Practitioner's Section

This portion of the *Journal of Juvenile Law and Policy* focuses on the experiences of persons who work with children. The journal selected a solo practitioner who practices special education law, a middle school teacher, and a former intern at the juvenile division of a district attorney's office.

Roberta Savage, a solo practitioner in Davis, California, shares her insight into the world of special education law and the personal rewards she has garnered through this career path. Keli Martinez, a middle school teacher, discusses how her class reacted to a story about freedom of speech and how educators can strive to foster discussions on the topic with young students. Derrick Muhammad, a third-year law student, shares a story of a juvenile prostitute he encountered while interning at the juvenile division of the San Francisco District Attorney's office during his first summer in law school.

The Practitioner's Section is followed by summaries of recently passed state laws and court decisions affecting juveniles. Topics include health, delinquency, dependency, and education.

REPRESENTING STUDENTS WITH SPECIAL NEEDS: THE REWARDS OF BEING A SOLO PRACTITIONER

By Roberta Savage*

Very few of us enter law school with a particular focus. I happened to be one that did. I worked with children with disabilities prior to attending law school and knew that I wanted to advocate for them as a lawyer, which was my sole purpose for applying. Once I enrolled, I hunted down any opportunity to expose myself to the area of special education law. Now, entering my tenth year as a lawyer, I can attest that it was well worth the effort. Although the area of special education law is contentious, both sides of the dispute – students with disabilities and public schools – are honorable.

The Individuals with Disabilities Education Act (IDEA) is the federal law that guarantees a free, appropriate public education to all children with disabilities that live in the United States. Each state is charged with enacting its own laws and regulations to carry out its IDEA obligations, thereby resulting in some differences in the law between the states. Enacted in 1975, the IDEA was originally known as the Education of All Handicapped Children Act, or Public Law 94-142. Public Law 94-142 was enacted to ensure access to public schools for all children with disabilities. Over thirty years later, it is commonplace to see children with disabilities attending classes on a public school campus. Since its original enactment, Congress has changed the scope of IDEA to create rights beyond mere access to public school for children with disabilities.

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The cornerstone of the current version of the IDEA is the provision of a free, appropriate public education (FAPE). What FAPE is for any particular child is a fact-based determination based upon the unique educational needs of that child. What is FAPE for one child with Autism may not be FAPE for another child with Autism. In defining a FAPE for any child, an Individualized Education Plan (IEP) team meets to begin developing a program. The IEP team must include parents and public school employees. It may also include private service providers and attorneys. The programs developed by the IEP team rely on individual assessments to identify each particular child's unique educational needs, which in turn guide the team to develop reasonable and achievable annual goals. Once the annual goals are developed, the IEP team develops a plan of specialized services, such as speech and language therapy or one-on-one direct instruction, and a placement where those services can be implemented. Although this process seems straightforward and efficient, in reality it is neither.

In my experience, it is rare that the IEP team members agree with each other regarding what constitutes a FAPE for any particular child. In those cases where there is not an agreement either the school district or a parent can file for a due process hearing. As an advocate, I may participate in an IEP team meeting, however, I am most often brought into the case after a dispute arises. My practice consists of representing students at due process hearings and mediation with the school district.

The special education law climate has changed dramatically since I was admitted to the California Bar in 1999. In 2004, the IDEA was dramatically changed with the passage of the Individuals with Disabilities Education Improvement Act of 2004, which became effective in July 2005.[1] Additionally, there have been significant changes in recent case law that make it more difficult for students to

[1] Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

challenge the programs offered by school district[2] and reduce the amount of reimbursement for costs incurred in litigating matters.[3]

Those factors, paired with the July 1, 2005 change in administrative agency that hears the special education disputes, has made the practice of special education law exceedingly difficult. It has lead to a reduction in the number of attorneys who are able to represent students in IDEA disputes. For those of us who remain fortunate enough to continue representing students with disabilities, the road we travel seems even more unfairly balanced. I represent students with more struggles in their lives than most people ever face or could ever imagine. Yet when it comes to their education, the struggles their families face are overwhelming and exhausting.

Families of students with disabilities have been portrayed in the media as seeking unreasonable services from a struggling public school system. This inaccurate description of families of students with disabilities does not help improve the climate or attitude that parents face. In my experience, parents want what is right for their child. When it comes to public education, the law requires that students with disabilities are entitled to a free, appropriate public education. These families are not asking for the moon, just what the law requires. There is no level of service that a public school can provide a child that will make a parent forget that their son or daughter has Autism, Down Syndrome, Cerebral Palsy or Bi-Polar Disorder, and these families are not asking for that type of service. I can only try to ease their burden by advocating for appropriate services for their children. This quest has led me to a satisfying career, for which I am eternally grateful.

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[2] *See* Schaffer v. Weast 546 U.S. 49 (2005).

[3] *See* Arlington Cent. School Dist. Bd. of Educ. v. Murphy 548 U.S. 291 (2006).

DEVELOPING A STUDENT UNDERSTANDING OF FREE SPEECH: EXPERIMENTS IN A SEVENTH GRADE CLASSROOM

By Keli Martinez*

As a first year middle school English and Literature teacher, I am constantly looking for opportunities to challenge and motivate my students. Over the years I have had many opportunities to work and volunteer in a wide variety of elementary and middle school classrooms. In nearly every classroom I visited I witnessed the use of outdated and ineffective teaching methods, specifically when dealing with literature and reading. I grew increasingly frustrated with the fact that students were given few opportunities to voice their own opinions or interpretations of literary text. Typically, classroom literary discussions consisted of teachers summarizing a story, lecturing on aspects of the plot they deemed important, and interpreting the text for their students. Teachers then usually asked lower level questions that focused on a student's ability to memorize key events in the plot rather than the student's ability to independently analyze and construct meaning from the story.

It has always been my belief that children are capable of independent thought far sooner than they are generally granted the opportunity to exercise it. Through my experiences as an educator I have heard students voice opinions that were mature, eloquent, and rational beyond their years. However, when these curious and thoughtful young minds are presented with repetitive reading tasks, mindless worksheets, and unimaginative lines of questioning, it is no wonder many students are struggling to find relevance in the classic and contemporary literature that is presented to them

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through classroom curriculum. Students, even at a young age, have a great desire to understand their world -- its civics, its government, and what it means to them.

