

Practitioner's Section

The two pieces included in the Practitioner's Section also intertwine issues of juvenile justice and definitions of community. One of the pieces is written by Kyung (Kathryn) Dickerson, Esquire, a family law practitioner in the Washington, D.C. metro area with the law firm of SmolenPlevy. Ms. Dickerson explores the emergence of online communities for youth and how courts are currently struggling with issues arising from same, including cyber bullying and presenting evidence in court from online accounts. The second piece is written by Joel Baum, M.S., Director of Education and Training for Gender Spectrum, an organization providing education, resources and support to help create a gender sensitive and inclusive environment for all children and teens, thereby creating more inclusive communities for youth.

The Practitioner's Section is followed by summaries of recent legislation and court decisions affecting juveniles on the federal and state level. Topics include education law, criminal cases, family law and jurisdictional issues.

An Increase in the Presence of Children in the Courtroom - As Witnesses and as Litigants

Kyung (Kathryn) Dickerson *

It is an accepted condition of our judicial system that while the law evolves to address the issues created by advances in science and technology, the law is rarely able to anticipate these issues. The unfortunate result of this reality is that a critical mass of change must be achieved before the law can respond, and those in the system before the change suffer the often harsh consequences of the old system. This reality is particularly troubling when the people subject to the indeterminacy are children. The increase in the use of social media and mobile technology by increasingly younger children seems to be part of the reason why there is an increase in the presence of children in the courtroom as witnesses and defendants.

The ability to use mobile technology and social media does not change the inherent immaturity of children. Thus, what was once playground bullying has now become cyber-bullying. While children used to pass around cartoon caricatures from child to child, inappropriate or explicit pictures and texts can now be circulated to the entire class within seconds. The law is evolving to criminalize certain acts committed through the use of technology, like cyber-bullying and cyber-stalking; however, while the new laws try to incorporate a *mens rea* element such as intent or knowledge of the consequences, often the legislation is so broadly drawn that from the outset, children will be penalized in the same manner as adults.

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Further, the longevity of electronic information is a growing issue, particularly as certain crimes have long statutes of limitations. If an opinion or picture is posted, it may be cached and retained, even if the initial posting is taken down.¹ This is a significant issue for children who generally have longer electronic footprints. They will have a history that any future classmate or employer can access.²

Generally, children are comfortable with technology and think little of taking and posting pictures or of tweeting and texting their every thought and action. Because they do so, they create evidence that may be used by the courts against them or against others, making the children defendants as well as witnesses. Can a five year old who took a picture on a cell phone competently testify as to authenticity?

Social scientists, members of our legal profession and the media have noted the recent increase in the number of children being tried as adults for crimes. Such prosecution begs the question of whether children as young as 9 or 11 years old are cognizant and competent enough to assist in their

¹ There is an increase in the number of cases where people allege libel and harassment for postings made on the web about them by others. See the number of cases in the United Kingdom, including Don King's action against Lennox Lewis, in Australia and other countries. In the United States, the 2008 case in which two female Yale Law School students sued for numerous posting on a listserv site serve as an example of the direction of the court's inquiry. In several cases, the information posted was accurate at the time of the posting but was resolved afterwards, by adjudication or agreement. For example, Jack was arrested for a crime. He was subsequently found not guilty and his record was expunged. Jill runs a public interest website and posted that Jack was arrested for a crime. Jack now wants Jill to remove the posting. However if Jill refuses to do so or simply ignores his request, then Jack is faced with the decision of whether he wishes to file suit to compel Jill to remove the posting. The dilemma for Jack is that a suit will bring attention to the crime for which he was arrested and which has since been expunged, and that having Jill remove the posting will not remove the cached history on all search engines.

² Given the mutability of electronic information, children can capture, modify and publish pictures of one another. They can look at one another via webcam, if they belong to the same gaming system or network. As such information is readily available to almost everyone, it can be very difficult to pinpoint the source of any modified or recorded images.

own defense and to make substantive legal decisions, such as whether to invoke the Fifth Amendment or to testify on their own behalf. With the adoption of new laws criminalizing acts committed with the use of technology, this inquiry will have to be made of younger and younger children.

When children perpetrate a crime and then tweet about it or post pictures from the scene on their Facebook pages, could such statements be taken as confessions? If a child is competent to take the stand and testify about what happens at a parent's house for the purposes of a custody trial, should that same child be deemed competent to be tried as an adult in the murder trial of one of his parents – particularly if he posted threats on his Facebook page for months prior to the act? How should counsel and the courts address the reliability of such evidence and the competency of the creator to testify?

The question of competence is one that defies attempts at codification. Whether a child is competent to stand trial as an adult is usually left in the discretion of the judge; however, the increasing number of children in court as defendants seems contradictory to the more restrictive review of their appearance as witnesses, often in the same courts.³

The presence and use of children as witnesses has had a convoluted past. The substantive majority of the case law and legislative history has related to the ability of children to testify when they are the victims of crime. A review of the laws in the fifty states reflect a focus on the manner of testimony – whether in the courtroom, by closed circuit, in camera, and whether a victim advocate or support person can be present during the testimony. The question of competency has also evolved from *Wheeler v. United States*, 159 U.S. 523 (1895), in which the United States Supreme Court held that a five year old child could be sworn as a witness provided that

³ Assume a blended family situation where a son takes explicit photographs of his younger step-sister and posts them. Assume that the son also captures video of his stepfather physically and verbally abusing his mother. Should there be a different standard applied as to the child's competence as a defendant in the criminal charge of child pornography as opposed as a witness in the protective order action filed by his mother?

he understood the difference between truth and falsehood and ramifications of telling a lie. Despite the long established acknowledgement that children could be witnesses, the standards established have not been easily met by counsel seeking to call children to the witness stand.

There is not an easy answer to the question of when or why children can be witnesses and when they can be litigants. The more transparent children are encouraged to be with their social media and the more children accept that there is someone with a cell phone camera everywhere, the more likely it is that the courts will be seeing more children as witnesses. As the judicial system becomes more comfortable having children present in the courtroom, it will seem less shocking to try them for crimes, particularly crimes committed through electronic media.

Gender, Safety and Schools: Taking the Road Less Traveled

Joel Baum*

I. Introduction

Parents raising transgender or gender diverse children frequently find themselves between a rock and a hard place as they grapple with supporting their child's gender exploration while keeping them safe, particularly in the school context. As issues related to gender and youth become more commonly examined in our culture, many are finding a path that allows them to navigate these seemingly mutually exclusive approaches to raising a gender diverse child.

David Cooper⁴ wasn't sure what to do next. His twelve-year-old son, Louis, was tired of using the staff restroom at school, and tired of being someone he wasn't. A 7th grader at an urban middle school, Louis is a transgender boy—born with an anatomy most commonly associated with girls, yet knowing himself as a boy. Louis has felt this way since he was a child; growing up, he refused to wear dresses, would only play with boys, and wondered aloud when he would “get his penis.” Should David correct a stranger who referred to him as a boy, Louis would explode with anger.

Over time, David came to realize that Louis' actions were neither a phase nor a ploy to get attention (something frequently suggested by those around him), but rather a persistent and consistent reality for his child. Consequently, towards the end of elementary school, David began carefully constructing his child's life to support the authentic expression of his male identity. First with close friends, then with extended family, David allowed Louis to assert a male presentation consistent with his own sense of self. He changed

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⁴ Names changed to protect identity

his decidedly female name and began using male pronouns. The battles over clothing ceased and Louis donned the attire of the boys he saw around him—baggy pants, basketball jerseys, baseball caps askew just so, and an array of Nike, Converse, and Doc Martin footwear.

