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For the Welfare of Children:

# LESSONS LEARNED

from Class Action Litigation

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»» January 2012 ««

## Acknowledgments

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## About CSSP

The Center for the Study of Social Policy (CSSP) is a nonprofit public policy, research and technical assistance organization. Headquartered in Washington, D.C., CSSP works with state and federal policymakers and with communities across the country. Its mission is to create new ideas and promote public policies that produce equal opportunities and better futures for all children and families, especially those most often left behind. Using data, extensive community experience and a focus on results, CSSP's work covers several broad areas, including promoting public policies that strengthen vulnerable families; mobilizing a national network to prevent child abuse and promote optimal development for young children; assisting tough neighborhoods with the tools needed to help parents and their children succeed; educating residents to be effective consumers securing better goods and services; and reforming child welfare systems.

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# Preface

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Judith Meltzer, Rachel Molly Joseph and Andy Shookhoff, Editors

For the past 40 years, advocates have resorted to class action litigation to address difficult and long-standing problems in public child welfare systems and poor outcomes for children and families. Approximately 70 class action lawsuits are pending or have governed some aspect of child welfare practice in nearly 30 states, and almost 20 states are currently working to implement consent decrees and/or other court orders related to the reform of their child welfare systems.<sup>1</sup>

Debate among advocates, public administrators and other key stakeholders about the merits and consequences of class action litigation in child welfare is lively and frequently heated. Individuals hold strong and often divergent views about the long-term costs and benefits of involving the federal or state courts in child welfare policy and practice. While there is evidence of significant and lasting improvements that began with litigation-driven reforms in a number of jurisdictions, there are also examples where expectations have exceeded results, where one problem has been solved only to create another, or where it has simply taken far too many years to achieve the anticipated improvements of the litigation. Many jurisdictions that were ultimately successful in reforming their child welfare systems with litigation experienced periods of failure and wheel spinning before finding the road to improvement.

This series of papers brings together distinguished experts writing on the use of class action litigation to reform public child welfare systems. It is an effort to tease out of four decades of experience in this work, the factors that increase the likelihood that litigation will result in successful system reform. This publication is an outgrowth of a series of conversations among a diverse group of people who have been involved in such litigation – from plaintiffs’ lawyers who have filed these cases and agency attorneys who have defended them, to child welfare administrators who have managed systems involved in litigation and technical assistance providers who work with them, to foundation representatives who have helped negotiate settlement agreements and experts appointed by the court to monitor and report on agency performance under those agreements.<sup>2</sup>

There are differences of opinion among the authors on the relative merits of litigation as a vehicle for improving child welfare systems. However, there was broad agreement that the child welfare field would benefit from pulling together a set of “lessons learned” reflections. The Center for the Study of Social Policy (CSSP), with funding from the Annie E. Casey Foundation, commissioned and compiled this set of papers. The publication covers all stages of this type of litigation – the decision whether to litigate or pursue other reform strategies, the key elements of a negotiated settlement agreement or remedial court order, successful ways of assessing progress and monitoring compliance, and strategies for disengagement and exit from court oversight. Each paper represents the views and experience of the individual author. Collectively, they provide both an orientation to the critical issues that surround child welfare reform class action litigation and present a set of practical suggestions (drawn from both positive and painful experiences with litigation-driven reforms) for addressing those issues.

The intent of this series is to accelerate the pace and quality of progress by helping policymakers, agency administrators, lawyers and judges make better and more informed decisions throughout the course of child welfare reform class action litigation. We are grateful for the thoughtful insights provided

by each of the authors who individually and as a group demonstrate their commitment to the common goal of enhancing the effectiveness of public child welfare system performance.

## **ENDNOTES**

<sup>1</sup> National Center for Youth Law, Foster Care Reform Litigation Docket, retrieved from: [http://www.youthlaw.org/publications/fc\\_docket/](http://www.youthlaw.org/publications/fc_docket/). See also, Child Welfare Consent Decrees: Analysis of Thirty-five Court Actions from 1995 to 2005, retrieved from: [www.cwla.org/advocacy/consentdecrees.pdf](http://www.cwla.org/advocacy/consentdecrees.pdf).

<sup>2</sup> Conversations began at the "Roundtable on Lessons Learned in Child Welfare Class Action Litigation" held at Vanderbilt University Law School in March 2009.

# Introduction and Overview

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Judith Meltzer, Deputy Director, Center for the Study of Social Policy; Rachel Molly Joseph, Special Assistant, Office of the Deputy Mayor for Health and Human Services, District of Columbia; Andy Shookhoff, Attorney and Former Juvenile Court Judge (Nashville)

State and local child welfare systems play critical roles in safeguarding our nation's most vulnerable children. Too often, fundamental deficits in the capacity to deliver even the most basic services to children and their families undercut the potential for these systems to protect children from harm and to promote their well-being and healthy development in stable families. The consequences for those families and especially for those children who have been abused and neglected are enormous.

The key mission of state and local child welfare agencies is to protect children from harm. Federal and state legal mandates require states to investigate allegations of maltreatment and to intervene to protect children by supporting families, providing substitute care when children cannot be safe and secure in their homes and helping every child find a safe and permanent home. Despite the best efforts of administrators and child welfare workers, the poor outcomes for many children and families involved with these systems and the scores of daily press accounts of children at risk speak powerfully to the limitations, scarce resources and dysfunctions in many of these systems.

The causes for poor performance are multiple and complicated and the levers for powerful and lasting change are limited. While state child welfare agencies are subject to oversight by federal agencies and state legislatures, many advocates have concluded that the monitoring by federal agencies and state legislative bodies lacks the necessary force to effectuate comprehensive reform in chronically under-resourced and failing systems. Class action litigation has therefore emerged as a predominant strategy for holding public child welfare systems accountable for achieving their mission and effectively carrying out their mandated responsibilities for children and families.<sup>1</sup>

Initially, these class action cases were built on constitutional civil rights protections for individuals in state custody. Later suits have added statutory claims based on both federal child welfare legislation and applicable state law.<sup>2</sup> The relief sought in these lawsuits is often broad and prescriptive. Many states have spent decades in the courts, diverting staff and other resources to the defense of class action lawsuits, sometimes at the expense of applying those resources to the delivery and enhancement of core services for at-risk children and families. Taxpayers shoulder the formidable costs of litigation but it is the children and families – mired for years in failing public systems – for whom the stakes are the highest.

Several child welfare systems that have been the subject of class action lawsuits (including systems in New Mexico,<sup>3</sup> Alabama,<sup>4</sup> Utah,<sup>5</sup> Tennessee,<sup>6</sup> Missouri,<sup>7</sup> Kansas<sup>8</sup> and New Jersey<sup>9</sup>) have demonstrated or are now demonstrating measurable systemic improvements and better outcomes for children and their families. Others, such as systems in Washington<sup>10</sup>, Maryland<sup>11</sup> and Washington, D.C.,<sup>12</sup> have been through many years without much success and have newly renegotiated agreements that recommit the parties to work together toward better results. Several child welfare systems are currently in the early stages of implementing consent decrees and other types of remedial court orders.<sup>13</sup> Other lawsuits remain entangled in an adversarial process. Given the short-and long-term consequences of child maltreatment, the predominance of litigation as a child welfare system reform strategy, the sheer number of pending lawsuits and the millions of children and families affected by these systems, it is important to know what has worked and what has not in using litigation as a tool for reform. The application of the

“lessons learned” that are highlighted in this series can be applied to pending litigation, to the decisions about whether and how to bring and structure any new lawsuits and to the ongoing work in many jurisdictions to bring existing lawsuits to successful conclusion of improved outcomes for children and their families.

### ***Significant and Recurring Themes***

The authors of the papers in this series were specifically asked to address issues of importance that had been identified by participants in the initial “Roundtable on Lessons Learned in Child Welfare Class Action Litigation” held at Vanderbilt University Law School in March 2009. Each paper addresses a discrete topic and the individual authors write from differing points of view. However, as one reads them, the interrelationships among the areas of inquiry become clear and significant recurring themes emerge that are highlighted in this overview paper.

#### **Improving child welfare system outcomes is a difficult multi-year endeavor; while pursuing that reform within the context of litigation has some advantages, it also presents additional challenges.**

Building the constituency for change among a very varied range of stakeholders, listening to and incorporating the voices of competing interests, understanding the data and system performance well enough to know what is working and what needs to be fixed, sequencing the work to prioritize and address the day-to-day implementation barriers and maintaining sufficient political and public will to garner the resources is the work of every comprehensive child welfare reform initiative, whether court-ordered or not. Litigation-driven reform can bring political will, additional resources, wider community and external support, an attention to data and performance and often new leaders committed to positive change. It also complicates the process and dynamics of reform in many small and large ways. The lessons from the authors provide insight into how to minimize the challenges of this work.

