# Discovering the Undiscoverable in Child Protective Proceedings: Safety Planning Conferences and the Abuse of the Right to Counsel

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## Introduction

*A "concerned neighbor" makes an anonymous phone call to the child abuse hotline because the mother in the apartment adjacent to hers is "always drunk" and "the baby is going to get hurt." A case worker from the Administration for Children's Services (ACS), responding to an intake report, investigates and finds the mother stumbling drunk, with alcohol on her breath, dilated pupils, slurred speech and living in an apartment with a sea of empty vodka bottles at 4:00 o'clock on a weekday afternoon. The three-year-old child is removed from the home, taken to the children's center in Manhattan to be evaluated and to locate an available foster home. The next day, a child neglect petition is filed in family court, alleging inadequate guardianship of the child due to alcohol use. In court, ACS asks for a removal (a.k.a. remand) of the child to foster care and the judge grants that application. Within 72 hours of the removal, ACS is mandated to hold a conference with the respondent. Realistically, these service plan meetings/conferences are usually held at least four or five days after removal. In this case, as is the norm, the meeting is attended by the ACS case worker*

*who removed the child, her supervisor and the respondent mother. A service plan, which is meant to provide the appropriate resources in order to ameliorate the current alleged neglect and prevent future neglect, is supposed to be discussed. But what happens is the case worker asks questions of the mother on topics that go far beyond the petition. The supervisor asks whether the mother is using any drugs. The mother denies. Asked again by the case worker, the mother admits she used crack but not recently. During the conference, the case worker arranges for the mother to take a drug test. The mother tests positive for crack-cocaine. She then admits she last used crack the prior night and during a baby shower two months earlier. This leads to a series of questions about the frequency of the use, where mom got the money to buy the drugs, etc. The case worker leaves the interview and meets with the agency's attorney at the Department of Legal Services (DLS) to discuss whether new charges can be raised in light of the new information. The decision is then made to amend the original neglect petition to include the new drug use allegations. The DLS attorney files an order to show cause and the case is advanced to the court calendar for the next day.*[2]

"It happens fairly often…we file a case against a parent with allegations that are relatively minor, like educational neglect, when the child isn't attending school regularly, and then when the case workers start speaking in more depth with the parent, usually at the 72-hour conference, all sorts of other issues, like drug abuse may come up. So, we amend the

[2] Conversation with anonymous Administration for Children's Services attorney (May 2002) (on file with author).

> child abuse or neglect petition to include the new allegations or add an additional respondent, like the boyfriend or grandparent to the petition." [3]

This story reflects just one of more than 50,000 reports made annually of child abuse and neglect, affecting approximately 85,000 children in New York City alone.[4] Based on a real-life situation in Bronx County, this account appears, from a non-legal standpoint, relatively benign. One sees the compassionate intervention of a kind neighbor, and the admirable behavior by the social services case workers trying to protect children from further abuse or neglect. No one will argue that children should not be provided a safe environment. A problem, nonetheless, is highlighted when the focus is shifted from the child to the parent, and a legal examination of the constitutional rights of the parent is conducted.

It is well established that the government should not interfere with the fundamental liberty interest of the right to supervise and rear one's child except upon a showing of overriding necessity.[5] Parents undoubtedly have the right to raise their children and control their upbringing; however, they also bear the crucial responsibility of safeguarding their children. Where parents fail to meet that responsibility, the state may properly intervene to protect a child.[6] This essay will explore cases in which the State has intruded into the family unit by citing the interest of the well-being of the children. Specifically, this essay will examine the parents' right to counsel in their out-of-court dealings with the prosecuting child welfare agencies.

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[3] *Id.*

[4] ADMINISTRATION OF CHILDREN'S SERVICES OFFICE OF RESEARCH AND EVALUATION, MANAGEMENT ANALYSIS AND REPORTING, 1 (February, 2005). [hereinafter ACS MANAGEMENT ANALYSIS REPORTING].

[5] *In re* Marie B., 465 N.E.2d 807, 810 (N.Y. 1984).

[6] N.Y. FAM. CT. ACT ARTICLE 10 (McKinney 2004).

## II. Premise

Child welfare agencies investigate whether children are injured, unsupervised, or at risk of harm, and if necessary will remove children from their homes upon imminent risk.[7] This often leads to a civil child abuse or neglect case being filed in family court for the protection of the child. Social Services or the local child welfare agency files a Family Court Child Abuse or Neglect (a.k.a. Child Protective) petition. At a post-arraignment and pre-trial stage, in which counsel has been assigned to the respondent-parents, the petitioner calls a mandatory out-of-court "conference", "case plan meeting" or "service plan meeting" with the respondents[8] in order to make a plan for the reunification of the family.[9] These meetings are often designed to "specify the expectations negotiated with the family regarding participating in services and completion of tasks that support the family member's ability to effect these changes."[10] During the questioning by the petitioning agency, statements and admissions will be made by the parents in absence of their counsel. New allegations may surface. A criminal case may be threatening or pending. No formal recording or transcript is kept of the meeting. The petitioner will most certainly testify at the trial. Decisions about the course of the proceedings and the petitioner's position will hinge on statements made during this conference. Routinely,

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[7] Cynthia R. Mabry, *Second Chances: Insuring that poor families remain intact by minimizing socioeconomic ramifications of poverty*, 102 W. VA. L. REV. 607, 627 (2000).

[8] And, depending on the jurisdiction, children may be entitled as well to attend such meeting

[9] For the purposes of this article, I will focus on the parent's rights, although at times the child evidently is also being denied the right to have counsel present at certain meetings.

[10] Pamela Diaz and Madelyn Freundlich, Children's Rights, Child and Family Service Review Final Reports: An Assessment of States' Success in Involving Children and Families in Case Planning, http://www.childrensrights.org/print/policy/childfamilyservice.htm (last visited, October 12th 2005) (on file with author).

parents attend such meetings without their attorneys being present.[11]

The parents are often the least financially and emotionally equipped to take on the government.[12] Faced with the loss of a child, poor parents may regularly become intimidated by welfare officials' demands and confused, if not panic-stricken, by legal proceedings. In turn, the parents hesitantly submit to a "plan" which child welfare devises.[13] These "plans" are formulated at service plan meetings.[14]

This article will explore the critically important Service Plan Meetings which are a principal part of child welfare agency practice in Child Protective proceedings. The article will focus primarily on New York state while incorporating national trends. Consideration will be given to family court procedure; the many hats that petitioning/prosecutorial agencies wear; and the statutory and constitutional rights of parents to representation and the arguably overriding safety interest of the children. Lastly, this article will offer suggestions to level the highly uneven playing field in the family court process.[15]

## III. The Child Protective Court Process in New York State

Child protective cases commence with the filing of a petition in family court. At intake, the arraignment stage, and upon proper service, parents are informed that they may retain counsel. If qualified, lower-income parents are entitled to assigned counsel. The parents are entitled to discovery and to present their defense at pre-trial, fact-finding, and disposition

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[11] Service Planning Meetings are routinely held weekdays while most court-appointed counsel are required to be in court.

[12] Reist v. Bay, 241 N.W. 2d 55, 58 (Mich. 1976).

[13] Mabry, *supra* note 7, at 653.

[14] Language varies from jurisdiction to jurisdiction; may be called a Family Team Meeting, a 72-hour conference, Service Plan Review, etc.

[15] Sheri Bonstelle and Christine Schessler, *Adjourning Justice: New York State's failure to support assigned counsel violates the rights of families in child abuse and neglect proceedings*, 28 FORDHAM URB. L.J. 1151, 1152 (2001).

hearings. The declared paramount goal is to rehabilitate and reunite families whenever possible.[16]

In New York, the family court has exclusive original jurisdiction over child abuse and neglect, and termination of parental rights proceedings.[17] These courts handle some of the most sensitive issues surrounding families in crisis including but not limited to: domestic violence, physical abuse, excessive corporal punishment, sexual abuse, educational neglect, lack of supervision in the home, drug and alcohol abuse, and medical neglect.[18]

Family court in New York City is unsurprisingly overcrowded. Annually, over 2 million people walk through the doors of family court alone.[19] Child abuse and neglect must be detected and investigated, but it is not the court which does such work.[20] Child welfare agencies are given the responsibility for child protection and for safeguarding against child abuse and neglect. [21] Child protection agencies gather and present the evidence in court, and provide services to help reunite the family and keep the children safe.[22] However, these multiple mandates appear to pose an inherent conflict. The prosecuting party to the proceeding, the local child welfare agency, must simultaneously gather information during their investigation in order to sustain their petition for a finding of child abuse or neglect, including removing children from the family at any time. Yet, the agency must also "work with" the parents to reunite the family.[23] It is blatantly apparent that the potential for child welfare's abuse of discretion will be at the expense of these vulnerable parents

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[16] *In re* Nathaniel T., 468 N.Y.S.2d 768 (1983).
[17] N.Y. FAM. CT. ACT §§ 111, 115 (McKinney 2004).
[18] *Id.* at § 111 practice cmt.
[19] Quoting the Honorable Joseph Lauria, City of New York Bar Association Continuing Legal Education Presentation (October, 2001).
[20] N.Y. FAM. CT. ACT §1011 (McKinney 2004).
[21] CHILD MALTREATMENT, ADMINISTRATION FOR CHILDREN AND FAMILIES, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, 5 (2003) [hereinafter CHILD MALTREATMENT ACS].
[22] *Id.*
[23] Bonstelle, *supra* note 15, at 1190.

and could result in coerced written and signed agreements, pressured admissions, alienated parties, etc.

## IV. The Role of Child Welfare Agencies

Case workers employed by child welfare agencies often feel pressure from various sources: families, agency expectations, lawyers, the public media, police officers and children.[24] Case workers need to provide parents with information so that the parents can understand what they have been accused of; what they can expect from the child welfare agency; what they are expected to do or not do; how they can visit their children; and ultimately how to have them returned home.[25] It is an immense responsibility to quickly gather information about the children and families in order to determine if maltreatment occurred and whether there would be an ongoing risk to the children.[26]

These agencies will investigate and determine what services are most appropriate for the family.[27] Nationally, each week, child protective agencies receive more than 50,000 referrals alleging that children have been abused or neglected.[28] Some children are removed from their homes during this initial investigatory period, approximately 206,000 annually.[29] During 2003, a massive 5.5 million children were referred to child protective agencies.[30] This enormous number of child maltreatment reports translates into hefty caseloads for child welfare workers. Based on data from 28 states, the weighted average number of investigations per agency worker is 63.1 per year.[31] Some states, such as California, vary

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[24] U.S. Department of Health and Human Services, available at: http://nccanch.acf.hhs.gov/pubs/usermanuals/cps/cpsf.cfm, (last visited June 28th 2005).Y
[25] *Id.*
[26] *Id.*
[27] CHILD MALTREATMENT ACS, *supra* note 21, at 5.
[28] *Id.*
[29] *Id.* at 70.
[30] *Id.* at 5.
[31] *Id.* at 8.

significantly with an average of 194 cases per year. [32] These agencies formulate an ongoing plan of services the parents are required to comply with[33] in order to rectify the underlying allegations of abuse or neglect. The common-sense rationale for referring parents for services is to equip the parents with the skills they need to provide a safe environment for the children. Nationally, an estimated 517,000 families received services in 2003.[34] In New York, of the 4.5 million child population, 1 in 25 families received preventive services, a number which mirrors the national average.[35]

