

## Practitioner's Section

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This portion of the *Journal of Juvenile Law and Policy* focuses on the experiences of persons who work with children. The journal selected four Court Appointed Special Advocates and one attorney who is also a retired social worker.

Elizabeth Stein, an attorney and CASA in California discusses both the difficulties and triumphs she has had working with two brothers who were in foster care. Bouree Kim, a CASA in Colorado, documents the training she received and the experiences she has had working with a child with developmental disabilities. Marilyn Clark, a retired social worker and practicing attorney in Sacramento and the Bay Area, details her application of techniques she learned as a social worker to her practice as an attorney assisting grandparents through the guardianship process. Finally, Stefanie Fricano and Greg Darrah explain why they choose to volunteer as CASAs in Sacramento and their experiences as a married couple working with children in foster care.

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

## CONFESSIONS OF A CASA

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By: Elizabeth Stein\*

I have always had an interest in the welfare of children; in particular, children in the foster care system. Although I had no personal or professional experience with foster children, it always moved me to think of children who, through no fault of their own, were forced from the only homes they had ever known and thrown into a foreign and scary situation. Little did I know exactly how foreign and scary these situations can be to these children.

About five years ago, I enrolled in a training course sponsored by the local Court Appointed Special Advocate (CASA) program. CASAs act as the eyes and ears of the juvenile court through long-term one-on-one contact with a foster child. The hope is that the CASA can help guide the child through the dependency process, provide special insight to the court about the child's case and hopefully expedite the process of finding a permanent home for the child. In the CASA training, I learned the nuts and bolts of the dependency system: how and why children come to be removed from their homes, what happens at a review hearing, how and why a court report is written, the issues that may arise in the life of a foster child and how to handle delicate situations. Having a fair amount of exposure to the court system, as well as three children of my own, I figured I was well prepared for the role of a CASA when I was handed over my first case file. In retrospect, learning about the foster child's life on paper was the easy part. What was harder was having a teenager in front of you who has no idea who you are, why you are there and what you "want" from them.

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Unfortunately, my first experience as a CASA wasn't quite a success story: the teenage girl I was assigned decided after a few weeks that she "didn't need" a CASA in her life. After some supportive discussions with the CASA staff, I sadly retreated from my position as her CASA. Shortly thereafter, I was assigned two teenage brothers who had been in foster care for about two years. Both were placed in group homes about a mile apart from one other and it was clear from their files that they had serious emotional and anger issues. In addition, both struggled with ADHD and post-traumatic stress disorder. It was also clear early on that the older brother, John, was headed down a dangerous path. As John's educational "surrogate" I was called to attend multiple meetings at his school to address his repeated discipline problems (in addition to taking on the role of CASA, I became the boys "educational surrogate" wherein I could act as a surrogate parent for educational purposes). I felt that being the brothers' educational surrogate was particularly important since these boys were not placed with foster parents, but instead were placed for short terms at a variety of group homes and did not have a stable adult presence in their lives. While I spent a great deal of time trying to help John obtain educational services and attempted the best I could to be a mentor to him, I felt helpless as I witnessed his behavior continue to spin out of control until he finally ended up in the probation system.

In the meantime, I am happy to report that I was able to have a positive impact upon his younger brother, Timothy. First, I was able to get him moved out of his group home into a foster home he liked. Second, I successfully moved him from a large public school where the distractions and bad influences were too tempting to a small, specialized non-public school where he was able to flourish. I then began to work on getting him placed with extended family members. While certain family members were not able to take him in for various reasons, I found an aunt and uncle who expressed interest in having Timothy come live with them. For several months, I acted as a go-between—and a somewhat pushy one—to get the aunt and uncle to complete the necessary

paperwork, as they seemed to be “dragging their feet”. Unfortunately, during this same period of time, I watched as Timothy’s behavior worsened, both at his foster home and at school. After many meetings with Timothy and many phone calls to the aunt and uncle, Timothy finally revealed to me that he did not want to go live with his aunt and uncle but, instead, wanted to live with a friend of his dad’s who had always been good to him and his brother John. I immediately got to know this family friend and, after seeing that it would be a healthy placement for Timothy, I pushed hard on his behalf to have the family friend approved for placement. This was a little more than a one year ago. I am happy to report that Timothy is now in a guardianship with this family friend and has been doing much better ever since.

What I learned from my experiences thus far is that a CASA can play a vital role in what happens to a foster child. It is common to refer to the foster care system as “broke” since children often move around frequently, in turn causing their schools to habitually change. Unfortunately, the only adults to whom most of these children are exposed quickly move in and out of their lives, and there is nobody around consistently enough to see “the big picture” and to advocate for what these kids may need. I see the CASA program as “glue” that can fill some of these holes. During the time I was a CASA for these brothers, about three years total, I was the only one who knew who all of their extended family members were, who knew what had worked and what did not, what schools the brothers had been in and what medical or emotional problems were present. While I couldn’t necessarily take away their pain or reverse the path the older brother John was headed down, it is nice to know that I could be there and make a difference for his younger brother, who, the last time I saw him, spoke excitedly about the prospect of college.

*\*Some names and details have been changed to protect the privacy of the individuals mentioned.*

## **BUILDING RELATIONSHIPS WITH ABUSED AND NEGLECTED CHILDREN**

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By: Bouree Kim \*

Not every child's story is the same. During my training as a Court-Appointed Special Advocate (CASA) for abused and neglected children, I learned about the situations I might face: children exposed to methamphetamines, undiagnosed signs of dyslexia, and abnormal behavior exhibited by sexually abused children. But the training could only prepare me for so much. Spending time with two young siblings, Maggie and David,\* taught me how to communicate and build a relationship with abused and neglected children. Maggie and David showed me that forging relationships can be as complex as the range of emotions people feel, but also as simple as sharing hugs and kind words.

As a CASA, I build rapport with the children in order to fulfill two goals: I help the children's guardian *ad litem* attorney, Sharon Plettner, determine what is in the best interest of the children, because Sharon handles several dependency and neglect cases simultaneously, she requests a CASA to help serve as her "eyes and ears;" second, I strive to be a continued presence in the children's lives. While transitioning from one home to another or upon Social Services closing a case, the children are often forced to part with people with whom they have closely bonded. Particularly for young children, such rapid changes in a short period of time can leave them feeling insecure and confused. My job is to decrease any anxiety the children may have by helping them adjust to new environments.

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\* Bouree Kim graduated from Claremont McKenna College. She is currently a CASA through Voices for Children in Boulder, CO. She also volunteers at the Kempe Therapeutic Preschool for abused children and will be pursuing a Masters in Social Work next fall.

When I arrived at the foster home, I met first Maggie. I knew that Maggie had speech difficulties, a developmental impediment which most likely the result of fetal alcohol syndrome. Knowing this information was helpful, but it also led me to wrongly assume that it would be difficult to get to know her. How do you get to know someone whose words you don't understand? Fortunately, Maggie started talking to me without hesitation. She didn't seem to notice that her words were mispronounced and jumbled together. Although I was only able to understand bits and pieces of her sentences, I could see that we were communicating more through our body language and the intonation of our voices than with words. Maggie eagerly showed me her meticulously dressed dolls and announced that it was naptime for her babies. I asked which doll was her favorite. She picked one up and, with deft hands, changed her doll's clothes into pajamas, to prepare for naptime of course. I told her that I had a doll just like hers when I was little. Maggie asked where the doll was now. After a pause I confessed that I wasn't sure. Maggie clutched her doll to her chest as if refusing to believe she could ever forget about it.