#### **In spite of the fact that litigation is at its core an adversarial process, the jurisdictions that have made the most progress have done so by relying on approaches to reduce the distrust and conflict, to provide objective assessment and to build relationships and structures to foster cooperation and joint problem solving.**

The experiences described by those involved in litigation in Utah, Alabama, Kansas, Washington, New Jersey, Tennessee and New York City demonstrate how difficult it can be to do this work in a non-adversarial way. Each case has had periods of deep conflict and other times when the parties have found a way, sometimes with the help of outside experts, to overcome their mutual and natural distrust and work together toward common goals. In each of these cases both the plaintiffs and the defendants wanted to achieve the same high level of performance and positive outcomes for children and families. Finding ways to capture and build on the shared goals has allowed jurisdictions to take advantage of the positive attributes of litigation and minimize the negatives.

#### **Getting to a candid understanding and assessment of a system’s problems is a critical first step.**

Almost every author talks about the importance of systematic assessment and the work to gather, understand and accurately portray data (both quantitative and qualitative) about a system’s performance. Data are critical to helping plaintiffs decide whether to pursue litigation and helping agencies decide how to respond. Accurate data are also essential to structuring an agreement and developing a reform plan; managing any change initiative and ultimately for demonstrating progress sufficient for successful exit. The task is not collecting data for data’s sake but using data to know what is working and what is not, to make mid-course corrections and to build internal capacity for quality improvement and accountability. Several authors wisely caution that not everything can and should be counted and that an overreliance on quantitative data and process indicators for purposes of monitoring can have



unintended negative consequences. Equally important is using data to assess impacts on specific populations, including children and families of color, where strategies to improve overall outcomes may not sufficiently address disparate outcomes by race or ethnicity. Finally, many authors urge that court orders and monitoring structures should focus more on child and family outcomes and the quality of interventions rather than on process improvements.

**The structure of a court order whether entered through a Settlement Agreement\* or by the court after a contested hearing can either facilitate or cripple a reform effort.**

Many of the authors reference the ways in which court orders can influence the pace and process of reform. Several of the papers offer similar recommendations including:

- **Begin with a clear understanding of the values and principles** that need to guide the reform and resist the urge to pre-define every implementation strategy at the start.
- **Resist creating unrealistic expectations and overly ambitious timeframes.** The systems that are typically involved in litigation may exhibit leadership problems, resource deficits and a host of basic infrastructure problems including high caseloads, insufficient data and quality assurance, poor external relations and others. The jurisdictions that achieved the most success were able to balance expectations in order to provide time to build the infrastructure before expecting to see significant improvement in child and family outcomes, sometimes after one or several false starts and prolonged periods of frustration and non-compliance.
- **Pay attention to a system's leadership.** Litigation-driven reform must ensure that the court order is not a "lawyer-driven" document but incorporates the expertise of a system's leaders and practitioners. No matter what an agreement says, a child welfare agency needs a talented leadership team to carry it out. The leadership, which goes beyond the director or commissioner, needs to be able to create and communicate a vision for change, to engage staff at all levels in improving case practice and making other changes that are key ingredients for success and to "manage to results." In some systems this team may need to be built; other systems may have knowledgeable staff with leadership ability who need to be enlisted and engaged in the work.
- **Provide for phased implementation in any court-ordered reform plan.** Phasing implementation provides opportunities for early milestones and success, which are necessary to build and sustain momentum for multi-year change. Workers, agency leaders, governors, state legislators, plaintiffs and the court all need to see evidence of positive movement but not everything can and should be done at once. The case studies from Kansas and New Jersey demonstrate clearly that competing and multiple deadlines can overwhelm a system and its supporters
- **Ensure that the court order provides a mechanism for modification.** While it is true that a benefit of a court order is that it provides durability to commitments over time and across political changes, it is also essential that the detailed provisions of an agreement not be set in stone without any process for modification. Court orders must be able to respond to new understandings and changing internal and external conditions and must incorporate changes based on experience and data analysis. The case studies of successful litigation-driven reform efforts demonstrate the importance of being able to modify agreements to support improved performance and better outcomes.
- **A court order should include processes for problem solving outside of the courtroom.** This is essential if the parties wish to proceed in a less adversarial way. While the court's oversight and power have a critically important role to play in class action litigation (as discussed in the Utah case study, for example), several authors urge that the court's ongoing intervention be used judiciously and strategically and that there be agreement by the parties to use forums outside of the court for attempting to mediate and resolve the conflicts that are inevitable in this work.

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*\*The vast majority of remedial orders entered in class action lawsuits in the child welfare field have been a result of settlement agreements developed by the parties and ordered by the court. The authors in this compendium refer to these orders as "settlement agreements" or "consent decrees." Because many of the insights that the authors offer in discussing settlement agreements apply generally to remedial orders (whether entered by agreement of the parties or developed by the court following a contested hearing), we use the general term "court order" in this introduction, unless the point being made is limited to negotiated settlements.*

- **A court order should include at the outset a plan for termination of court jurisdiction and exit.** As articulated in the paper on disengagement, the conditions and route to exit must be thought about from the very beginning and the court’s order needs to include an “efficient and practical approach to termination and dismissal.” As explored in several of the case studies and referenced in administrator reflections, the tensions around exit are real and deep. Ambiguity about conditions for exit is frustrating for systems that have achieved significant progress and want to be released from court oversight. Thinking from the start about “how good is good enough” and issues of sustainability (what and for how long), about processes for reassessing and modifying conditions for exit and about mechanisms that can be incorporated into agreements to ensure longer-term public accountability after exit may help to mitigate unnecessary and frequently demoralizing conflict toward the end of a lawsuit.
- **The structures established and individuals selected for independent monitoring of progress under a court order should have qualities that ensure the confidence of the court, the defendants and the plaintiffs.** The provisions for court-ordered monitoring in child welfare class actions vary in terms of the number and expertise of the people charged with monitoring, the specific responsibilities of the monitoring work and the structures within which they operate. The paper on monitoring and the discussions on the role of monitoring in the case stories and administrator reflections share a common theme: effective monitoring must be transparent, viewed by all as objective and fair and carried out in a manner that does not interfere unnecessarily with an agency’s operations. The ability of a monitor or monitoring entity to engage in mediation and problem solving is viewed in some instances as another attribute that contributes to less adversarial resolution of litigation. Several papers recommend building community accountability processes and internal quality improvement capacity that demonstrate the ability and commitment of public systems to hold themselves accountable to performance standards and public reporting as part of the disengagement and exit from a lawsuit.
- **The most successful litigation-driven reform efforts have included the use of outside expertise at almost every stage of the process.** Each of the authors cites the effective use of credible outside expertise at every stage of this work. Expertise comes in many forms and includes the voices of clients and community stakeholders, child welfare professionals and foundation and other national partners. In the case stories and as summarized in the article on the role of foundations, there is evidence of the constructive roles played by “informed neutrals” in such varied tasks as facilitating negotiations leading to a settlement, providing an unbiased view of a system’s strengths and weaknesses, providing technical support in strategic planning and the development and implementation of strategies, acting as the court’s eyes and ears and mediating conflicts throughout the course of litigation.

### **A Brief Overview of the Papers**

The papers in this series are presented in two sections. Section I includes papers that address a specific stage or aspect of child welfare litigation, drawing on experience in particular cases, but presenting a more general discussion. Section II focuses more deeply on specific cases from which the authors draw lessons based on their role and case experience.

In the opening paper, *“A Powerful Route to Reform or When to Pull the Trigger: The Decision to Litigate,”* Marcia Lowry, an experienced litigator who has brought suit against multiple states and local jurisdictions over many years, discusses the factors that attorneys consider when deciding whether to use the “blunt” but “extremely powerful” instrument of litigation to pressure a child welfare system to

improve its practice. Recognizing that even otherwise relatively well-functioning child welfare systems will periodically fall short, Lowry describes what advocates look at when determining whether a system is so chronically dysfunctional, its performance so damaging to significant numbers of children and families, and its efforts to improve so ineffective, that it merits the substantial time and resources required for successful class action litigation. Lowry discusses how legal advocates assess a system's functioning by analyzing data on the rate at which children suffer maltreatment while in foster care, the frequency that children in foster care move from place to place and delays in achieving permanency, among other outcomes. Also important is determining whether there are local advocates and/or committed leaders who can be engaged as partners in the reform.

In *"Structuring Litigation-Driven Child Welfare Reform for Success,"* Paul Vincent begins with the question he faced as a child welfare director when, after two years of litigation, the parties sat down to design a settlement agreement to support meaningful child welfare reform and said, "So how do we do this?" Drawing on both that experience as an administrator charged with implementing a settlement agreement and his subsequent work monitoring and providing technical assistance to child welfare systems operating under court orders, Vincent cautions against making hasty decisions on settlement agreement provisions without sufficient assessment of crucial areas of poor performance and organizational capacity to manage change. Vincent recommends developing an implementation plan based on a good assessment of current organizational performance and capacity, giving priority attention "where agency performance is causing the most harm to children," sequencing strategies and tasks, establishing interim benchmarks of performance with clear targets for incremental improvement, providing for a periodic assessment of what is working and building in the expectation that implementation plans and obligations will undergo reexamination and modification.