I began this school year hoping to find a novel that would act as a springboard for in-depth analysis and debate. After much research, I serendipitously stumbled upon a box of books that contained an Avi novel entitled Nothing But The Truth: A Documentary Novel.[4] The novel is not a usual pick for middle schools, perhaps because the questions it raises about society are so different from those that arise from more standard classroom books. Scanning the pages, I was immediately struck by the unique and creative structure of the book. Unlike typical young adult narratives, the book included a series of memos, conversations, diary entries, speeches, and transcripts. This structure tells the story from multiple perspectives and gives the reader greater access to the thoughts, feelings, and actions of characters from many walks of life.

The novel revolves around a ninth grader named Philip Malloy who, as described by my students, "is a bit of a wise guy who is not serious about his studies." Philip struggles with his English teacher, Miss Narwin, a passionate veteran teacher who is frustrated by Philip's lack of effort and ambition. Their feud erupts when, during morning announcements, Philip hums along with the National Anthem, disregarding the school's standard protocol which asks students to "stand at respectful, silent attention" during the playing of the Anthem.[5] This single incident set into motion a series of events that would eventually spark a nationwide controversy over the issues of both freedom of speech in the classroom and patriotism.

As I passed out copies of the novel to my seventh graders, I asked them to take a few minutes and skim through the book. I watched with excited anticipation as they flipped through the pages cautiously, their brows furrowed in

[4] AVI, NOTHING BUT THE TRUTH: A DOCUMENTARY NOVEL (1991).
[5] *Id.* at 1.

confused curiosity. "Mrs. Martinez, what kind of book is this?" asked one student. I explained to the class that the novel used a variety of sources, giving them an opportunity to read a narrative that detailed multiple characters' perspectives, thoughts, and actions. I began reading the text aloud to the class as they followed along in their own books, stopping occasionally to discuss not only the plot and characters, but also the format of the novel. A number of students commented on how different the structure of the book was when compared with the literature they had read in the past. This unique format seemed to help my students gain a deeper understanding of key plot events. I was surprised and delighted when my students began commenting on a character's actions or voice their opinions about the choices made by the main character. Rather than directly answer these students' questions, I invited the class to begin a self-directed dialogue. With little hesitation, my most vocal students began commenting on Philip's "laziness," while some of their peers came to his defense by accusing Miss Narwin of being "too wound up," "over reactive," and "way too strict."

As the story progressed, students discussed not only the obvious features of the characters and story line, but also the prevailing theme and lesson in the plot: freedom of speech. As a class, we began to parse out what this freedom really meant: is it absolute, or are there times when individuals will be denied that right? What if the speech is threatening or can be categorized as hate speech? Students revealed their own personal definition of free speech, under what circumstances that right should be censored, and how Americans can best use their freedom of speech. One student commented, "There are a lot of countries that don't have free speech so I feel lucky. If we didn't have free speech we would only get the ideas of a few elected people." A number of her classmates agreed with her sentiments. In response to her remark, another student expressed, "But we have to remember to use that freedom carefully and not say things that are wrong or hurtful." Students used the storyline from the novel to explore broader issues that were undoubtedly relevant and intriguing to them. Serious and critical issues like freedom of speech are all too

often glossed over or completely omitted from an average middle school classroom curriculum.

Expanding on the benefits and consequences of freedom of speech, the novel touched on such themes as the dangers of miscommunication, the media's propensity for one-sided sensational stories, and politicians' use of isolated anecdotes for political gain. During class discussions I remained as silent and neutral as possible, allowing the students an opportunity to explore the issues themselves and engage in student directed dialogue. The students posed many thought provoking and insightful questions to each other, including:

- "What does it mean to be patriotic and is patriotism part of the First Amendment?"
- "Why did the media only focus on one side of the story?"
- "Why were people offended by the humming of the National Anthem?"
- "Would it have been different if a teacher had broken the school rule?"

Though literary discussions certainly are not new to education, teaching Nothing But the Truth showed me the importance of giving young students a platform to voice their opinions and concerns surrounding the fundamental rights of our society. One student commented that our discussion about the book was itself an exercise in the right to free speech. This comment epitomized my goal in selecting the novel: the students read and interpreted the story, and in turn, the story facilitated a discussion of their understanding of the freedom of speech. Educators must strive to give their students a voice in the classroom, and at the same time help them realize the power and privilege of their ability to use that voice. Such an understanding, which my students proved can be explored at a young age, is critical to developing an appreciation of our rights and responsibilities as citizens.

JUVENILE PROSTITUTION: JUSTICE OR REDEMPTION?

By Derrick Muhammad*

During the summer after my first year of law school, I interned in the juvenile division of the San Francisco District Attorney's office. I worked on a wide variety of cases, including narcotics sales, assault, battery, robbery, witness tampering, and obstruction of a police officer by threats and violence. Out of all the cases I worked on, however, one case touched me the most.

The case involved a female juvenile who was arrested for loitering in a public place with the intent to commit prostitution. She was also charged with solicitation and agreement to engage, and engaging in an act of prostitution. Although she was only sixteen years old, records indicated that she ran away from home two years prior. As a father of two daughters, I felt sympathy for her and wondered how she became involved in her current lifestyle. Because of departmental protocol and the adversarial relationship that exists between prosecutors and public defenders, I was not able to speak with the juvenile to gain an understanding of her plight.

At the request of my supervisor, I drafted a motion arguing against informal probation for the juvenile, as requested by her public defender. Informal probation includes deferred adjudication so long as the minor demonstrates good behavior for six months while under the supervision of a probation officer. She would not be required to make regular court appearances, and once she completes the prescribed probation time without any other legal violations, the charges

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would be dismissed. In contrast, formal probation – the option sought by my supervisor – would result in the juvenile becoming a ward of the court. Additionally, the charges would remain on her record, and she would have mandatory court appearances. The presiding judge ultimately ruled in favor of formal probation as requested by the District Attorney.