When I met David, he observed the way I played with Maggie before deciding it was safe to join us. Soon he was quick to pull me into games or to tell me about the huge horses he saw that day. I noticed that it was during play that the children would comment about what happened at supervised visits with their parents or about incidences at school.

With Maggie, I make an extra effort to listen to her carefully without interrupting. I tell her honestly when I don't understand something she says. She then happily repeats her previous statement. Sometimes I catch myself paying more attention to Maggie because the last thing I want her to feel is that I think she is not important enough to listen. Thus I make sure to balance my attention between Maggie and David as best as I can. I listen to both Maggie and David patiently and let them control the direction of the conversations. My assignment may be to learn about the children's needs and wants, but I never do so by asking them intrusive questions.

Sharon's rule about interviewing children is easy: you don't. Unless, she qualifies, there is a dire situation in which a question must be asked directly. When I spend time with the children, I ask them playful and open-ended questions: "What did you eat at the fair?" "Do you think if Batman fought Spiderman he could win?" I try to gauge how willing the children are to further discuss a topic and if they change the subject, I let it be. Sometimes it is the children who ask questions. David once asked me what Sharon does. I explained that Sharon's job is to make sure children, like he and his sister, are happy and safe. The concept of a lawyer and details about his judicial case would have been difficult for him to understand. Still, neither Sharon nor I discourage children from asking questions or lie to them and create false expectations.

It is mostly through actions that Maggie and David's underlying feelings surface. Maggie and David are not afraid to cringe away from people with whom they feel uncomfortable or to show affection for the ones they like. Two signs clued me in to the fact that Maggie and David were beginning to trust me: first, they initiated more hugs with me, a gesture they did not show everyone; second, they started to run to me after they scraped their knee or tripped over a rock. Wanting consoling words, they would cling to me until their tears dried. Sharon emphasizes the importance of these nonverbal cues because they are the most telling. Having the sensitivity and the motivation to read and interpret behaviors allowed me to understand what Maggie and David wanted without them telling me in words.

During my training, I heard horror stories about children misbehaving and lying without compunction to their CASA. Such stories inflated my fears about building relationships with Maggie and David. I expected the worst and as a result lost sight of what is most important: the trauma does not define who these children are. Maggie and David's past experiences significantly inform their behavior, but at the heart of everything is the fact that they are both human and therefore deeply affected by the way people act and react towards them. It is our actions that resonate in the lives of

children, more so than any words. I showed the children respect by upholding my promises, actively listening to their stories, and being supportive. In turn, they gave me their trust and welcomed me into their lives.

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## **THE ATTORNEY-SOCIAL WORK CONNECTION IN GUARDIANSHIPS**

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By Marilyn Clark\*

I began my working life as a social worker and ended it as an attorney. I found as a practitioner in both fields that there are many commonalities between the professions.

As a social worker, I assisted neglected, abandoned, or abused children find foster homes in Monterey County, California. This was one piece of the broad spectrum of Child Protective Services. Many children returned home to live with one or both biological parents; others found permanent placement in adoptive homes while some languished in long-term foster care.

The law and agency policies mandate permanent placement. It was critical to eliminate multiple foster placements and to situate children quickly in permanent homes. Guardianship, which gives someone other than the parent legal custody of a minor, was preferable for a child when the only other option was to stay in the public juvenile dependency system rotating through many sets of foster parents.

Following my retirement from social work, I became an attorney and began another career. During my second year of practice, I worked at a non-profit agency where I represented low-income grandparents seeking probate guardianships. In this capacity I realized the attorney-social work connection.

I worked in a county where social services staff who investigated child abuse and neglect situations referred some

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families to a non-profit agency for a myriad of services. This included children who had been placed with grandparents or other relatives informally and would not enter the public juvenile dependency system under Welfare & Institutions Code Section 300. The agency screened those families to determine if caretakers would be willing and able guardians. Grandparents or other relatives age 60 and above were referred to the agency in which I worked to obtain legal guardianships.

The magic of this public-private partnership was threefold:

First, children got placed in a permanent home. Permanency is the goal of every child welfare case. For example, child protective services received a call when a mom was on drugs and the dad was in prison, leaving their children unattended. The children were placed with grandparents, but no dependency petition was filed by the public agency. The grandparents were referred to private agencies for both support services and legal services to obtain guardianship.

Second, there was savings of taxpayer dollars: no foster care costs, no on-going court costs and no social services costs to supervise the placement. Once probate guardianship was granted, the grandparents became permanent custodians until the minor reached age 18.

Third, decisions were made by grandparents, not the juvenile court. This keeps responsibility for child-raising in the hands of family members and not with the government. While the juvenile dependency court also grants guardianships, this usually occurs at the end of the process when other options for permanency are exhausted.

As I worked on guardianship cases, I realized that I was using many of my social work techniques to do legal work. For example, every guardianship petition begins with a client interview, similar to the beginning of a social work activity. In both professions, fact gathering is paramount and there are a number of ways to gather facts. One way is what I call the "fill in the box" approach: ask the questions and

record the answers. Whether one uses a yellow legal pad or a Judicial Council form, the approach is thorough, mechanical, and covers the issues. Another way is what I call the “get the story” approach. The interviewer asks the client: “Why you are requesting guardianship and why at this time?” “How are your grandchildren” “How long you have cared for them?” This approach is commonly used in a social work setting. It may take longer and does not follow a strict order. However, the client is likely to feel more at ease and may provide more complete answers.

I found that if there is a melding of these two approaches – a blending of social work sensitivity and attorney efficiency through which a better rapport is developed with the client. This is particularly important when dealing with the legal issues. For instance, in a guardianship, all relatives to the second degree must receive notice of the hearing. Grandparents sometimes state that they do not know where the other set of grandparents live. Underlying this statement may be their fear that relatives who are entitled to notice may swoop in and try to take the children themselves. However, when trust has been developed through using the blended interviewing technique, it is easy to discuss the consequences of giving notice. Most often the other grandparents simply want to continue visiting if they have been or establish a relationship through visitation if they have not.

Another social work technique I have utilized to assist with fact gathering and resolution of legal issues in guardianships is what I call a “Family Tree.” It is simply a diagram of the relationships of each person entitled to notice. I leave room for the names and birthdates and label the boxes specifically. I say “maternal grandmother” rather than grandmother. Specificity as to which grandparent you are referring is crucial in addressing the court and also provides clarity in writing case notes. Often there is a step-grandparent involved. Sometimes there are great-grandparents or half siblings. Having a picture of the relationships on paper gives both the attorney and the social worker a snapshot of the

client's family. This tool helps either practitioner avoid confusion and mistakes.

Finally, I use social work techniques when, I prepare clients for court in two important ways:

First are the mechanics. I tell them where to stand and when to speak. Don't wear caps, sunglasses, chew gum, or bring books or magazines into the courtroom. I want clients to have a positive courtroom experience and I do not want them to be embarrassed. I learned the importance of that preparation as a social worker when I was writing reports for the court.

