Recent Developments in Child Law: Important Case Summaries

This has been an eventful season in the area of child law, especially in the ever-changing world of child protection and abuse and neglect. Here are some interesting cases and legal developments that have occurred over the last several months:

Child Protection and Abuse/Neglect

Child Abuse Substantiation and Corporal Punishment

Lovan C. v. Department of Children and Families

86 Conn. App. 290 (2004)

To no one's surprise, the most sensational legal development over the past few months was the controversial Appellate Court decision in *Lovan C. v. Department of Children and Families*.[1] As discussed elsewhere in this newsletter, *Lovan C.* curiously interprets the statutory scheme for determining when corporal punishment is considered child abuse for purposes of "substantiation" and placement on the Department of Children and Families' (Department) child abuse registry. Rather than address the statutory and regulatory scheme appropriately utilized by the Department's hearing officer in the substantiation hearing, the Appellate Court chose to borrow an interpretation from the criminal statutes by inserting a "reasonableness" standard when analyzing parental control and discipline issues. The result was exoneration for the offending mother, and a new structured analysis for the Department when reviewing corporal punishment cases.

Physician's Liability

Manifold v. Ragaglia *227 Conn. 410 (2004)*

Just when physicians acting as mandatory reporters at the Department's behest thought it was safe to provide a conclusory opinion regarding abuse or neglect, along come the plaintiffs in *Manifold v. Ragaglia*,[2] whose reaction to an erroneous medical interpretation resulting in the removal of their children for two days constituted a civil action for malpractice, negligence, and infliction of emotional distress against the diagnosing physician.

The Department invoked a ninety-six hour hold and removed the Manifold children from their parents on April 23, 2001, after a Birth-to-Three program worker notified the child's pediatrician about suspicious bruises and a rash. Upon investigation, the Department social worker transported the children to a community hospital, where staff physician Robert Cruetz determined that the bruises and rash were extremely suspicious and recommended further investigation of the injuries. The Department removed the children, placed them in custody, and applied for and obtained orders of temporary custody.

On April 25, the Department brought the children to another pediatrician, who immediately ordered blood tests that revealed significant hematological abnormalities, including a very low blood platelet count for one of the children. Seeking further clarification, the Department brought the child to Yale-New Haven Children's Hospital, where he was diagnosed with idiopathic thromcytopenic purpura (ITP), a somewhat rare but not unusual blood disorder. The Department immediately moved to vacate the OTC and returned the children to their parents' custody later that day.

The parents subsequently filed their action against Cruetz for medical malpractice (for failing to order blood tests resulting in a misdiagnosis), and against the Department (and its commissioner at the time) for negligence, recklessness, acts of malice and negligent infliction of emotional distress. The trial court granted Cruetz' motion for summary judgment, and the Supreme Court invoked its statutory authority to address the question of whether Cruetz' failure to order blood tests and misdiagnosis fell outside the scope of immunity provided to mandatory reporters under the immunity provision of the mandatory reporting law.[3]

Termination of Parental Rights

In re Destiny D.

86 Conn. App. 77, cert. Denied 272 Conn. 911 (2004)

and **In re Jermaine S.** *86 Conn. App. 819 (2005)*

The Appellate Court affirmed the termination of parental rights in two interesting cases, *In re Destiny D.*, and *In re Jermaine S.* In *Destiny*, the respondent mother appealed the trials court's termination of her parental rights with respect to her three minor children. The mother challenged the judgment against her, contending the court erroneously found that (1) the Department failed to make reasonable efforts to reunify the family, and (2) there was no ongoing parent-child relationship between her and one of the minor children. The Appeals court respectfully demurred, finding that the Department made efforts to provide regular visitation between the mother and her children, arranging rehabilitative services for her, and arranging counseling and therapy for the three children. The Department also provided various rehabilitative services to the mother to address her substance abuse and mental health problems. The record indicated that the mother's long history of substance abuse and her recidivistic nature regarding substance abuse carried the day, and the appellate court found that the Department's efforts were "reasonable" under the circumstances. Since the court found that the Department made reasonable efforts at reunification, it did not address the mother's claim of an ongoing relationship with the children.