In this instance neither choice seemed adequate to further the interest of justice. Informal probation did not provide enough supervision or parental involvement, thereby allowing the juvenile more opportunities to fall back into prostitution or other vices. On the other hand, formal probation did not include rehabilitative components such as family counseling, individual therapy and education. Simply restricting her activities would not necessarily lead to rehabilitation. Furthermore, neither option took into account the overarching social problem of juvenile prostitution. Many youth involved in prostitution have run away from abusive family situations or were thrown out by their families.[6] Our society needs more meaningful prevention measures to truly address this issue.

The experience of interning in the juvenile division of the District Attorney's office was eye-opening. Even though juveniles who engage in prostitution are violating the law, more emphasis needs to be placed on the reasons why they turn to this lifestyle to begin with if we are to fix the problem.

[6] Hofstede et al., The Hofstede Committee Report: Juvenile Prostitution in Minnesota (1999) available at www.heart-intl.net/HEART/080105/**JuvenileProstitution**Minn.pdf.

RECENT COURT DECISIONS AND LEGISLATION IMPACTING JUVENILES

6TH CIRCUIT – FEDERAL COURT OF APPEALS:

🕮 *Barr v. Lafon*
538 F.3d 554 (6th Cir. 2008)

Steve Lafon, principal of a Tennessee high school, implemented a policy prohibiting students from wearing clothing with Confederate flag depictions to school. Lafon considered the flag to be disruptive to the school learning environment based on several incidences of violence and threats. Three students - Derek Barr, Roger Craig White, and Chris White - wore shirts depicting the Confederate flag to school to express pride in their southern heritage, despite the school policy.

The students sued the principal, director of county schools, and county school board, alleging that the policy unconstitutionally violated the First Amendment, Equal Protection Clause, and Due Process Clause. Defendants filed a motion for summary judgment, which the district court granted. The district court dismissed the case with prejudice.

The Court of Appeals for the Sixth Circuit first reviewed *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). In *Tinker*, the school banned students from wearing black armbands to protest the Vietnam War. The United States Supreme Court ruled that the ban violated the students' right to expression because there was not "evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students." *Barr v. Lafon*, 538 F.3d

554, 563 (6th Cir. 2008) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 393 U.S. 503, 509 (1969)).

Under *Tinker,* in order to suppress expression, school authorities must reasonably foresee that the expression will materially and substantially disrupt the learning environment. The Sixth Circuit held that this case met the standard. The school experienced high levels of racial tension prior to the ban on Confederate flag apparel, including racially motivated fights. Additionally, the symbol was pictured in graffiti next to a noose with specific African American students' names.

The circuit court next considered the students' Equal Protection claim. The court held that the restriction did not violate the Equal Protection Clause for the same reasons it did not violate the First Amendment. The court stated that the school's substantial interest was to "educate its students in a learning environment conducive to fostering both knowledge and democratic responsibility . . . ." *Id*. at 576. Furthermore, because the restriction satisfied the *Tinker* standard, the dress code was narrowly tailored. Therefore, the court affirmed the district court's granting of summary judgment on this issue.

Finally, the court noted that the students had forfeited their Due Process claim because it was merely mentioned but not developed in the record. Therefore, the court did not consider this issue in its analysis. The circuit court therefore affirmed the granting of summary judgment in favor of Defendants with respect to the First Amendment, Equal Protection, and Due Process claims.

9TH CIRCUIT – FEDERAL COURT OF APPEALS:

🕮 *Redding v. Safford Unified School District No.1*
531 F.3d 1071 (9th Cir. 2008)

Assistant Principal Kerry Wilson called Savana Redding, a thirteen-year-old honor student at Safford Middle School, into his office for questioning. Wilson had caught another student with ibuprofen pills earlier in the day, and that

student implicated Redding as the supplier. When Redding denied having the pills, Wilson asked if he could search her belongings. Redding consented. He and an administrative assistant searched Redding's bag, but did not find any pills. Wilson instructed the administrative assistant to take Redding to the nurse's office for a more invasive search.

In the nurse's office, the school nurse and administrative assistant strip-searched Redding. When the women did not find ibuprofen in her shoes or socks, she told Redding to systematically undress. Humiliated, Redding began to cry as the administrators forced her to expose her breasts and pelvic area. The administrators did not find any drugs. Redding did not consent to this search.

Redding's parents filed suit against the school district and the three school officials alleging that her rights were violated under 42 U.S.C. § 1983. Claiming that the search did not violate Redding's Fourth Amendment rights, the defendants moved for summary judgment. The district court granted the motion, asserting that the search was constitutional because Wilson had reason to believe the ibuprofen would be found and the need to locate it was sufficiently urgent. Although the Ninth Circuit initially affirmed the decision on appeal, the judges voted to reconsider the case en banc.

The circuit court found that the culpable informant's tip, absent corroborating physical evidence, was not justification for a highly invasive strip-search. Because the search was unconstitutional at its inception, the court considered the qualified immunity claims of Wilson and the two other school officials. The court held that Wilson was not entitled to qualified immunity because he ordered the search in his official capacity when he should have been fully aware that it violated Redding's personal liberties. The court affirmed the grant of qualified immunity for the administrative assistant and nurse because they merely followed their superior's instructions. The court remanded the case to the district court for further proceedings.

ARIZONA

🕮 *Steven H. v. Arizona Department of Economic Security*
190 P.3d 180 (Ariz. 2008)

In this case, the Arizona Supreme Court considered whether it is lawful to place two children of Native American descent in foster care if expert testimony regarding the welfare of the children does not address the specific language of section 1912(e) of the Indian Child Welfare Act ("ICWA"). This portion of the act requires "serious emotional or physical damage to the child" before a removal may occur. 25 U.S.C. § 1912(e) (2000).

Mathew and Savannah, the biological children of Tammy H. and adopted children of Steven H., are of Indian descent and affiliated with the Cherokee Nation. The family had numerous interactions with Child Protective Services due to allegations of emotional and physical abuse of the children. A guardian ad litem (GAL) filed a petition requesting the court to order Savannah and Mathew dependents because of these allegations.

Because Mathew and Savannah were of Indian descent, the child custody hearing was governed by ICWA. ICWA states that before a state court judge can place a child of Indian descent into foster care, the judge must make "a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(e) (2000). At the dependency hearings for Mathew and Savannah, expert witness testimony and other evidence demonstrated that the children were abused. Thus, the juvenile court declared the children to be dependent. However, the expert witnesses did not directly state whether the children would suffer serious emotional or physical harm if they remained in the Tammy and Steven H.'s custody. Tammy and Steven H. appealed, arguing that the expert's failure to address the above

mentioned issue precluded the state from meeting its burden of proof under section 1921(e) of ICWA.