Vincent acknowledges that his recommended approach to strategic planning and staged implementation in the context of litigation is often easier said than done. Even when the parties agree that improvement is needed, there can be considerable legitimate differences at the time of settlement negotiations about how those improvements are to be defined, on what timetable they are to be produced and how accountability will be measured.

As Steve Cohen writes in the *"Role of Foundations in Child Welfare Litigation,"* parties in a number of child welfare cases have enlisted foundations and nonprofits whose missions focus on improving public systems that affect disadvantaged children and families to help resolve these differences and fashion workable court orders. These organizations are often well suited to facilitate settlement negotiations because they have credibility with both parties: "for plaintiffs, these foundations share their commitment to large scale, sustained system reform; for defendants, foundation staff and consultants, many of whom have themselves led child welfare systems, know how long it takes to achieve reform and can be a credible source of advice as the agency encounters problems." Foundations have also helped promote successful reform in child welfare class actions by funding small, but important expenditures that may be difficult for government to undertake quickly, by providing technical assistance through their own staff and consultants, by mediating post-settlement disputes and by acting as the court's monitor, reporting on the jurisdiction's progress in implementing provisions of the settlement agreement.

It is now common for court orders in child welfare litigation to provide for the appointment of a person or persons charged with monitoring agency performance and regularly reporting to the parties and the court on the extent to which the agency is meeting its obligations. The role of the monitor is the subject of *Andy Shookhoff's* paper. In some cases, the monitoring role is limited to information gathering and factual reporting on compliance. In other cases, the monitor is also expected to make recommendations to the parties and/or the court; to provide technical assistance to the agency; to help develop, review and/or approve implementation or corrective action plans; to "flesh out" or resolve certain matters and/

or mediate disputes between the parties. In *“Reflections on the Role of the Monitor in Child Welfare Litigation,”* Shookhoff discusses the qualities that lawyers, agency administrators, judges and those who have served as monitors identify as key to effective monitoring: appreciation of the different perspectives of the parties and understanding of the public and political context in which monitoring occurs, skill at facilitating communication and mediating disputes between the parties and the ability to structure information and data gathering and reporting responsibilities in a way that supports rather than distracts from the reform effort.

Discussion of the sources of information and data that are critical to understanding and assessing system performance and tracking improvement is the focus of three of the papers. In *“The Use of Data in Child Welfare Litigation,”* Jerry Milner discusses the role of quantitative and qualitative data in making the case for legal action, identifying components of agency operation that require remediation, understanding strengths of agency practice and capacity, establishing performance baselines and benchmarks for progress, determining exit criteria and sustaining progress. Milner discusses the challenges systems face not only in generating accurate data, but also in developing staff capacity to understand what the data mean. And while Milner affirms the importance of integrating data into the work of public child welfare staff, he also cautions that a lawsuit-imposed focus on numerical data alone can result in an overemphasis on ensuring the frequency of certain activities without giving equal attention to the quality and outcome of the work.

Kathleen Noonan’s paper, *“Qualitative Case Review in a Child Welfare Lawsuit,”* focuses on the expanded use of qualitative data gathering methods in child welfare reform efforts, describing in some detail the qualitative tools used in successful litigation-driven reform in Alabama and Utah. Noonan discusses the critical role that the qualitative service review (QSR) played in the success of each of those efforts. In Noonan’s view, the strength of the qualitative service review, as implemented in these two jurisdictions, is that it not only serves as a measure of performance and a diagnostic tool of systemic reform, but is an important tool for clinical training and organizational norm setting.

In *“Engagement is the Reform: The Role of Youth, Foster Parents and Biological Parents in Child Welfare Litigation,”* Erik Pitchal highlights the importance of incorporating the perspectives and experience of key stakeholders in informing, monitoring and sustaining a litigation-driven reform effort. Writing from the perspective of a legal advocate, Pitchal discusses the ways in which lawyers can engage their young clients, birth families and foster parents at the beginning of the case and throughout the litigation. He emphasizes the importance of creating structures for stakeholder groups to exert continued influence, not only in decision-making on individual plaintiff’s cases, but in addressing systemic issues through participation on advisory committees and in focus groups, constituent surveys and public hearings.

In *“Establish the Finish Line at the Start: The Importance of a Disengagement Plan,”* Grace Lopes discusses the standards and procedures that govern the termination of court jurisdiction and the issues and conflicts that can arise at that stage of litigation-driven reform. Drawing on her diverse experience as an attorney representing a child welfare agency and a court-appointed monitor, Lopes identifies steps that parties can and should take early in the litigation process to develop an approach to exit that reduces the likelihood of additional conflict. Ideally an initial consent decree should include a design for exit anchored by a strategic framework; at a minimum, it should provide for subsequent development of a disengagement scheme, specifying the process for exit and the conditions that would “trigger” that process. Part of that work involves being clear at the start on the legal standard for exit, factors related to and timeframes for sustainability and a consideration of public accountability mechanisms that can be substituted for court oversight when a lawsuit ends.

In the final paper of Section I, *“Is Class Action Litigation a Viable Tool to Achieve Race Equity?”* Karen Baynes-Dunning concludes that it hasn’t been, but it should be. Given data that show disparate

representation and poorer child welfare outcomes for children of color, the question Baynes-Dunning poses is a pressing one. Baynes-Dunning examines several lawsuits that had race-based claims and looks closely at the provision in Tennessee's settlement agreement that required examination of and "appropriate" response to differences between minority and white children and youth on such outcomes as rates of maltreatment findings, entry into care, length of stay and time to permanency. Baynes-Dunning recommends that any litigation-driven reform effort that is focused on broadly improving outcomes for children in the child welfare system include provisions for race focused data collection and analysis and remedial actions specifically targeted at improving outcomes for "overrepresented" children and families.

The papers in Section II of the volume focus on specific cases and, through more detailed discussion of those cases and/or reflections on the experience, provide examples of some of the themes discussed more generally by the first set of authors.

In *"Litigation Leads to Sustainable Reform: A Case Study of Utah's Success,"* John O'Toole and Leecia Welch, attorneys for the plaintiff class, describe the "ups and downs" of 14 years of litigation-driven system reform: the feeling of success that the plaintiffs experienced when they first entered what was considered at the time a "state of the art" settlement agreement "requiring reforms in virtually every facet of the state's protective services and foster care system," and the subsequent frustration when years later practice had not changed and the experiences of children and families had not improved. Ultimately, with active involvement of the court, and with critical technical assistance by expert outside consultants in whom both parties had confidence, a more workable settlement agreement and implementation plan "grounded in social work knowledge and values, not just legal requirements and compliance" was fashioned that brought about significant improvements and the successful conclusion of the litigation. Among the factors that Welch and O'Toole, in retrospect, see as contributing to the failure of the initial settlement agreement was that the lawyers on both sides were the driving force behind much of the agreement. Some of the later success in Utah came with the recognition that a phased-in approach that ensures agency ownership over the process in accordance with specified principles is a preferable route to sustained change than solely acquiescing to the will of the lawyers.

Similar observations are made in *"Child Welfare Compliance in the State of Kansas: Conditions for Success"* by Teresa Markowitz, who led the state's child welfare agency as it successfully implemented court-ordered reforms. While the original settlement agreement reached through court ordered mediation was initially viewed as a reasonable guidepost for good practice in child welfare, the complexities created by the agreement and the monitoring process overwhelmed the agency and "yielded little measured success." Eight years after the original suit had been filed and four years after the entry of the initial settlement agreement, the lack of demonstrated progress prompted the presiding judge to create a "Non-Adversarial Task Force," made up of local advocates, state representatives and child welfare experts, to help assess the situation. Moving from an adversarial process driven by lawyers with little field perspective to more inclusive discussions with state workers provided the opportunity for advocates and stakeholders to become educated about the complexities of child welfare. As a result, what had begun as a focus on how to modify current practices to achieve compliance with settlement agreement requirements shifted to a broad redesign of the service system, developed in partnership with providers and other stakeholders, supported by the governor and key state policymakers and implemented by a committed and capable leadership team.

Reflections from the perspective of a committed and capable leadership team are presented in *"New Jersey: A Case Study and Five Essential Lessons for Reform."* When New Jersey's new governor appointed authors Kevin Ryan, Eileen Crummy, Molly Armstrong and Lisa Taylor to lead New Jersey's

troubled child welfare agency, the state was facing a contempt motion in the wake of significant lack of progress and three years of non-compliance with a child welfare class action settlement agreement. The new leadership team focused their approach to system improvement on five key elements: prioritizing resources and support so that the field staff got what they needed first, focusing on key infrastructure improvements, identifying and building on system strengths, making sure that there is data and analysis to support initiatives before embracing them and managing with data. Within three years, staff morale was up, staff turnover down and caseloads manageable, and four consecutive reports from the court appointed monitor reflected credible and significant progress in achieving the improvements envisioned by the settlement agreement.