As David slowly choreographed his son's social transition, Louis began to blossom, becoming a child who slept, ate, and felt better than at any other time in his life. With the exception of school, Louis was living full time as a boy, and was happier than he had ever been. Now Louis was asking that he be allowed to attend school as the boy he knew himself to be. Despite his child's clearly improved disposition, however, David was terrified by the implications of his son's request to conquer this last barrier to his child's authentic expression of self.

II. The Numbers Don't Lie

Louis' father had ample reason to be concerned. According to a variety of studies, transgender and gender nonconforming youth face myriad difficulties in schools, from their peers as well as from the adults charged with keeping them safe. According to research conducted by the Family Acceptance Project, "A growing body of literature suggests that young people who do not conform to heteronormative societal values are at risk for victimization during adolescence."⁵ Perhaps nowhere is this truer than in school:

- 23% of California students reported being harassed because they were not "as masculine as other guys" or "as feminine as other girls." Gender non-conformity-based harassment is more pervasive for lesbian, gay, bisexual, and transgender students than for heterosexual students: 42% of students who identify as lesbian, gay, or bisexual (LGB) and 62% of those who identify as transgender report harassment based on gender non-conformity.⁶

⁵ Meyer, 2003; Oswald, Blume, & Marks, 2005.

⁶ Russell, S. T., McGuire, J. K., Toomey, R., & Anderson, C. R. (2010). Gender Non-conformity and School Safety: Documenting the problem and

- 82% of transgender students reported that they “sometimes” or “often” hear students make negative comments based on gender nonconformity. Unfortunately, only 45% of all students, 39% of LGB students, and 25% of transgender students hear teachers or staff stop negative comments based on gender nonconformity.⁷

- A third of transgender students heard school staff make homophobic (32%) remarks, sexist (39%) remarks, and negative comments about someone’s gender expression (39%) sometimes, often, or frequently in the past year.⁸

- 53% of all transgender students had been physically harassed (e.g., pushed or shoved) in school in the past year because of their gender expression.⁹

- Almost half of all transgender students reported skipping a class at least once in the past month (47%) and missing at least one day of school in the past month (46%) because they felt unsafe or uncomfortable.¹⁰

III. What is a Parent to Do?

With these sobering numbers as a backdrop, parents who wish to support their child’s gender identity face what appears to be an impossible decision. On the one hand, they

steps schools can take. (California Safe Schools Coalition Research Brief No. 12). San Francisco, CA: California Safe Schools Coalition.

⁷ *Id.*

⁸ Greytak, E. A., Kosciw, J.G., and Diaz, E. M. (2009). *Harsh Realities: The Experiences of Transgender Youth in Our Nation’s Schools*. New York: GLSEN.

⁹ *Id.*

¹⁰ *Id.*

seek to celebrate their child's authentic self expression and are loathe to send a message that there is something wrong with their child. At the same time, they fear the very real and possibly dangerous consequences their child might face should they assert their true gender identity at school.

However, another possibility exists that can potentially undo this dangerous dichotomy: through systematic training and education, schools around the country are beginning to challenge the assumption that a child's gender diversity will automatically be met with intolerance, and in the process, are creating more accepting climates for all children. Through concerted effort across multiple aspects of the institution, schools are discovering that the concept of gender inclusion is a reachable and worthy goal to pursue; in so doing, each school pursuing a more accepting climate creates space for others to follow behind them.

IV. Gender Inclusive School

Through our collaboration with institutions across the United States and beyond, Gender Spectrum has begun to identify a variety of key strategies that mark the development of a gender-inclusive school culture. In conjunction with the work of a variety of other organizations working in this field, a concrete set of promising practices is emerging. Encompassing efforts at the systemic, structural, relational and instructional level, our work demonstrates that openly transgender and other gender nonconforming students can safely navigate their school day, and in the process create opportunities for more diverse gender expression for all students.

Schools that are successfully establishing such environments share a number of interrelated features, including strong leadership, clearly articulated and enumerated anti-discrimination policies, a commitment to training for all parts of the community, consistent reinforcement of positive school culture and nimble systems of communication. Moreover, these sites also consistently assert a proactive stance in the establishment of a gender inclusive climate; rather than simply responding to the needs of one or a handful

of students, they seek opportunities to reinforce their commitment throughout all aspects of the institution.

V. Gender Inclusive Leadership: Creating Urgency

Gender-inclusive schools have strong leaders dedicated to student well-being and safety. The administration's explicit expectation for a safe and supportive school for all children, and the insistence that all adults on campus are responsible for ensuring it, is imperative. For the gender inclusive school leader, the question is not "if" but "how" their school will be welcoming to gender diverse students and their families.

In working with school leaders, Gender Spectrum has found there are critical assertions that must be made to effectively jumpstart a leader's commitment to gender inclusion:

Vision – even the most progressive schools have only a finite amount of time and energy to devote to any one area of focus and change. An important element in launching a systematic program of gender inclusiveness is to help school leaders visualize what gender inclusiveness looks like, and the steps for achieving it. Most leaders, saddled with their own experiences and observations about gender nonconformity, have a difficult time even imagining a setting that supports a non-binary view of gender.

Framing – frequently, a particular student will prompt a school's recognition of their need to become more inclusive. However, rarely will a school leader commit the time and resources necessary to work towards a school-wide culture shift to meet the needs of a single child. By framing the effort as a process for creating space for all students to express themselves fully, a leader can more easily make the case for moving forward. Rather than being about a single child, or some amorphous group of

“those kids,” the endeavor shifts in focus to the needs of all students.

Context – in any form of change work around issues of culture, the notion of “meeting people where they are,” is critical. The pervasiveness of a narrowly defined binary understanding of gender means that many members of the school community have never had to consider gender diversity and its relationship to students. Naming that reality, and presenting a process that will move people over time to a broader view of gender is essential.

Partnership – schools can be insular and distrustful places, particularly when it comes to working with outsiders who come to “improve them.” In initiating our work with schools, Gender Spectrum clearly articulates our role as partners and advocates, rather than activists. While a particular family may have prompted a school’s desire to move in this direction, we are clear with all involved that we work with and for the school.

With this foundation in place, most leaders are positioned with both a sense of urgency and agency to move ahead. Mapping out a strategy with implications for policy, infrastructure, community engagement, and instruction, and grounded in carefully sequenced training, Gender Spectrum collaborates with the school or district’s leadership to shift the school’s climate.

VI. Policy and Protection

A key aspect in developing a more gender inclusive school culture is clear policy language. The importance of explicit, enumerated statements prohibiting discrimination on the basis of gender cannot be underestimated. With policies in place as coverage, school leaders are emboldened to take

action on behalf of gender inclusion. Many states have laws that include gender as a protected class. Nine states and Washington, D.C. explicitly include gender in their school anti-bullying laws. Several other use broad definitions of sexual orientation to encompass gender as well. In addition to these states, districts in cities ranging from Decatur, GA, to Lawrence, KA, to Denver, CO has also established explicit protections related to gender identity and/or expression. And in a "Dear Colleague Letter," the United States Department of Education Office of Civil Rights make clear that schools, under federal law must prevent discrimination based on gender.

VII. Commitment to Training

In order to effectively create an authentically gender-inclusive school culture, both initial and ongoing training for all school personnel, parents and families, and students is crucial. Education and training reinforces the school's commitment to an environment of acceptance and replaces common myths and misconceptions with practical, evidence-based information regarding gender variance in children.