In New York City, the Administration for Children's Services (ACS) is the local child welfare agency charged with the role of safeguarding children against child abuse and neglect, and is responsible for prosecuting the same parents in family court.[36] ACS consists of child protective case workers and attorneys working in their legal branch, the Division of Legal Services. Each attorney carries a demanding active caseload of approximately 80 which is a 30% increase from 2001.[37]

ACS may charge parents with, among other causes of action, child neglect or abuse. If charged, the parents are provided some procedural protections: proper service,[38] discovery, a fact-finding hearing conducted pursuant to formal rules of evidence,[39] and a dispositional hearing.[40] Indigent parents are provided with an attorney to represent them at both the fact-finding and dispositional hearings.[41] Attorneys

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[32] *Id.*
[33] *Id.* at 70.
[34] *Id.* at 72.
[35] *Id.* at 74.
[36] N.Y. FAM. CT. ACT ARTICLE 10 (McKinney 2004); *In re* Commissioner of Social Services, 413 N.Y.S.2d 532, 534 (1979).
[37] ADMINISTRATION OF CHILDREN'S SERVICES OFFICE OF MANAGEMENT DEVELOPMENT AND RESEARCH ANNUAL REPORT, 85 (2001) [hereinafter ACS ANNUAL REPORT] (on file with author).
[38] N.Y. FAM. CT. ACT § 624 (McKinney 2004) only competent, material and relevant evidence may be admitted.
[39] *Id.* at §§ 614, 616, 617.
[40] *Id.* at § 1046(b)(ii).
[41] *Id.* at § 262(a)(I); Santosky et al. v Kramer 455 U.S. 745, 778 (1982).

submit documentary evidence and call witnesses who are subject to cross-examination. Based on all the evidence, the judge then determines whether the petitioning child welfare agency has proven the statutory elements of neglect or abuse by clear and convincing proof.[42]

As ACS conducts its ongoing investigation to prepare for trial, it works concurrently to formulate a dispositional plan addressing long-term concerns about reunification and services which the parents may be required to engage in. One of ACS's methods of formulating this dispositional plan is by conducting one or more Service Plan Meetings in which the caseworker, the parent and perhaps the children meet outside of court to discuss a plan for reunification. In theory, parents are not obligated to cooperate at these meetings.[43] This will be discussed in further detail in upcoming sections.

## V. Respondent-Parents in Family Court

Parents in child protective proceedings are often suffering from emotional crisis as they face a highly adversarial process.[44] In addition to the burdens of responding to abuse and neglect allegations, many parents are also confronting issues such as substance abuse, indigence, housing problems, educational difficulties, and parallel criminal cases.[45] These are parents who have been reported to child welfare. They naturally feel embarrassed, angry, confused, threatened and possibly helpless. [46] Their children may have been torn away and temporarily placed in foster care, or the parents face a threatening termination of parental rights proceeding in which their rights to their children could be permanently severed.

However, their nonattendance or noncompliance with whatever "plan" is decided upon could be held against them.

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[42] N.Y. FAM. CT. ACT §622 (McKinney 2004).
[43] Matter of Vulon Children, 288 NYS 2d 203, 208 (1968); N.Y. FAM. CT. ACT ARTICLE 10 (McKinney 2004).
[44] Bonstelle, *supra* note 15, at 1152, 1186.
[45] *Id.* at 1151.
[46] U.S. Dept. of Health and Human Svcs., *supra* note 21.

Undoubtedly, these are parents who desperately need a zealous advocate to safeguard their rights both within and outside of court to ensure their voices are heard, and they have the basic services necessary in order to be reunited with their children.[47] Nonetheless, one is obliged to question whether these parents are getting the full representation they are entitled to at the Service Planning Meetings given that attorneys routinely do not attend.[48] According to an ACS mandate, many fundamental decisions regarding the return of the children are made during these meetings.[49] Are the parents' privacy rights outweighed by serving the child's best interests?

## VI. Pre-trial Out-of Court Conferences, Service Plan Meetings, Case Planning and Family Team Conferences

Probing closer into this concept of Service Plan Meetings, ACS conducts "Family Team Conferences" as a way of "engaging families in decision-making."[50] ACS developed these conferences with the goal of partnering with families while their children were living in the foster care system. ACS hoped to improve communication with the parents, increase parent involvement in planning for their children, and ensure that services and visitation schedules were meeting the needs of the families.[51] There are currently a series of these out-of-court conferences in New York[52] including: the Elevated Risk 72-Hour Child Safety Conference (held within 3 business days of an assessment that risk to a child has increased); Post-Removal 72-Hour Child Safety

[47] Bonstelle, *supra* note 13, at1152.

[48] It is only as of December 15, 2005 that parents in New York State have the right to bring attorneys to service planning meetings, New York State Family Court Act, Article 10-A, effective Dec. 21, 2005, NY CLS, Family Ct Act § 1089 (2005).

[49] *Id.* at 1170.

[50] NEW YORK CITY CHILD WELFARE ADVISORY PANEL REPORT ON FAMILY ENGAGEMENT (August 2003)[hereinafter NYC CHILD WELFARE PANEL REPORT].

[51] *Id.* at 5.

[52] Listed are conferences in which the Respondent-Parent may not bring counsel in New York City

Conference (held 3 to 5 business days after the child's removal);[53] 30-Day Family Permanency Conference (held 30 to 35 days after the child is removed); and the Family Service Planning Conference (held at 45 days from assignment).[54] The 72-hour child safety conference was initiated as a pilot program in Queens County, New York in 1999 and gradually expanded all over New York City.[55] These meetings/conferences are unilaterally initiated and facilitated by ACS, the prosecuting agency. These meetings/conferences occur periodically outside of court throughout the pendency of legal proceedings,[56] taking place before or after children are removed from their homes. These meetings last usually between 1 ½ - 2 hours, and the respondent-parents are encouraged to "actively participate" in dialogue.[57] In a two-page, question-and-answer pamphlet that is handed out to parents in New York City family court, the initial safety conference is described as an "opportunity to present your perspective on the current situation and provide input on a plan that best meets your children's needs… it serves as a forum for sharing information."[58] Additionally, the objectives of the conference are to: 1) reach an agreement; 2) assess the family's functioning; and 3) coordinate service providers involved in the child's life.[59] This pamphlet only speaks about these meetings in very general terms. The information given does not emphasize or make clear the rights of parents during the conferences, the connection between the parents' participations and the child's return home, or conversely that

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[53] NYC CHILD WELFARE PANEL REPORT, *supra* note 50 at 26. Other conferences are the Service Planning Review/ Third Party Review, Reunification Discharge conference, Independent Living Discharge Conference, and Pre-Adoptive Conference.

[54] *Id.*

[55] Sharonne Salaam, People United for Children, Inc., Urban Web Developers, http://www.fcny.org/scripts/usq (last visited, June 27th 2005) (on file with author).

[56] ACS ANNUAL REPORT, *supra* note 37, at 4.

[57] *Id.* at 11.

[58] NEW YORK CITY, ADMINISTRATION FOR CHILDREN'S SERVICES 72-HOUR CHILD SAFETY CONFERENCE PAMPHLET, 2005 (on file with author).

[59] *Id.*

failure to cooperate can result in a series of additional hurdles for the parents.[60]

One of components of the Service Plan Meeting in New York City is that parents *must* be present and when age-appropriate, the child "should" also attend.[61] The ACS "case planner" and "case manager" are also present. Parents may bring family members, friends, an attorney[62] and others to assist as ACS talks to the parents about what they need to do to get their children back.[63] Topics discussed include whether remand to foster care will continue or whether an alternative approach may be considered, such as a return to family with mandated services. Also addressed are various concerns about developing a plan, and addressing the factors that threaten or present a risk to the child's safety.[64] Generally, the aim of these meetings is for the parent to clear up problems that may have led to the children being placed in foster care, and to have the children returned to the parents as soon as possible.[65]

ACS states that one of the primary purposes of such meetings is "information sharing" and not to "discuss legal matters."[66] ACS firmly maintains that these meetings concern "mutual information sharing between the family, service providers and ACS staff."[67] "If a service plan is agreed upon, the attorneys will have the opportunity to review it with their client after the conference and to make any objections." [68] This underlying principle is conversely laced with tribulations and conflict since at these meetings parents are often asked to

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[60] NYC CHILD WELFARE PANEL REPORT, *supra* note 50, at 22.
[61] ACS ANNUAL REPORT, *supra* note 37, at 2.
[62] Attorneys are permitted to attend in New York only as of December 15, 2005.
[63] NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, DIVISION OF CHILD PROTECTION, FAMILY TEAM CONFERENCES, 72-HOUR CHILD SAFETY CONFERENCE PROTOCOL, 3d Eds. (2004-2005)[hereinafter NYC 72-HOUR PROTOCOL]; 30-DAY FAMILY PERMANENCY CONFERENCE PROTOCOL, 1st Ed., (2004-2005) (on file with author).
[64] NYC 72-HOUR PROTOCOL, *supra* note 59, at 9-13.
[65] Salaam, *supra* note 55.
[66] NYC 72-HOUR PROTOCOL, *supra* note 63, at 6.
[67] *Id.* at 8.
[68] *Id.*

sign a binding service plan agreement during the conference often without the benefit of attorney consultation or review.

David Lansner, a New York practicing attorney, does not view these meetings as an "opportunity to participate in a collaborative process," [69] Lansner states:

> Parents are questioned in detail about the allegations in the petition as well as many other areas surrounding their parenting such as punishment, discipline, supervision, school, employment history, income and expenses, etc. Even if these areas were not alleged in the petition. They will be asked to sign medical, employment and school release forms. After the conference they will be told by social services the services which the case workers want them to engage in, and are asked to sign a written "contract" agreeing to such service. "They are told that this 'contract' is binding and we have seen neglect petitions filed based on the parent's 'breach' of this contract." [70]

ACS might argue that a parent has the absolute right to refuse to attend the meeting. However, case workers have in fact threatened and actually filed charges in family court for the parents' "failure to cooperate." ACS concedes that the Service Planning Meetings are held at critical decision-making points throughout legal proceedings, [71] and they therefore encourage parents to "contribute information to develop the most appropriate course of action." [72] ACS would like these meetings to be open discussions and suggest that there is no threat of legal repercussion because statements made post-filing of the petition in court cannot be brought out at the trial. In spite of this, what often happens is that child abuse or neglect petitions are habitually amended. The Family Court Act permits motions to amend petitions to conform it to the

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[69] ACS ANNUAL REPORT, *supra* note 37, at 2.
[70] Email from David Lansner, Esq. (July 13th 2005) (on file with author).
[71] ACS ANNUAL REPORT, *supra* note 37, at 1.
[72] NYC 72-HOUR PROTOCOL, *supra* note 63, at 9-13.

proof, but requires that respondents be afforded opportunity to secure a continuance of the hearing for the purpose of preparing a defense to the amended allegations.[73] ACS will include new allegations that arise during the service plan meetings, as evidenced by the introductory narrative to this article. Even without the petition being amended, information, whether helpful or harmful to the parent, will inescapably influence the case worker's position.