In *"Perspectives of a Child Welfare Administrator—Managing Change While Under a Consent Decree/Court Order,"* Uma Ahluwalia reflects on her experience as a child welfare system administrator in both Washington State and the District of Columbia. In Ahluwalia's view, having the right mix of agency leadership, internal practice experts and legal support on the state's negotiating team and using skilled outside experts in whom both parties had confidence to facilitate settlement negotiations were critical to developing a workable settlement agreement in Washington. The negotiations resulted in a settlement agreement built around best practices with a defined exit strategy, aligned with the key provisions of the state's federal Performance Improvement Plan and monitored by a panel of child welfare experts selected by agreement of the parties.

In *"When Solutions Are the Problem,"* Linda Gibbs, currently New York City's Deputy Mayor for Health and Human Services, concedes that class action lawsuits are sometimes required to push public agencies to behave responsibly, but describes the situation that she found when she joined New York City's Administration for Children's Services in 1996 as an example of how a "class action solution can be as bad as the problems it is intended to fix." Gibbs saw an agency subject to multiple class action orders, paralyzed by excessive control by a hostile judge and a poorly functioning court appointed panel who had limited child welfare expertise, were disconnected from the agency leadership and staff who were responsible for day to day operations, and were wasting agency funds on high-cost consultants. When the mayor, in response to a high profile fatality, appointed a new agency director with a commitment and charge to fix the system, the rigidity and narrow focus of the panel became an obstacle to needed reform. With support from The Annie E. Casey Foundation and with consent of the plaintiffs' attorneys, a special panel of experts was created to help the agency devise and implement a strategic reform plan, provide the agency with ongoing technical assistance and report on the agency's efforts. After two years of work, based on the progress made by the agency and a panel report endorsing the agency's efforts, court supervision ended.

Successful exit from court supervision is also the subject of Page Walley's observations in *"From a Commissioner's Perspective: The Double Edged Challenges of Managing Under a Consent Decree."* In writing about the experience of Alabama's child welfare agency, Walley acknowledges that class action litigation played an important role in bringing needed improvement. However, in Walley's view, the benefits of litigation as a lever of reform became obstacles over time, especially as the state moved closer to substantial compliance. As commissioner, Walley saw plaintiffs' counsel as overly resistant to termination of court jurisdiction, which was ultimately granted by the court over plaintiffs' objection. Walley's experiences in Alabama lead him to argue that consent decrees that are heavy on process measures and light on attention to evidence-based outcomes can, in fact, undermine political support for needed reforms.

In contrast, Viola Miller, reflecting on the seven years that she served as the commissioner of Tennessee's child welfare agency while it was operating under a settlement agreement, is skeptical of the ability of struggling child welfare systems to bring about sustainable reform without "lawyer-driven" litigation. In

*“Life Under a Consent Decree: An Interview with Viola Miller,”* she comments that the systemic change needed to build a strong high-quality infrastructure often takes considerable time, even with a dedicated governor, a supportive legislature and excellent child welfare leaders. However, state administrations function in four- to eight-year political cycles, which may not provide sufficient time to implement and institutionalize sustainable change. Miller credits Tennessee’s settlement agreement with providing leverage, support and time to succeed. Miller acknowledges the aversion of state officials to a court telling them “what to do” – but questions the assertion made by some of her colleagues that poorly functioning state systems can reform problematic child welfare practice on their own. Miller concludes, “Did I like having a Settlement Agreement? Absolutely not. Do I think we would have or could have made the accomplishments we did without it? Doubtful, at best.”

### **Putting “Lessons Learned” to Use**

There is certainly no way to guarantee that litigation will always be a successful catalyst and force for systemic child welfare reform and improved results for children and families. Myriad factors can derail such an effort and there are plenty of examples of well-intended work yielding disappointing results. Even the most successful of the litigation-driven child welfare system reforms have not travelled a straight and unobstructed path to improvement.

However, the authors of this collection of papers, drawing on their own experiences, have identified the key challenges and opportunities that arise in litigation-driven reform efforts and provide practical suggestions for anticipating and responding to those challenges. By taking these “lessons learned” to heart, those involved in these cases – administrators, lawyers, policymakers, community members and other stakeholders – can increase the likelihood that litigation-driven reform will start on the right track, stay on track and ultimately succeed.

## **ABOUT THE AUTHORS**

### **Judith Meltzer**

Judith Meltzer is responsible for co-directing all of CSSP’s work. Meltzer helped pioneer efforts to strengthen child welfare systems through more productive, less adversarial approaches to resolving class action litigation. She serves as the federal court-appointed monitor of the District of Columbia and New Jersey’s child welfare systems which are subject to oversight as the result of class action litigation. In addition, she helps oversee technical assistance to child welfare agencies in Tennessee and Connecticut operating under court-ordered settlement agreements to improve child welfare systems. In 2005, Meltzer was honored by the American Public Human Services Association with the Peter Forsythe Award for Leadership in Public Child Welfare. Meltzer graduated from the University of Chicago with a master’s degree in social welfare policy.

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Rachel Molly Joseph serves as the Special Assistant to the Deputy Mayor for Health and Human Services for Washington, DC. In this capacity, Rachel works with the six District of Columbia agencies operating under institutional reform consent decrees. Rachel also works with staff from the Deputy Mayor for Education’s office on issues related to early childhood education and development. Previously, she was at CSSP where she was responsible for providing technical assistance to and monitoring of child welfare systems operating under federal consent decrees to improve practice for children and families. Rachel has also worked at the Field Center for Children’s Policy, Practice and Research at the University of Pennsylvania, the Department of Human Services in Durham, NC and the American Bar Association’s

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### Andy Shookhoff

Andy Shookhoff, a practicing attorney and former Juvenile Court Judge of Davidson County (Nashville), Tennessee has been a progressive and effective advocate for children and families for over three decades. Shookhoff presently chairs a panel of national child welfare experts that provides technical assistance and monitoring in *Brian A. v. Haslam*, a class action suit brought on behalf of children in Tennessee's foster care system.

## ENDNOTES

<sup>1</sup> The use of class action litigation to reform public child welfare systems can be analogized to the use of class action litigation to reform other public systems such as mental health, juvenile justice, adult corrections and developmental disabilities. Given the similarities in the tactics used in a litigation context, many of the themes and lessons presented in this series can be extrapolated to these other contexts.

<sup>2</sup> *Wilder v. Bernstein* is an example of a case built on constitutional civil rights protections for individuals in state custody. *Wilder* was a class action filed in 1973 on behalf of black Protestant children in New York City, alleging that the provisions by which children were "matched" for child welfare placements violated, among others, the Establishment Clause and the Free Exercise Clauses of the First Amendment. See, *Wilder v. Bernstein*, 848 F.2d 1338, 1339. More recent cases, such as *Jeanine B. v. Walker*, sought injunctive relief to ensure that child welfare systems complied with federal statutory and constitutional law and with state law. See, *Jeanine B. v. Doyle*, 877 F. Supp. 1268 (E.D. Wis. 1995); 967 F. Supp. 1104 (E.D. Wis. 1997); 2001 WL 748062 (E.D. Wis. Jun. 19, 2001).

<sup>3</sup> *Joseph and Josephine A. v. Bolson*, 575 F. Supp. 346 (D.N.M. 1982), *vacated*, 69 F.3d 1081 (10th Cir. 1995), *reh'g denied*, (Dec. 14, 1995), *cert. denied*, 517 U.S. 1190; 262 F.3d 1113 (10th Cir. 2001), *superseded by* 275 F.3d 1253 (10th Cir. 2002).

<sup>4</sup> *R.C. v. Wally*, 969 F. Supp. 682 (M.D. Ala. June 16, 1997), *aff'd by* 145 F.3d 363 (11th Cir. 1998); 992 F. Supp. 1328 (M.D. Ala. Oct. 28, 1997); 390 F. Supp. 2d 1030 (M.D. Ala. May 13, 2005).

<sup>5</sup> *David C. v. Huntsman*, 900 F. Supp. 1547 (D. Utah 1995); 13 F. Supp. 2d 1206 (D. Utah 1998); 242 F.3d 1206 (10th Cir.), *cert. denied*, 534 U.S. 822 (2001).

<sup>6</sup> *Brian A. v. Bredesen*, 149 F. Supp. 2d 941 (M.D. Tenn. 2000), *aff'd* 83 Fed. Appx. 692 (6th Cir. 2003); 2009 U.S. Dist. LEXIS 96685 (M.D. Tenn. Oct. 15, 2009); 2009 U.S. Dist. LEXIS 112890 (M.D. Tenn. Dec. 4, 2009); 2010 U.S. Dist. LEXIS 16119 (M.D. Tenn. Feb. 23, 2010).