No one has a greater impact on student safety than the adults working at the school. When teachers and staff fully understand their school's nondiscrimination policy and their own ethical and legal obligations to enforce it, they will be equipped to respond effectively to questions from students and parents about what the policy means, and to act in accordance with it. Moreover, through direct training about the complex issues of gender and schooling, educators will be equipped with the concrete information, tools, and mindset to create a truly safe and inclusive atmosphere. Specific gender-inclusive strategies, resources and activities are introduced to enhance each adult's capacity to establish a more accepting school climate.

Parent training is equally necessary. In some instances, schools will be implementing gender-inclusive practices in a community context that embraces these notions easily. In others, members of the school community might be supportive, but have concerns about the content or structure

that will be used with their children. Still others will present a much less favorable setting in which to launch the effort. In each case, the design of the parent training is critical. In our experience, the vast majority of parents with whom we have worked have not been against the content of the work; rather, they want to be prepared to answer questions that may come from their children. Effective parent training serves to provide parents and families with a) a basic understanding of gender related concepts and terminology, b) previews the lessons and materials that will be used in classrooms, and c) provides developmentally appropriate language, examples, and approaches for responding to their child's questions.

Finally, once adult members of the community have been prepared, work with the students can commence. Using a variety of materials, including video-, music-, art-, and writing-based approaches, students are introduced to topics through age appropriate lessons and activities. At the early elementary level, the children learn to challenge gender stereotypes and that there aren't "girl things" and "boy things," but rather, just "things." Later lessons about gender in nature and history, as well as videos of gender nonconforming youth or guest speakers widen students' capacity to recognize gender's complexity. Regardless of the age of the students, fundamental messages of kindness and respect are integrated throughout each classroom presentation, along with language and strategies students can use to interrupt or challenge unkind actions they may observe. In older grades, additional content about media portrayals of gender, gender and culture, and social justice are included as well.

VIII. "Like, We Could All Just Be People?"

This brings us back to David and Louis Cooper. After initially refusing to even consider his son's requests, David relented and requested that Gender Spectrum work with the school. A systematic plan was developed that would ultimately conclude with Louis' social transition from female to male. Following two sessions with staff and a sparsely attended parent education night, workshops with the students

took place. One sixth grader's reaction epitomized the students' response in general. Tentatively raising her hand and referring to the graphic on the board introducing gender as the complex interaction of biology, expression and identity, she asked, "You mean, like, if everyone knew that gender worked like this, we could all just be people and, like, be ourselves?" Clearly, the message was being heard.

In this case, due to the very public nature of Louis' transition, each meeting with the students concluded with the revelation that one of their peers was in fact transgender, that Lisa would now be known as Louis, use male pronouns, and use the boys' restroom. The students' reaction? As with every school in which we have worked, once a multi-dimensional framework for understanding gender was established, the students were incredibly positive. Louis received comments of support. One older boy said to let him know if anyone gave Louis problems and he would "take care of it." Throughout the day, students approached him with positive comments, high fives, and slaps on the back. Perhaps most importantly, within a day, it was a non-issue as students went about their lives. Though one parent did call concerned about bathroom use, the principal quickly pointed out that policy in the district clearly stated the student's right to use the restroom consistent with his gender identity.

Finally, a year and a half later, David reports that his son has had no problems in relation to his gender identity at school. Like many of his peers, Louis is navigating dating, academics, and the new environment of high school. In general, he is a typical teenager trying to figure out where his life is going. Now able to authentically live his life, Louis can turn his attention to simply growing up, something every child deserves.

RECENT COURT DECISIONS AND LEGISLATION IMPACTING JUVENILES

UNITED STATES SUPREME COURT:

 *United States v. Juvenile Male*
130 S. Ct. 2518 (U.S. 2010)

United States v. Juvenile Male was the response from the Supreme Court of the United States to a petition for a writ of certiorari from the Supreme Court of Montana on the retroactivity of the Sex Offender Registration and Notification Act (SORNA). This case involves a juvenile found guilty of a sex offense in Montana. In 2005, a juvenile male of an unspecified age admitted to “knowingly engaging in sexual acts with a person under 12 years of age.” *United States v. Juvenile Male*, 130 S. Ct. 2518 (2010). Had the young man been an adult, such acts would constitute a federal crime. Because he was a juvenile, the District Court of Montana deemed him “delinquent” and sentenced him to two years of official detention and juvenile delinquent supervision, until his 21st birthday. A key aspect of his sentence involved spending his first six months in a prerelease center and abiding by its conditions of residency. *Id.* He did not comply with the center’s residency conditions.

In 2006, while the juvenile male was still in official detention, Congress enacted SORNA. SORNA required not only that juveniles who have been judged delinquent in court for certain sex offenses register alongside adults, but that they must also “keep their registrations current in each jurisdiction where they live, work, and go to school”. *Id.* at 2519. This law would not have affected the juvenile male but for an interim rule issued by then Attorney General Albert R. Gonzalez, which stated that SORNA applied retroactively. In finding that the juvenile male did not comply with the conditions of residency, he was sentenced to another six months in the prerelease center. The prosecutors, invoking the Attorney General’s interim rule, argued that as part of his additional sentence for non-compliance, the juvenile male

should be required to register under SORNA. The District Court ordered the juvenile to register under SORNA and keep his registration current.

The U.S. Court of Appeals for the Ninth Circuit vacated the SORNA requirements of the District Court's order on the grounds that applying SORNA retroactively violates the Ex Post Facto Clause of the U.S. Constitution. The prosecution petitioned for a writ of certiorari to the United States Supreme Court, arguing that they could, in fact, apply SORNA retroactively.

In response to the writ of certiorari, the Supreme Court of the United States noted that certain details of the case needed to be resolved before they would be able to make a decision. As of May 2, 2008, the juvenile's term of supervision had expired, releasing him from the requirements of SORNA and potentially rendering the case moot. Thus, the Supreme Court posed this certified question to the Supreme Court of Montana: "Is [the juvenile male's] duty to remain registered as a sex offender under Montana law contingent upon ... his now-expired federal juvenile-supervision order that required him to register as a sex offender?" *Id.* at 2524. Essentially, the Supreme Court of the United States asked the Montana high court if there was any pertinent Montana law that would compel the juvenile male to register even if his obligations to do so under federal law no longer existed. Only if there is another way to compel the juvenile to register would the Supreme Court need to decide the question of whether SORNA retroactivity would be unconstitutional.

 *Graham v. Florida*
130 S. Ct. 2011 (U.S. 2010)

Petitioner Terrance Graham pled guilty as an adult to armed burglary and attempted robbery at the age of 16 and was sentenced to life without the possibility of parole. Graham filed a motion with the trial court challenging his sentence under the Eighth Amendment. The trial court denied the motion. The Florida Court of Appeals affirmed, reasoning

that the sentence was not grossly disproportionate to Graham's crimes. The Supreme Court of Florida denied certiorari. The United States Supreme Court granted certiorari to decide whether a sentence of life without the possibility of parole for a non-homicide offense committed as a juvenile violates the Eighth Amendment's prohibition on cruel and unusual punishment.

Under Florida law, the prosecutor assigned to Graham's case had discretion to charge Graham as an adult because he was at least 16 years old and had allegedly committed a felony. The prosecutor elected to charge Graham as an adult with armed burglary with assault or battery, a first-degree felony carrying a maximum sentence of life in prison, and attempted robbery, a second-degree felony carrying a maximum sentence of fifteen years' imprisonment.