Although ACS repeatedly refers to "sharing" in their regulations surrounding service plans, their requests contradict the adversarial nature of litigation. ACS is clear in their position that the case workers and parents are "working together" to ensure the safety and well-being of the children brought to ACS's attention. [74] That may be standardly factual. Nonetheless, real-life cases have illustrated that statements made by the parent at these meetings influence ACS's decision-making process regarding how to proceed at trial. Child welfare is a party-opponent to a child protective proceeding. The child welfare agency is the party pressing charges against the parents. At no other type of civil litigation would a party be compelled to "share" information outside the parameters of civil discovery methods. The position that information from the conference may subsequently be taken to the attorney to be discussed simply misses the point.[75] Although ACS's attorneys are not traditionally present and the meeting seems to be casual, the mere fact a government agent is conducting the questioning gives the appearance of an informal, inapt and unrecorded deposition which does not conform to the rules of civil procedure**.**

The New York City Child Welfare Advisory Panel (NYCCWAP) submitted an August 2003 report, concluding three years of work, on progress made by ACS and "challenges to bear in mind." In speaking to Family Team Conferences, the Panel observed that: 1) the conferences were run as though planning decisions about a child's return home

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[73] N.Y. FAM. CT. ACT §1051(b) (McKinney 2004).
[74] NYC 72-HOUR PROTOCOL, *supra* note 63, at 1-3.
[75] ACS ANNUAL REPORT, *supra* note 37, at 3.

were made elsewhere; 2) workers were uncomfortable raising permanency questions; 3) workers did not use plain language to articulate; and 4) visit planning was not a central focus of the discussion.[76] The Panel observed that these conferences "had not yet become useful enough… to achieve quicker permanency." [77]

In New York City, very few children have been reunited with their families as a result of the 72-hour conference specifically as, "parents are not offered the kind of support services [78]needed to assist them in getting their children back."[79] During the service plan meetings held by ACS, in 50% of the cases the parent is not present; in 75% of the cases, children subject to the petition are not present; in 90% of the cases, not one person is there to support the parent's point of view; and in virtually all cases the parent has no legal representative. [80]

In February, 2003, Children's Rights issued "Child and Family Service Review Final Reports: An Assessment of States' Success in Involving Children and Families in Case Planning", a report reviewing the results of an assessment of twenty-two states. [81] This report found[82] that case workers were not effectively engaging the parents that were categorized as "challenging" – those parents who suffered from cognitive disabilities. The report further held that there was concern as to whether case workers were making an effort to actively engage parents in the case planning process and the

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[76] NYC CHILD WELFARE PANEL REPORT *supra* note 50, at 9.
[77] *Id.*
[78] For example, referrals may be made for the parent to attend counseling, therapy, drug or alcohol rehabilitation, domestic violence program, parenting skills classes, etc.
[79] Salaam, *supra* note, 55.
[80] *Id.*
[81] Pamela Diaz and Madelyn Freundlich, Children's Rights, Child and Family Service Review Final Reports: An Assessment of States' Success in Involving Children and Families in Case Planning, http://www.childrensrights.org/print/policy/childfamilyservice.htm (last visited October 12th 2005) (on file with author).
[82] *Id* at 5 (Forty-nine cases were reviewed).

decision-making process; specifically, those issues speaking to termination of parental rights. [83]

## VII. The Present State of Affairs

### *A. Statistics*

In 2003, an estimated 900,000 plus children nationally were victims of child abuse or neglect[84] with approximately 3 million reports being made to child welfare agencies concerning 5.5 million children. [85] Approximately 80 percent of these child-victims were neglected by their parents or other caregivers.[86] Ethnic characteristics of the children are as follows: African-American, American Indian and Pacific Islander children had the highest rates of victimization.[87] The rate of victimization for African-American children almost doubles the rate of white children.[88] The highest rate of victimization is for children aged from birth to 3 years, at a rate of 16.4 per 1,000 children.[89] In 2003, 1,500 children died due to child abuse or neglect.[90] The rate of children who receive an investigation has been increasing: from 36.1 per 1,000 children in 1990 to 45.9 per 1,000 children in 2003, a 27.1 percent increase.[91]

New York received 144,562 child maltreatment reports in the year 2004, involving 188,068 children.[92] In the years 2003-2004, there were 42,110 children in New York City alone who were the subjects of abuse or neglect allegations.[93]

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[83] *Id* at 6.
[84] CHILD MALTREATMENT ACS, *supra* note 21, at xiv.
[85] *Id.* at 5.
[86] *Id.* at xviii.
[87] *Id.* at xiv.
[88] *Id.* at 23.
[89] *Id.* at xiv.
[90] *Id.* at xvii.
[91] *Id.* at 21.
[92] Email from Paul Nance, NYS Office of Children and Family Services, Bureau of Management Information/Data Warehouse, (August 10th 2005) (on file with author).
[93] Available at: www.childrensrights.org/legal/marisol_pataki.htm, (last visited on August 9th 2005).

The races of maltreated children in New York City during 2004 were as follows: 63.4% Black or African American; 31.7% White, 2.9% Asian and 4.5% unknown.[94] In prior years, the New York City Family Court caseload increased by more than thirty percent between 1989 and 1998, to roughly 230,000 filings.[95] In 2001, the number of reports, 57,224 represents a 7% increase from the previous year.[96] In the four years prior to 2001, the percentage of abuse/neglect reports classified as "High Risk" ranged between 31.8% and 36.7%. However, in 2001 high risk reports jumped to 48.4%.[97]

During the first 22 months that 72-hour conferences were held, from June 1988 – April 2000, 5000 families had participated within New York City. [98] In the one-month period of May 2002, New York City's ACS held 465 conferences. Seventy-six percent of the time a respondent appeared for the initial Service Plan/72-hour conference.[99]

## VIII. National Trend

Amongst the 49 states and the District of Columbia surveyed[100], the tendency is disproportionately in favor of parents'counsels not attending Service Plan meetings. In 35 states, parents' counsels regularly did not attend Service Plan meetings. Only in 4 states did counsel regularly attend, and contacts in the remaining 11 states reported that relevant data was not maintained in order to comment.[101]

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[94] NYS CENTRAL REGISTER HIGHLIGHTS 2004, Table 10.
[95] Bonstelle, *supra* note 15, at 1174.
[96] ADMINISTRATION FOR CHILDREN'S SERVICES, OFFICE OF MANAGEMENT DEVELOPMENT AND RESEARCH, OCTOBER, 2001, ACS MONTHLY UPDATE: FISCAL YEAR 2001, END OF YEAR SUMMARY REPORT.
[97] *Id.* at 3.
[98] Salaam, *supra* note 55.
[99] NYC CHILD WELFARE PANEL REPORT, *supra* note 50, at 12.
[100] Survey reflects county office contacted as reflected in footnotes, but protocol and procedure may vary by county in each state. Article does not offer itself as an empirical study, rather an informal polling.
[101] Unsure due to recent legislative changes or no statistics maintained regarding parents' attorneys presence at safety planning meetings.

| Attorneys Regularly Attending Service Planning Meetings | Attorneys Regularly Not Attending Service Planning Meetings |
|---|---|
| WV, WY, OH[102], WA[103] | AK, AL, SC, MD, DE, OK[104], MN, NC, CA, CT, PA, NV[105], KT[106], IN[107], IL[108], MO[109], NJ[110], DC[111], NH[112], MA[113], LA, SD[114], RI, GA[115], ME, NE[116], TX[117], VT, AR[118], UT[119], AZ[120], KS[121], TN[122], CO[123], IO[124] |

[102] Telephone interview by Bina Trivedi with Susan Garbowski, Supervisor, Clermont County Children's Services (February 6, 2006) (on file with author). Case plan meetings are held by policy, Parents' attorneys are allowed to attend, and generally by the time the case plan is due in court, if the parent has an attorney, it would have been reviewed as attorneys do participate in meetings prior to court. *See also*, OHIO REV. CODE ANN. §2151 (2005), Family, Children and Services Manual at http://emanuals.odjfs.state.oh.us/emanuals/family/FCA (last accessed, October 23, 2005).

[103] Washington State conducts "Case Conferences" following the first hearing and no later than 30 days prior to trial to discuss expectations for the parent. Parents' attorneys are statutorily permitted to attend. A written agreement is made and signed by the parties, setting forth the services. However the substance of the meeting cannot be discussed or used against the parent in court. Attorneys are now attending these conferences which are used for case planning as well as settlement negotiations. Telephone interview with Patrick Dowd, Ombudsman, Office of Family and Children (August 24th 2005 and February 13, 2006) (on file with author), REV. CODE WASH. (ARCW) §13.34.067 (2005); *See also*, WASH. ADMIN. CODE §388.32.0030 (2005).

[104] Telephone interviews by Bina Trivedi with Amy White, Department of Human Services, Child Protective Services (September 16th 2005 and January 27, 2006) (on file with author). Parents are usually asked who they want at the meetings so they can invite who they want, there is no express exclusion of attorneys but usually the reason that most parents don't have attorneys is the cost associated with having them there. *See also*, OKLA STAT. ANN. Tit. 10 § 7103 (2005), OKDHS Policy Online http://www.policy.okdhs.org/ch75/Chapter_75-6/ (last accessed, October 23, 2005).

[105] Telephone interview by Bina Trivedi with Dorothy Meline, CPS Coordinator, Washoe County, (January 31, 2006) (on file with author).

[106] Email to Bina Trivedi from Marian Call, Children and Family Services, (September 13th, 2005) (on file with author) "Meetings are called Family Team Meetings or Case Planning Conferences by policy include whomever the parent wishes to be present, because the idea is to have as many community partners present who can help the family and to put as many services in place as possible to either make it possible for the child to return home or to close the case. If parents want their attorney to be present, they can ask him or her to be present." And Telephone interview by Bina Trivedi with Gayle L. Yocum, MSW, CSW, Internal Policy Analyst, Cabinet for Heath and Family Services (January 31, 2006)(on file with author). *See also,* 922 KY. ADMIN. REGS. 1:400 (2005).

[107] Telephone interviews by Bina Trivedi with Felicia Boyd-Smith, Department of Children's Services (September 9th 2005 and January 31, 2006) (on file with author). *See also*, IND. CODE §31.33.13 (2005).

[108] Telephone interviews by Bina Trivedi with Johan Ham, Division of Children and Families (September 9th 2005 and January 31, 2006) (on file with author). *See also*, 325 ILL. COMP. STAT. 5/7.21 (2005).

[109] The Missouri Department of Social Services adds a helpful, albeit vague, caveat to allowing parents to be present at their service planning meetings, stating that attorneys can be present as long as they are "supportive." Telephone interview by Bina Trivedi with Melanie Staza, Missouri Department of Social Services (September 9th 2005) (on file with author), and Melanie Staza, Program Development Specialist (February 6, 2006) (on file with author) who states that there is no central oversight but generally attorneys attend about half the time. And there is a disadvantage if counsel is ablsent because they are needed to help parents understand the legal ramification of involvement, and consequences if they don't attend. *See also*, MO. CODE REGS. ANN. tit.13, §40-30.010 (2005).

[110] Telephone interview by Bina Trivedi with Bob Rabinski, Caseworker Supervisor, New Jersey Division of Youth and Family Services (September 9th 2005 and February 6, 2006) (on file with author). *See also,* N.J. REV. STAT. § 9:6-8.8 (2005). In New Jersey, the Division of Youth and Family Services reports that parents' attorneys are allowed to participate in the meetings but parents usually don't request to bring them along. Mr. Rabinski states that in his experience he doesn't even know if the attorneys have "even ever inquired let alone attended." "Parents are getting adequate representation in court which is where the final decisions are made."