Second, I review the importance of disclosure. The court uses a form, Judicial Council Form GC-212, to determine a person's fitness as a guardian. The questions include mental health treatment, criminal convictions, use of illegal substances, bankruptcies and traffic offenses. I stress that disclosing something unfavorable in their background results in a greater chance of having the petition granted. When non-disclosure comes to the court's attention the result is almost always the denial of the petition. This tedious and time consuming review helps ensure the most suitable guardian(s) for children are selected, a goal of both attorneys and social workers.

In utilizing the social work techniques in probate guardianships I have become a better legal advocate.

## WHY WE ARE CASAS

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By: Stefanie Fricano and Greg Darrah\*

“What is a Court Appointed Special Advocate (CASA)?” “Why do you do it?” “How much time does it take?” It seems like we must have answered these questions hundreds of times but we’re always happy to talk about being a CASA. Being a CASA volunteer can be exhausting, draining, sad, and frustrating but it is also probably the most important thing we do in our lives (along with raising our own children to be good citizens). Our CASA kids need our involvement in their lives perhaps even more than our own children, because we are their only consistent source of stability. After working with our CASA kids for only 19 months, we are the people in their lives who have known them the longest (aside from each other and their birth mother who sees the children for one supervised hour per month). We are the only consistent interaction that they have with someone who is not getting paid to be with them, and we are exceptional for them in that we care about them not because it matters in our lives, but because it matters in theirs.

We provide the continuity when our kids change houses and/or schools. We are the people who make sure school records follow our children, remember upcoming birthdays and field trips, attend Open House and school plays, and take photos so the kids can see themselves over time and remember fun events together. It does not cost very much or take a lot of time, but it is important and otherwise missing from their lives. Even though there are days we do not feel like getting off our sofa, there is no way we could stop.

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\* Stefanie Fricano and Greg Darrah are CASA volunteers in Sacramento, California. They keep busy by working full-time, coaching the best under-8 girls soccer team ever and raising two hyper dogs and two wonderful kids. They don't watch much T.V.

I was introduced to the idea of being a CASA when I read a novel about CASA advocates. I was looking for a new volunteer opportunity that would give me more direct impact on children's lives and this sounded like an amazing opportunity to help a child at a vulnerable time. I signed up, filled out the application and referrals and went to the interview.

After the interview, I began my training. This was perhaps the most difficult and time-consuming part because it required six hours of training per week, after work, for six weeks, with only two excused absences. It was very difficult to balance work, parenting, a spouse, CASA training and all the other regular life activities, but there were thirty of us who decided to make this work. The training is a challenge because it is difficult to prepare each of us for the thirty different kids with whom we will work with once we get our first case. However, the instructors were excellent and taught us, among other things about abuse, drug and alcohol addiction and issues teenagers face. The time passed quickly and before I knew it I was being sworn in by the presiding juvenile court judge. I was now an officer of the court. Even though I felt prepared for the job at hand, I was still extremely nervous to be assigned my own foster youth. A number of questions were running through my mind: "What would we talk about?" "What if they didn't like me? What if I couldn't handle their unique issues?"

One of the first things I realized when working with foster kids is that they are first and foremost children: they like to eat at McDonald's, they like to go to the park or the mall, they like to listen to music too loudly and they do not care for their homework – just like my biological kids. Sometimes they are talkative and other days, or even months. But this defines them as typical children, not foster kids.

I soon learned that one of the hardest parts of being a CASA volunteer are the confidentiality rules. In order to protect the privacy of both the children and the volunteers, CASAs cannot bring the children to their home, to their work, or introduce them to family or friends. CASAs cannot reveal

the identity of their children to anyone. For instance, I can talk about my CASA kids in general at the dinner table, discussing where we went or things we did but I cannot introduce them to my biological children, even if I think it would be a great experience for everyone. CASA volunteers may only speak about their CASA kids to other CASAs. Thus, it was a huge relief to be able to discuss my first CASA child with the CASAs who were assigned to her older siblings. This helped us confirm stories, get better insight into the family and also do activities together to promote bonding between the siblings.

I, nevertheless, still missed sharing my rewarding CASA experience with my family – and my family missed me. Last year my husband made the commitment to become a CASA. We have a case where we share responsibility for three siblings—ages six through nine—and the experience has been so helpful for both us and the children.

While it is helpful to have another adult on the visits purely for logistics, sometimes a kid needs to be chased down, or pulled off a fence, or pushed on a swing while the other CASA can attend to the other children's needs. Further, this arrangement has been beneficial for our CASA children for a multitude of reasons:

First, my husband and I have very different personalities and the kids might feel more comfortable opening up to one of us on different days. I am more serious, more focused on school work and more of the planner. My husband, on the other hand, is more carefree and can make anyone laugh. This has been great for having discussions with the kids.

Second, It is good for the kids to see a functional married couple. We are not perfect, we fight, we share responsibilities and we love each other. It is important for the children to see our multifaceted relationship.

Third, it is valuable for the kids to see a male role model. Many of the social workers, teachers, therapists and volunteers these kids see are women. While any volunteer is appreciated, it is helpful for the kids to see a positive, responsible male in their lives. Our youngest CASA kid, a 6-

year-old boy whose father has not made an effort to contact him since he was removed from his custody nearly four year ago, is particularly enthralled with my husband.

Finally, sometimes we need to sit down with one child, and let the others play while we discuss something. Having an extra set of hands makes this much easier and less awkward to do.

It is difficult to describe our CASA experience to people when they ask us why we do it. Some visits are good, but some are really hard. Almost all of them are tiring.

On the drive home, we often ask ourselves: "Did we make a difference today?" Then we step back from the day-to-day issues, and the difficulties of spending the afternoon with three kids and realize that we have made a substantial difference in these kids' lives over the last nineteen months. We know they are better off for our efforts, and that makes it easy to get off the sofa next week and do it all over again.

## RECENT COURT DECISIONS AND LEGISLATION IMPACTING JUVENILES

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### U.S. SUPREME COURT

 *Forest Grove School District v. T.A.*  
129 S. Ct. 2484 (2009)

The Supreme Court of the United States found the 1997 Amendments (“Amendments”) to the Individuals with Disabilities Act (“IDEA”) do not preclude parents from receiving private school tuition reimbursement from a public school district, even if their child never received special-education services from the school district.

Previously, in 1985, the Supreme Court held that under the Education of the Handicapped Act (renamed Individuals with Disabilities Act in 1990), 20 U.S.C. § 1400 *et seq.*, a court may require a school district to reimburse the parents of a child with a disability when they place the child in a private school without the school district’s consent if the public school does not adequately provide a free appropriate public education (“FAPE”). *Sch. Comm. of Burlington v. Dep’t of Ed. of Mass.*, 471 U.S. 359 (1985). In arriving at the decision, the Court took into consideration the purpose of IDEA: “To assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.” *Id.* at 367, 369.

In 2003, the parents of T.A. removed him from high school in the Forest Grove School District (“District”) and enrolled him in private school. Prior to that, a school psychologist and officials determined that T.A. did not qualify for an individualized education program despite his struggles in school. Subsequently, a private professional diagnosed

T.A. with ADHD and a hearing examiner found that the District's examination was legally inadequate because it did not consider ADHD. The examiner concluded the District failed in their obligation to provide a FAPE, and therefore, T.A.'s parents deserved reimbursement for private school's tuition.