Graham pled guilty to the armed burglary and attempted robbery charges. The court withheld adjudication of guilt as to both crimes and sentenced Graham to three years of probation. Thirty-four days before Graham's 18th birthday, he was arrested again for robbery. The trial court found that Graham had violated probation by committing the second robbery, possessing a firearm and associating with criminals. As such, the earlier armed burglary and attempted robbery charges were adjudicated. Graham was found guilty of both crimes.

In the sentencing phase, the judge spoke at length about how Graham had chosen a life of crime despite his second chance and stated that juvenile sanctions were no longer appropriate. The minimum sentence Graham could have received was five years. The probation officer recommended a truncated sentence of just four years while the prosecution recommended a thirty-year sentence for the armed burglary charge and a fifteen-year sentence for the attempted robbery charge. The judge sentenced Graham to the maximum term of life in prison. Because Florida had abolished its parole system, Graham's life sentence was the equivalent of life without the possibility of parole. Graham

had no possibility of release unless he was granted executive clemency, which was unlikely.

Generally, Eighth Amendment challenges to term-of-years sentences are overturned only if they are grossly disproportionate to the offense committed. Because Graham argued for a categorical ban on a term-of-years sentence, however, the Court stated the appropriate test was that which applied in other categorical ban cases. Under this approach, the Court was required to determine whether a national consensus exists against the type of sentence at issue and exercise its own independent judgment as to whether the type of sentence violates the Eighth Amendment. In doing so, the Court was to consider the culpability of the offender, the severity of the crime, the severity of the type of sentence and penological justifications.

In Graham's case, the Court found that sufficient data demonstrated the rarity of imposing life without the possibility of parole on juvenile, non-homicide offenders. Further, prior case law had already established that such offenders are less culpable and thus less deserving of the most severe punishments. Lastly, the Court stated that none of the accepted penological justifications were met by imposing a sentence of life without the possibility of parole, the second most severe form of punishment, on a non-homicide, juvenile offender.

In an opinion by Justice Kennedy, the Court held that a sentence of life without the possibility of parole for a non-homicide offense committed as a juvenile violated the Eighth Amendment's prohibition on cruel and unusual punishment. Further, the Court held that a person convicted of committing a non-homicide offense as a juvenile must be provided a meaningful opportunity to obtain release. In doing so, the Court rejected the case-by-case approach advocated by Justice Roberts, which would simply have required sentencing judges to consider the offenders age. The opinion was joined by five other Justices – Stevens, Ginsburg, Breyer and Sotomayor – with Justice Roberts concurring only in the judgment.

FEDERAL LEGISLATION **The Healthy, Hunger-Free Kids Act of 2010**
S.B. 3307, 111th Cong. (2d Sess. 2010)

Senator Blanche Lincoln of New York proposed S.B. 3307, commonly known as the Healthy, Hunger-Free Kids Act, on May 5, 2010. This bill aims to revolutionize child nutrition by expanding access to child nutrition programs, funneling additional funds to schools and child care facilities, raising nutrition standards, and providing technical assistance and training for implementation. S.B. 3307 also reauthorizes all child nutrition programs that are currently scheduled to expire in September 2010.

S.B. 3307 aims to promote the health of children both by providing more funds to schools and child care centers and requiring more from entities that provide food to children within their facilities. Under the bill, all food sold on school campuses, including from vending machines and snack bars, must comport with the most recent dietary guidelines. Additionally, schools and child care centers participating in the school lunch or breakfast programs are required to establish local school wellness policies for their schools.

The proposed legislation makes the largest investment in child nutrition programs since their inception, dedicating \$20 million to the project and raising the reimbursement rate for school lunch programs. The training component of the bill includes education on the importance of regular physical activity and healthy eating.

S.B. 3307 also launches a pilot program that provides children a “direct certification” option through the Medicaid program. Through this option, children who are living in Medicaid households will be automatically eligible to receive free meals. The bill mandates that the Secretary of Agriculture distribute performance awards to states that demonstrate exceptional results or substantial improvement in implementing the direct certification program. Additionally,

the bill establishes the categorical eligibility of foster children to receive free meals.

CALIFORNIA

 *In re Karla C.*

186 Cal.App.4th 1236 (Cal. App. 1st. Dist. 2010)

This decision by the California Court of Appeal, First District, considers whether a court may order a child to live with a noncustodial parent domiciled in Peru, when living with the custodial parent is not in the child's best interest. The key issue was whether the court would be able to maintain jurisdiction over the child after sending them out of the country.

Typically, a judge has three options in dependency proceedings when it is found the child is suffering abuse or neglect under the care of the custodial parent. First, the judge can enter a custody order to the noncustodial parent and terminate jurisdiction over the child. Second, the judge may retain jurisdiction and require a home visit within three months. Finally, the judge can order reunification services to be provided to either or both parents and determine who should have custody of the child. Here, the appellate court was concerned that if the child was transported to Peru, the lower court would not be able to maintain jurisdiction and reunification with the mother would never be possible.

The California Court of Appeal, First District considered whether the trial court abused its discretion by placing the child with the non-custodial father without ordering measures to enforce continuing jurisdiction. Such measures would include contact with Peruvian officials, or legal assurances that the child would be returned to California if needed. While California juvenile dependency law does not prohibit placing a child outside of the United States, there are special concerns with international relocations that are not implicated in intrastate or interstate relocations. These concerns involve culture, distance and jurisdiction. The court

acknowledged that California court orders governing child custody lack enforceability in many foreign jurisdictions. The basic question is whether the mother will be able to assert any parental rights if the child is in Peru.

Despite failure to preserve the issue on appeal, the court decided to consider the jurisdiction issue and rule on whether the court would be able to reestablish jurisdiction over the child if she were sent to Peru. The First District concluded that it was error for the trial court to assume that Peruvian courts would respect California court orders and retention of jurisdiction over the child. The court noted that the Hague Convention would not necessarily guarantee the return of the child, if needed, to the United States.

The case was remanded to the juvenile court to determine (1) evidence regarding recognition and enforcement of the juvenile court's continuing jurisdiction under the laws of Peru, and (2) implementation of measures necessary or appropriate to ensure enforceability of the juvenile court's continuing jurisdiction of orders when the child is outside of the United States.

 *People v. Mendez, et al.*

188 Cal.App.4th 47 (Cal. App. 2d Dist. 2010)

In the early hours of July 1, 2007, police officers apprehended Victor Manuel Mendez and Luis Enrique Ramos, 16 and 15 years old respectively, following reports of a gang-related crime spree. In the Superior Court of Los Angeles County, Ramos and Mendez were tried as adults. They were found guilty in April 2009 of carjacking, assault with a firearm, and seven counts of second-degree robbery with criminal gang and firearm enhancements on every count. These kinds of enhancements impose additional punishments for certain offenses, including criminal activity committed to benefit a gang. *People v. Mendez*, 188 Cal.App.4th 47, 62 (2010). Ramos was sentenced to 48 years and 8 months in state prison. Mendez received a harsher sentence: 84 years to life in state prison. The list of factors contributing to the 84-

year sentence was substantial and mathematically calculated: “Count 1 (carjacking) 25 years to life...count 2 (robbery) four years and four months...counts 3 and 4 (robberies) four years and four months each....” *Id.* at 62.