<sup>7</sup> *G.L. v. Sherman*, 564 F. Supp. 1030 (W.D. Mo. 1983); 731 F. Supp. 365 (W.D. Mo. 1990); 873 F. Supp. 252 (W.D. Mo. 1994).

<sup>8</sup> *Sheila A. v. Whiteman*, 253 Kan. 793, 861 P.2d 120 (Kan. 1993); 259 Kan. 549, 913 P.2d 181 (Kan. 1996).

<sup>9</sup> *Charlie and Nadine H. v. Christie*, 83 F. Supp. 2d 476 (D.N.J. 2000); 213 F.R.D. 240 (D.N.J. 2003).

<sup>10</sup> *Braam v. State of Washington*, 81 P.3d 851 (Wash. 2003).

<sup>11</sup> *L.J. v. Massinga*, 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989); 699 F. Supp. 508 (D. Md. 1988); 778 F. Supp. 253 (D. Md. 1991); 1991 U.S. Dist. LEXIS 18744 (D.M.D. 1991).

<sup>12</sup> *LaShawn A. v. Gray*, 762 F. Supp. 959 (D.D.C. 1991), *aff'd.*, 990 F.2d 1319 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994), *appeal after remand*, 69 F.3d 556 (D.C. Cir. 1995), *vacated*, 74 F.3d 303 (D.C. Cir. 1996) (en banc), *reh'g granted*, 87 F.3d 1389 (D.C. Cir. 1996) (en banc), *aff'd*, 107 F.3d 923 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997); 1993 U.S. Dist. LEXIS 20997 (D. D.C. Nov. 12, 1993); 1994 U.S. Dist. LEXIS 20878 (D. D.C. Jan. 21, 1994); 1994 U.S. Dist. LEXIS 20872 (D. D.C. Jan. 28, 1994); 1994 U.S. App. LEXIS 32460 (D.C. Aug. 26, 1994); 887 F. Supp. 297 (D.D.C. 1995); 144 F.3d 847 (D.C. Cir. 1998); 701 F. Supp. 2d. 84 (D.D.C. 2010).

<sup>13</sup> *Olivia Y. v. Barbour*, 351 F. Supp. 2d 543 (S.D. Miss. 2004); 2006 U.S. Dist. LEXIS 39970 (S.D. Miss. June 5, 2006). *Dwayne B. v. Granholm*, 2007 U.S. Dist. LEXIS 28265 (E.D. Mich. Apr. 17, 2007); 2007 U.S. Dist. LEXIS 60412 (E.D. Mich. Aug. 17, 2007); 2009 U.S. Dist. LEXIS 4791 (E.D. Mich. Jan. 23, 2009). *Katie A. v. Bonta*, 433 F.Supp. 2d 1065 (C.D. Cal. 2006); 481 F. 3d 1150 (9th Cir. 2007). *D.G. v. Henry*, 2008 U.S. Dist. LEXIS 33237 (N.D. Okla. Apr. 23, 2008); 2008 U.S. Dist. LEXIS 60885 (N.D. Okla. Aug. 11, 2008), 591 F. Supp. 2d 1186 (N.D. Okla. 2008); 594 F. Supp. 2d. 1273 (N.D. Okla 2009); 2009 U.S. Dist. LEXIS 13739 (N.D. Okla.



Fe. 20, 2009); 2009 U.S. Dist. LEXIS 31820 (N.D. Okla. Apr. 15, 2009); 594 F. 3d 1188 (10th Cir. 2010); 2010 U.S. Dist. LEXIS 28000 (N.D. Okla. March 24, 2010); 2010 U.S. Dist. LEXIS 50333 (N.D. Okla. May 21, 2010). *Sam and Tony M. v. Carcieri*, 610 F. Supp. 2d. 171 (D. R.I. 2010); 608 F. 3d 77 (1st Cir. 2010). *Connor v. Patrick*, 3:10-cv-30073 (D. Mass. Apr. 15, 2010). *Henry A. v. Willden*, 2:10-cv-00528-RCJ-PAL (D. Nev. April 13, 2010).

## SECTION 1

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# A Powerful Route to Reform or When to Pull the Trigger: The Decision to Litigate

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Marcia Robinson Lowry, Executive Director  
Children's Rights

Child welfare is a world fraught with uncertainty, where there are few absolutes, either in decisions or methodologies and where there are more questions than answers. Any child welfare system that hopes to do a good job for the children who depend on it for their safety and well-being must make decisions and take action in a complex environment. The federal government has struggled for years to arrive at defensible outcome measures by which to judge whether a particular system is doing a good job for its children and families. In the midst of all of this there are few, if any, child welfare systems in the country that don't have heartbreaking and deeply troubling stories about children who are harmed – harm that child welfare systems are supposed to be designed to prevent.

Sometimes troubling stories reflect a tragic but largely unpredictable convergence of unexpected factors in an otherwise relatively well-functioning system; at other times a child who is harmed is simply one of many who represent the latest manifestation of known problems in a chronic dysfunctional system.

Concerned administrators, researchers, policymakers, and reformers who hope to affect these systems for the better struggle to improve practice; to come up with model formats for measuring the likelihood of danger to a child and to a child's well-being, and to develop "practice models," which will guide the everyday actions of workers responsible for the lives of children and the fate of families. As these efforts continue, however, the use of litigation to pressure systems into reform is an increasingly common and sometimes increasingly powerful lever to pressure a system into changing its practices.

System reform is delicate and often requires subtlety to bring about change. Litigation, on the other hand, is a particularly blunt instrument to use – but it is without doubt an extremely powerful one. Litigation can legitimately be considered the nuclear option. It usually has a major impact on any system in which it is being deployed. But, litigation must be done carefully and responsibly. Child welfare reform litigation that attempts to reform an entire child welfare system requires a large commitment of resources by the organization that chooses to bring the lawsuit, costing several millions of dollars in staff time, expert and other related expenses, and it also can easily cost the state a similar amount to defend. Few states agree to negotiate an acceptable resolution of the case early in the legal process, particularly if they have engaged a private law firm to defend them, as many do. Thus, it can take several years of intense work before even concluding the first stage – settling the lawsuit with a system-wide and legally enforceable reform plan.

Children's Rights has learned that reaching an acceptable settlement agreement in a child welfare reform lawsuit is only the first step of a protracted process. All too often, the settlement is negotiated by representatives of the state who either:

- have little knowledge about how the system actually operates and, thus, lack knowledge about how much work it takes to change it; or
- are working within a state bureaucratic structure where the child welfare agency is a sub agency of a larger human services bureaucracy without the necessary flexibility to realign or control personnel or budget decisions; or

- will agree to anything that sounds good as a way to end the lawsuit quickly without really thinking through what is necessary to implement the reform measures they agreed to or the time it will take to plan and implement those measures; or
- a combination of any or all of the above.

Given these conditions, Children's Rights' decision whether to bring a system-wide reform lawsuit is a major, multi-year commitment of the organization's time and resources.<sup>1</sup>

Currently, Children's Rights has eight cases it is monitoring to ensure the implementation of comprehensive reform settlements (Milwaukee, Wisconsin; Connecticut; metropolitan Atlanta; Tennessee; New Jersey; Mississippi; Washington, DC; and Michigan); four cases that are in active, prejudgment litigation (Oklahoma, Rhode Island, Massachusetts and Texas); and others under active investigation. Because Children's Rights has been involved in such lawsuits for quite awhile, we give a lot of thought to and have extensive experience in weighing all the factors before concluding that filing a reform lawsuit both is necessary and is likely to be constructive.

We often receive requests to investigate issues that have negative impact on a child welfare system from a wide variety of people, including concerned foster, biological or adoptive parents who have experienced the system's problems firsthand; service providers who are living with the system's problems and sometimes feel stymied by the impediments to providing good services; advocates who witness the impact of the system's problems; former public agency employees who felt they could not do their job given the constraints of the system; state court judges who see the consequences of system failures regularly in their courtrooms; and attorneys and/or Court Appointed Special Advocates (CASAs) who represent individual children in those courtrooms.

We never begin a lawsuit without a thorough investigation that usually lasts six to twelve months. Such an investigation begins with a review of as much available information as exists. Such sources include available public data from federal sources (e.g., CFSRs, PIPs, AFCARS, NCANDS and periodic reports such as Child Maltreatment and the NIS)<sup>2</sup>, state sources (e.g., state policy and procedure manuals), and organizations concerned with child welfare in the state (e.g., advocacy group reports, Citizen Review Boards and CASAs). We also rely on investigations of the child welfare system conducted by a commission or task force, or on a newspaper series that focused on system deficits or heinous cases, etc. At the same time, we give consideration to a new administration that has developed clearly articulated reform plans but that administration may have just assumed office, or to a state that is making significant positive strides through its own initiatives or with technical assistance from an outside source. If the state or city, in spite of these efforts, still looks as if it needs reform that is not otherwise underway, then we take the next steps.