(continued on page 12)

In *Jermaine S.*, the Appellate Court once again dealt with the difficult issues of substance abuse and mental health. Here, the respondents appealed a judgment from the Superior Court which granted a termination petition terminating the mother's parental rights to her two sons, and terminated the father's parental rights to one of the sons. Both children tested positive for drugs at birth. The first child, while not removed right away, was removed after the mother failed to comply with court ordered steps to address her substance abuse and mental health issues. The Department was not as generous with the second child (the father's son), removing him at birth after he tested positive to drugs as well. The father was incarcerated when his son was born and had virtually no contact with him while in jail. The Appellate Court found that the trial court appropriately terminated the parental rights in both cases because in the mother's case, she had neglected her first son and failed to achieve personal rehabilitation under Conn. Gen. Stat. § 17a-112(j)(3)(B). The court also found that the father had abandoned his son pursuant to Conn. Gen. Stat. § 17a-112(j)(3)(A). The court was also convinced that termination was in the childrens' best interests because they lived in the same foster home and the trial court had properly considered the seven statutory factors when analyzing termination of parental rights.[1]

Family Law/Non-Custodial Visitation

Denardo v. Bergamo *272 Conn. 500 (2005)*

Jurisdictional issues abound in *Denardo v. Bergamo*, where the Connecticut Supreme Court retroactively applied its own previously espoused criteria for non-custodial visitation and terminated a child's grandparents' visitation rights. In *Denardo*, the plaintiff grandparents sought and obtained visitation rights to their grandchild, over the defendant mother's strenuous objections. Subsequent to the trial court's 2001 order granting visitation to the grandparents, the Connecticut Supreme Court decided the cases of *Roth v. Weston* [2] and *Crockett v. Pastore* [3], cases that held that a person seeking visitation rights pursuant to Conn. Gen. Stat. § 46b-59 [4] must satisfy jurisdictional and substantive requirements for the statute to be constitutional as applied. The key holding of *Roth* was that in order for a court to have jurisdiction over a petition filed under § 46b-59, contrary to the wishes of a "fit" parent, the petition must allege that the petitioners' relationship with the child was similar to a parent-child relationship and denial of visitation would cause real and significant harm to the child. Without those findings, court does not have subject matter jurisdiction. In light of *Roth*, the mother moved to modify and terminate the grandparents' visitation. She alleged, *inter alia*, that the grandparents were overly intrusive upon her parental rights, unreasonably sticking their nose into school and extracurricular affairs. The trial court opined that *Roth* and *Crockett* were applicable to the motion to terminate the grandparents' visitation, and that these cases applied retroactively to the case at hand.

The Supreme Court agreed that *Roth* applied retroactively and the trial court appropriately applied the jurisdictional standard regardless of whether the grandparents moved to secure an initial order of visitation or the parent moved to modify such an order. Only in the event of exceptional circumstances or overriding needs of public policy would a "*prospective only*" application of subject matter jurisdictional rulings. In *Denardo*, the court found that no such exceptional circumstances existed, and the "overriding needs of public policy weigh heavily in favor of a retrospective application of *Roth*." [5] The constitutional right of a parent to raise her child as she sees presumes that she is acting in the "best interests" of her child. Thus, where a fit parent moves to terminate visitation, she is presumed to act in the child's best interest. Without specific good faith allegations that the grandparents' relationship was similar to the parent-child relationship, or allegations that the denial of visitation would cause real and significant harm to the child, the prior visitation order was deemed rendered without subject matter jurisdiction.

For more information about SSI disability, or other matters discussed in this column, please contact Jay Sicklick at the Center by calling (860) 570-5327, or send an e-mail to *jsicklic@kidscounsel.org*.

– Jay Sicklick, Director, Medical-Legal Partnership Project, Center for Children's Advocacy

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[1] See Conn. Gen. Stat. § 17a-112(k).

[2] 259 Conn. 202 (2002).

[3] 259 Conn. 240 (2002).

[4] The statute provides, in pertinent part, that "[t]he Superior Court may grant the right of visitation with respect to any minor child or children to any person, upon an application of such person." Here, the grandparents invoked this statute seeking non-custodial visitation.

[5] 272 Conn. at 511.

[6] The Listing of Impairments may be found at 20 C.F.R. § 404, Subpt. P, App. 1, or on line at *www.ssa.gov/disability/professionals/bluebook/2005%20Part%20B.pdf*

Medical-Legal Partnership Project News: Important Case Summaries

CCA's Medical-Legal Partnership (MLPP) helps resolve the legal aspects of children's medical problems to ensure better health outcomes.

Chris M.

Chris M. is a seven year old boy who was diagnosed with a brain tumor in November 2003. He is currently under the care of a pediatric oncologist in Hartford, CT. Because of Chris' brain tumor and treatment of cranial and spinal radiation and chemotherapy, he is at an increased risk for educational problems. The learning disabilities associated with radiation and chemotherapy involve very specific disabilities including visual perception, memory, processing speed and sequencing. Based on this information, Chris' treating physician recommended neuropsychological testing in order to provide a comprehensive, detailed assessment of his ability to encode, process, store and express information. Interpretation of the various test results would help uncover Chris' strengths and weaknesses and assist in developing an appropriate educational plan.