Expert testimony from a Los Angeles Police Department gang specialist supported the criminal gang enhancements. Officer Smith testified that he met Mendez when Mendez was 11 or 12 years old, and by that young age, Mendez was a “full-fledged, active” member of the “Blythe Street Gang”, a territorial gang most active in Panorama City, California. *Id.* at 53. He asserted that gang members commit violent acts for several reasons, including motivation to increase their status within the gang, to create a sense of fear in the community so that their crimes will not be reported, and because “nongang persons are easy targets.” *Id.* at 53. Testimony from the several victims, who were each not gang members, and a pistol found near where Ramos and Mendez were apprehended, supported the jury finding that Mendez and Ramos both wielded a firearm at some point during the incident. The Second District of the California Court of Appeal upheld both the firearm and criminal gang enhancements, finding that there was substantial evidence to support them.

On appeal, Mendez argued that an 84-year sentence for a non-homicide crime constituted cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution. *Id.* at 63. He argued that his sentence “amount[ed] to a de facto life sentence without parole,” given that he would be 88 years old before becoming eligible for parole and that average life expectancy for a male his age was 76 years. *Id.* at 64. Mendez relied on *Graham v. Florida*, 130 U.S. 2011 (2010), where the Supreme Court of the United States found that life without the possibility of parole “is an unconstitutional sentence for any juvenile who does not commit murder.” *Id.* at 2036.

The Court of Appeal agreed, finding that Mendez’s sentence did constitute cruel and unusual punishment, but not under the *Graham* decision, which only applies to juveniles

expressly sentenced to life without parole. In determining whether a punishment violates the Eighth Amendment, the court used a test examining the nature of the crimes committed, the kinds of punishments imposed for more extreme offenses within the same jurisdiction, and punishments for similar offenses in other jurisdictions that have been found to be cruel and unusual. *People v. Mendez*, 188 Cal.App.4th 47, 66 (2010). The Court of Appeal remanded for a re-determination of Mendez's sentence and affirmed all other charges against the two defendants.

 *In re Jose C.*

188 Cal.App.4th 147 (Cal. App. 2d Dist. 2010)

In an action terminating a mother's parental rights, the child and the maternal grandfather appeal. The issues presented were (1) whether the juvenile court erred in finding the child was likely to be adopted, and (2) whether the juvenile court erred in not considering the maternal grandfather a presumed parent, allowing him to assert the continuing beneficial relationship exception to the termination of the mother's parental rights.

The child, Jose C., and his mother are both developmentally disabled. Jose has been diagnosed with attention deficit hyperactivity disorder and mild mental retardation. Jose's mother has the cognitive ability of a 5 year old and functions socially at the level of an 11 year old. Both Jose and his mother lived with the maternal grandfather for the first six years of Jose's life. Jose first came to the attention of the Department of Child and Family Services (the Department) at the age of 7 after it was alleged that his mother physically abused him. At the time, the family was receiving in-home supervision from the government, which allowed Jose to stay with his mother; however, the physical abuse continued and the Department subsequently removed Jose from his mother's care. Jose's father's whereabouts were unknown and the grandfather elected not to have his residence, a friend's basement, assessed for placement because he did not think it would be approved.

Seven weeks after Jose was removed from his mother's care, he was placed with foster parent A.A. where he remained throughout the proceedings. A.A. wanted to adopt Jose, who had thrived and adjusted well in her home. Jose's mother and A.A. both supported an open adoption; however, they felt that it was not in Jose's best interests to remain in contact with the grandfather.

On December 10, 2008 the juvenile court terminated reunification proceedings. It found that Jose could not be returned to his mother, and moved forward with establishing a permanent plan for Jose. In July 2009, the juvenile court granted the grandfather *de facto* parent status, allowing him to appear at Jose's hearings, gain representation and present evidence. The grandfather argued that he should be allowed to assert the continuing beneficial relationship exception to the termination of the mother's parental rights. The juvenile court disagreed and terminated the mother's parental rights, allowing Jose to be adopted. In making its decision, the juvenile court noted the bonded relationship of Jose to both his mother and grandfather, but reasoned that the law simply would not allow the grandfather to assert the continuing beneficial relationship exception.

On appeal, the grandfather argued that the juvenile court should not have found Jose to be adoptable because termination of Jose's relationship with his mother and grandfather might cause Jose trauma and grief. The grandfather also argued on appeal that the juvenile court erred by not finding him to be a presumed father, which under California law would have allowed him to properly assert the continuing beneficial relationship exception. The court rejected both arguments, holding that (1) mere speculation cannot be grounds for finding a child is not likely to be adopted, and (2) a maternal grandfather who had not held the child out as his own biological child could not be considered a presumed parent and thus was precluded from asserting the continuing beneficial relationship exception to termination of the mother's parental rights.

📖 *R.R. v. Superior Court of Sacramento County*
180 Cal. App. 4th 185 (Cal. App. 3d Dist. 2009)

The Indian Child Welfare Act of 1978 (ICWA) granted tribal jurisdiction over custody cases of Indian children not domiciled on reservations. In 2006, California passed legislation requiring inquiry and notice to specified parties in any proceeding where an Indian child is at risk of entering foster care. The parents or guardians of the child, the child's Indian custodian, and the tribe must be given notice of the right to intervene in the proceeding, the right to counsel for the parents or Indian custodian, and right to transfer the proceeding to tribal court.

The goal of ICWA is to protect the best interests of Indian children. ICWA was enacted to remedy the issue of Indian children being removed from their families and placed with non-Indian families. ICWA is most often implicated where foster care placement is at issue, not in juvenile delinquency actions; however, California has recently extended ICWA protections to criminal actions, such as the misdemeanor battery involved in this case.

In 2006, the California Legislature amended ICWA application rules, requiring the probation department to inquire whether a child may be an Indian child where the child is at risk of entering foster care or was in foster care. The purpose of the legislation was to promote practices in accordance with ICWA. Additionally, the Legislature required that the court give affirmative notice of the juvenile's case to the parents, Indian custodian tribe and the Bureau of Indian Affairs.

The main issue in this case was whether ICWA applies in juvenile delinquency proceedings where the child is at risk of entering foster care, but where termination of parental rights is not involved. The Sacramento County Juvenile Court determined that California law does not require the application of ICWA to a juvenile delinquency proceeding where the case plan does not include termination of parental rights.

The Third District Court of Appeal disagreed with the juvenile court and held that the California Legislature had expressly made the inquiry and notice requirements of ICWA applicable to such cases, imposing a higher standard that is consistent with the purpose of the federal law and therefore not preempted. They held that (1) the Federal ICWA does not apply by its own terms in most juvenile delinquency proceedings, (2) California Law provides that ICWA is applicable in delinquency proceedings where the child is at risk of entering foster care, and (3) federal law does not preempt state law that is more protective.

The Federal ICWA does not preempt the 2006 California amendments, because the legislation provides more protection than Federal ICWA. California law is more protective of tribal interests than ICWA in a broader range of cases. Therefore, the Third District Court of Appeal concluded that if there is any possibility that the juvenile will be placed in foster care as a result of the court proceeding, there must be an inquiry to determine if the juvenile is an Indian child. If the child is an Indian child, notice must be given to the parents, Indian custodian, the tribe and the Bureau of Indian Affairs, and ICWA applies to subsequent proceedings.