[111] Since Washington, D.C. holds "Family Team Meetings" during the 72-hours after the child is removed from the home, but before the initial hearing, parents have not yet been appointed counsel. Therefore only the children's attorneys, appointed as guardians ad litem, and the parents are invited to attend. However, for all conferences and meetings subsequent to the initial meeting, all attorneys are permitted to attend. Telephone interview by Bina Trivedi with "Anonymous" Family Services Division,

Office of the Attorney General for Washington DC (September 13th 2005 and February 6, 2006) (on file with author). *See also*, D.C. CODE ANN. § 1623-12, §4-1301.51 (2005).

[112] New Hampshire's "Case Planning Meetings" allow attorneys, but not many attorneys attend the meetings, "probably as a practical matter" as it's "not really necessary for them to be present". Although Kennedy "doesn't really know why they aren't attending." Telephone interview by Bina Trivedi with Byree Kennedy, Esq. Department of Health & Human Services, Division for Children, Youth and Families (September 13th 2005 and February 6, 2006) (on file with author). *See also*, N.H. REV. STAT. ANN. § 169-C:17 (2005).

[113] The Department of Social Services in Massachusetts holds a series of informal meetings with no specific name, except for the Foster Care Meetings held every six months. There are no formal rules written about who is entitled to be present and some parents do bring their attorneys, but from Mr. Pariser's own experience attorneys usually don't attend. He states that as a practical matter it is not always possible to attend, as the social worker meets with the parent several times. He believes that parents are not disadvantaged and it moves things along quicker to not have an attorney there. Also, parents can refuse to sign any documents until their attorney has had the opportunity to review, so it's "no real problem." Telephone interview by Bina Trivedi with Brian Pariser, Esq. Office of the Ombudsman, Massachusetts Department of Social Services (September 9th 2005 and February 6, 2006) (on file with author). *See also*, MASS. GEN. LAWS ch. 119. §35 (2005).

[114] During the informal meetings held in South Dakota, the state attorney will draw up a stipulation, but parents' attorneys are permitted to attend. "Not a lot of parents attend…and they usually only attend if they are hired privately." Telephone interview by Bina Trivedi with Michelle Moller, Family Services Social Worker, South Dakota Division of Social Services (September 9th 2005 and February 6, 2006) (on file with author). *See also*, S.D. CODIFIED LAWS §26-8A-21 (2005).

[115] Georgia allows the parents' attorney to be present, upon the parents' request Telephone interview by Bina Trivedi with Susan Hill, Department of Family and Children's Services (September 9th 2005) (on file with author) and Erica Barnes, Director/Administrator (February 6, 2006) who states that there is very little attorney presence at these meetings. *See also,* GA. CODE ANN. § 15-11-58 (2005).

[116] In Nebraska, "Team Meetings" are held approximately once or less per month, in which progress on the case is reviewed; parents' attorneys are permitted to attend. Email from Larry Ohs, Esq. (July 13th 2005) (on file with author). *See also*, NEB. REV. STAT. §28-713.01 (2005).

[117] Although the state of Texas does not organize formal meetings or conferences, the case worker and family do in fact develop a service plan and the parent can bring her attorney "anytime she chooses." The vast majority of parents are not represented by counsel, but he does not have statistics on whether attorneys are attending these meetings; 11 regions and

234 counties so very hard to say. Telephone interview with Michael Hess, Office of Consumer Affairs, Department of Family and Protective Services (August 24th 2005 and September 6, 2006) (on file with author). *See also*, 40 TEX. ADMIN. CODE § 700.705 (West 2005).

[118] Arkansas conducts "Staffings", the functional equivalent of Service Planning Meetings in the case worker's office; attorneys are allowed to be present but rarely attend according to Diane Robinson, the State CASA Director. Ms. Robinson sees no disadvantage to parents as attorneys are permitted to attend if they choose. Telephone interview by Bina Trivedi with Diane Robinson, State CASA Director, Dept of Human Services, Division of Children and Family Services (September 2nd 2005) (on file with author). *See also*, Department of Human Services, Division of Children and Family Services Reference center at http://www.arkansas.gov/dhhs/chilnfam/Master%20Policy.pdf (last accessed October 23, 2005).

[119] Telephone interview by Bina Trivedi with Michelle Wilson, Permanency Worker Tooele County Office of Child and Family Services/Child Protective Services (October 18th, 2005 and February 6, 2006) (on file with author). Attorneys may be present however, if one attorney comes then all parties' attorneys must also be present so the GAL, and AGS and the parent's attorney would all have to be present for one to be present - which is hard to do so often, no attorney is present but none is barred - depends on the nature of the case. No statistical information is kept on whether attorneys are attending. *See also*, UTAH CODE ANN. §62A-4a-205 (2005); UTAH ADMIN. CODE R-512-301-3 (2005).

[120] Telephone interview by Bina Trivedi with Rob Shelley, Arizona Court Improvement Project (October 19th, 2005 and February 6, 2006) (on file with author) the only case he knows where attorneys aren't present is when a child is removed from home, there is an initial 72 hour (mandatory must happen within that time) conference where counsel hasn't been assigned yet - at that point there is no attorney for the parents present because not assigned yet, at all meetings after that, attorneys are allowed to be present if appointed and requested. If attorneys aren't attending, it's because it's impractical given time constraints and cost. *See also*, ARIZ. REV STAT ANN. §8-845 (2005), Division of Children, Youth and Families, Child Protective Services at http://www.de.state.az.us/dcyf/cps/guide.asp#Case%20Plans%20And%20Staffings (last accessed, October 27, 2005).

[121] Telephone interview by Bina Trivedi with Jana Gunkel, Children and Family Services (September 13th 2005 and February 6, 2006) (on file with author) Case Plan meetings in their state are contracted out to private providers like the Foster Care Services and Adoption who are in charge of the case planning, attending ct. etc. She knows that the case plan provider doesn't invite the parent's attorney but the guardian at litem is always invited. Parents' attorneys are not generally involved with case planning. The parents' attorney however is not excluded from the meeting but the parents would have to invite them, it's up to the parents. *See also*, KAN.

| Recent Legislative Changes | Uncertain |
|---|---|
| MT[125], NY[126] | NM[127], MS[128], WI[129], FL[130], MI[131], ND[132], ID[133], IA[134], OR[135] |

STAT. ANN. § 38-1531-1546 (2005), Children and Family Services Policy and Procedure Manual at http://www.srskansas.org/CFS/cfp_manuals/ppm_manual/PPM%20Sections%20July%2005/SECTION%203000.htm#3200__Development_of_the_Case_Plan (last accessed, October 23, 2005).

[122] Tennessee has very straightforward "Team Decision-Making Meetings" in which everyone comes to the table to work out a service plan and refer the parents for services to remedy underlying concerns; parents can bring their attorneys, but they only attend (rough estimate) about one-third of the time due to scheduling problems. Telephone interview by Bina Trivedi with Carla Forsyth, Department of Children's Services (February 6, 2006) (on file with author). Available at: www.state.tn.us/youth, chapter 14 (last accessed on August 24th 2005). *See also*, TENN. COMP. R. & REGS. 0250-4-11-.04 (1999).

[123] Telephone interview with Carol Wahlgren, Administrator for Ongoing Child Protection, Child Welfare Division (September 20th, 2005 and February 6, 2006) (on file with author**).** Although Ms. Wahlgern states that she has no statistical information on attendance, anecdotally, her impression is that attorneys rarely attend due to costs and scheduling. *See also*, COLO. REV. STAT. §§ 19-3-301 to -316 (2005), Child Welfare Practice Handbook at http://www.cdhs.state.co.us/cyf/Child_Welfare/rules_regs/handbook/Chapter%206.htm (last accessed, October 23, 2005).

[124] Telephone interview by Bina Trivedi with Darla Brown, Department of Human Services, Child Protective Services (September 13th 2005) (on file with author). There are no real guidelines for the case transfer meetings and usually the question of attorneys doesn't arise because the parents haven't been assigned on at this point, its before pre-trial hearing. They are trying to experiment with Family Team Decision Making meetings because they had a redesign of their system and it was suggested that instead of their prior fragmented approach, they try these meetings. There are pros and cons to having attorneys present at the meetings because they sometimes hamper the process but parents can invite them if they want. Other meetings like staffings that the caseworker may conduct with the parents, attorneys can attend, no real exclusion of attorneys except they have been known to hamper the process. *See also*, IOWA ADMIN. CODE r. 441-175.42(2) (2005).

[125] Montana has just granted parents a right to counsel in child protective proceedings, effective October 1, 2005. Telephone interview by Bina

Trivedi with Brenda Wahler, Department of Children and Family Services/CPS (January 27, 2006) (on file with author).

[126] New York State Family Court Act, Article 10-A, Effective December 21, 2005, Section 1089. Act amended to allow counsel or representative to be notified of planning conferences and right to attend such conference.

[127] Telephone interview by Bina Trivedi with Susan Chavis, Investigative Supervisor, Department of Children, Youth and Families (September 16th 2005 and January 27, 2006) (on file with author) Generally if the parents have an attorney they can always be present, but what happens is sometimes attorneys aren't appointed at this stage yet or if they are court appointed, they wont usually meet the parents until they are in court. There are however no limitations to attorney presence if the parents request it and only their (CPS) attorneys would be excluded from certain meetings where both the parents and the parents' attorney is present. *See also*, N.M. ADMIN. CODE tit. 8 §10.6.16 (2005).

[128] Telephone interview by Bina Trivedi with Kathy Triplett, Division of Family and Children's Services (September 16th 2005 and February 6, 2006) (on file with author). Parents allowed to have present whomever they choose unless there is a situation where the parent is bringing 15 people and they are hindering the process. Even then if they want to exclude someone the parent wishes to be present, they have to ask the judge for the exclusion. There is no way of providing specific information about the number of times attorneys are present. *See also*, MISS. CODE ANN §§ 43-21-351-357 (2005).

[129] Telephone interview by Bina Trivedi with Amy Smith, CPS Specialist, Department of Health and Family Services, Child Protective Services (September 16th 2005 and February 6, 2006) (on file with author). Attorneys are allowed to be present and what sometimes happens is that parents will retain counsel and then stop meeting with caseworker all together, at that point they have to take them to court and have judge order that parents meet with the case workers but even then, the attorneys are allowed to be at the meetings. Ms. Smith reports that there is no real way to know how many attorneys attend, except for anecdotally. *See also*, WIS. STAT. ANN. §48.33 (2005).

[130] Florida's "Family Team Conferencing Meetings" are not uniform throughout the state. However, parents' attorneys are permitted to attend. No statistics are maintained on how often attorneys attend. Telephone interview by Bina Trivedi with Judith Lavine, Legal Division Department of Children and Families, (September 13th 2005 and February 6, 2006) (on file with author). *See also*, FLA. ADMIN. CODE ANN. r. 65C-11.002 (2005).

[131] Michigan holds informal meetings in court house hallways in order to formulate service plans for the parents (email Frank Vandervort, July 22nd 2005) (on file with author). Attorneys have been present at "some of the meetings", but does not have an exact percentage. Telephone interview by Bina Trivedi with Elrita Dodes, Program Section manager, Department of Human Services (February 6, 2006) (on file with author). *See also*, MICH. ADMIN. CODE r.400.4336 (2005), Michigan Child Welfare Law, Chapter

### *A. States In Which Counsel Regularly Do Not Attend Service Plan Meetings*

Each state carries its own local law and regulations regarding service plan meetings for child protective proceedings. An informal survey showed that attorneys are generally not accompanying their clients to service planning

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6.4 at http://www.michigan.gov/documents/MCWLChap6_34811_7.pdf (last accessed, October 23, 2005).