The Supreme Court evaluated whether amendments, specifically to 20 U.S.C. § 1412(a)(10)(C), alter the result of *Burlington*. The Court reasoned that by not expressly prohibiting reimbursements, Congress, who is presumed aware of judicial interpretations of statutes, did not intend to reverse the decision in *Burlington*. Also, the factual distinctions between the instant case and *Burlington* are not such that the reasoning proffered in *Burlington* should not apply. That is, the purpose and text of IDEA allows the court to award T.A.'s parents reimbursement.

Justice Souter, in his dissent, argued that the amendments necessitate a reading that allows reimbursement only for "parents of a child with a disability, who previously received special education and related services under the authority of a public agency." Individuals with Disabilities Act of 1990, 20 U.S.C. § 1412 (2005). However, the majority points out that the statute provides that the courts "may require" reimbursement under the conditions specified by the dissent, which does not preclude reimbursement in other cases.

 *Horne v. Flores*

129 S. Ct. 2579 (2009)

The United States Supreme Court held that compliance with the No Child Left Behind Act ("NCLB") benchmarks do not automatically satisfy requirements of the Equal Education Opportunity Act of 1974 ("EEOA"). EEOA demands states take "appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f).

In a class action lawsuit commenced in 1992, English Language-Learner (“ELL”) students in the Nogales Unified School District and their parents brought suit in the District Court for the District of Arizona requesting a declaratory judgment against its Board of Education, the Superintendent of Public Instruction and the state of Arizona for violations of the EEOA. The lawsuit was based on the school district’s failure to provide adequate ELL instruction. The District Court found the funding provided to ELL students in the Nogales district was not related to the actual cost of ELL instruction and concluded the school district was in fact in violation of the EEOA. *Flores v. Ariz.*, 172 F. Supp. 2d 1255 (D. Ariz. 2000).

In 2001, the court extended the judgment statewide and imposed a deadline for the state to come into compliance by appropriately funding ELL programs. This deadline was not met. After another failure to meet this requirement in 2005, the court held the state in contempt. *Flores v. Ariz.*, 405 F. Supp. 2d 1112 (D. Ariz. 2005). In an attempt to comply with federal law, the Arizona state legislature passed HB 2064 in 2006, which increased ELL funding and created two new related funds. ARIZ. REV. STAT. ANN. § 15 (2006). After a series of appeals, the District Court concluded that HB 2064 failed to meet the appropriate standards and denied a motion to remove the District Court’s contempt order. *Flores v. Ariz.*, 480 F. Supp. 2d 1157 (D. Ariz. 2007).

The issue before the Supreme Court was whether Arizona had fulfilled its EEOA obligations through newly implemented policy and program changes, including NCLB. The Supreme Court agreed with the Ninth Circuit Court of Appeals that the statutory schemes of the two acts were significantly different, and that therefore compliance with NCLB did not establish compliance under EEOA. *Flores v. Ariz.*, 516 F. 3d 1140, 1172-1176 (9th Cir. 2008). The Court provided additional support for its conclusion by pointing out that approval of NCLB does not involve substantive review of ELL programming or the results of that programming for ELL students.

Justice Alito, speaking for the 5-4 majority in *Horne*, wrote that while implementation of NCLB does not constitute *per se* state compliance with EEOA, changes made under NCLB may be relevant to determining compliance based on the effectiveness of the current ELL programs. The Court highlighted four changes made under NCLB as particularly relevant to the question of EEOA compliance. These changes included: structural and programming changes to the ELL infrastructure; increased federal funding for ELL programming; ELL student progress as measured by assessments required by NCLB; and a shift in federal education policy from a focus on minimum funding levels to demonstration of progress.

The Supreme Court remanded the case to the District Court for the District of Arizona to determine whether changes under NCLB, in conjunction with additional reforms, would in this circumstance satisfy EEOA requirements.

#### **7TH CIRCUIT—FEDERAL COURT OF APPEALS**

 *Zbaraz v. Madigan*  
572 F.3d 370 (7th Cir. 2009)

From a class action suit that physicians brought against them, the state's attorneys appealed an order of the U.S. District Court for the Northern District of Illinois granting physicians' motion for permanent injunction preventing enforcement of the Illinois Parental Notice of Abortion Act. The Act prohibits a physician from performing an abortion upon a minor or incompetent person without giving at least 48 hours' actual notice to an adult family member. The state attorneys claimed that the Act was invalid on the ground that it does not provide for express authorization-of-consent, that it does not provide for flexibility in considering the best interest of the minor, rather than maturity, and that the act precludes a minor or incompetent person from giving informed consent to her own abortion. After the state's attorneys appealed, anti-abortion groups moved to intervene and amend the judgment.

The anti-abortion group's motion to intervene and amend the judgment was denied and they appealed.

The issue before the Court of Appeals for the Seventh Circuit was whether the Illinois Parental Notice of Abortion Act of 1995 ("IPNA"), 705 ILL. COMP. STAT. § 70, is facially invalid because its judicial bypass provisions do not allow for authorization of a state court judge to issue an order of consent to a minor's abortion when the abortion is in her best interest without notifying her parents. In making its decision, the court considered the Supreme Court's precedent regarding parental involvement laws, the constitutional right to abortion and the explicit language of the statute.

The court found the following: first, the statute did not lack an authorization-of-consent provision. Section 25 of the Act provides that notice shall be waived if the court finds that the minor is "sufficiently mature and well enough informed to decide intelligently whether to have an abortion," or "that notification . . . would not be in the best interests of the minor." §25(d). The provision further provides that "an order authorizing an abortion without notice shall not be subject to appeal." §25(f). Second, the Act leaves room for the court's flexibility in deciding whether or not maturity should be considered before best interests. Third, the language of the statute allows "bypass" courts to make findings based on maturity or best interests, and does not specify what the court must include in its findings. As a result, the statute serves judicial efficiency by narrowing the issues and allows the court to waive notification for an immature minor for whom an abortion is not in her best interest.

According to the appellate court, the statute establishes that if the state bypass court determines that the minor is either mature or that an abortion without notice is in her best interests, that court must waive parental notice of the abortion and likely issue an order authorizing the minor's consent. It would be unconstitutional for the court to waive parental notice and not issue an order of minor's consent. The appellate court also found that the district court overlooked the purpose of the statute in its interpretation. The purpose of the

statute is to require parental notification unless a bypass court waives this notification because the minor is sufficiently mature to make her own decision or unless it is deemed that notification is not in her best interest.

After considering several factors, the court found that the Illinois Parental Notice of Abortion Act was constitutional on its face. The Act does not deprive the minor of any of her rights; nor does it ignore the rights of her parents. In determining whether a pregnant minor must obtain the consent of her parents for an abortion, the courts of Illinois will take both the minor's best interests and maturity into consideration.

### **9TH CIRCUIT—FEDERAL COURT OF APPEALS**

 *In re B. Del C. S. B.*,  
559 F.3d 999 (9th Cir. Cal. 2009)

The U.S. District Court for the Central District of California granted petitioner father's petition to return a minor child to Mexico for custody proceedings. The court found that respondent mother had not proven her defense as to the legal status of the child in the United States (U.S.) under The Hague Convention on the Civil Aspects of International Child Abduction. The court based its finding on the fact that the child was not a legal resident of the United States, and therefore could not be considered "settled" in the country with any degree of certainty.