KANSAS

Masha's Law

2010 Kansas Laws Ch. 133 (H.B. 2509)

In May 2010, Kansas passed a law modeled on Masha's Law, a federal law that created a private cause of action for victims of child pornography. Under H.B. 2509, a victim of child pornography who suffers personal and/or psychological injury as a result of production, promotion or possession of child pornography that resulted in a conviction, can bring an action in a state court against a producer, promoter or intentional possessor of such child pornography. The victim can bring suit even as an adult, and would recover

a minimum of \$150,000 in damages. The statute of limitations under the Kansas Masha's Law is three years. Additionally, the victim can request the attorney general to pursue cases on his or her behalf. The victim would collect damages and the attorney general would then be able to see reasonable attorney's fees and costs.

The Kansas Attorney General's Office and Attorney General Steven Six were instrumental in the crafting and passage of H.B. 2509. Attorney General Six noted that the most vulnerable Kansans are children and that sexual predators represent a constant threat to children. The bill will bring a new avenue of justice to these victims, allowing them to seek relief through the Attorney General's Office, as well as through private counsel.¹¹

Masha's Law was originally a federal law incorporated into the Adam Walsh Child Protection and Safety Act ("Adam Walsh Act"), signed by President Bush on July 27, 2006. The Adam Walsh Act was designed to "protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims."¹² The law was crafted in response to the experience of Masha Allen, who was adopted from a Russian orphanage into the United States at age 5 by a man who sexually abused her. Even after her abuser was convicted, pornographic images of her as a child were being downloaded from the Internet around the world. Prior to passage of Masha's Law, the penalty for downloading songs illegally from the Internet was three times the penalty of downloading child pornographic images. The law, among other things, raised the civil penalty for anyone who downloads images of

¹¹ Available at: <http://www.ksag.org/page/attorney-general-six-national-center-for-missing--exploited-children-see-to-raise-awareness-of-new-law-benefitting-victims-of-child-pornography> (accessed November 5, 2010).

¹² Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, §707, 120 Stat 587, 587 (2006).

child pornography from the internet from \$50,000 to \$150,000.¹³

The application of Masha's Law in Kansas, in addition to the federal law, will bring justice to many victims of child pornography by helping to ensure sexual predators are held civilly liable for their actions. In 2008, Florida also passed a state law version of Masha's Law. Hopefully, these laws mark the beginning of a growing trend of states recognizing the need to bring justice to victims of child pornography and sexual exploitation.

KENTUCKY

 *Petitioner F v. Brown*
306 S.W.3d 80 (Ky. 2010)

The appellants, two juveniles, were adjudicated public offenders for various sex offenses. In keeping with Kentucky DNA sampling statutes, the appellee, the Department of Juvenile Justice (DJJ), took DNA samples from the appellants according to the DJJ's own directives and policies regarding sampling DNA from certain juveniles under its custody or control. The appellants argued that Kentucky's DNA sampling statute did not require them to submit DNA for inclusion in a state and national database. They also argued that the DJJ had violated their state and federal constitutional rights against unreasonable search and seizure and that the DJJ had violated certain state statutes regarding procedures in issuing directives, policies, and regulations. The Supreme Court of Kentucky rejected all of the appellants' arguments.

The Supreme Court of Kentucky stated that the DNA sampling statute required DNA sampling of all felons, as well as juveniles who were both 14 years or older at the time of their offense and were adjudicated public offenders for a sex

¹³ Bush Signs Child Predator Law (July 27, 2006), available at <http://www.cbsnews.com/stories/2006/07/27/Politics/main1843910.shtml> (accessed November 5, 2010).

offense. In holding that the DJJ had correctly applied the DNA sampling statutes to the appellants, the court construed the relevant statutes to give effect to the intent of the General Assembly and avoid an absurd result.

The General Assembly is presumed to be aware of the Juvenile Code and its purpose when enacting new laws. The appellants had argued that inclusion of the DNA samples into the DNA database was a punishment that ran counter to the rehabilitative purpose of the Juvenile Code. The court held that such sampling for inclusion in a non-public database was not intended as punishment. Since the database was non-public, any fears of stigmatization for being included in the database were moot. Under this interpretation, the court held that the DNA sampling statutes did not run counter to the Juvenile Code and did apply to the appellants as they fell within the categories set forth in the statutes.

The court also held that the DJJ did not violate the appellants' federal or state constitutional rights. While the state constitution had greater privacy protections than the federal constitution, the court never extended those greater state protections to searches and seizures. In discussing whether the appellants' federal Fourth Amendment rights had been violated, the court applied the special needs test. In determining the proper test, the court discussed United States Supreme Court precedent involving Fourth Amendment violations in searches performed without cause. In keeping with US Supreme Court doctrine, the Supreme Court of Kentucky held that the special needs test was more appropriate.

In applying the special needs test, the court first asked if the DNA sampling statutes served some need beyond the normal needs of law enforcement. The court found that there was a special need involved with the DNA sampling statutes. The DNA sample was not used as evidence to a crime, but to serve identification purposes. The court then balanced the need against the individual's privacy, protections of which are greater for juveniles than for adults. The court held that the privacy interests of the appellants did not outweigh the state's

interest in sampling DNA, because the DNA database was not public and furthered the state's interest in the deterrence and rehabilitation of minors. Therefore, the court held that the DNA sampling statute applied to the appellants and the DNA sampling under the statute did not violate the appellants' constitutional rights.

NEW JERSEY

In re Doe

416 N.J. Super. 233 (Ch.Div. 2010)

The New Jersey Division of Youth and Family Services (DYFS) filed a petition to terminate the parental rights of Jane Doe under the Safe Haven Infant Protection Act ("Safe Haven Act"). The court sought to determine whether Noel Doe qualified under the Safe Haven Act. The Act generally requires that infants be surrendered in the emergency room, but the mother, Jane Doe, immediately surrendered Noel Doe after birth in the hospital maternity ward. The Appellate Division of the Superior Court held that the baby qualified as a Safe Haven infant and that DYFS held legal guardianship.

This case involves the scope and applicability of the Act¹⁴, which states that the parent may deliver a baby under thirty days old to "the emergency department of a licensed general hospital in this State." Noel Doe was born on December 16, 2009 in the maternity ward at South Jersey Regional Medical Center in Vineland, New Jersey. The mother, Jane Doe, arrived in the emergency room of the hospital in labor and was admitted to the maternity ward where she delivered the baby. Upon delivery, Jane informed the hospital workers that she would like to surrender the baby under the Safe Haven Act. On December 18, hospital officials notified DYFS that Jane had expressed her intent to leave Noel under the Safe Haven Act and had not returned after leaving the hospital, at which point DYFS took custody of the

¹⁴ N.J.S.A. 30:4C-15.5 to 5.11

baby under the Act. There was a question as to whether or not Noel qualified under the Safe Haven Act since the baby was surrendered in the maternity ward and not the emergency room.

In order to determine Noel's qualification under the Act, the court looked at the background and legislative intent behind the Safe Haven Act in order to answer the question at hand. Considering the Safe Haven Act's three main principles — safety of the child, anonymity, and immunity from prosecution from the biological parents — the court weighed different interpretations of the Act. One interpretation focused on the plain language of the statute pertaining to emergency room delivery. While the language seems clear, the outcome appears to be inconsistent with the main goals of the Act. Thus, the court considered the legislative intent. The court found that the Legislature had not only expressly stated that their intent was to save the lives of these children, but had also anticipated a need for Safe Haven sites to include more than just emergency rooms. Additionally, the court examined a website established by the State to educate the public on the Safe Haven Act. They found that by visiting the site, a mother would reasonably believe that she would not be forfeiting her protections under the Safe Haven Act by delivering her baby in the hospital maternity ward. As applied, it was reasonable for Jane Doe to believe that if she presented herself to the hospital in labor, she would be surrendering the baby under the law. The safety of the child being of utmost importance, the court ultimately found that allowing mothers to surrender their infants in the maternity ward and encouraging them to give birth in a hospital setting is good public policy. Therefore, the court held that Jane made a knowing and voluntary surrender of her child under the Safe Haven Act and granted guardianship of Noel Doe to DYFS.