Our investigation of a system where we may file suit includes meeting those people in the state who may have contacted us, and returning frequently to speak to others who are knowledgeable about the system. Our discussions may include talking to direct service providers and collateral service providers, state court judges, foster parent organizations and individual foster parents, biological parents and relatives who have had experience with the system, adoptive parents, legislators, caseworkers in the public and private agencies, attorneys and CASAs representing children in state court proceedings and any citizen watchdog or good government groups that may have taken an interest in child welfare. In all cases we are careful to follow applicable ethical rules so as not to jeopardize either those who speak to us or our own case.

Determining if a lawsuit is both necessary and has a reasonable chance of being successful requires us to examine the following questions:

## ***Is the system demonstrably damaging children and families?***

Investigating the extent to which a system may be damaging to children and families requires us to obtain as much data as possible on that particular system. There is far more data now available about how child welfare systems function, from federal reporting systems and from the state agency's own public reports and website. In addition, we often seek information from the state under its Freedom of Information Act (FOIA).

The data are, of course, quite imperfect, particularly when used to compare one state to another. Although the Department of Health and Human Services (DHHS) requires states to report on certain indicators through AFCARS and defines certain metrics in a uniform way, uniformity in reporting is not examined or reinforced by the federal government. For example, one state's rate of abuse in foster care may be limited to abuse in foster family homes while it excludes abuse in any group facilities, even though that reporting is required. This is the case in Oklahoma. Similarly, some states may include data on child-on-child abuse in foster care and other states may not; some states may include rates of abuse by a parent while a foster child is on a home visit while others may not; some states where their data show a low rate of abuse in care may discourage such reports by, for example, understaffing the state office that receives the reports, or adopting informal policies of not accepting or including these reports in their data as long as the abused foster child is moved from the abusive foster home. Other times, data are not available because there is grossly inadequate monitoring of children's safety. Poorly staffed child welfare systems where workers visit children in their foster homes or other placements infrequently, or do not meet with children privately, are less likely to learn about a child that has been abused. Nonetheless, the federal and state data and the state's own reports are all that are available to review when we are considering whether to initiate a lawsuit. Further, while the state may be doing worse than they are reporting to the federal government, we believe it is fair to conclude that they are not doing a lot better than they report to the federal government.

The data we choose that are relevant to a decision to file a new lawsuit in federal court must meet applicable legal standards that we have to satisfy, both at the point at which the court will evaluate the case to determine whether we have adequately stated claims in support of our legal theories, assuming that the facts we have asserted are true, and at the point of the trial itself.<sup>3</sup> The facts we consider relevant in asserting that children are being harmed in the system we consider suing are:

- **The rate at which children are harmed while in foster care, and how the state compares to other states** – Children's Rights has lawsuits pending in both Oklahoma and Rhode Island, and both states have consistently rated among the five worst in the country with regard to abuse in care. The states' poor ratings reflect a likely number of problems that exist in their systems. DHHS has established an "acceptable" rate of abuse while in foster care. The degree to which a state's rate is in multiples of the federal "acceptable" rate is another indication that the state may be violating constitutional standards.
- **The frequency that children move from place to place within foster care** – In itself, this is another important indicator of harm to children and is an indicator of a child welfare system that is likely dysfunctional in a number of areas. If a state is moving a child from one place to another frequently, this not only damages the child's ability to form significant relationships, it also means that the system is poorly managed, may have too few appropriate placements, may lack adequate services to support its placements and/or have a poor placement matching process.
- **Delay in obtaining permanence** – By both law and public policy, the purpose of a state child welfare system is not to have the state raise children; rather it is to address the child's immediate need for protection, and provide treatment, if necessary. The child should then either be returned to the family, if that can be done safely and appropriately, or if not, be placed in another permanent

placement with either a relative or with a new adoptive family. Failure to do so on a timely basis is another indicator that the system is not doing its job.

- **A high rate of reentry into custody** – A higher rate of children reentering state custody than the federal standard at which children who are returned home then have to reenter state custody, is usually the result of the child being abused or neglected again, which raises questions about a state’s success in reuniting a child safely with his family.
- **Rate of institutionalization** – Research confirms that children generally do better in foster family homes than in institutions. In addition, if a child is going to need an adoptive family, the most likely source for a family interested in adopting is the foster family who already has a relationship with the child. A state that has a high rate of institutionalization, particularly of its young children, is a state that would cause us to be concerned.
- **Use of psychotropic medications** – Data on this issue are very hard to obtain. However, we know that in some states medications are used to control children’s behavior rather than as part of a carefully planned treatment program. So if information on this issue can be obtained before filing, we are very interested in it.
- **Separation of siblings** – There is no federal standard on separating siblings, but for children separated from parents, maintaining sibling relationships is very important for their well-being and future development. If a state is doing a poor job of keeping siblings together, this is yet another indication that the system is not being run in a manner beneficial to children.
- **Children placed far from their homes and communities** – Many states do such a poor job of organizing services and matching children with appropriate placements that children are placed wherever there is a bed, regardless of how far it is from the child’s parents, relatives, school and community. Disregard for a child’s distance from his life anchors is also an indicator of system dysfunction.
- **Number of children “aging out” of the system** – Children who leave foster care just because they have reached the age of majority, and not because they have a permanent family to go to, are truly the system’s failures.
- **Failure to provide children with required medical, dental and mental health screenings and treatment** – This is another indicator that the system is failing to meet the basic needs of the children in its care.

In addition to the child-related factors, we also try to obtain information on other indicators regarding the strength or weakness of a system, such as:

- worker and supervisor caseloads;
- the frequency of worker visitations with children;
- the quantity and quality of worker training;
- the availability of a computerized information system that is generally considered reliable; and
- the use of data to actually manage the system and assess its quality.

None of these factors are dispositive, but all are relevant as we evaluate whether a system is sufficiently in need of reform to require a lawsuit.

We also look at the results of the federal Child and Family Service Reviews to evaluate the systems. Although we find the CFSR process to be far from perfect, it provides further information about some of the relevant variables and the system indicators described above. We do not have any precise formulas by which we apply these factors, but we want to learn as much as possible about them before making the decision to bring a lawsuit.

Within the last two years, we have been contacted by people in two states who are close to the state's child welfare system and who were concerned that well-regarded reform measures were being dismantled because of state budget pressures and because child welfare was not a priority for the new state administration. There are strong indications that these states, which had been doing relatively well on the indicators described above, are likely to decline significantly. However, in both instances, the cutbacks have not yet resulted in declines in services that could be documented. We are closely watching those states.

***Are the system's problems relatively well recognized, and have reform efforts other than litigation already been attempted?***

Because we truly believe that litigation to reform a child welfare system should be a last resort, after other more traditional approaches to reform have been attempted and failed, Children's Rights does not move forward to bring a lawsuit when the problems are not already well known in the state or where potentially beneficial reform efforts are underway but have not yet been given a chance to work. For example, in New Jersey, we did not file suit until after a major report had been issued and ignored. In Tennessee, at the time we filed the lawsuit, several independent legislative audit groups were regularly issuing reports on many system failings, which were routinely ignored. In other states we are currently monitoring, there have been similar circumstances, with the problems well known but not acted upon.

This is important both for the credibility of the lawsuit when it is filed and to emphasize the point that the lawsuit addresses a problem well recognized by the state's citizens but one about which traditional methods of redress have proven ineffective. So it is not uncommon for us to investigate a case and decide the time is not right for a class action lawsuit.

In both Tennessee and New Jersey, we began investigating those state's problems years before filing lawsuits. In New Jersey, our investigation began before then-Governor Christie Todd Whitman appointed a large task force to study foster care problems in the state. At that point, local advocates asked us to await the recommendations of the task force and the governor's response to them. The task force issued an extraordinarily critical report in 1998, yet no action was taken to respond to the report, and Children's Rights filed its New Jersey lawsuit in 1999. Similarly, we were contacted by Tennessee advocates at a point at which child welfare problems were well known, but a major change in the structuring of children's services was being undertaken in an attempt to address those problems. Because of change efforts, local advocates proposed giving the system changes a chance to produce results. Several years later, when little improvement was seen in how the child welfare system was functioning, advocates asked us to bring suit, which we did in 2000.

In another state where we began an investigation several years ago, the problems were so well known that a high level commission was appointed to investigate and recommend reforms. The people with whom we were working asked us to await the results of the commission's work, so we suspended our investigation. The commission reported on the problems and recommended reforms. These reforms were not implemented and we have resumed our investigation.

***Is there a strong local presence concerned with and committed to the need for reform?***

Class action lawsuits aimed at system reform must truly be partnerships to be effective. Therefore, one of the factors we weigh in deciding whether a lawsuit is appropriate is whether there is strong support for this particular approach to reform within the state. This is very important for a number of reasons.