The child, Brianna, was born in Mexico and lived in Mexico with both parents through her first year of preschool. The following summer, Brianna traveled to the U.S. to stay with her mother, who had moved there and began attending kindergarten in California. Neither parent had obtained status as a U.S. citizen. The father lost contact with the child's mother after several months. One month after the father learned the mother's U.S. location, which was four years after he had last spoken to Brianna, he filed his Hague petition.

The district court concluded that the child was not settled in the U.S. even though she had been living in the same apartment and regularly attending school in California for the past five years. The Court of Appeals reversed, holding that the district court should not have considered the child's status as an undocumented immigrant because there was not an immediate, concrete threat of removal, and that a child who is an illegal alien can be considered domiciled in the U.S. The court further found that the father failed to meet his burden of establishing concealment. There was no evidence that the mother had ever hidden Brianna's location from him. To the contrary, the record was clear that he had sent a package to an address at which the child had lived prior to the time that communication was cut off, and that the address did not subsequently change.

Consequently, the father's petition under the Hague Convention was denied.

 *United States v. Juvenile Male*  
581 F.3d 977 (9th Cir. 2009)

Defendant, S.E., appealed the District Court of Montana's decision to require him to register as a sex offender pursuant to the Sex Offender Registration and Notification Act (SORNA) as a condition of supervised release. The Court of Appeals for the Ninth Circuit held that SORNA was in fact a violation of the Ex Post Facto Clause of the United States Constitution, which prohibits laws that retroactively change the legal consequences of acts committed prior to the enactment of the law.

At age 15, Defendant-appellant was adjudicated a delinquent under 18 U.S.C. § 5031, *et seq* after he pled "true" to engaging in non-consensual sexual acts with another minor of the same sex for a period of two years. Such acts would constitute aggravated sexual abuse under 18 U.S.C. §§ 1153 and 2241(c) if committed by an adult because the victim was under the age of twelve during the time period of the charges. In 2005, S.E. was sentenced to two years of detention at a

juvenile facility followed by supervised release until his twenty-first birthday. After completing two years at a facility, he was moved to a pre-release center where he was required to engage in job searches as part of the program. When he failed to do so, center officials requested his removal and deemed him a program failure. In 2007, a year after the enactment of SORNA, the district court revoked S.E.'s supervised release, ordered an additional six months of confinement and imposed a "special condition" mandating that he register as a sex offender. Juvenile appealed.

The Court of Appeals for the Ninth Circuit was deciding whether the retroactive application of SORNA's provisions to former juvenile offenders is punitive and therefore unconstitutional. A statute or regulation that imposes retroactive punishment violates the constitutional prohibition on the passage of ex post facto laws. U.S. CONST art. I § 9, cl. 3; *Smith v. Doe*, 538 U.S. 84, 92 (2003). In determining whether the statute, which is clearly retroactive, was also punitive, the court examined a variety of factors including legislative intent and the historical treatment of juvenile offenders. The test they used in applying these factors to SORNA was whether its: (1) purpose or (2) effect is clearly shown to be punitive.

When addressing the issue of purpose, the court stated that unlike adult adjudications, juvenile adjudication has traditionally been outside the public domain. Additionally, juvenile adjudication was designed to rehabilitate rather than to punish the convicted. The court referred to the opinion in *In re Gault* 387 U.S. 1, 30 (1967), where the Supreme Court stated that the origins of the juvenile justice system was established to make the child "feel that he is the object of [the state's] care and solicitude," and that he would "be treated and rehabilitated" through "clinical" procedures "rather than punitive" ones. *Id.*, 387 U.S. at 15-16. The court in the present case concluded that applying the retroactive provision of the Act would be a breach of faith of the juveniles who voluntarily accepted status as juvenile delinquents believing

that their offense would not later become publically accessible. *Juvenile Male*, F.3d at 7.

When deciding whether the effects of the retroactive application of SORNA's juvenile registration provision were clearly punitive, the court considered whether it "imposes an affirmative disability or restraint." *Doe*, 538 U.S. at 97. The court determined that because the effects of this provision imposed a disability that is neither "minor" nor "indirect," but rather severely damaging to former juvenile offenders' economic, social, psychological and physical well-being, this factor strongly supports a determination that the statute's effect is punitive.

After the court's analysis of legislative intent, the history of juvenile law and the purpose of the punishment, the court held that SORNA's juvenile registration provision may not be applied retroactively to delinquent individuals under the Federal Juvenile Delinquency Act. Enforcing such a provision would be unconstitutional and would conflict with the goals and purposes of the juvenile adjudication system.

## FEDERAL LEGISLATION

 Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 8, 2009

On February 4, 2009, President Obama signed one of the first pieces of legislation passed by the 111th Congress. This Act, the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA), increases funding and creates incentives for more efficient and effective state participation, thereby expanding and improving on the established State Children's Health Insurance Program (CHIP).

### *Children's Health Insurance Program Description*

Congress conceived of CHIP as a means to provide medical coverage for children in families that did not qualify

for Medicaid but were still unable to afford health insurance. The two main strategies to expand provision of medical insurance were to expand eligibility levels and to simplify enrollment procedures. The federal government matches state spending for CHIP at an enhanced rate. For example, if a state's CHIP spending is \$1 million, the federal government would provide \$700,000. CHIP was set to expire in 2007, and although Congress passed two versions of a reauthorization plan, President Bush vetoed both versions. Congress ultimately passed a temporary extension of the plan in December 2007 sustaining the program until April 2009.

*Effects of the 2009 Reauthorization Act*

The goal of CHIPRA is to provide health insurance coverage to an additional 4.1 million children. 3.4 million of those uninsured children are already eligible for CHIP or Medicaid under current guidelines, but remain uninsured due to complicated enrollment procedures or lack of local efforts to ensure statewide coverage. 700,000 additional children are expected to become newly eligible and receive coverage under the expanded eligibility criteria. CHIPRA encourages states to creatively expand their current efforts to cover children by providing for:

**Performance Bonuses:** CHIPRA offers states increased CHIP funding as a reward for improving their enrollment of eligible children beyond specified target levels. Target levels are based on each state's 2007 enrollment in Medicaid, adjusted for child population growth, plus several additional percentage points. To qualify for a performance bonus, states must also implement at least five of eight specified enrollment and renewal simplification procedures.

**Increased Outreach Funding:** CHIPRA allocates an additional \$100 million for improved outreach efforts. These funds will initiate a National Enrollment Campaign, which the U.S. Secretary of Health and Human Services will design and administer. Additional funding will also enable states to expand their current translation and interpretation services, thereby identifying eligible but uninsured children.

 S. 435, 111th Cong. (2009)

On February 13, 2009, Sen. Robert Casey [D-PA] introduced the Youth Prison Reduction through Opportunities, Mentoring, Intervention, Support, and Education Act (Youth PROMISE Act). This bill amends the Juvenile Justice and Delinquency Prevention Act of 1974, establishing a PROMISE Advisory Panel to assist the Office of Juvenile Justice and Delinquency Prevention. In addition, it amends the Violent Crime Control and Law Enforcement Act of 1994 to authorize grants for the creation and expansion of state, local and tribal juvenile witness and victim protection grants. At last action, it was read twice on February 13, 2009 and referred to the Committee on the Judiciary.