On or about October 29, 2004 the physician's recommendation was communicated to Chris' school. No action was taken at that time. After a few months, another meeting was held to discuss, in part, neuropsychological testing. The school felt strongly that Chris did not need neuropsychological testing and refused to pay for it. However, in January 2005, with the help of the Medical-Legal Partnership Project (MLPP) the school finally agreed to pay for the neuropsychological testing. This agreement will allow Chris' educational plan to address immediate difficulties and ultimately, gives Chris a fighting chance for a brighter future.

Joyce B.

Joyce B. is a four year old girl who was diagnosed with a kidney disorder. She must remain hospitalized for months at a time, awaiting a kidney transplant and thus cannot attend school regularly. Joyce's mother, Lisa, does not want to deprive her daughter of a pre-school education, especially considering Joyce's special needs. In this case, however, obtaining a tutor proved difficult because Joyce not only suffers from kidney failure, but she is also profoundly deaf.

Joyce's local school district claimed they simply did not have the resources to provide Joyce with a tutor, but ultimately did arrange for one to come to the hospital a couple of times a week. However, the tutor knew only limited sign language and was not a certified sign language instructor. The MLPP quickly contacted the school board and addressed the problem with their director of special education. Within days, Joyce had a certified sign language instructor visiting her for five hours a week, as required by law.

Joyce is bonding beautifully with her teacher and her learning is progressing.

TIPS for Lawyers

Center for Children's Advocacy frequently receives calls from attorneys seeking advice on cases.

Please email questions and tips to *cghio@kidscounsel.org.* In this column, we'll share questions and responses that may affect other cases.

As the child's attorney, what can I do when DCF plans to move my client to a different foster home but she doesn't want to leave?

If I get a hearing, can my child client attend?

Except in cases of emergency, DCF is required to provide the foster parent, child's attorney, and guardian ad litem with 14 days prior notice of the removal. The notice must include the reason for the removal. The foster parent has a right to request a removal hearing. DCF Policy Manual § 22-6-2 *et seq*.; DCF Policy Manual § 36-55-15. The standard of review in an administrative hearing is a preponderance of the evidence. DCF Policy Manual 22-6-8. The Department has the burden of showing that the change in placement is in the best interests of the child. Id. The child is a party to the administrative hearing and entitled to representation.DCF Policy Manual 22-3-6.

If the foster parent does not request a removal hearing, the child has two options.First, the child can request a treatment plan hearing, pursuant to Connecticut General Statutes §17a-15(c) and DCF Policy Manual § 22-7-2.The issue to be determined at a treatment plan hearing is whether the treatment plan is appropriate to the needs and problems of the child. Second, the child can request an immediate in-court review and seek a court order prohibiting the removal.To ensure that the matter is heard prior to any DCF removal, the attorney should file an ex parte motion seeking a temporary order prohibiting any change in placement pending an emergency hearing. *See* Practice Book § 34a-23.

Whether you request an administrative hearing or a court hearing, your child client should be permitted to be present. For court hearings, "[c]hildren, who are parties to the court action, have the right to be present if they so request." Conn. Prac. Book § 32a-5, c*mt*. However, they may be excluded for good cause shown. Practice Book § 32a-5. The question of when and to what degree the child may attend or participate in administrative hearings is addressed in DCF Policy Manual § 22-3-6. Taking into consideration such factors as the child's age and other case specific factors, the parties to the hearing and their counsel will decide whether or not the child will attend and participate. Id. In the case of a dispute, the Hearing Officer shall decide after hearing evidence and/or argument. Id. Although allowed to attend, the child may be excluded from any portion of the hearing which would be detrimental to him/her. Id.

IDEA Reauthorization Includes Numerous Changes

(continued from page 11)

The most significant change concerning IEP development is the delay in development of postsecondary goals until the first IEP in effect when the child turns sixteen. Arguably, because these goals must be based upon "transition assessments" administered before the development of the goals, the discussion of transition should occur before this IEP is developed. The excusal of a member of a team from a PPT meeting, whether or not that member's area of curriculum or related services will be discussed, may occur by mutual written agreement. If the member's area of expertise is being discussed, the member must submit written input to the parent and the team before the meeting. If a parent and school district agree, changes may be made to an IEP without convening a meeting, provided the changes are in writing and the annual review of the child's IEP has occurred. In addition, a demonstration project in fifteen states permitting the development of three year IEPs was created.

Amendments to the section concerning surrogate parents require that a surrogate parent be appointed for a child who meets the definition of "unaccompanied homeless youth" under the McKinney-Vento Act, and that the state appoint a surrogate parent within thirty days of a request.