NEW MEXICO *State v. Jones*

2010 NMSC 12 (N.M. 2010)

Defendant, Curtis Jones, was charged with first degree murder and two counts of sexual penetration after he allegedly murdered one-year-old Amy May. Defendant was 17 years old at the time of the alleged murder. Defendant initially pled no contest to child abuse charges and agreed to adult sentencing in exchange for dismissal of a first-degree murder charge. Defendant later moved to withdraw the plea, which the trial court denied, sentencing him to the maximum adult sentence, an eighteen-year prison term and two years of parole. The Court of Appeals affirmed the defendant's conviction.

The Supreme Court of New Mexico granted certiorari. The court highlighted the relevant provisions of the New Mexico Delinquency Act, which divides juvenile offenders into three classes: serious youthful offenders, youthful offenders, and delinquent offenders. Each class has different applicable trial procedures and potential post-adjudication consequences. Prior to the plea bargain, the defendant was charged as a serious youthful offender, a classification limited to juveniles charged with first-degree murder. Once in this category, the juvenile is automatically sentenced as an adult if convicted.

On appeal, the defendant argued that once his first-degree murder charge was dropped, he was subject to the rules guiding "youthful offenders," who are adjudicated to have committed offenses less serious than first-degree murder. Youthful offenders, as compared to serious youthful offenders, are given more procedural protections, including a hearing to determine whether the juvenile should be treated as an adult. The procedures require additional findings that the "child is not amenable to treatment or rehabilitation," and "the child is not eligible for commitment to an institution for the

developmentally disabled or mentally disordered.”¹⁵ The State argued, and the Court of Appeals held, that the defendant remained a serious youthful offender even after the prosecution dropped the first-degree murder charge.

The Supreme Court of New Mexico disagreed with the Court of Appeals, explaining that when a charge of first-degree murder is brought and then later dismissed, “it is unfair to subject the erroneously charged child any longer to the potential consequences of serious youthful offender status.”¹⁶ The moment the State dropped the first-degree murder charge, the defendant became a potential youthful offender and was entitled to the full range of protections afforded to that class.

The second issue was whether the court lacks the authority to impose an adult sentence on a child without first making a determination that the child is not amenable to treatment. The governing Delinquency Act section is silent as to whether the court must make an amenability determination even when the youthful offender, as here, agrees to be sentenced as an adult. The court points out, however, that the language of the statute and its legislative history suggests the legislature intended the court to make an amenable determination whenever it considers imposing an adult sentence under these circumstances. The court also referenced the legislature’s intent to protect children from adult consequences, as well as the fact that the juvenile justice system “reflects a policy favoring the rehabilitation and treatment of children.”¹⁷ In response to the State’s argument that the defendant waived his right to an amenable hearing, the court held that neither party can bargain away the court’s responsibility to make an amenability determination. The Supreme Court of New Mexico reversed the ruling of the Court of Appeals and remanded to the children’s court, requiring the court to vacate the plea bargain and conduct an amenability hearing before the possibility of sentencing the defendant as an adult.

¹⁵ See N.M. Sta. Ann. § 32 A-2-20(B) and (C).

¹⁶ 2010 NMSC 12 (N.M. 2010) at 20.

¹⁷ *Id.* at 35.

PENNSYLVANIA

 *Miller v. Mitchell*

598 F.3d 139 (3d Cir. Pa. 2010)

In October 2008, several teenagers in Wyoming County, Pennsylvania, were caught sending sexually suggestive text messages at school. After launching an investigation, the District Attorney contacted the parents of each student involved, and informed the parents that unless their children attended a six to nine month education program, they would be prosecuted for “sexting” by minors. Three of the students involved refused to attend the program. The District Attorney threatened to prosecute the students on child pornography charges if they did not comply. The students and their parents filed suit against the District Attorney in federal court, alleging retaliation in violation of their constitutional rights.

The court defined “sexting” by minors as “the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the internet.” The plaintiffs argued that the District Attorney’s threat of retaliation for “sexting” infringed on several constitutional rights. First, they argued that the choice to appear in photographs was protected by their right to free expression. Second, they argued that the education program’s requirement that they submit an essay explaining why “sexting” was wrong violated their First Amendment right to be free from compelled speech. Lastly, they argued that certain portions of the education program violated parental Fourteenth Amendment substantive due process right to direct their children’s upbringing.

On March 17, 2010, the Third Circuit Court of Appeals issued a preliminary injunction, barring the District Attorney from bringing the retaliatory criminal charges. The appellate court found that the plaintiffs had reasonably established that compelling completion of the educational program under threat of prosecution might violate the minors’ First

Amendment right against compelled speech and the parents' Fourteenth Amendment right to parental autonomy. The case was remanded to the district court for further proceedings.

RHODE ISLAND

📖 *Sam M. v. Carcieri*
608 F.3d 77 (1st Cir. R.I. 2010)

A number of individuals, acting as Next Friends¹⁸ on behalf of several foster children (Sam M. et al), filed suit in the Federal District Court of Rhode Island against the Rhode Island Governor, the Secretary of Executive Office of Health and Human Services, and the Director of the Department of Children, Youth, and Families (DCYF), alleging a violation of the children's First, Fourth, and Fifteenth Amendment rights. The Next Friends alleged that the foster children's liberty, privacy, and associational rights were violated under the Adoption Assistance and Child Welfare Act of 1980 because of abuse by foster parents and neglect for the children's living environment. The defendants moved to dismiss the claim for lack of subject matter jurisdiction, arguing that the Next Friends lacked standing to sue on behalf of the named plaintiffs. The trial court granted the dismissal and plaintiffs filed a timely appeal.

The First Circuit Court of Appeals reversed the trial court's ruling and held that the Next Friends had standing. The court considered whether the children had suitable representation and found that they did not. Although the defendants argued that the court appointed guardians *ad litem* (GALs) were the foster children's duly appointed representatives, the appellate court stated that the GALs were only authorized to advocate for the children within the confines of family court, and this representation did not extend

¹⁸ For those unfamiliar with the term, "Next Friend" refers to a person or group representing an individual in court who, by reason of disability, minority, or lack of counsel, does not have representation.

to federal court proceedings. In the circumstances of this case, the court found that the Federal Rules of Civil Procedure¹⁹ allowed federal courts to appoint a Next Friend to represent the children in federal court.

The court next addressed the propriety of Next Friends' representation of the children. Following the holding in *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the court determined there were "two firm prerequisites" required for Next Friend representation. The first prerequisite is "an adequate explanation - such as inaccessibility...why the real party in interest cannot appear on his behalf to prosecute the action." *Sam M. v. Carcieri*, 608 F.3d 77, 90 (1st Cir. 2010). In this case, the real parties in interest are minor children in the foster care system, which fulfills the first requirement. The second prerequisite is "a showing that the Next Friend is 'truly dedicated to the best interests of the person the Next Friend seeks to represent.'" *Id.* at 90 (quoting *Whitmore, supra*, at 163). The court determined that each of the Next Friends were acting in good faith and were acting in the best interests of the children. The court stated that there is a possible third, non-mandatory requirement that the Next Friend must have a significant relationship with the real party; however, because the real parties in interest in this case did not have significant ties to their parents and were under state custody, a "significant relationship" was not required.