The Youth Promise Act authorizes the Administrator of the Office of Juvenile Justice and Delinquency Prevention to award grants to local governments and Indian tribes to: (1) plan and assess evidence-based and promising practices for juvenile delinquency and criminal street gang activity prevention and intervention, especially for at-risk youth; and (2) implement PROMISE plans, developed by local PROMISE Coordinating Councils (PCCs), for coordinating and supporting the delivery of juvenile delinquency and gang prevention and intervention programs in local communities.

S. 435 establishes a National Research Center for Proven Juvenile Justice Practices to provide PCCs and the public with current research. This research includes evidence-based practices related to juvenile delinquency, and criminal street gang prevention and intervention. The bill authorizes the Attorney General to award grants to partnerships comprising state mental health authorities and local or private entities. The partnerships will work to prevent or alleviate the effects of youth violence in urban communities with a high or increasing incidence of such violence. Finally, the bill authorizes the Director of the National Institute of Justice to make three-year grants to public and private entities for the implementation and

evaluation of innovative crime or delinquency prevention or intervention strategies.

 H.R. 2103, 111th Cong. (2009)

On April 27, 2009, the United States House of Representatives introduced House Resolution 2103. Presently, hundreds of thousands of girls in developing countries are forced into marriage before the age of 18. Complications with pregnancy and childbirth are the leading cause of death for women ages 15-18 in developing countries. This bill will authorize the President to implement new ideas and provide assistance through existing international programs to prevent child marriage and promote the empowerment of girls and women in developing countries.

H.R. 2103 will improve the physical and emotional well-being of girls in developing countries by strengthening existing programs and implementing new programs to encourage the completion of secondary education among young girls, raise awareness of the health risks associated with child marriage and provide training for adolescent girls and their parents on alternative ways to discover and profit from economic activities. The bill will also authorize the President to provide assistance in providing community-based education aimed at breaking down gender stereotypes and increasing the perceived value of girls.

H.R. 2103 will target areas of developing countries in which child marriage is prevalent. It will amend the Foreign Assistance Act of 1961, providing that following the enactment of the bill Human Rights reports from countries with a high prevalence of child marriage will include a description of related activities in the region.

**CALIFORNIA**

 *People v. Nguyen*  
46 Cal.4th 1007 (Cal. 2009)

The defendant, Vince Vinhtuong Nguyen, appealed the trial court's decision to increase his sentence under the Three Strikes Law using a prior juvenile adjudication, arguing that the decision violated his Sixth Amendment rights because he did not have a jury in his prior juvenile proceeding. Therefore, according to Nguyen, the court could not use the juvenile conviction as one of his strikes to increase his sentence. Upon appeal, the Court of Appeals agreed and held that his sentence could not be increased. However, the Supreme Court reversed the Court of Appeals decision, holding that the use of prior juvenile adjudication to increase sentence under the Three Strikes law did not violate the defendant's right to a jury trial.

Under California's Three Strikes Law, the maximum sentence may be increased for an adult felony offense if the defendant suffered one or more qualifying "prior felony convictions" CAL. PEN. CODE, §§ 667(d)(3), 1170.12(b)(3). *In Apprendi v. N.J.*, 530 U.S. 466 (2000), the United States Supreme Court established that under the Fifth, Sixth and Fourteenth Amendments a defendant has the general right to a jury finding beyond reasonable doubt of any fact used to increase the sentence for a felony conviction beyond the maximum term permitted by conviction of the charged offense alone. However, in California, juveniles do not have a right to a trial by jury for juvenile proceedings. When juveniles break the law they automatically "waive" their right to a trial by jury in their juvenile proceeding. Instead, juveniles have the right to a trial by jury in a matter disputing whether or not a prior adjudication properly occurred as a substitute for the trial by jury in their original juvenile proceeding. With this opportunity for a jury trial comes a choice of whether or not the juvenile would like to waive the right to a jury trial.

The California Supreme Court held that in this case, since the defendant had a qualifying “prior felony conviction” his sentence could be increased. The court reasoned that although a defendant has the right to a jury trial on the facts of whether he or she “has suffered” an alleged prior conviction, in this case the defendant had a right to a trial by jury to decide whether or not there was a prior adjudication and the defendant waived that right. By waiving that right, the defendant authorized the judicial system to count the conviction as a strike against him despite not having a jury trial. This authorization is sufficient to allow juvenile adjudication without a jury trial. Further, the court held that since the prior juvenile adjudication included “all the rights and guarantees constitutionally applicable therein,” it satisfied the standard for a “prior conviction” exception in accordance with the *Apprendi* rule. Therefore, the court found that the defendant had a prior juvenile adjudication sufficient to constitute a strike under the Three Strikes Law, and that the defendant was afforded the due process necessary to uphold the strike on his record.

 *In re Nuñez*

173 Cal. App. 4th 709 (Cal. Ct. App. 2009)

Nuñez, a 15-year-old from South Central Los Angeles, petitioned the California Supreme Court for habeas corpus on grounds that his sentence of life imprisonment without parole (LWOP) for kidnapping for ransom constituted cruel and unusual punishment, in violation of Article 1 Section 17 of the California Constitution. Nuñez was the only juvenile under age 15 to be sentenced to life imprisonment without parole for a non-homicide, non-injury crime in California. The California Supreme Court found a prima facie case for relief and ordered Petitioner’s prison custodian to show cause justifying the sentence’s constitutionality before the California Court of Appeal for the Fourth District.

An adult acquaintance, Delfino, paid Nuñez, 14, to assist in a kidnapping attempting to collect money from the

victim's brothers. Nuñez admitted that he actively participated in a volatile situation that included a danger-enhancing ransom motive and that he discharged a deadly weapon between 11 and 18 times during a police chase. However, the appellate court found evidence that Nuñez did not participate in the original kidnapping and had limited knowledge of the criminal scheme, lessening his criminal culpability.

The appellate court accepted defensive psychiatric evidence indicating the petitioner's diminished mental capacity due to Post Traumatic Stress Disorder (PTSD) and major depression. Nuñez, who grew up in an abusive home in a rough neighborhood, was shot in the stomach while riding his bicycle at age 13 and at that time witnessed the fatal shooting of his 14-year-old brother in an unrelated, random act of gang violence. Considering his flawed mental state, as well as his youth and limited history of criminality, the appellate court held that a sentence of life in prison without parole as specifically applied to the petitioner violated the Eighth Amendment of the United States Constitution.

The California Court of Appeal for the Fourth District also construed the holding broadly, finding that California Penal Code § 209, subdivision (a) violates Article 1 § 17 of the California Constitution as an unjust sentencing discrepancy. The code section reads in pertinent part:

Any person who . . . kidnaps or carries away another person by any means whatsoever with intent to hold or detain, or who holds or detains, that person for ransom...is guilty of a felony, and upon conviction thereof, shall be punished by imprisonment without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or is intentionally confined in a manner which exposes that person to a substantial likelihood of death...

## Cal. Penal Code § 209(a).

Under California sentencing structure, a juvenile first-degree murder conviction can result in a maximum sentence of life imprisonment *with* the possibility of parole. Stressing that courts must consider a defendant's youth, as well as the degree of violence in his criminal acts, the appellate court found that sentencing any juvenile to life imprisonment without parole for a kidnapping offense not resulting in the victim's injury or death was cruel and unusual.