[132] Email to Bina Trivedi from Don Snyder, North Dakota Foster Care Administrator (October 2nd 2005 and February 13, 2006) (on file with author). Child and Family Team Meetings, family picks team members which could include attorneys. Does not know how many attorneys attend, as those records are not kept. *See also*, N.D. ADMIN. CODE § 75.03.19 (2005).

[133] Telephone interview by Bina Trivedi with case worker at Department of Health and Welfare, Child Protective Services (September 2nd 2005) (on file with author) and Stephanie Miller, Department of Health and Welfare who states that parents' attorneys are permitted to attend, but she couldn't provide any further information. (February 13, 2006) (on file with author). *See also*, IDAHO ADMIN. CODE §16.06.01 (2005), Idaho Child Protection Manual, http://www.isc.idaho.gov/chapter5.pdf (last accessed, October 23, 2005).

[134] Telephone interview by Bina Trivedi with Darla Brown, Department of Human Services, Child Protective Services (September 13th 2005) (on file with author). There are no real guidelines for the case transfer meetings and usually the question of attorneys doesn't arise because the parents haven't been assigned on at this point, its before pre-trial hearing. They are trying to experiment with Family Team Decision Making meetings because they had a redesign of their system and it was suggested that instead of their prior fragmented approach, they try these meetings. There are pros and cons to having attorneys present at the meetings because they sometimes hamper the process but parents can invite them if they want. Other meetings like staffings that the caseworker may conduct with the parents, attorneys can attend, no real exclusion of attorneys except they have been known to hamper the process. *See also*, IOWA ADMIN. CODE r. 441-175.42(2) (2005).

[135] Oregon holds three types of meetings for service planning: Team Decision Meeting, Oregon Family Decision Meeting (OFDM), and Family Decision Meeting (FDM). Parents attorneys are not only permitted to attend, but must be invited. No statistics kept on frequency of attorneys attending.Telephone interview with Stacey Daeschner, Oregon Child Protective Services, Child Protective Program Coordinator (August, 24th 2005 and February 13, 2006) (on file with author).

meetings due to time constraints and no sense of urgency. The principal advantage of not having counsel present appears to be that their absence causes the meetings to proceed at a quicker pace. Having counsel present would involve gathering attorneys for all parties including petitioner's, child's and other respondent's which could lead to extensive scheduling problems.

In the state of Maryland, Child Protective Services holds informal meetings throughout the case in order to discuss safety plans and "Family Group Decision Making Meetings." All players and attorneys may attend, but Brad Biel of the Department of Human Resources says that not more than 1% of parents bring their attorneys to the meetings.[136] Biel states that parents are only slightly disadvantaged by not having their lawyers attend, and is outweighed by the child's safety.[137] Louisiana routinely sends notices out to attorneys informing them of the date and location of family team conferences, but according to a Union County case worker, attorneys almost never attend.[138] Low wages may be the cause of attorneys not attending service planning meetings in Virginia and other states, as court appointed counsel are paid a mere $123 per petition which requires their presence at 3 hearings.[139] Some parents can't

[136] Telephone interview by Bina Trivedi with Brad Biel, Allegany County Department of Human Resources, Child Protective Services (September 9th 2005 and January 27, 2006) (on file with author). *See also*, MD. REGS. CODE tit. 70, §02.07.14 (2005).

[137] Telephone interview by Bina Trivedi with Brad Biel, Allegany County Department of Human Resources, Child Protective Services (September 9th 2005 and January 27, 2006) (on file with author). *See also* MD. REGS. CODE tit. 70, §02.07.14 (2005).

[138] Telephone interview by Bina Trivedi with Letoshia Phillips, case worker (February 6, 2006) and Tanya Wilson, Union County Department of Social Services, Child Protective Services (September 20th 2005)(on file with author). Usually parents meet with case workers in what is known as Family Team Conferences. These conferences are held by policy, and most times they are held at their offices. Parents attorneys can be present. *See also*, LA. ADMIN. CODE tit. 67 § 3701 (2005).

[139] Telephone interview by Bina Trivedi with Jill Applebaum, City Attorney (February 6, 2006) and Ms. O'Donnell, City Attorney's office, Alexandria (October 20th, 2005) (on file with author). There is nothing it the law that states whether an attorney can or cannot attend - the practice is

afford to pay for two or more hours of attorney time to attending planning meetings with case workers, according to Margaret Davis, Special Investigation Chief of Vermont.[140] In Maine, Assistant Attorney General Matt Pollack believes that there are several reasons why parents' attorneys are not attending: attorneys are not seen as being an emotional support for the family; they can make the process more adversarial and less useful; and the attorneys are too busy and don't get paid sufficient wages. "Spending a couple of hours in a family team meeting would often result in the attorney spending time without compensation on the case." [141] In the fifteen years

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not to notify the parent's attorney of the meetings but if the parent wants to notify and have the attorney attend, she sees no problem with that. Virginia, court appointed counsel get paid $123 per petition which requires their presence at 3 hearings: 5 day removal hearing, 30 day finding hearing and 75 day dispositional hearing - the low fee results in attorneys not being as aggressive as private attorneys and may explain their being absent from the meetings. *See also*, VA. CODE ANN. §63.2-1506 (2005); Child Protective Services Manual. http://www.dss.virginia.gov/files/division/dfs/cps/policy/policy.pdf (last accessed, October 27, 2005).

[140] Telephone interview by Bina Trivedi with Margaret Davis, Department of Children and Family Services, (September 16th 2005 and February 6, 2006) (on file with author). Family Team Meetings, by policy, anyone the parents feel would help the process like school counselors etc are present. Attorneys are allowed at these meetings, but there is no current way of tracking their attendance. Some attorneys attend, but for finacial reasons more don't attend because they can't afford to pay. If something is being contested, attorneys may attend. Ms. Davis does not believe that parents are at any disadvantage because the attorneys are made aware of what is going on. *See also*, VT. STAT. ANN. Tit. 33 §5517 (2005), Child Welfare and Youth Justice Policy Manual at http://www.path.state.vt.us/cwyj/manual/71.html (last accessed, October 23, 2005).

[141] Maine refers to service planning as "Family Team Meetings" (FTM) or simply meetings to adopt a rehabilitation and reunification plan. According to Assistant Attorney General Matt Pollack, these meetings are "mandatory" to the extent that the applicable Maine statute requires both the Department of Health and Human Services (DHHS) and the parents to "cooperate" with each other in developing the plan. The meetings are scheduled by the caseworkers and parents, without involvement by the court. "There is nothing in statute, court rule, policy, or anywhere else that I am aware of that governs whether attorneys can or can't be at these meetings. I know that caseworkers generally do not like lawyers being at the meetings because they generally slow down the meeting and can turn

that Maggie Oliver has been a caseworker in the state of Rhode Island, attorneys have typically been invited to these meetings but didn't usually attend.[142] However, if a parent wants an attorney present and specifically requests it, they would have no objection to it. In Nebraska, "Team Meetings" are held approximately once or less per month, in which progress on the case is reviewed. Parents' attorneys are permitted to attend, but in Ohn's experience only attend less than 25% of the time. Attorney Larry Ohn states that he rarely is notified of the team meetings by either the case workers or the clients. Another reason for non-attendance is economics. Ohn has seen a judge deny the attorney payment approval for time spend at a team meeting.[143] "Case Plan Meetings" are conducted in Minnesota[144] to identify the changes the parent must make in order for the child to be safely returned home. Statutes do not preclude an attorney from attending case planning or case progress meetings, but parents' attorneys

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what might otherwise be a cooperative meeting into an adversarial one. On the other hand, I know of several meetings in which both the parents' attorneys and the AAGs [petitioners] were present…I don't think anybody keeps statistics available, but the parents' attorneys generally do not attend these meetings." Email to Bina Trivedi (February 13, 2006) (on file with author). ME. REV. STAT. ANN. tit.22, § 4041 (2001); Bureau of Child and Family Services Policy, Child Protection, Family Team Meeting at http://www.maine.gov/dhhs/bcfs/policy/policy.htm (last visited October 23, 2005).

[142] Telephone interview by Bina Trivedi with Maggie Oliver, Caseworker, Department of Children, Youth and Families (September 16th 2005 and February 6, 2006) (on file with author). *See also*, RI GEN LAWS §§ 40-11-1 TO 40-11-16 (2005); Rhode Island Social Services Code of Rules at http://www.ridhscode.org/0500.htm#_Toc117295243 (last accessed, October 23, 2005).

[143] Email from Larry Ohs, Esq. (July 13th 2005 and February 13, 2006)(on file with author). *See also*, NEB. REV. STAT. §28-713.01 (2005).

[144] Telephone interview by Bina Trivedi with John Langworthy, Department of Human Services, Child Protective Services (September 16th 2005 and January 27, 2006) (on file with author). Case management meetings which are required by statute they are supposed to meet every 30 days to review if it goes to court then the case plan becomes court ordered but if not they still meet. Parent's attorneys are allowed to be present but generally don't show up because a lot of the times they are court appointed and they only time they see their client are in court. MINN. STAT. § 260C.212 (2004).

generally do not attend, according to worker John Langworthy, because they usually see their clients only in court.[145] Mr. Langworthy states that the focus of the meetings is on the protection of the child, and refers to only a "slight disadvantage" that uncounseled parents face.[146] In Alaska, attorneys generally don't attend these meetings because they are time consuming, and some attorneys would rather opt to advise their clients not to sign the plan until the attorney has had the opportunity to review it.[147] Delaware also subscribes to the theory that it is safe for the parents to excuse their attorneys as long as the attorneys have the opportunity to review the plan before it is signed[148] Alabama holds "Individualized Service Plan Meetings" in which family members, attorneys and anyone whom the parents wish to bring may attend, but often attorneys do not attend according to one case worker interviewed.[149] "Family Conferences"

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[145] Email from Judy Nord, Esq., Staff Attorney and CJI Project Manager, Minnesota Supreme Court (August 30th 2005) (on file with author).

[146] *Id.*

[147] Email to Bina Trivedi from Myra Casey, Field Administrator, Office of Children's Services (September 20th 2005 and telephone conversation on January 27, 2006) (on file with author). "By policy a case plan must be made for every open case. Parents attorneys could be present but generally don't attend. Some attorneys will tell their clients not to sign a plan until they review it." *See also,* ALASKA ADMIN. CODE tit. 7 § 56.340 (2005).

[148] Email to Bina Trivedi from JoAnn Bruch, Treatment Program Manager, Delaware Division of Family Services, (September 13th 2005) and telephone call (January 27, 2006) (on file with author). "The planning meetings with the family are all informal and take place outside of the court. They can take place in our offices, in the client's home, or anywhere else that is mutually agreeable to the family and our staff. All of our parents are represented by an attorney due to the court improvement project. It is up to the client and their attorney as to whether or not the attorney needs to be present for the planning meetings. In most instances, the attorneys choose not to be present for the meetings as they are usually representing clients pro bono. However, clients are also asked to present the case plan to their attorneys prior to signing it." *See also,* Department of Services for Children Youth and Families Policies at http://www.state.de.us/kids/pdfs/pol_dsc201_nov_2004.pdf (last accessed, October 23, 2005).