The Arizona Court of Appeals agreed with Tammy and Steven H., and vacated the dependency order. The appellate court held that section 1912(e) of ICWA requires an expert witness to "explicitly" attest that if the children stayed in the custody of their parents, they would suffer grave emotional and physical harm. In this case, the expert witness' testimony did not "explicitly" address this issue. The Supreme Court of Arizona granted review after the GAL appealed.

The Supreme Court of Arizona held that while foster care proceedings regarding Indian children under section 1912(e) of ICWA require qualified expert testimony as to the likelihood of future harm to the child, "the expert testimony need not parrot the language of the statute. So long as expert testimony addresses the issue that continued custody of the Indian child by the parent is likely to result in emotional or physical harm," the statute is satisfied. *Steven H. v. Ariz. Dep't of Econ. Sec.*,190 P.3d 180, 187 (Ariz. 2008). The court further explained that expert testimony under ICWA is not to be the sole criterion for the court's conclusion, rather, it should support the court's ultimate conclusion. The state supreme court vacated and remanded the appellate court's ruling, thereby ordering it to reconsider the expert testimony in a manner consistent with the standard set forth above.

ARKANSAS

🕮 *Porter v. Arkansas Dept. of Health & Human Services* ---S.W.3d---, 2008 WL 4173644 (Ark. 2008)

Mark Porter and Diana Rolen appeared in juvenile court for a Family in Need of Services ("FINS") hearing. Their daughters, twelve year-old S.P. and sixteen year-old D.P., were allegedly truant. At the hearing, the Department of Health and Human Services ("DHS") presented evidence that Rolen and Porter consented to D.P.'s marriage to thirty-four

year-old Ralph Rodriguez. Porter testified that he knew little about Rodriguez, and that he signed the necessary documents for the marriage out of fear that D.P. would run away if he did not consent. Subsequent to the FINS hearing, DHS was granted emergency custody of Porter and Rolen's three minor children, D.P., S.P., and J.P., due to neglect and lack of supervision.

The trial court voided D.P.'s marriage, which Porter moved to strike. Porter then moved to dismiss the court's finding that his consent to D.P.'s marriage was an adequate basis for dependency-neglect. Porter's motions were denied, and he thereafter appealed both the trial court's judgment of dependency-neglect and the annulment of D.P.'s marriage.

The Supreme Court of Arkansas reviewed *de novo* the findings for dependency-neglect, and found that the charge of dependency-neglect was appropriate under section 9-27-303(3)(A)(iii) of the Arkansas Code Annotated. Porter did not perform his parental duty to protect D.P. from sexual exploitation. D.P.'s premarital contact with Rodriguez included sexually explicit internet postings and improper sexual encounters. Thus, the trial court was correct in considering Porter's consent to D.P.'s marriage as a basis for finding dependency-neglect.

The court also noted other factors that indicate neglect. Porter's children's truancy, which incited the original FINS hearing, demonstrated Porter's neglect to provide his daughters with necessary education. Under the state's custody, it was also discovered that D.P.'s immunizations were not to date, which showed Porter's neglect for his daughter's medical care. When the action commenced, Porter was unable to provide D.P. and J.P. with adequate shelter with sufficient shelter. The children were living with their mother, who Porter knew had substance abuse problems. Furthermore, Porter failed to prevent inappropriate sexual contact between his son J.P. and four of J.P.'s siblings in Porter's home. The Arkansas Supreme Court held that there was substantial evidence to charge Porter with dependency-neglect.

Finally, the state supreme court reviewed the trial court's decision to void D.P. and Rodriguez's marriage. The court found that there was no persuasive evidence that Rodriguez's age was misrepresented. The fact that the marriage was not in D.P.'s best interest was not an adequate ground for voiding the marriage, and there was no convincing evidence that D.P. did not have the mental capacity to make the decision to enter into marriage. The supreme court thus reversed the trial court's decision on this issue and remanded for entry of judgment in agreement with its opinion.

CALIFORNIA

🕮 California AB 3051
Amendment to Section 349 of the Welfare and Institutions Code
Introduced February 28, 2008
Status: Chaptered

Governor Arnold Schwarzenegger signed Assembly Bill 3051 ("AB 3051") into California law on July 21, 2008. Existing law permits children in dependency proceedings to be present at those hearings and to be represented by counsel of their choice. In order to promote communication, participation and understanding among children who are the subjects of these hearings, AB 3051 expands these preexisting rights to allow them to become active participants in their hearings. Thus, the bill requires courts to allow dependent children who are present at their hearings to address the court and voice their opinions regarding decisions about their future.

Additionally, AB 3051 requires that the court determine whether the child was given an opportunity to attend the hearing. Existing law only requires the court to determine whether a child ten years of age or older was properly notified of his or her right to attend the hearing. Under AB 3051, if the child wished to participate but was not properly notified or given an opportunity to attend, the court must continue the hearing to allow the child to be present.

The court may be exempt from this requirement if the court determines that it is not in the child's best interest to continue the hearing.

AB 3051 was drafted in response to the San Jose Mercury News' year-long investigation, *Broken Families, Broken Courts*, which highlighted critical flaws within the California juvenile dependency court system. Karen de Sá, *Broken Families, Broken Courts: A Mercury News Investigation*, SAN JOSE MERCURY NEWS, Feb. 8, 2008, *available at* http://www.mercurynews.com/dependency.

These issues were further explored in a two year study by a California state commission, Blue Ribbon Commission on Children and Foster Care. The commission found that typical child dependency hearings are approximately ten minutes in duration, as opposed to the recommended thirty to sixty minutes, and children are routinely absent from their hearings. CAL. BLUE RIBBON COMM'N ON CHILDREN IN FOSTER CARE, CALIFORNIA BLUE RIBBON COMMISSION ON CHILDREN IN FOSTER CARE FINAL RECOMMENDATIONS TO THE JUDICIAL COUNCIL (2008), *available at* www.courtinfo.ca.gov/jc/tflists/bluerib-rec.htm. Proponents of the law believe that allowing children the opportunity to participate in court hearings that dictate their future will empower abused and neglected youth, as well as help courts recognize important issues earlier.