Granting his petition for habeas corpus and vacating the petitioner's sentence of life imprisonment without parole, the California Court of Appeal for the Fourth District remanded the case to the trial court for a new sentencing hearing consistent with the their holding.



California AB 81  
2009 Cal. Stat. 76

Governor Arnold Schwarzenegger signed into law Assembly Bill 81 on August 5, 2009, extending the rights of foster care children in California. AB 81 amends Section 48850 of California's Education Code to ensure foster children the opportunity to participate in interscholastic athletics and other extracurricular activities.

Existing law establishes a responsibility on the part of the juvenile courts, educators, placing agencies, care providers and advocates to collaborate to ensure access to extracurricular and enrichment activities for foster youth, equal to the opportunities available to their peers. CAL. EDUC. CODE § 48850(a) (2008).

AB 81 acts concurrently with existing law requiring that following a court order or child welfare workers decision to change a foster child's residence, the child immediately meets the residency requirements for interscholastic sports and other extracurricular activities. This regulation extends to

athletics administered by the California Interscholastic Federation (CIF), which oversees interscholastic athletic activities in high schools. This amendment to the current Education Code was made partly in response to a finding by the Alameda Superior Court in *Dyer v. California Interscholastic Federation*, that strict eligibility requirements required by CIF bylaws create a barrier for foster children and their immediate participation in school athletics. *Dyer v. Cal. Interscholastic Fed'n*, No.RG08421517 (Alameda Sup. Ct. Nov. 24, 2008). This legislation was intended to strengthen and clarify the already existing rights of foster children, in light of the court's decision in *Dyer. Interscholastic Athletics: Pupils in Foster Care, Before the S. Comm. on Education*. 2008-2009 Sess. (Cal. 2009).

## MICHIGAN

 *Lee v. Detroit Medical Center*  
285 Mich. App. 51 (Mich. Ct. App. 2009)

Rufus Young, Jr., a four-year-old foster child in the care of Tara and Roderick Hall, died on April 6, 2003 from numerous blows to his head and body. His death was ruled a homicide and a jury convicted his foster father of second-degree murder.

While in the care of Sonceria Cooperwood, his first foster mother, doctors confirmed that Rufus Jr. suffered from various health issues, some stemming from his mother's use of cocaine and alcohol during pregnancy. In 2002, Rufus and his sister were placed with new foster parents, Tara and Roderick Hall, because Cooperwood could no longer care for them. During his time with the Halls, Rufus's weight dropped significantly despite his being previously known for a robust appetite.

In February 2003, Tara Hall took Rufus back to Children's Hospital for Rufus's failure to thrive and for tremors; Rufus was examined by Drs. Rao and Truong. Tara informed the doctors that Rufus suffered from a history of

physical abuse from his biological parents, as well as drug and alcohol exposure at birth. Dr. Truong found evidence of physical abuse in the form of “multiple bruising suggesting history of abuse.” Dr. Truong testified to finding both old and new bruises, but did not file a report for Actual or Suspected Child Abuse or Neglect because Tara Hall showed genuine signs of concern and care. Dr. Rao agreed, but thought that the bruises were actually scars from Rufus’ eczema. Dr. Rao testified that she would have contacted the hospital’s social worker had the scars actually been bruises and if she suspected Tara Hall of abuse. Rufus was seen by three more doctors during February and March of 2003, and none of them reported suspicions or evidence of abuse or neglect.

After Rufus Jr.’s death, Plaintiff, Rufus Jr.’s sister, filed suit against defendants for breach of their statutory duty to report suspected child abuse and neglect under Michigan Compiled Laws (MCL) §§722.623 and 722.633. Defendants, Drs. Rao and Huq, Detroit Medical Center (DMC), and Children’s Hospital moved for summary judgment asserting that the claims should be dismissed because they were really claims for medical malpractice. Dr. Huq claimed that he was not required to file a report, and DMC and Children’s Hospital claimed that they should not be held vicariously liable because MCL §722.633 does not provide for respondeat superior liability. The trial court dismissed plaintiff’s statutory liability claims against defendant doctors and plaintiff’s vicarious liability claims against the hospitals. On appeal, the Michigan Court of Appeals ruled that the trial court erred in doing so.

MCL §722.623 requires certain kinds of individuals, such as physicians, teachers and other regulated child care providers, to report child abuse or neglect when they have a reasonable cause to suspect such actions. Child abuse is defined as “harm or threatened harm to a child’s health or welfare that occurs through nonaccidental physical or mental injury...by a parent, legal guardian, or any other person responsible for the child’s health or welfare...” MICH. COMP. LAWS § 722.623 (1975). Child neglect is defined as “harm or threatened harm to a child’s health or welfare by a parent,

legal guardian, or any other person responsible for the child's health or welfare that occurs through either" their negligent treatment or by "[p]lacing a child at an unreasonable risk to the child's health or welfare by the failure of the parent...to intervene to eliminate that risk when that person is able to do so and has, or should have knowledge of the risk," MICH. COMP. LAWS §722.622 (1975). Liability for failure to report is established in MCL §722.633, which holds that a person can be held "civilly liable for the damages proximately caused" by failure to report.

In accordance with Michigan's statutes, doctors are required to report any time they have a reasonable cause to suspect child abuse or neglect. The issue is distinguishing between medical malpractice and ordinary negligence. In distinguishing between the two, the courts rely on the two-part Bryant test. The two questions raised by the Bryant test address: (1) if the claim arises during the course of a professional relationship; and (2) if the claim raises questions of medical judgment that goes beyond the realm of common knowledge and experience. However, doctors need not report every bump or bruise. Rather, they must report those injuries that raise a reasonable suspicion of child abuse or neglect whether or not they themselves believe that it is actually neglect.

Michigan's Court of Appeals held that individuals required who are to report child abuse and child neglect under the MCL §722.623 can be found both civilly and criminally liable under MCL §722.633 for failure to report if there is a "reasonable cause to suspect abuse." The court added that employers may also be held vicariously liable under MCL §722.633 for an employee's failure to report child abuse or neglect. Therefore, a hospital can be held liable for a doctor's failure to report. In coming to this conclusion the court considered the legislative intent of MCL §722.633, which expressly holds individuals civilly liable for the damages proximately caused by the failure to report. Despite this express language to hold individuals liable, the court found that the intent of the legislature was in accord with the well-settled common law principle of vicarious liability, which in

this case was not expressly abolished by the statute. Therefore, since it was not within the legislature's intent to abolish vicarious liability when enacting MCL §722.633, the court found that vicarious liability still applies, and cannot be abolished by implication. The court further held that vicarious liability is well within the purpose of the statute – to protect children who are abused and neglected – by encouraging employers to properly train and supervise their employees to comply with reporting laws.

## NEBRASKA

 *In re C.H.*

277 Neb. 565, 763 N.W.2d 708 (2009)

The Supreme Court of Nebraska evaluated whether the presence of certain aggravating and mitigating factors meant that a juvenile was in custody for *Miranda* purposes. They held that the juvenile was in custody for three reasons: The investigator did not inform the juvenile that he was free to leave at any point, the juvenile did not voluntarily provide his statement, and the investigator took the juvenile into custody after the interview. As a result, the court erred in admitting the juvenile's statements from the interview when the officer did not advise him of his *Miranda* rights.