[149] Telephone interview by Bina Trivedi with Jimmy Harden, Dept. of Human Services, Family and Children Services Division (September 2nd 2005 and January 27, 2006)(on file with author). *See also,* ALA. ADMIN. CODE r. 660-5-34.11 (2005).

conducted in South Carolina allow parents' attorneys to participate, but according to one social services worker's experience, attorneys for the most part don't show up. Instead, they will subsequently ask the case worker to share information from the meeting.[150] In California, North Carolina and Connecticut parents' attorneys are permitted to, but generally do not participate, in these meetings due to time constraints, cost and due to the lack of disadvantage to their clients if they don't show up.[151] Pennsylvania is in agreement in that the services offered at the safety planning meetings are considered voluntary; therefore, parents are not at a disadvantage. [152] In Washington, D.C. the practice is that

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[150] Telephone interview by Bina Trivedi with Carolyn, Evatt, South Carolina Division of Social Services (September 9th 2005 and January 27, 2006)(on file with author). *See also*, 114 S.C. CODE REGS. 4980 (2004).

[151] Telephone interview by Bina Trivedi with Laura Elmore, Division of Social Services, Child Protective Services (September 9th 2005) and Hally McNeil, MRS Policy Consultant (January 31, 2006) (on file with author). *See also*, N.C. GEN. STAT. §7B-808 (2005); Department of Health and Human Services, Division of Social Services, Online Publications, Chapter VIII Protective Services at http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/CS1412-07.htm#P154_18572 (last accessed October 24, 2005). Telephone interview by Bina Trivedi with Elaine Anonymous, Connecticut Dept. of Children and Families (September 2nd 2005) (on file with author) and Rebecca Pie, Social Worker (January 31, 2006). *See also*, CONN. GEN. STAT. ANN. § 17a-101-107 (2005), Department of Children and Families Policy Manual, Treatment Planning at http://www.state.ct.us/dcf/Policy/Trmt36/36-5-2.htm (last accessed October 23, 2005). Telephone interview by Bina Trivedi with Mary K, Social Worker Code es24, Department of Social Services (January 31, 2006) (on file with author).

[152] Telephone interview by Bina Trivedi with Steve Good, Supervising Case Worker, Birch County, Department of Public Welfare, Child Protective Services (September 20th 2005)(on file with author). Family Service Plan meetings are required by law. Most cases these meetings are informal, depending on the county, larger counties will have these meetings at the Children and Youth Family Services offices, smaller ones will have them at the home. If parent requests attorneys he sees no reason why they would be excluded in fact he has had cases where even upon an abuse investigation, sometimes the parent will refuse to talk to them without an attorney present and they will honor that. Don't know of any reason why they would be excluded, it holds things up to have them present but wouldn't be excluded if the parents wanted them to be there.

usually only privately retained, as opposed to court appointed counsel, appear at service planning meetings. [153]

### *B. States In Which Counsel Regularly Attend Service Plan Meetings*

States in which attorneys are attending and participating in Service Planning meetings are by far the minority, totaling only 4 of the 50 states contacted. Parents' attorneys are not only invited, but are expected to attend in West Virginia's "Multidisciplinary Treatment Team Meetings.[154] Stacy Karspeck, of the Wyoming Department of Family Services states that she wouldn't meet with parents without their attorneys being present because it "may violate their rights."[155]

## IX. The Right to Counsel in Child Abuse and Neglect Proceedings

*The family entity is the core element upon which modern civilization is founded. Traditionally, the integrity of the family unit has been zealously guarded by the courts.*[156]

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Telephone interview by Bina Trivedi with Renee Long, Director of In Home Services, Department of Public Welfare, Child Protection Services (January 31, 2006) (on file with author). *See also*, PA STAT ANN. tit 23, §§ 6301 to 6319, Pennsylvania Code, Title 55 Department of Public Welfare, http://www.pacode.com/secure/data/055/chapter3490/chap3490toc.html (last accessed, October 23, 2005).

[153] Telephone interview by Bina Trivedi with "Anonymous" Family Services Division, Office of the Attorney General for Washington DC (September 13th 2005 and February 6, 2006)(on file with author). *See also*, D.C. CODE ANN. § 1623-12, §4-1301.51 (2005).

[154] Telephone interview by Bina Trivedi with Daryl Farmer, West Virginia, Department of Health and Human Services (September 9th 2005 and January 27, 2006) (on file with author). *See also*, W. VA. CODE §49-5D-3 (2005).

[155] Telephone interview by Bina Trivedi (September 9th 2005 and January 27, 2006)(on file with author). *See also*, WYO. RULES & REGS. r. 4468 (2001) at http://soswy.state.wy.us/RULES/4468.pdf (last accessed on October 24, 2005).

[156] Ginsberg v. New York, 390 U.S. 629, 639 (1968); May v. Anderson 345 U.S. 528, 533 (1953).

In 1972, the New York courts granted the right to counsel to parents in Child Protective Proceedings [157] because, "[a] parent's concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right to be relinquished to the State without the opportunity for a hearing with assigned counsel if the parent lacks the means to retain a lawyer."[158] Three years later, the Legislature codified the decision and mandated the assignment of counsel to indigent parents in neglect, family offense, child protective, custody, adoption and contempt proceedings.[159] Although child protective proceedings are civil in nature, when determining the kind of substantive and procedural protections required in an individual type of proceeding, the courts have time and again disregarded identifiers such as civil, criminal, and quasi-criminal. As an alternative, the courts focused on the "nature and weight of the private and public interests at stake."[160]

Article Ten of the New York Family Court Act governs child protective proceedings and aims to establish procedures to help protect children from injury, mistreatment and to maintain their physical, mental, and emotional well-being.[161] Nonetheless, Article Ten is also designed to afford due process of law[162] for determining when the state may intervene against the wishes of a parent in a family's life on behalf of a child.[163] The risks in these cases are high. Parents are in danger of losing custody of a child to the government. The child may be placed in the foster care system with strangers cutting off daily contact with the parents. The long-term threat is that the parent will have parental rights terminated permanently.

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[157] *In re* Ella B., 285 N.E. 2d 288, 290 (N.Y.1972).
[158] *Id.*
[159] *Id. See also* N.Y. FAM. CT. ACT. §262 (McKinney 2004).
[160] *In re* Gault 387 U.S. 1, 49-50 (1967). *See also* Santosky et al. v Kramer 455 U.S. 745, 758 (1982); *In re* Winship, 397 U.S.358 (1970).
[161] *Id.* at §1011.
[162] Bonstelle, *supra* note 15, at 1160; N.Y. FAM. CT. ACT ARTICLE 10 (McKinney 2004).
[163]N.Y. FAM. CT. ACT ARTICLE 10(McKinney 2004).

There is a guaranteed statutory right to assigned counsel for indigent persons in any New York Child Protective proceeding.[164] This right to appointed counsel also includes the right to effective[165] and competent representation.[166] Even if an indigent parent is not facing criminal charges, the Family Court Act (FCA) gives the parent the right to assigned counsel.[167] The statutory right to counsel affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings.[168]

The parents' right to counsel attaches at the time the respondent-parent first appears in court and is advised by the judge of the right to counsel.[169] In New York, the right to counsel applies to both termination of parental rights and child abuse and neglect proceedings.[170] The child welfare agency, the child, and the respondents[171] are all represented by counsel in child protective proceedings in New York State Family Court. Parents may face parallel criminal and family court proceedings regarding the same underlying incident (for example, in family court an excessive corporal punishment charge and in criminal court an assault or endangering the welfare of a child charge). The only substantial criminal court rights that parents have not been accorded in Family Court proceedings are: (1) the right to a jury; and (2) the right to proof beyond a reasonable doubt. [172]

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[164] N.Y. FAM. CT. ACT §262(a)(I) (McKinney 2004).
[165] *In re* Erin G., 527 N.Y.S.2d 488, 490 (1988).
[166] N.Y. FAM. CT. ACT. §262(McKinney 2004).
[167] *Id.* at §262(a)(v).
[168] *In re* Erin G., 527 N.Y.S.2d at 490.
[169] N.Y. FAM. CT. ACT §262 (McKinney 2004).
[170] *In re* Ella B., 285 N.E. 2d at 290; *In re* Shalom S., 451 N.Y.S. 2d 165, 262 (1982).
[171] Generally parents are the respondents in child protective proceedings; however, other relatives or persons legally responsible may be named as respondents on the petition.
[172] N.Y. FAM. CT. ACT ARTICLE 10(McKinney 2004).

### *A. Constitutional Considerations*

Although there is no federal constitutional right to counsel in child abuse and neglect proceedings,[173] persons facing loss of a child's "society" may have a New York state constitutional right to counsel.[174] The Family Court Act is intended to help ensure that counsel is appointed at the earliest possible stage in legal proceedings.[175] It further recognizes that due process and equal protection require assistance of counsel, especially when rights and interests as fundamental as those involved in the parent-child relationship are at stake.[176]

Due process of the law mandates availability of free counsel for indigent parents in child abuse and neglect proceedings in spite of the fact that such proceedings are denominated as "civil."[177] Parental rights need not be at risk of being completely or permanently terminated in order for constitutional protections to apply.[178] The pivotal issue is the right to procedural due process, and such analysis requires a court to consider: (1) whether a liberty or property interest exists which the state has interfered with; and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient.[179] Parents without a doubt have a due process liberty interest in caring for and rearing their children. Child protective proceedings create a risk of loss of that liberty.[180] This fundamental right is protected by both the substantive and procedural safeguards of the Due Process

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[173] Lassiter v. Department of Social Services, 452 U.S. 18, 26, 34 (1981).
[174] *In re* Ella B., 30 N.Y. 3d 352, 334 N.Y.S. 2d 133 (1972); N.Y. FAM. CT. ACT. §262(a)(i) and §261(McKinney 2004).
[175] N.Y. FAM. CT. ACT §1022(a)(McKinney 2004).
[176] *In re* Ella B., 30 N.Y. 3d 352, 334 N.Y.S. 2d 133 (1972); *In re* Shalom S., 451 N.Y. S. 2d 165, 262 (1982).
[177] Joint Anti-fascist Refugee Committee v. McGrath, 341 U.S. 123, 178 (1951).
[178] Southerland v. Giulani, 4 Fed. Appx. 33 (2d. Cir. 2001).
[179] C.R. v. Bowman, 646 N.W.2d 506, 516 (Mich. 2001).
[180] *Id. See also,* Tenenbaum v. Williams, 193 F 3d 581, 594 (2d Cir. 1999).

Clause of the Fourteenth Amendment which encompasses assistance of counsel.[181]

It has been argued and held that when a poverty-stricken parent is faced with the loss of a child concurrent with criminal charges, the parent is entitled to the assistance of counsel**.** These issues involve too fundamental an interest and right to be relinquished to the State without the opportunity for representation by assigned counsel. Merely because a parent lacked the means to retain a lawyer, a denial of legal assistance under such circumstances would certainly constitute a violation of a parent's due process and equal protection rights.[182] The question that must logically stem from this reasoning is whether the parent who does not have the benefit of counsel during mandatory out-of-court conferences while the case is active is denied equal protection of the law. If so, is that right trumped by the arguably paramount safety interests of the child.