Children’s Rights has the legal expertise to litigate these kinds of cases. But we view these cases more as reform campaigns than as lawsuits, and coalition building on the ground is critical. The lawsuits are played out in the courts, of course, but also in the legislature and the executive branch offices. It is vital for decision-makers in the state and the judge to know that many of the committed citizens of the state support what is, after all, a drastic action with potentially far-reaching consequences.

The availability of interested media is also an important factor. The press is a very important player in keeping the issue in the public eye, reporting on developments in the case when appropriate and, of very great importance, providing editorial board support for the need for reform. In New Jersey, the extensive press coverage of the terrible facts about the New Jersey child welfare system significantly contributed to the settlement of the Children’s Rights New Jersey lawsuit. After the well-publicized death of Faheem Williams, a child who was so neglected by New Jersey’s child welfare system that his mummified body was discovered in a basement, and the release of our expert reports shortly thereafter, then-Governor McGreevey quickly became amenable to settlement, although his administration had been fighting the case up to that point. But the public view about the need for reform had changed, and the lawsuit was there to turn a new and receptive political environment into an extremely beneficial settlement agreement.

### ***Is there a strong leader committed to reform or a weak leader who can be ousted?***

Since our investigations prior to filing a lawsuit are so extensive, the state administration almost always knows at some point that we are considering filing. In most of the last several cases we have filed, we have been asked to meet with the child welfare agency administrator or the key attorneys before filing the lawsuit. In the course of those discussions, we usually are asked not to file the lawsuit but instead to give the administrator the opportunity to address the problems without the distraction, diversion of resources and inevitably hostile environment that a lawsuit can engender.

Our response to such requests is always that we would be more than willing to discuss proposed solutions, but we will only do so in the context of a court-ordered settlement. That is because Children’s Rights never files a lawsuit in a system in which we have discovered problems that are unknown to others. It has been our experience that there is a reason that entrenched problems have not yet been addressed, and it will take a court-ordered and enforceable agreement to ensure that promises, even when made in the best of good faith, are actually implemented.

That’s why the leadership of the executive branch official responsible for both planning and implementing the reform is critical. A weak leader simply cannot get it done, and it is an unusually strong leader who can acknowledge that things are bad enough to justify the court order.

When we meet with and attempt to negotiate a settlement with a strong administration, it frequently becomes clear that the leader does not know how poorly the child welfare system is functioning, a situation most typical when child welfare services are located within a larger human services agency and the strong leader has been focused on managing the more “important” aspects of the human services agency. But child welfare reform litigation focuses attention on the issues, creates urgency to their resolution, supplies the political will necessary to create sustained attention and creates the pressure necessary to provide the additional resources.

As this paper has discussed, thorough examination of all available information that is relevant to file or not to file a lawsuit is essential. If, however, the problems in a particular system are bad enough, and they have been bad for a long time —and litigation should not be considered unless the problems are



bad and longstanding—it is highly unlikely that anything other than litigation will produce the kind of fundamental change the situation demands.

## **ABOUT THE AUTHOR**

### **Marcia Robinson Lowry**

Marcia Robinson Lowry is the executive director of Children’s Rights, the leading national, non-profit organization fighting for the rights of children dependent upon state child welfare systems. Children’s Rights, which Ms. Lowry founded in 1995, protects America’s most vulnerable children using policy, public education, and the power of the courts. Ms. Lowry has dedicated her legal career to protecting the rights of children. Formerly director of the Children’s Rights Project of the New York Civil Liberties Union (1973-1979) and the American Civil Liberties Union (1979-1995), Ms. Lowry has a long history of reforming child welfare systems. She pioneered the first body of law to protect children in foster care, bringing increased attention and public scrutiny to systems that were all but ignored. Her work at Children’s Rights uses litigation or the threat of litigation in conjunction with national and local policy analysts, experts, and government officials to implement realistic, long-term solutions to change the lives of children. These efforts have created concrete changes in foster care systems such as more funding and resources, as well as improved management and better outcomes for children.

## **ENDNOTES**

<sup>1</sup> Children’s Rights does occasionally bring narrower lawsuits, which attack a serious problem having an impact on a large number of children, but one that is more targeted. Examples of that are the lawsuit (*E.C. v. Sherman*) challenging a Missouri statute invalidating adoption assistance subsidy contracts for special needs children and imposing a “means test” for subsidy eligible children, cutting back on adoption subsidies for special needs children; a damages action (*Jeremy M.*) on behalf of a young New York City boy who was one of thousands of New York City children kept in foster care custody despite his custody having lapsed for several years, denying him and his biological mother court review of his status and the opportunity for reunification; and a challenge (*Brian A. v. Bredesen*) to a Tennessee statute that imposed foster care costs against any county whose juvenile court judges committed children to foster care above a preset limit.

<sup>2</sup> Acronyms stand for Child and Family Services Reviews, Program Improvement Plans, Adoption and Foster Care Analysis and Reporting System, National Child Abuse and Neglect Data System, and National Incidence Study.

<sup>3</sup> A lawsuit based on federal claims begins with the state challenging whether the facts asserted in the complaint, taken as true, are sufficient to support the legal claims being made by plaintiffs. If the court finds they do not, the lawsuit can be dismissed. The primary legal argument supporting most of the large-scale, system-wide child welfare reform litigation brought by Children’s Rights is that children in state custody have a substantive due process right under the 14th Amendment to the United States Constitution to be protected from harm while in state custody. The exact parameters of the scope of that protection, beyond the right not to be physically abused while under the protection of the state and in its custody, have not been conclusively determined. But because the legal strength of the case is tested at the beginning of the lawsuit, before formal court-ordered fact gathering begins, plaintiffs must be able to assert enough specific and relevant facts to meet that challenge. So far, the courts have rejected a federal constitutional right to services to keep a child safe in his own home prior to the time the child enters foster care custody, or to require the state to provide services to the child’s family to enable the child to remain at home and out of custody.

# Structuring Litigation-Driven Child Welfare Reform for Success

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## ***Introduction***<sup>1</sup>

I served as child welfare director in Alabama during the first six-year period in which the state's *R.C. v. Hornsby* child welfare case was settled and implemented. After two years of litigation, and on the eve of trial, the parties agreed to begin settlement discussions. Plaintiffs' counsel and defendants sat in a conference room together and said to each other, "So how do we do this?"—meaning design a settlement and determine the chronology of change in the reform. For systems in a similar environment or those undertaking major reform efforts, answering that question will significantly affect success or failure in improving outcomes for families and children.

Even though the period of discovery in the Alabama litigation provided important information about the problems with the system's performance, at the beginning of negotiations neither party felt confident that they knew enough to craft a settlement that would bind the state to strategies that would be in place for years ahead. Plaintiffs' counsel suggested beginning with agreement on a set of practice principles that would ultimately shape an enforceable plan. This led to a practice principle-based settlement that focused on improving practice as the primary means of improving outcomes. That experience strongly informs the content of this paper; however, a number of options to structure a settlement and reform effort for success are explored, which address the systemic change strategies required, the composition of the strategies and the sequencing of implementation. The settlement agreement and subsequent enforceable implementation plan are closely linked, and comments about strategies will not necessarily delineate the distinctions between the two.

## ***The Settlement Environment***

Regardless of the facts of the case, settlement discussions usually proceed with parties in agreement that improvement is needed. However, as a result of the different roles of the parties, there may be considerable differences about how those improvements are to be defined, on what timetable they are to be produced and how accountability will be measured. Plaintiffs have an obligation to secure a remedy as responsive to the needs of their clients as possible and defendants want to retain some level of autonomy and flexibility in implementing the remedy and securing a level of accountability that is within their power to reach.

The facts of the case will significantly affect decisions about the settlement's design and ambition, but the level of trust between the parties and the confidence plaintiffs have in the will and capacity of defendants can also affect settlement terms. While contrary to the natural role of attorneys representing defendants, candor about the nature of system deficiencies and a demonstration of commitment to address those deficiencies on the part of defendants can contribute to greater willingness by plaintiffs to consider some allowance for flexibility in implementation. Admittedly, shifting from a litigation posture to a settlement negotiation can be a difficult transition and the challenge of making this transition should be anticipated.

## ***The Role of Stakeholders***

Understanding the goals and concerns of key stakeholders in the redesign of the system – families, courts and other legal partners, providers, foster parents and other organizations – can greatly facilitate implementation. While it is not practical to include such parties in settlement negotiations, knowing their goals and concerns will be vital in developing an effective implementation plan. In the Alabama reform, we made a mistake in leaving the residential provider organization out of the implementation design process largely out of a desire to have a clear internal vision before we translated it to the stakeholder community. We also had a wish to forestall early mischief making by late adopter providers. While that gave us more confidence that we had mastery of the strategy, as the director of a progressive child and family services agency told me, “...but you prevented us from learning about new approaches to practice along with you.” One lesson was learned from not involving stakeholders like providers, foster parents and legal partners in the frequent meetings with outside consultants who were helping to design the implementation plan. Stakeholders not only could have sharpened the Department’s strategic thinking, but they also might have felt more ownership of the plan. Our job was made more difficult by failing to engage providers early, resulting in a missed opportunity to enlist resisters in the vision of the reform. Maintaining a strategic dialogue with key stakeholders during the design process is critical; child welfare agency reform requires broad stakeholder support.