🕮 California AB 86
Pupil Safety
Introduced December 13, 2007
Status: Chaptered

Governor Arnold Schwarzenegger signed into California law Assembly Bill 86 ("AB 86") on September 30, 2008. AB 86 amends the California Education Code, adding provisions to prevent "cyber-bullying" to the School/Law Enforcement Partnership Program. The bill mandates the creation of a state wide safety cadre to address the reduction of

cyber-bullying and authorizes school officials to suspend or recommend expulsion of students who engage in cyber-bullying.

As defined by the California Assembly Committee on Education, cyber-bullying is the use of electronic devices and information, such as e-mail, instant messages, mobile phones and web sites, to send or post harmful messages or images about an individual or group.

AB 86, in part, addresses a 2007 study released by the National Association of Attorneys General Task Force on School and Campus Safety that points to the importance of cyber-bullying prevention in the reduction of school violence. The report points to the increased belief among education professionals that with the rise of social networking sites like Facebook and MySpace, cyber-bullying will become the most prevalent means of bullying in elementary and secondary school settings. National Association of Attorneys General, *Campus Safety Task Force: 2007 Report and Recommendations (2007)*, *available at* http://www.naag.org/assets/files/pdf/2007.TaskForceOnSchoolAndCampusSafety.pdf (last visited Oct. 10, 2008).

Several other states, including Oregon, Washington and New Jersey have introduced similar bills or established programs aimed at reducing cyber-bullying.

🕮 *In re Vincent M.*
161 Cal. App. 4th 943 (Ct. App. 2008)

Vincent M.'s mother immediately surrendered him at the hospital after she gave birth. The mother refused to identify the father before fleeing. Shortly thereafter, the dependency court declared Vincent M. a dependent of the court and placed him with Dan and Tina B. Because the dependency court did not know the whereabouts of either biological parent, the court began permanency placement proceedings. Eight months later, Jorge, the biological father, asked the dependency court to declare him as Vincent M.'s

presumed father pursuant to section 388 of the California Welfare and Institutions Code. Jorge stated that he had just learned of Vincent M.'s existence from the mother. However, Jorge did acknowledge he and Vincent's mother engaged in unprotected sex for several months and that he saw she was gaining weight at one point during their relationship.

Jorge filed a petition under section 388 of the California Welfare and Institutions Code requesting status as Vincent M.'s presumed father and asking for family reunification services. The dependency court granted Jorge's request, finding that he was entitled to presumed father status pursuant to case law. The court stated that it had no choice but to grant Jorge's request, and the court did not consider Vincent M.'s best interests when making this determination.

On appeal, the California Court of Appeal reversed the dependency court's decision for several reasons. First, Jorge had not satisfied the statutory requirements found in section 7611 of the California Family Code with regard to presumptive father status. This section requires more than a mere showing that the purported father is the biological father, and Jorge failed to meet any applicable prong of the statute. Furthermore, the court held that the case law cited by the dependency court does not modify this statutory requirement, and thus the dependency court's reliance was erroneous.

Second, the appellate court noted that, because he was not entitled to presumed father status, Jorge's only remedy was to seek modification of the order pursuant to section 388 of the California Welfare and Institutions Code. In order to satisfy this statute, he needed to show changed circumstances or evidence demonstrating that Vincent M.'s best interest would be promoted by reunification services. Jorge did not meet this burden, and therefore the lower court's order was an abuse of discretion.

Finally, the Court of Appeal discussed Vincent M.'s need for permanency and stability in the home. Dan and Tina B. demonstrated that Vincent M. had formed a strong bond with them. Jorge's delay in coming forward resulted in the loss of an opportunity to develop a fatherly connection with

Vincent, so Vincent's best interest would not be served by being in Jorge's custody. Therefore, the court reversed and remanded the dependency court's order.

🕮 *In re Jonathan L. v. Superior Court*
165 Cal. App. 4th 1074 (Ct. App. 2008)

Prior to the present case, the L. family had a history of dependency court hearings for abuse, neglect, and failure to prevent sexual abuse. All 11 of the L. children were home schooled by the mother, who had an eleventh grade education. In this dependency hearing, the dependency court declared Jonathan L. and Mary Grace L. dependents of the court. The children's attorney requested that they be sent to public or private school out of concern for their safety. Their counsel argued that this was necessary so that the children would be in contact with individuals outside of the home who could report suspected abuse. The dependency court denied this request, finding that parents have an absolute constitutional right to home school their children. Jonathan L. and Mary Grace L.'s attorney appealed.

The appellate court considered two issues on appeal: (1) whether home schooling is permitted under California law, and (2) whether it is unconstitutional to order parents to send their children to a public or private school instead of being home schooled when the order is meant to promote the children's safety. With regard to the first issue, the court reviewed California statutes and legislative history to determine if home schooling is allowed under California law. The court concluded that home schooling was permitted when conducted as the equivalent of a private school. The appellate court noted that this interpretation was necessary in order to avoid a constitutional question, as the United States Supreme Court had previously held that parents had a constitutional right to home school in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Turning to the second issue, the appellate court held that parents do not have an absolute constitutional right to home school. Although parents do have a right to direct their children's education, the state's interests may overcome this right in certain circumstances. The appellate court held that if the restriction on the parents' right to home school the children satisfied strict scrutiny review, it would be constitutional. Strict scrutiny review requires a showing of a compelling state interest and a narrowly tailored state action to serve that interest. In the present case, the state possesses a compelling interest in the welfare of Jonathan L. and Mary Grace L., as they were dependents of the court. Furthermore, the restriction on home schooling in order to ensure regular contact between the children and mandated reporters appeared to be narrowly tailored in order to serve the state's safety interest. The appellate court remanded the case to the dependency court to reconsider whether the children should be required to attend public or private school under the standards provided.