The Court of Appeals remanded the case to the district court and the complaint is reinstated. The holding in this case will impact the future ability of Next Friends to represent abused youth in court proceedings.

¹⁹ See Fed. R. Civ. P. 17(c)

TEXAS *In re B.W.*

313 S.W.3d 818 (Tex. 2010)

Juvenile defendant B.W. brought an appeal after pleading guilty to a charge of prostitution. The trial court denied B.W.'s motion for a new trial and the appellate court affirmed. The Supreme Court of Texas granted review to consider B.W.'s challenges to the adjudication of delinquency for the offense of prostitution. In a 6-3 decision, the court held that since B.W. was a minor under 14 years of age at the time of the offense, B.W. could not have legally consented to having sexual intercourse and thus could not be convicted of a crime that required consent to sexual intercourse.

The issue in this case is whether or not a defendant, who was 13 years old at the time of arrest, could consent to sex and therefore commit the crime of prostitution. B.W. contended that a child under the age of 14 could not legally consent to sex. The State of Texas asserted that consent by a child under the age of 14 is a shifting concept designed to protect victims of sex crimes, rather than juvenile offenders.

The Supreme Court of Texas held the notion that a child could not legally consent to sex was a longstanding rule with origins in the common law. The court referenced the state's statutory rape laws, pointing out that there was an exception for teens 14 years or older consenting to sex, but no exception for younger children. There was an underlying rationale that younger children could not understand the significance of sex and could not give meaningful consent. Without the capacity for consent, a child under the age of 14 could not knowingly commit prostitution, which requires that the person knowingly offers to have sex. The court's reasoning flows from a subsequent analysis of related statutes relating to sex with minors.

The Court stated that in passing statutes giving children greater protection against sexual exploitation, the legislature had demonstrated the importance of protecting

children from sexual exploitation. The court cited other state statutes regarding the inability of children to give consent, such as the voidability of a minor contract and voiding all marriages to children under the age of 16, absent a court order. In the same sense that children under the age of 16 could not consent to marriage, neither could children consent to sex. Due to the strict liability nature of the statutory rape law and the absence of a defense for children under the age of 14, B.W. could not have committed the crime of prostitution.

The dissent had several concerns regarding the court's opinion. The court had not cited any specific statutory language that barred B.W.'s conviction. The dissent also argued that simply because a defense was not available to B.W.'s age category in the statutory rape law did not indicate that a child could not commit prostitution. Lastly, the dissent was concerned that in overturning B.W.'s conviction, she would be deprived of the state and social services necessary to rehabilitate her and prevent her from further instances of criminal behavior, given her prior juvenile and foster care record. The majority responded that its conclusion in overturning B.W.'s conviction was based on inferences on related statutory laws. The majority also stated since there were already many state and social services in place to assist B.W., such as Child Protective Services, the dissent's concerns were unfounded.

TENNESSEE

 Amendments to the Tennessee Sexual Offender and Violent Offender Registration, Verification, and Tracking Act of 2004
H.B. 2789, 106th Sess. (Tn. 2010)

This year, the Tennessee Legislature passed H.B. 2789, which creates a violent juvenile sexual offender registry. A "violent juvenile sexual offense" is defined by the bill as "an adjudication of delinquency for any act that, if committed by an adult, constitutes the criminal offense of aggravated rape,

rape of a child provided the victim is at least four years younger than the offender, aggravated sexual battery, or criminal attempt of such offenses". The bill requires that juveniles between the ages of 14 and 18 who are adjudicated delinquent for such offenses register with the sex offender registry as a violent juvenile sexual offender. Once the offender attains majority, he or she would be subject to the provisions of the Tennessee Sexual Offender and Violent Offender Registration, Verification, and Tracking Act ("Act").

Under H.B. 2789, violent juvenile sexual offenders would be subject to the same terms as the Act even before reaching 18 years of age, with a few exceptions. For instance, the restrictions pertaining to the residence of an offender under the Act are different for juvenile offenders. Unlike adults, a violent juvenile sexual offender would be able to receive treatment and be able to accept employment within 1,000 feet of a school, day care center, or park. Under the Act, adults must wait ten years after discharge from incarceration without supervision, or termination of active supervision, probation, parole, or other alternative to incarceration, before they are authorized to file a request for termination of the registration requirements; however, under H.B. 2789, the ten-year period would not apply to juveniles. Violent juvenile offenders would not be authorized to file a termination request until at least twenty-five years after their active supervision terminates. If a violent juvenile sexual offender fails to comply with the requirements of the Act, this twenty-five year reporting period would be tolled, notwithstanding any alleged violations of the Act. Violent juvenile sexual offenders are not required to pay annual administrative fees until they attain majority.

Current law states that a violent adult offender must comply with registration, verification and tracking requirements for the life of the offender if the offender has prior sexual offense convictions. H.B. 2789 extends this requirement to juveniles. The bill also added the requirements that "at least once during the months of March, June, September, and December of each calendar year, all violent juvenile sexual offenders shall report in person to the juvenile

court in which the adjudication occurred to update the offender's fingerprints, palm prints and photograph, as determined necessary by the agency." The Act took effect on July 1, 2010.

WASHINGTON

Dependency Proceedings – Children's Representation H.B. 2735, 61st Leg., 2010 Reg. Sess. (Wa. 2010)

On June 10, 2010, H.B. 2735, which the Washington State House of Representatives and Senate unanimously passed, went into effect. This legislation modifies the requirements²⁰ dealing with foster children and their representation in the Washington dependency courts. The goal of this legislation is to inform dependents of their right to counsel by correcting the inconsistent practices in the various Washington counties that have left children in the dependency system without notification of their right to counsel.

This legislation makes three significant changes to the current dependency system. First, the legislation requires that when a foster child reaches the age of 12, the supervising agency or department and the Court Appointed Special Advocates (CASAs) or Guardians *ad litem* (GALs) are required to notify the child that he/she has a right to counsel for representation in court proceedings. The notification is to occur annually after the age of 12, as well as whenever actions are taken that will impact the child's relationships, placement or services. The GALs must comply with the reporting requirement and inform the court that the dependent was informed about their right to counsel, and whether or not counsel is requested. Unless the dependent already has appointed counsel, the court also has a duty to inquire if the dependent has been notified of their right to counsel or requested counsel after their 12th and 15th birthday.

²⁰ See R.C.W. §§ 13.34.100, 13.34.105, 13.34.215

The second significant change is the requirement that the GAL notify any foster child over the age of 12 that the child can request to reinstate parental rights if they were previously terminated. The reinstatement process is the only process in the dependency system in which counsel is automatically appointed.

The last significant change is an addition to the Code requiring that the Administrative Office of the Courts work with the State Supreme Court Commission on Children in Foster Care to develop recommendations for voluntary training and caseload standards for foster care cases. These recommendations will be presented to the legislature by December 31, 2010.

This legislation was passed in response to the efforts of Washington state child welfare advocates. It made clear that the state bears the burden of informing dependents and other children of their rights to representation, and will standardize procedures across the state in this area. H.B. 2735 will ensure that foster youth are informed and involved in the dependency process. Informing youth of their right to counsel ultimately provides an outlet for the youth to advocate for his/her own needs, helping to ensure safe and positive environments for all youth.