## X. Right to Counsel in Termination of Parental Rights Proceedings

Child neglect and abuse findings can lead to the filing of a termination of parental rights (TPR) petition, and eventually a finding terminating a mother or father's parental rights - a permanent loss of custody. In TPR cases, as with child abuse and neglect cases, indigent parents face particular disadvantages as they are often poorly-educated and economically and socially challenged. In addition, they are propelled into a seemingly inexplicable legal situation. All these factors combined may easily overwhelm an unrepresented parent.[183] At least 33 states, including New York, have guaranteed parents the right to counsel in proceedings to terminate their parental rights.[184]

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[181] Reist v. Bay, 241 N.W. 2d at 61; Kia P. v. McIntyre, 235 F3d 749, 758-59 (2d Cir. 2000).
[182] *In re* Ella B, 285 N.E. 2d at 290.
[183] Lassiter v. Dept. of Soc. Serv., 452 U.S. 18, 46.
[184] *In re* Tanise B, 462 N.Y.S. 2d 537, 540 (1983) *citing* Lassiter v Dept. of Social Svcs., 452 U.S. 18, 33-34.

Terminating a parent's rights is a harsh result which concludes the parents' role entirely.[185] The courts acknowledge the gravity of terminating the right to care, custody and management of one's children, stating that it is an "interest far more precious than any property."[186] In TPR cases, just as in child neglect cases, the proceedings pit the State directly against the parents - the State charging that the parents are at fault.[187] The function of the TPR trial is not to balance the child's interest in a normal family home against the parents' interest in raising the child, nor to resolve whether the natural parents or the foster parents would provide the better home. Rather, the idea is to prove that the parent is responsible for the underlying allegation.[188]

The Supreme Court has repeatedly reviewed the question of what process is due in an array of noncriminal proceedings.[189] In criminal cases, an indigent defendant has a right to counsel even where actual imprisonment is a threat.[190] However, despite the general rule mandating the appointment of counsel in criminal cases, there is no predetermined rule regarding the right to counsel in noncriminal proceedings.[191] The lower courts have consistently held in TPR cases that an indigent parent has a right to the appointment of counsel.[192] In spite of this, the prevailing due process analysis requires a balancing of the three interests, which this author will now explore.[193]

In 1981, the United States Supreme Court held that no constitutional right to counsel exists for indigent parents facing [194]termination of parental rights proceedings.[195] The

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[185] Santosky v. Kramer, 455 U.S. at 759.
[186] Stanley v. Illinois, 405 U.S. 645, 651 (1972).
[187] Santosky v. Kramer, 455 U.S. at 760.
[188] *Id.*
[189] Kevin W. Shaughnessy, *Lassiter v. Department of Social Services: A new interest balancing test for indigent civil litigants*, 32 CATH. U.L. REV. 261 (1982).
[190] *Id.* at 262.
[191] *Id.*
[192] *Id.*
[193] Lassiter v. Dept. of Soc. Svcs., 452 U.S. at 33.
[194] *Id.*

*Lassiter Court* held that the Fourteenth Amendment Due Process Clause creates a presumption for the appointment of counsel for indigents only when their physical liberty may be constrained. The Court noted that under a case-by-case analysis parents may be able to rebut the presumption and demonstrate that the risk to their First Amendment Right of Association with their child requires appointment of counsel. The U.S. Supreme Court established a three-prong balancing test for analyzing due process questions: (1) the private interest at stake; (2) the governmental interest; and (3) the risk of error or injustice." [196] The Court held that the Due Process Clause of the Fourteenth Amendment requires that parents receive representation when "the parents' interest [is] at [its] strongest, the State's interests [are] at their weakest, and the risks of error [are] at their peak."[197] So, it is only when an indigent respondent-parent can show the Court that fundamental fairness presumptively requires appointment of counsel due to the threat of a loss of a child.

Justice Stevens's dissent in *Lassiter* is notable:

> A woman's misconduct may cause the State to take formal steps to deprive her of her liberty. The State may incarcerate her for a fixed term and also may permanently deprive her of her freedom to associate with her child. The former is a pure deprivation of liberty; the latter is a deprivation of both liberty and property, because statutory rights of inheritance as well as the natural relationship may be destroyed.

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[195] *Id.*

[196] Mathews v. Eldridge, 424 U.S. 319, 335 (1976); William Wesley Patton, *Presentation of Children: Searching for the proper role of children's counsel in California dependency cases: Or the answer to the riddle of the dependency sphinx*, 1 J. CENTER CHILDREN & CTS. 21, 24 (1999); Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings*, 24 TOURO LAW REV. 247 (1997).

[197] William Wesley Patton, *Childlaw Symposium Issue: Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 LOY. U. CHI. L.J. 195, 200 (1996) *citing* Lassiter v. Dept. of Soc. Svcs., 452 U.S. 18 at 31 (1981).

> Although both deprivations are serious, often the deprivation of parental rights will be the more grievous of the two. The plain language of the Fourteenth Amendment commands that both deprivations must be accompanied by due process of law. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless.[198]

Justice Stevens applies the reasons supporting the conclusion that the Due Process Clause of the Fourteenth Amendment entitling the defendant in a criminal case to representation by counsel applies with equal force to a TPR case – an issue of fundamental fairness.[199]

However, the majority opinion in *Lassiter* noted that due process may be violated under certain circumstances if counsel is denied in dependency cases. Public policy and statutory law prudently hold that indigent parents are entitled to representation in neglect proceedings as well as in termination proceedings[200]. Therefore, despite the Supreme Court's ruling, most states recognize the importance of court-appointed counsel for parents at all stages of these proceedings.[201]

### *A. Right to Counsel During Termination of Parental Rights: Psychological Exams*

New York courts have held in Termination of Parental Rights cases that there is a right to counsel. Such right

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[198] Lassiter v. Dept. of Soc. Svcs., 452 U.S. 18 at 59 (*J. Stevens dissenting*).
[199] *Id.*
[200] *Id.*
[201] Mabry, *supra* note 7; Lassiter v. Dept. of Soc. Svcs., 42 U.S. at 18.

extends to any stage of the proceeding in which there is a "potential for substantial prejudice," and the presence of counsel would avoid such risk of prejudice.[202] In *The Matter of Tanise B.*, a finding of child abuse was made against the respondent-mother and the children were placed in foster care with the Commissioner of Social Services.[203] A Termination of Parental Rights (TPR) proceeding was subsequently filed alleging the respondent's inability by reason of mental illness to provide adequate care for the children. The child welfare agency's objective was to free the children for adoption. During the TPR proceeding, the court ordered a psychiatric examination, and respondent-mother made a motion requesting the presence of her attorney at such examination. Respondent's application was based on New York constitutional and statutory principles of effective assistance of counsel.[204] The New York Court of Appeals had previously found that the right to counsel in criminal prosecutions includes the presence of counsel at pretrial court-ordered psychiatric examinations of a defendant.[205] The mother in *Matter of Tanise B.* argued by analogy that in a termination proceeding based on a charge of mental illness the right to counsel also encompassed the right to have counsel present at the court-ordered psychiatric examination, so that counsel can effectively cross-examine the psychiatrist at trial.[206] This issue was a matter of first impression. The court "looked to the interests at stake in a termination proceeding rather than the dichotomy between civil and criminal proceedings."[207] The court recognized that terminating one's parental rights is among the most severe forms of state intervention both in terms of the nature of the protected interests threatened and the permanency of the loss of a child.[208]

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[202] *In re* Tanise B. 462 NYS 2d at 540.
[203] *Id.* at 538.
[204] *Id.* at 539; People v. Cerami, 306 N.E.2d 799, 802 (N.Y. 1973); Lee v. County Court of Erie County, 267 N.E.2d 452, 458 (N.Y. 1971).
[205] *Id.*
[206] *In re* Tanise B., 462 NYS 2d at 540.
[207] *Id.*
[208] *Id.*

In determining the scope of the right to counsel, the court applied the test enunciated in *U.S. v. Wade*.[209] Under the *Wade* test, the right to counsel is not merely satisfied by counsel's presence at trial, but counsel is required at all critical stages of a prosecution whether formal or informal. As long as it is necessary to preserve the defendant's right to a fair trial, counsel is required. This right includes the right to meaningful cross-examination. Therefore, where the right to counsel exists, it automatically extends to any stage of a proceeding where there is the potential for substantial prejudice. The presence of counsel will avoid the risk of such prejudice.[210] Counsel must be able to hear the questions put to the respondent as well as her answers to observe the interaction and behavior of the respondent and the psychiatrist.[211] Counsel is given the opportunity to determine if the expert's descriptions of the respondent's statements and behavior are accurate and complete, and if the examination was conducted in a fair manner. Additional presence at this initial interview will afford counsel the ability to recognize any actual bias the expert may have, and to question the expertise of the mental health professional.[212] It was held that although the Sixth Amendment does not provide a blanket guarantee to the presence of counsel at every stage of a proceeding, a defendant is entitled to the presence of counsel at a pretrial psychiatric evaluation.[213]

Similarly, a termination of parental rights proceeding was brought against the mother on the grounds of mental illness. She was about to be examined by a court-appointed psychiatrist, and the court held that she was entitled to have her attorney present during the examination if she desired - assuming such presence would not impair the validity and effectiveness of the particular examination.[214] The burden did not shift to the mother to establish that her attorney's presence

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[209] 388 U.S. 218, 226 (1967).
[210] *In re* Tanise B., 462 NYS 2d at 540; U.S. v. Wade, 388 U.S. at 227.
[211] *In re* Tanise B. 462 NYS 2d at 542.
[212] *Id.* at 541.
[213] U.S. v. Wade, 388 U.S. at 248.
[214] *In re* Guardianship and Custody of Alexander L, 457 N.E. 2d 731 (N.Y. 1983).

would not impair the effectiveness of the psychiatrist's examination.[215]

The New York Court of Appeals has found that the right to have counsel present at a court ordered pre-trial psychiatric examination applies in criminal prosecutions.[216] The principal issue the court considered in *Lee v. County Court of Erie* was whether the conviction should be set aside because pretrial psychiatric examination of the defendant by the expert for the prosecution was conducted without notice to, or presence of, defendant's counsel.[217] The defendant's rationale was that they were denied the appropriate opportunity to cross-examine the third parties and thereby bring before the court the underlying facts from which the expert had drawn his conclusion.[218] The court of appeals held that the defendant was entitled to counsel's presence at the psychiatric examination. Because this court held that the defense was essentially disabled from cross-examining the State's psychiatrist if denied the opportunity to attend the psychiatric examination, any expert opinion based even in part upon this examination would similarly be excluded.[219]

Analogous to the right to have notice and counsel present for criminal and TPR psychiatric examinations are the elements and implications of child protective service planning meetings. These meetings occur at a critical stage of the proceeding: the investigatory stage as parties are fact-gathering, negotiating, strategizing and preparing for trial. The threat of substantial prejudice to the respondent-parent is evident. Statements made to the petitioning agency are made outside of counsel's presence and can in turn be used in criminal court or to file new allegations in family court. Counsel is not realistically given the opportunity to hear or observe statements and interactions at the service plan meeting, resulting in the deprivation of the opportunity to

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[215] *Id.*
[216] Lee v. County Court of Erie, 267 N.E. 2d at 459.
[217] People v. Cerami, 306 N.E.2d at 800.
[218] People v. Keough, 11 N.E. 2d 570, 573 (1937).
[219] People v. Cerami, 306 N.E.2d at 804.

cross examine the case worker at trial on these issues.[220] Although ACS may argue that statements made during the service planning meetings will not be used at the child protective trial and providing notes from the meeting provides sufficient aid to counsel, the case record does not provide a complete record of what transpired at the meeting. These statements may very well affect their further thinking. The subject matter of the meeting does not consist merely of oral questions and answers, but much depends on the manner in which the caseworker-examinee relates to the examiner. Examples include: the affect communicated; speech patterns; communications emphasized, omitted, or selectively presented, etc. [221] Additionally, information ascertained at these meetings can be used by the petitioner to amend the original child protective petition to include new allegations stemming from information elicited at the meeting.