🕮 *In re Damien V.*
163 Cal. App. 4th 16 (Ct. App. 2008)

Damien V., a ward of the juvenile court, violated the terms of his probation and therefore was sentenced to a juvenile facility. While at the facility, Damien V. vandalized a chair with gang-related markings. The juvenile court sentenced him to thirty days in a juvenile facility for the vandalism, pursuant to section 186.22(d) of the California Penal Code. On appeal, Damien V. argued that the intent of section 186.22(d) was to punish adults, not juveniles. Section 186.22(d) of the California Penal Code provides:

> Any person who is convicted of a public offense punishable by felony or misdemeanor, which is committed for the benefit of . . . any criminal street gang with the specific intent to promote . . . any criminal conduct by gang members, shall be punished by imprisonment in

> the county jail not to exceed one year, but not less than 180 days . . . .

The California Court of Appeal first discussed *In re Jovan B.*, 6 Cal.4th 801 (1993), in which the California Supreme Court concluded that a sentencing provision that only explicitly referred to adult convictions can be applied to juvenile adjudications as well. By analogy, the appellate court concluded that section 186.22 of the California Penal Code may also apply to juveniles even though it only refers only to adult convictions, not juvenile adjudications.

The appellate court also looked to the legislative intent of Proposition 21, the voter initiative that led to the addition of section 186.22 to the California Penal Code. Officially named the "Gang Violence and Juvenile Crime Prevention Act of 1998," the stated purpose of Proposition 21 is to discourage juvenile gang violence. Additionally, three other statutes added to the California Penal Code pursuant to Proposition 21 explicitly apply to juveniles. Therefore, the court concluded that section 166.22(d) of the California Penal Code applies to juveniles and affirmed the juvenile court's decision below.

FLORIDA

🕮 *Graham v. State*
982 So. 2d 43 (Fla. Dist. Ct. App. 2008)

At the age of sixteen, Graham was charged with armed burglary with assault or battery and attempted armed robbery. Graham pled guilty to the offenses and was placed on three years probation with the condition that he serve twelve months in a pre-trial detention facility. Six months after completing his sentence, Graham was charged with committing an armed home invasion robbery and admitted to being involved in other previous neighborhood robberies. The trial court found Graham in violation of his probation and sentenced him to life imprisonment without the possibility of parole. Graham was nineteen years old at the time of his sentencing.

On appeal, Graham argued that (1) juvenile life sentences should be per se banned pursuant to prior United States Supreme Court and Florida state court rulings, and (2) the sentencing violates international norms and the United Nations International Covenant on Civil and Political Rights (ICCPR). The appellate court first held that precedent did not require a per se finding that this sentence was unconstitutional. Rather, the court found that courts look to the specific facts of each case when analyzing if a sentence is disproportionate to the crime committed and the age of the defendant.

The court next determined that Graham's international norms argument must fail because, although international views are persuasive, it is ultimately up to United States courts to interpret the Constitution. In addition, the court found that Graham did not have a judicially enforceable right under the ICCPR since the United States, under the treaty, reserved the right to treat juveniles as adults in exceptional circumstances.

Graham further argued that the sentence, as applied to the facts of his case, was grossly disproportionate to his offense in violation of the Eighth Amendment's ban on cruel and unusual punishment. The court disagreed, noting that Graham was placed on probation when he was a juvenile, and the life sentence was not imposed until he was an adult. Furthermore, his sentence was extremely lenient considering the offense committed was a life felony. Graham's escalating pattern of criminal conduct and his unwillingness to rehabilitate himself evidenced that the sentence was not grossly disproportionate to his offense.

KANSAS

🕮 *In re Adoption of G.L.V.*
190 P.3d 245 (Kan. 2008)

The stepfather of twin brothers, G.L.V. and M.J.V., petitioned to adopt the brothers without consent from their natural father as required by section 59-2136(d) of the Kansas

Statutes Annotated ("section 59-2136(d)"). Stepfather relied on the 2006 amendment to section 59-2136(d), which provides in part, "The court may consider the best interests of the child and the fitness of the non-consenting parent in determining whether a stepparent adoption should be granted." Stepfather argued that this amendment permits a court to override the statute's explicit requirement that the natural father consent to the adoption if the court determines that the adoption is in the child's best interest.

Relying on two previous Kansas Supreme Court decisions, *In re Adoption of B.M.W.*, 2 P.3d 159 (Kan. 2000) and *In re Adoption of K.J.B.*, 959 P.2d 853 (Kan. 1998), the district court denied Stepfather's petition. These cases demonstrate Kansas' two-sided ledger approach for determining if a parent has failed to perform his parental duties. The two sides are love and affection, and financial support. The parent must fail both sides of the ledger for a court to terminate parental rights. The district court found that, while the brothers' father failed the love and affection test, he provided financial support between April 2003 and June 2006 and thus passed the financial support test. In discussing the amendment to section 59-2136(d), the district court found no allegations that the natural father was an unfit parent. Furthermore, the court found that facts in this case did not weigh heavily in one direction or the other with regard to the best interest of the children. Therefore, the district court denied the adoption. The Kansas Court of Appeals affirmed.

The stepfather appealed to the Kansas Supreme Court on two alternate grounds: (1) the best interests of children factor found in the amended portion of section 59-2136(d) is an overriding factor in the analysis; or (2) the amendment to section 59-2136(d) converted the two-sided ledger approach to a three-column ledger, with the best interests of the child being entitled to equal weight and consideration as the love and affection and financial support factors.

The Kansas Supreme Court first noted that a natural parent has a fundamental right to raise his or her child under both the United States and Kansas Constitutions. However,

this right is tempered by the natural parent's failure to assume his or her responsibilities for that child. Section 59-2136(d) codifies this constitutional protection with the consent provision for the natural father. The court next declined to accept Stepfather's interpretation of the 2006 amendment to section 59-216(d), discussed *ante*, for two reasons. First, the plain language of the statute does not identify the child's best interest as an overriding consideration. Second, Stepfather's interpretation fails to acknowledge the legislature's implicit intention to preserve the natural parent-child relationship, which usually also protects the child's best interest. Thus, a district court may not override the mandatory consent requirement of section 59-2136(d) when a natural parent assumes parental responsibilities. The court affirmed the lower courts' decisions on these grounds.