In October of 2007, C.H., a 14 year old, admitted to having a sexual encounter with his five-year-old half-sister to an investigator with the Madison County Sheriff's Department. The investigator, acting on notification from C.H.'s father and with his approval, went to C.H.'s high school to interview him. C.H.'s father and stepmother expressed to the Sheriff's Department that they did not want C.H. to return home. Before the interview with C.H., the investigator determined that he would take C.H. to the juvenile detention center after the interview.

At the high school, the investigator and a worker with the Department of Health and Human Services interviewed C.H. in a conference room. The investigator did not tell C.H.

that he was free to leave or end the interview, nor did the investigator advise C.H. of his *Miranda* rights. At the end of the interview, the investigators transported C.H. to the juvenile detention center.

Prior to his juvenile court hearing, C.H. moved to suppress his statements from the interview. The juvenile court denied the motion, and subsequently found that C.H. had committed acts constituting sexual assault.

On appeal, the Supreme Court of Nebraska found that the juvenile court erred in denying C.H.'s motion to suppress his confession. The Court's decision hinged on a determination of whether C.H. was in custody during the interview, requiring the investigator to advise C.H. of his *Miranda* rights.

To determine if C.H. was in custody the Court weighed the common indicators as promulgated in *U.S. v. Axsom*, 289 F.3d 496 (8th Cir. 2002). Though C.H.'s movement was unrestrained during questioning, the investigator failed to inform him that he was not under arrest, was free to go at any time and did not have to answer any questions. Also, since the investigator initiated contact and failed to advise C.H. of his freedom to leave, the court concluded C.H. did not voluntarily acquiesce to questioning. The court further considered that the investigator took C.H. into custody after the interview, and had resolved to do so before the interview. Although, the investigator never used coercive tactics and the interview was not police dominated, presence of the remaining factors were sufficient for the Court to find that C.H. was in custody at the time of the interview.

Since C.H. was in custody and the investigator failed to advise him of his *Miranda* rights, the court held C.H.'s statements should have been suppressed. As C.H.'s statement was incorrectly considered in adjudication, and the juvenile court relied on it significantly in its decision, the Court reversed the decision and remanded the matter for a new hearing.

**UTAH** Utah H.B. 288

On January 1, 2009, the Utah State House of Representatives proposed H.B. 288, which redefines who can legally adopt in the state of Utah. The bill would allow for non-traditional families to adopt in certain circumstances. H.B. 288 amends sections of Utah Code 78B-6. Under the current Code, only couples in marriages that are found to be legally binding under state law are granted the right to adopt. H.B. 288 expands the limits of the adoption law by indicating that the best interest of the child should be considered first and foremost in every adoption, and then stating that it is “generally” in a child’s best interest to be adopted by persons who are in a legally binding marriage according to Utah’s state law.

H.B. 288 also amends existing law prohibiting the adoption of minors by cohabitating, unmarried adults. It outlines exceptions in cases where the parent’s or parents’ consent is obtained and when the state has legal custody of the child.

Under the new bill, children in the state’s custody will be placed with legally married couples unless it is “in the best interests of the child to place the child in another placement.” This subjectivity leaves room for the possibility of adoption by non-traditional couples and increases the number of potential homes for children who need them.

**WEST VIRGINIA** *State ex rel. Kutil v. Blake*  
679 S.E.2d 310 (W. Va. 2009)

Baby Girl C. (B.G.C.) was born on December 8, 2007 and tested positive for cocaine and methadone in her bloodstream. The West Virginia Department of Health and

Human Resources (DHHR) initiated abuse and neglect proceedings against the biological mother and placed B.G.C. in the custody of Petitioners Kutil and Blake, a lesbian couple whose home had been previously approved by DHHR for both foster parenting and adoption. Kutil and Blake were then serving as foster parents for several other children.

The court appointed a *guardian ad litem* (GAL) to oversee B.G.C.'s custody. On January 24, 2008, the GAL filed a motion to remove B.G.C. from Petitioners' home, asserting that raising the child in a same-sex parental environment, for short-term or long-term, would be detrimental to the child's development and against her best interests. The court ruled not to interfere with the child's foster placement and granted intervenor status to Petitioners at a hearing on January 31, 2008. The Court terminated the biological mother's custodial rights with an October 8, 2008 order after her failure to demonstrate fitness.

At a November 8, 2008 permanency hearing, the GAL renewed his motion for removal of B.G.C. from a home with same-sex parents. The court issued an order on November 12, 2008, concluding that it is in the best interest of children to be raised in a "traditional family setting," and that it was in the best interests of the child to be removed from Petitioners' home and placed in a foster home with a married mother and father. Petitioners appealed to the Supreme Court of West Virginia for a writ of prohibition to vacate the lower court's November 12, 2008 removal order, and moved for an emergency stay.

The West Virginia Supreme Court granted Petitioners' emergency motion and writ of prohibition against the trial court's order. The Supreme Court found that in ordering removal from Petitioners' home, the trial court had ignored the best interests of B.G.C. During the months Petitioners enjoyed custody, B.G.C. bonded with Petitioners, and B.G.C.'s individual emotional, physical and mental needs deserved examination. The Supreme Court further found no statutory preference for adoption by a traditional family, and held that under West Virginia law, Petitioners could not

jointly file for adoption of B.G.C.; however, one of them, as an unmarried person, could adopt B.G.C. In so ruling, the Supreme Court stressed that the GAL had presented no evidence proving that Petitioners' home was unfit, and that, in the best interests of the child, no legal reason exists to remove B.G.C. from her established foster home.

## WISCONSIN

 Wis. Stat. § 632.895 (2009)

On June 29, 2009, Governor Jim Doyle and the Wisconsin State Legislature signed the annual budget bill into law, which included provisions for comprehensive autism insurance reform. Though treatments for Autism Spectrum Disorders (ASD) are becoming increasingly reliable, the treatments remain painfully expensive for families with disabled children. In addition, few health insurance companies willingly provide coverage for ASD treatments. According to the autism advocacy group Autism Speaks, Wisconsin became the fourteenth state in the nation to require health insurance companies to provide coverage for ASD treatments.

Provisions of the new law require that every disability insurance policy and self-insured health plan in the state provide coverage for physician-prescribed ASD treatments. The new law also specifies that each insured child will be guaranteed coverage for at least \$50,000 per year for intensive-level services, with a minimum duration of 4 years, and at least \$25,000 per year for nonintensive-level services. The minimum coverage amounts will be adjusted annually to reflect changes in the consumer price index, which also follows changes in inflation.

Intensive-level services are evidence-based behavioral therapies that are designed to “help an individual with autism spectrum disorder overcome the cognitive, social, and behavioral deficits associated with that disorder.”

Nonintensive-level services are evidence-based therapies that occur after the completion of treatment with intensive-level services and that are designed to “sustain and maximize gains made during treatment with intensive-level services.” Minimum coverage requirements do not need to be met if a supervising professional, with the consultation of a physician, determines that a lesser treatment is medically appropriate.

The newly enacted bill also states that the Office of the Commissioner of Insurance will further define the rules and regulations needed to responsibly and quickly implement the new law. The commissioner recently formed a workgroup to begin addressing the implementation and regulatory issues that the state may face. The workgroup currently consists of three legislators, four autism community advocates, three members of the public, two members of the Department of Health Services and three insurance company representatives.