Procedural Safeguards: A due process complaint may only include violations that occurred within two years of the date that a party knew or should have known about the violation. Two exceptions are permitted -- when the district either made misrepresentations or withheld information to which the parent was entitled under IDEA. If a state has a different time limitation, then the state's limit prevails. No due process hearing may occur until a complaining party provides notice to the other party that meets the requirements articulated in the procedural safeguards. Only issues articulated in the notice may be raised during a hearing. The notice will be presumed to meet these requirements unless the other party objects to the hearing officer, which must occur within fifteen days of receiving the complaint. Parties are now required to respond to complaints within ten days of their receipt. Amendments to the due process complaint are permitted only if the other party consents and an opportunity to resolve the complaint through a meeting occurs or if a hearing officer grants permission. A hearing officer may only find that a child was denied a free appropriate education due to *procedural violations* under three circumstances - if the procedural violations impeded a child's right to FAPE, impeded the parent's opportunity to participate meaningfully in the process, or deprived the child of educational benefit.

A meeting to attempt to resolve the issues in the complaint is required before the start of a due process hearing. This session includes the parents and all school members of the PPT who have knowledge of the facts and issues raised in the complaint. The district may only have their attorney present if the parent has an attorney at the meeting. If the parties reach an agreement, then it must be stated in a legally enforceable written agreement. The LEA has thirty days from receipt of a complaint to resolve the complaint. A party now has only 90 days to appeal the hearing officer's decision to court. The attorney's fees provision now permits the award of attorney's fees to LEAs if the court finds that the parent's filing of a complaint or the pursuit of the complaint beyond a certain point was frivolous or meritless.

Manifestation Determination and Discipline: Amendments to the procedural safeguard section appear to make it easier for districts to place special education students in alternative settings. The amendments have resulted in a complete reorganization of the section. One significant change is the criteria considered during the manifestation determination. The criteria have been reduced to two: first, was the conduct caused by or directly and substantially related to the child's disability; second, was the conduct a direct result of the LEAs failure to implement the IEP. If the team agrees that *either* condition is met, the conduct is a manifestation of the disability. If the behavior is a manifestation, the LEA, if they have not already done so, must conduct a functional behavioral assessment and implement a behavior intervention plan. If these were done before, the LEA must review and modify either or both to address the current behavior and return the student to the placement from which he was removed. The district is not required to return the child to the original placement if the offending behavior involved a weapon, drugs or the infliction of serious injury upon another person while at school, on school premises, or at a school sponsored event. Under these circumstances, a child may be removed for forty-five days.

The criteria for presuming the district knew or should have known that the child who is subject to discipline had a disability have become more restrictive. The ability of an illiterate or disabled parent from expressing concern verbally has been removed. The concern, which must be stated in writing, must be expressed to supervisory or administrative personnel or to a child's teacher. A teacher must also express specific concerns about a pattern of behavior directly to the director of special education or another supervisor. The LEA will be relieved of being presumed to know if a parent has refused to allowed their child to be evaluated or has refused services or the child was evaluated and determined not eligible.

– Ann Marie DeGraffenreidt, Esq., Director, TeamChild Project, Center for Children's Advocacy

The preceding discussion addresses those changes to IDEA that have the greatest impact on children with disabilities receiving services from LEAs and their parents' ability to enforce their rights under the law. How the amendments to IDEA are interpreted will only be clarified once the final regulations are published.

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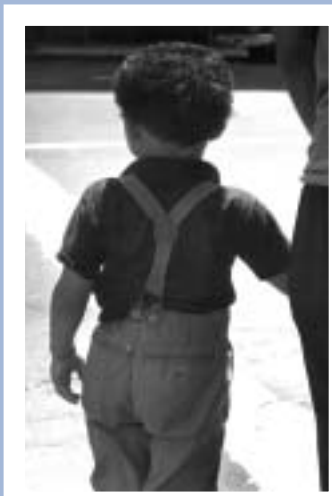

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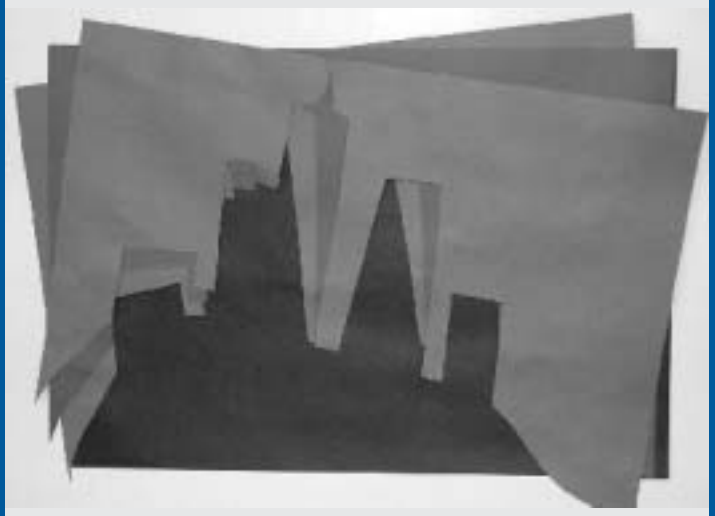

Artwork by Liz L., age 17

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