MINNESOTA

🕮 *In re Welfare of N.J.S.*
753 N.W.2d 704 (Minn. 2008)

At fifteen years old, N.J.S. was charged with second-degree murder for the shooting death of his grandmother. In juvenile court, the State moved to certify N.J.S. for adult prosecution pursuant to section 260B.125 of the Minnesota Statutes. The State cited N.J.S.'s school and institutional disciplinary records, which demonstrated noncompliant behavior, sexual harassment, and violence towards others. The juvenile court concluded that N.J.S. satisfied the six factors required for adult certification determination found in section 260B.125(4) of the Minnesota Statutes, which are seriousness of the offense, culpability of the child, prior record of delinquency, programming history, adequacy of punishment or programming in the juvenile system, and dispositional options available. The court of appeals affirmed the finding of adult certification. Thereafter, N.J.S. sought review from the Supreme Court of Minnesota.

On appeal, N.J.S. argued that there was insufficient evidence to prove the prior record of delinquency factor of section 260B.125(4) of the Minnesota Statutes. N.J.S. claimed that the plain language of the Minnesota statute prohibited the juvenile court from considering unadjudicated behavior reflected in school and institutional disciplinary records when evaluating this factor. He argued the term "prior record of delinquency" should refer to adjudicated conduct only, not general behavioral problems.

The Supreme Court of Minnesota found that the words "delinquent" and "delinquency" were consistently used in section 260B of the Minnesota Statutes to refer to the petition or adjudication of unlawful acts. N.J.S.'s prior behavior was not the subject of any petition to the juvenile court, nor was it the subject of any juvenile court adjudication. Therefore, the juvenile court erred by considering N.J.S.'s uncharged behavior found in school and institutional records to evaluate the prior record of delinquency factor. However, the juvenile court did not abuse its discretion by certifying N.J.S. for adult prosecution because there was sufficient evidence to support the other five factors of section 260B.125(4) of the Minnesota Statutes. Therefore, the court affirmed the juvenile court's ruling.

NEBRASKA

🕮 Nebraska L.B. 157
"Safe Haven" Law
Introduced January 8, 2007
Status: Approved

In February 2008, Nebraska Governor Dave Heineman signed into law Legislative Bill 157 ("L.B. 157"). The bill, which went into effect in July 2008, decriminalizes the act of leaving a child in the care of an on-duty employee at a state-licensed hospital. When a child is left at the "safe haven" of a hospital, the hospital must inform law enforcement officials who will

place the child in the custody of state Health and Human Services.

Other states with safe haven laws, such as Vermont, specify that there will be no charges for abandonment when a "child not more than 30 days of age" is left in the custody of an employee at a fire or police station, health care facility, or other authorized location. Vt. Stat. Ann. 13, § 1303 (2008). States such as Alabama, California, and Washington limit safe haven rights to parents of infants less than 72 hours old. Ala. Code 1975 § 26-25-1 (2008); Cal. Health & Safety Code § 1255.7 (West 2008); Wash. Code Ann. §13. 13.360 (2008). Florida and Massachusetts statutes describe a "newborn infant" as a child reasonably believed to be seven days old or younger. Fla. Stat. Ann. § 383.50 (West 2008); Mass. Gen. Laws Ann. ch. 119, § 39 (2008). Other states offer safe haven protection for infants up to 21, 30, or 90 days of age. Alaska Stat. § 11.81.500 (West 2008); Conn. Gen. Stat. Ann. § 17a-58 (West 2006); S.C. Ann. § 20-7-85 (1976); N.M. Stat. Ann., § 24-22-3 (West 1978). L.B. 157, by contrast, does not provide an age limit. Rather, it simply uses the word "child."

The ambiguity of the word "child" in Nebraska's L.B. 157 has resulted in children as old as seventeen years being left at Nebraska hospitals. Erik Eckhold, *Older Children Abandoned Under Law for Babies*, N.Y. Times, Oct. 3, 2008, at A21, *available at* http://www.nytimes.com/2008/10/03/us/03omaha.html?_r=1&ei=5070&oref=slogin.

Exasperated parents of children of all ages are taking advantage of Nebraska's safe haven law. After his wife passed away, one father left nine of his children at a Nebraska hospital. *Id.* There is evidence that the legislature did not intend for the bill to have this effect. Although L.B. 157 uses the word "child," the Nebraska legislature website features an article that declares the law would "apply only to infants less than 72 hours old." Unicameral Update Online, *Committee hears child safe haven bills*,

http://www.unicam.state.ne.us/web/public/update/judiciary/lb6-lb157/committee (last visited Oct. 5, 2008).

Nebraska lawmakers are aware of the consequences of L.B. 157, and planned to rewrite the law in January when the Legislature reconvenes. However, Governor Heineman called for a special legislative session on November 14 after five teenagers and pre-teenagers were abandoned at safe haven locations within an eight-day period in October. On November 21, the Legislature passed L.B. 1, which limits the applicability of L.B. 157 to infants aged 30 days or younger. Unicameral Update, *Nebraska Legislature modifies safe haven law,* http://unicameralupdate.blogspot.com/2008/11/nebraska-legislature-modifies-safe.html (last visited Nov. 21, 2008).

NEW YORK

🕮 *Matter of Brian L. v. Administration for Children's Services*
859 N.Y.S.2d 8 (App. Div. 2008)

Brian L., also known as Mariah L., was born a biological male, but was diagnosed at adolescence with Gender Identity Disorder (GID). GID is defined as "a disjunction between an individual's sex organs and sexual identity." *Id*. at 11 (citing Smith v. City of Salem, Ohio, 378 F.3d 566, 568 (6th Cir. 2004)). Subsequently, she began receiving psychological, psychiatric, and hormone therapy to develop secondary female anatomy.

While a foster child under the care of the Administration for Children's Services (ACS), Brian L. made a motion in family court to compel ACS to provide her with all subsequent treatment recommended by her doctors, including sex reassignment surgery. Her psychologist, psychiatrist, and two medical doctors supported the motion. Each concluded that she was not only a good candidate for sex reassignment surgery, but that the surgery was necessary to improve her deteriorating mental health and development.