## XI. Sixth Amendment Right to Counsel

The constitutional right to assignment of counsel at public expense was first established in criminal cases. The fundamental case is *Powell v. Alabama* in which the United States Supreme Court declared that "under the circumstances in the case before it of ignorance, illiteracy, public hostility, imprisonment and difficulty of communication with friends and family, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was a denial of due process within the meaning of the Fourteenth Amendment."[222] Although the constitutional provisions explicitly guaranteeing the right to counsel apply only in criminal proceedings, the right to due process also indirectly guarantees assistance of counsel in child protective proceedings. Thus, the principles

[220] U.S. v. Wade, 388 U.S. at 227; *In re* Patricia P., 459 N.Y.S 2d 392, 393 (1983).
[221] *In re* Guardianship and Custody of Jose T., 481 N.Y.S 2d 991, 997 (1984).
[222] 287 U.S. 45 at 57 (1932). *See also* Reist v. Bay, 241 N.W. 2d at 58.

of effective assistance of counsel developed in the context of criminal law similarly apply in child protective proceedings.[223]

The Sixth Amendment to the U.S. Constitution guarantees an accused assistance of counsel for his defense. This right extends to the period from arraignment to trial, which may be the most decisive period of the proceedings. [224] It is during this pre-trial state that the accused "requires the guiding hand of counsel…"[225]

Evidently, the right to counsel is less ambiguous for criminal proceedings than child protective proceedings. However, the initial incident underlying the child protective proceeding (e.g. physical or sexual abuse, etc.) may in turn result in the filing of parallel criminal and family law cases. A criminal case may be filed as a result and therefore subsequent to the child protective proceeding. Even if the family court prosecution is not using or persuaded by the respondent's pretrial statements made at the service planning conferences, these statements may be obtained by a criminal prosecutor if there is a parallel criminal case.[226] In the criminal case a respondent's liberty interest is also at stake, not only facing incarceration, but the interest in not being able to raise and care for the child, both socially and economically.[227]

In circumstances when there are contemporaneous civil and criminal child abuse proceedings, it is at the early investigative stage that the parents' Fifth Amendment privilege against self-incrimination is first brought in and is perhaps most threatened.[228] Often times parents have not yet been assigned counsel prior to the detention hearing, and these unrepresented parents are typically willing, if not eager, to cooperate with case workers investigating the abuse allegations in hope of reclaiming custody of their child and

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[223] Mabry, *supra* note 7, at 653.
[224] Powell v. Alabama, 287 U.S. at 57.
[225] *Id.* at 69.
[226] William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA L. REV 473, 478 (1990).
[227] *Id.* at 485.
[228] *Id.* at 511.

convincing the child welfare agency not to file a court case.[229] Also, in many jurisdictions the county attorney, with discretion to prosecute the parents for criminal child abuse, is often the same attorney representing the child welfare agency in the family court child protective proceeding.[230] The threat exists of the criminal prosecutor discovering the parents' family court pretrial statements, such as those made at the service planning conferences.[231] More often than not, parents are not taken into custody during the initial child protective pretrial investigations, so case workers, police officers and prosecuting attorneys need not give parents Miranda[232] warnings.[233] Consequently, prosecutors and case workers in a roundabout way gain discovery of parents' statements which would be statutorily undiscoverable during official criminal investigations.[234] Depriving a formally charged defendant of counsel during the pre-trial stages may be more damaging than denial of counsel during the trial itself.

In child protective proceedings, the parent's attorney's inability to observe directly the questioning and interaction between her client and the petitioning case worker at the service planning meeting compromises the ability to cross-examine the case worker and appropriately prepare for the challenge of her report to the court; thus, potentially violating the respondent's Sixth Amendment right.[235]

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[229] *Id.* at 478.
[230] *Id.*.
[231] *Id.* at 479.
[232] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966). Prior to any custodial interrogation, a person must be warned: that he has a right to remain silent, that any statement he does make may be used as evidence against him, that he has a right to the present of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.
[233] *Id.*at 480.
[234] *Id.*
[235] *In re* Patricia P., 459 N.Y.S 2d 392 (1983).

## XII. Right to Adequate Representation

In New York child protective proceedings, indigent parents are not only assigned attorneys, but are entitled to competent representation by such counsel due to the potentially drastic consequences.[236] The same holds true for the rights of children who are afforded the protection of their own legal counsel in the form of a Law Guardian.[237] In child protective proceedings, including termination of parental rights, parents are afforded effective representation protections equivalent to the constitutional standard of effective assistance of counsel provided to defendants in criminal proceedings.[238]

In the criminal *Matter of Massiah*, federal agents arranged a meeting between a defendant and an accomplice turned informant. The agents overheard incriminating statements which the prosecution thereafter sought to use at trial.[239] The *Spano* Court held that such statements should have been excluded from evidence, and "anything less…might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him."[240]

Valuable and helpful representation must be laced through the entire proceeding, from assignment of counsel through the dispositional hearing. When the petitioning child welfare case worker arranges a mandatory service plan meeting with a parent, yet the parent is virtually denied the opportunity of having her attorney attend, the parent is also denied effective representation.

## XIII. Inherent Imbalance of Power

The Due Process Clause of the Fourteenth Amendment was created to protect individuals from the overbearing and

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[236] N.Y. FAM. CT. ACT §262 (McKinney 2004).
[237] *Id.* at §249. Department of Social Services *ex rel.* Maitland v. Mitchell, 710 N.Y.S. 2d 509, 511 (2000).
[238] *In re* Alfred C., 655 N.Y.S.2d 589 (1997); *In re* James R, 661 N.Y.S.2d 160, 161 (1997); Maitland v. Mitchell, 710 N.Y.S. 2d at 511.
[239] 377 U.S. 201, 203 (1964).
[240] People v. Spano, 360 U.S. 315, 325 (1959).

powerful government agencies which are concerned with efficiency as they face sizeable caseloads.[241]

> The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given [case]. The State's attorney usually will be expert on the issues contested and the procedures employed at the fact finding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers who the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination. [242] The State's unusual ability to structure the evidence increases the risk of an erroneous fact finding.[243]

One goal of service planning meetings is helping to improve communication between the child welfare agencies and the parent.[244] However, should "communication" be "improved" between adverse parties during out-of-court meetings? Further, can they be considered "improved" when the "communication" is made mandatory by one party? There is a not-so-fine line between "communicating" and eliciting information from a respondent-parent.

Many caseworkers have expressed that these meetings bring family members and parents together early on to help ease the tension between the caseworker and the parent which

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[241] Stanley v. Illinois, 405 U.S. at 656.
[242] Santosky v. Kramer, 455 U.S. at 763.
[243] *Id.*
[244] Salaam, *supra* note 55.

makes the case worker's job more productive.[245] Easing tensions sounds like a harmless agenda; however, if tensions are eased in order to allow the case worker to probe further with her questioning of the unrepresented parent, the meetings are damaging. When "invited" to answer questions of the agency case worker who has taken custody of your children, and will subsequently decide when and if those children are going to be returned to you, there is real opportunity to refuse to participate. Once again, David Lansner states, "I have yet to encounter a credible reason (as opposed to one designed to simply tip the advantage to the government) for excluding attorneys at these conferences. It seems to me that placing obstacles between a particularly vulnerable segment of our society and information they need to make informed decisions serves nothing but the potential abuse of power over the weak."[246]

Countering the argument that parents' counsel should actively participate in these meetings is the contention that perhaps the meetings would altogether be unproductive having parents' attorneys in the room, as they would stifle interaction between the parents and case workers when advising their clients not to answer the many potentially incriminating questions. There are many parents who welcome a discussion as soon as possible with the case workers to obtain referrals to parenting skills class, drug rehabilitation programs or counseling in order to expedite the return of their children. Bringing attorneys into the picture as a regular practice would potentially slow down the process and cause further interpersonal friction between the parties.

It is true that children will not be returned to their parents until the underlying allegations which led to the filing of the child abuse or neglect case are rectified, and there is a safe home to return to. Few would argue that the paramount interest is protecting the children. The State's interest in

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[245] NYC CHILD WELFARE PANEL REPORT, *supra* note 50, at 10.

[246] Email from David Lansner, Esq. (July 13th 2005) (on file with author). Note that five months after this comment was taken, New York amended the Family Court Act to allow the presence of attorneys at service planning meeting.

protecting children may arguably trump due process considerations of the parents in this type of limited situation. Nevertheless, is there a plausible method for protecting the safety of children, while simultaneously engaging in productive service planning for the parents without violating due process rights?

## XIV. Conclusion

There are more than a few solutions to this predicament to ensure that parents have effective assistance of counsel at every stage of a child protective case while simultaneously ensuring the safety of the child. This author suggests one or more of the following:

1. An independent non-party be involved to prepare a service plan, make referrals and work out visitation between the parents and the children;
2. Narrow the scope of the service plan meeting to the client's need for services, rather than on the underlying maltreatment;
3. Make it practically feasible and economically meaningful for counsel to attend and participate in the meetings, with an understanding that the objective of the meeting is to reunite the family as soon as possible rather than using it as a litigation tool;
4. Audio or videotape planning meetings;[247]
5. Child welfare agency case workers develop service plans unilaterally, and

[247] Email from Sarah Tirgary, Esq. (October 17, 2005) (on file with author) stating that having no recording of the meeting has resulted in contrary statements: the caseworker claiming that the parent admitted to something and the parent denying such statement, pitting one word against the other and leaving the court to decide.

present their suggestions in writing to the parents' counsel; and

6. Eliminate service plan meetings in certain circumstances.[248]
7. At the very least, safeguards must be put in place to ensure that a written record of these meetings is available for all counsel.

During child protective service planning meetings, the parents are already accused of child maltreatment and possible criminal wrongdoing. These parents may be scheduled to defend themselves in family and/or criminal court. Being interrogated by their party-opponents in effective closed-door meetings certainly results in danger and threatens one's constitutional and statutory rights. Just as in the case of secret interrogations in criminal proceedings, there is serious difficulty in depicting what transpires. This results in gaps in our knowledge as to what in fact went on.[249]

There have been thousands of cases in which child welfare agencies have proceeded impermissibly to extract admissions either pertaining to the underlying allegations or to fodder for new allegations. This interrogation of underrepresented parents who are at serious risk of ultimately having their rights to their children terminated is unjust and arguably unconstitutional.[250] However, our legal system's goal is designed to consider and when appropriate correct the fairness and reliability of existing procedures. This fundamental right to counsel in child protective proceedings must be rediscovered.

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[248] Email from Sarah Tirgary, Esq. (October 17, 2005) (on file with author) maintaining that many times service plans can be easily devised without the need for a service planning meeting. For example, a person suffering from a drug addiction can be referred for a drug rehabilitation program, where trained personel can, in turn, assess the needs of the parent and services appropriate.

[249] U.S. v Wade, 388 U.S. at 229; Miranda v. Arizona, 384 U.S. 436, 448 (1966).

[250] People v. Wilson, 436 N.E.2d 1321, 1322 (N.Y.1982).