ACS opposed the motion on the grounds that, because Brian L. was a foster child who received medical care via New York's Medicaid law, it was only permitted to pay for those treatments approved by Medicaid, which prohibited coverage for sex reassignment surgery. The family court disagreed and granted Brian L.'s motion. ACS appealed, and a panel of the Supreme Court of New York, Appellate Division remanded the case, directing ACS to provide the Family Court with a clearer statement explaining why they denied the surgery. In addition to the Medicaid argument discussed *ante*, ACS argued that it had discretionary power to deny the request because Brian L. had not demonstrated the serious, thoughtful, or committed approach necessary to proceed with such a major procedure. Nonetheless, the family court granted Brian L.'s motion for summary judgment and again ordered ACS to pay for the procedure.

On appeal, the Supreme Court of New York, Appellate Division, ruled on several aspects of the complaint. First, the court rejected ACS' contention that foster children fall into two tiers of health care: those covered under Medicaid and those under ACS' general care. The court held that ACS must provide necessary care for all children in its care pursuant to section 398(6)(c) of the New York Social Services Law, even if the treatment extends beyond the scope of Medicaid's coverage.

Second, the court ruled that the family court cannot order ACS to pay for Brian L.'s surgical procedure. To do so would denigrate the discretionary statutory authority granted to ACS in determining the necessity of treatment for its wards pursuant to section 398 of the New York Social Services Law. The court relied on *Matter of Lorie C.*, 49 N.Y.2d. 161 (1980), to further find that sections 255 and 1015(a) of the New York Family Court Act cannot be read to permit the family court to compel performance of ACS when such an order would supersede the statutory authority of the agency. The plain language of section 398 of the Social Services Law is clear and unambiguous: to deprive ACS the authority to exercise discretion over the medical treatment of children in its care would constitute a violation of the separation of powers.

Therefore, it reversed the family court decision ordering ACS to pay for Brian L's sex reassignment surgery.

The court left open the question of whether ACS' refusal to pay for the surgery was arbitrary or capricious. It noted that such a question is one for the supreme court, not the family court, to consider.

PENNSYLVANIA

🕮 *R.C. v. J.S.*
957 A.2d 759 (Pa. Super. Ct. 2008)

In1997, the trial court ordered J.S. ("Father") to pay monthly child support to R.C. ("Mother") for the care of their son J.E.S. ("James"). At that time, Mother had sole physical custody of James. In 2006, James spent six months in an in-patient mental health facility, where he was diagnosed with Asperger's Syndrome. Following the diagnosis, James spent a brief time at home with Mother before being institutionalized in a mental health hospital in December 2006. Social security/disability ("SSI") benefits fully paid for James' treatment.

After learning of his son's hospitalization, Father petitioned for a suspension of child support. At the hearing, Mother testified that James' institutionalization was temporary, and he was scheduled for release in April 2007. Mother continued to visit James at the hospital for weekly family counseling. She brought him gifts and took him to the mall when he earned a day pass. Every other weekend, James returned home from Friday evening to Sunday evening. Mother provided all of James' clothing and maintained her household in anticipation of James' weekend visits and eventual permanent return. The hearing officer suspended Father's child support obligation because James' treatment was covered by SSI. Mother then appeal.

On appeal, the Superior Court of Pennsylvania disagreed with the trial court's legal and factual analysis.

First, the trial court held that because James was in an in-patient treatment facility, Mother did not have custody and therefore was not "caring" for him. As a result, Mother had no standing to seek child support. The superior court disagreed, stating that Mother had the right to seek child support because at the time she commenced her claim for child support she had sole custody of James and was caring for him. Additionally, Mother had standing to contest the reduction in child support because she is adversely affected by the hearing officer's decision to end Father's monthly child support payments. As for the trial court's contention that Mother was not caring for James, the Superior Court strongly disagreed, finding Mother continued to exercise the responsibilities of a parent with a child in in-patient care.

Finally, the superior court found that suspending child support based on temporary institutionalization was improper. Child support should only be suspended when in the best interests of the child, and a suspension due to temporary in-patient care violates the letter and the spirit of the law. Mother's continued financial and emotional support was in James' best interests, and presented a financial burden that should be shared equally between Mother and Father. In short, a substantial change in a living arrangement is necessary for a modification of child support, and a non-permanent hospitalization does not meet that threshold. Because the trial court ignored substantial evidence regarding Mother's continued role as James' only caregiver, the Superior Court of Pennsylvania reversed and remanded this case to the lower court.

RHODE ISLAND

🕮 *In re Richard A.*
946 A.2d 204 (R.I. 2008)

Richard A., a fifteen-year-old juvenile, was charged with first and second-degree child molestation sexual assault for allegedly assaulting his then nine-year-old cousin. The

family court dismissed the first-degree charge but adjudged Richard A. delinquent for the second-degree charge. Richard A. immediately objected to the state's requirement that he register as a sex-offender. He argued that the registration requirement was unconstitutional as applied to juveniles because it violated the confidentiality and rehabilitation tenants of the juvenile justice system. The family court rejected this argument and upheld the registration requirement. Richard A. appealed both the delinquency adjudication and the declared constitutionality of the sex-offender registration requirement as applied to juveniles.

The Rhode Island Supreme Court first considered Richard A.'s argument that the inconsistencies in his cousin's testimony rendered her to be non-credible and therefore the testimony was insufficient for adjudication. Although the family court judge noted a few inconsistencies in the cousin's testimony, he found her to be a candid and mature witness, providing reliable testimony for the delinquency adjudication of Richard A. Under a deferential standard of review, the court upheld the credibility determination by the family court judge.

As a matter of first impression, the state supreme court next considered whether the state's sex-offender registration requirement violated the more general standard of maintaining the confidentiality of juvenile proceedings. The court noted that the information provided by the registration requirement was not disseminated to the public at large. Furthermore, the court found that while the confidentiality of juvenile proceedings is important, it is not absolute. The need to protect the public outweighs the confidentiality of juvenile proceedings. Therefore, the court rejected Richard A.'s claim and upheld the sex-offender registration requirement as applied to juveniles.

The court then considered whether the sex-offender registration requirement made a juvenile adjudication so similar to an adult criminal conviction so as to entitle the juvenile to a jury trial. Persuaded by the unanimous agreement of other states that have considered this issue, the

court found that the registration requirement was not meant to be punitive, but rather to protect the public. Because of this difference in utility, the Rhode Island Supreme Court held that Richard A. was not entitled to a jury trial simply because of the sex-offender registration requirement. Therefore, the court affirmed the family court's judgment on all issues.