## ***The Practice Model***

The Alabama settlement contained an early version of what has become known as a child welfare practice model, although the term was not in use at that time. The settlement consisted of a set of clear goals for the system and twenty-nine operating principles taken from mental health system of care and child welfare best-practice literature. Part of the settlement agreement, called Agreement Regarding Implementation, also called for the development of an implementation plan based on the principles, leading to all sixty-seven counties practicing consistent with the principles within an eight-year period. Implementation of those principles, supported by other system initiatives like additional staff, new training, new flexible service resources and better accountability had a transformative effect on operations of the agency and outcomes for children and families.

Practice models or practice principles are now more common, both in agency mission statements and as core elements of settlement agreements. Often, however, they fail to rise above slogan status or are too vaguely worded and poorly understood to be operational. To effectively drive practice, principles need behavioral anchors and need to be given primacy by agency leadership. For example, a principle about teaming has a lot more meaning stated as “Every child and family is entitled to his or her own unique team for planning and decision making” instead of being worded “The agency supports teamwork throughout the life of a case.” Since the Alabama settlement, practice models increasingly revolve around core principles of family engagement, family involvement in planning and decision making, team-based practice, assessment and planning.<sup>2</sup>

There should be an intentional, ongoing process whereby the principles are applied to agency policy, training, service array and accountability measures to ensure conformity with the practice model. Utah’s *David C. Performance Milestone Plan* included a statement of general agency values, accompanied by a specific set of practice standards that the agency used effectively to guide implementation. The evolving policy, training and accountability measures were reflective of those standards and values and led to significant improvements in system performance.

## Sequencing

Knowing the areas where organizational improvement is needed also raises the issue of sequencing the change process. For child welfare agencies facing significant performance challenges related to safety, permanence and well-being, it is likely that many of the following organizational areas will need attention: defining a clear model of practice, high caseloads/workloads, policy content and clarity, human resource management, training, information systems, the service resource array, quality assurance and quality improvement and outcome evaluation. Olivia Golden, former Director of the District of Columbia Child and Family Services Agency (CFSA), noted that decisions about where immediate organizational attention is needed should be responsive to where agency performance is causing the most harm to children. This might involve replacing emergency shelters with family based settings, returning children from out-of-state congregate settings or addressing placement instability. Unfortunately, some of the most pronounced performance challenges are unlikely to be the easiest to fix, so these may not be the best candidates for an early win. To permit early success and begin work on more complex barriers, early milestones will need to involve both.

Weaker systems or systems where the leadership has not inspired confidence in the agency's will and capacity to succeed at the reform may need a much more structured set of settlement expectations than systems with stronger leadership. In such cases, immediate system capacity building may be a higher priority. Unfortunately, the frequent turnover of child welfare leadership doesn't permit unqualified confidence in current leadership, which is why plaintiffs' lawyers are cautious about providing unqualified flexibility in settlement designs. The practice of establishing progressively higher benchmark targets for each subsequent court reporting period seems to be a functional strategy for providing time for capacity building while still holding systems accountable for improving outcomes.

Deciding on what commitments to change are needed, the answer to the questions of where to begin and how to order the change process will be dependent on unique factors in each system. For example, in recalling struggling systems, Leecia Welch of the National Center for Youth Law mentioned examples where systems are unable to perform basic functions, such as providing accurate data on core issues like numbers of children in out-of-home care and placement stability. Obviously it would be essential to find some resolution to such a challenge early in the implementation process.

Upon agreement for settlement there is likely to be a sense of urgency for action by the parties, key stakeholders and political decision-makers to agree to an implementation plan and begin producing improvements quickly. There is danger in making hasty decisions on the provisions of a settlement agreement and in taking on too much organizational change at one time, especially since the system may have limited internal capacity to plan, manage and provide technical assistance. Resources may also be a challenge, limiting the ability to immediately reduce caseloads, build training capacity and expand resources.

As strategies and tasks are developed, attention is needed to deadlines for tasks to ensure that too many task completion dates are not due concurrently or in sequences that are unlikely to contribute to progress, such as initiating foster care recruitment before developing the internal capacity to respond to inquiries promptly and fully. There is a limit to the ability of systems to manage multiple major initiatives at one time and this stress is often magnified when deadlines are an enforceable mandate. Even though the ambition of settlement agreements cannot be limited to current system capacity, it is in no one's interest for a system to fall behind schedule, especially in the early stage of implementation. Whatever the chronology of implementation, settlement language and implementation plans should provide for interim benchmarks of performance which provide clear targets for incremental performance improvement, serve as a motivator for urgent action, measure the effectiveness of organizational change

and demonstrate the achievement of improving child and family outcomes. Olivia Golden found that the court benchmarks applicable to CFSA permitted a shift from the perception of constant failure to opportunities to recognize interim success. As will be discussed later, the unpredictability within the change process merits agreement by the parties for a periodic reassessment of strategies and an opportunity for adjustment.

New Jersey's experience offers one possible option for strengthening the opportunity for well-informed planning. According to Molly Armstrong, who had a leadership role in New Jersey during the development of major revisions to an earlier settlement, systems negotiating a settlement should consider bargaining for time for an initial diagnostic period during which organizational capacity can be assessed before committing to an implementation plan. In New Jersey, the diagnostic period was approximately six months and permitted time to identify system barriers and what would be required to address them. To some extent, New Jersey used the principles in its new case practice model to create placeholders for strategies that needed additional assessment and time to make them thoughtful and functional.

Similarly, the Alabama settlement permitted the initial implementation of new practice to begin in just six counties for a period of experimentation prior to committing to a detailed implementation plan for the entire state. The settlement included specific expectations for the content and specificity of the plan, providing assurance to plaintiffs that deferral of selected commitments would receive proper attention at a later date when more planning information was available. As a result, the Department had the benefit of experimentation in identification of barriers and implementing improvements on a small scale before agreeing to an enforceable plan. This process may not fit all systems, but does provide a mechanism for testing assumptions before making binding commitments.

Both New Jersey and Alabama approached intensive practice reform incrementally, providing training and coaching in additional groups of counties each year rather than trying to introduce new practice simultaneously in all the counties at once. Child welfare systems are not likely to have the training and coaching capacity or resources to strengthen practice and performance statewide in a short time frame. While some areas of performance improvement are so critical that statewide attention is needed immediately, such incremental implementation of front-line practice improvement permits the practice change to go deeper in the organization and strengthens the likelihood of sustainability.

When the court in Utah's *David C.* case decided to replace the original settlement with a new implementation plan (the Performance Milestone Plan), the court directed that the Department utilize technical assistance to develop the plan over a six month period, which permitted the agency six months to craft a detailed implementation plan. That plan, even though it needed revision periodically as experience identified better strategies, remained an effective platform for achievement of settlement objectives and eventual exit.

It is unlikely that all the reform strategies and performance benchmarks specified during settlement discussions or development of the implementation plan will be relevant or constructive in any system after several years of implementation experience. As Grace Lopes, court monitor in Mississippi's *Olivia Y.* case, observed, reform is dynamic and messy. Undoubtedly, this recognition led to the often heard metaphor in system reform of "riding a bicycle while repairing it." It would be worthwhile for parties to build in the expectation that implementation plans and obligations will undergo reexamination and provide for a periodic assessment of how well strategies are working and what changes are required.

Although each system environment will dictate the details of sequencing, there are some elements of the change process that merit a higher priority for early attention. The following sections will discuss the areas where system improvement will most likely need attention, how improvements might be designed and what priority they should have in the chronology of implementation.

## **Capacity Building**

Unfortunately, many child welfare systems dealing with significant performance problems have limited internal capacity with which to create and implement strategic remedies. State budget constraints and pressures to limit the size of the public workforce have in numerous systems reduced the number of staff available to work directly with families. This has affected the central office as well, lessening the capacity to effectively plan strategically, provide technical assistance and manage multiple initiatives. Where front-line capacity is insufficient to address current workloads, settlements often specify maximum caseload size limits, requiring systems to increase the workforce size to permit adequate attention to child and family needs. Ceilings for turnover rates may likewise be prescribed to help address the challenge of high caseloads and staff inexperience. In addition, settlements may also require the creation or expansion of support functions, like training or quality assurance. Whatever caseload targets are adopted, parties should recognize that low caseloads alone do not assure improved practice and outcomes, which is why practice model implementation is so important.

The Alabama experience is instructive in regard to staged workload reduction, an issue particularly relevant where budget constraints are present. In the first year of Alabama's pilot site operations, there were not sufficient funds to support significant staffing increases, even in the six pilot counties. The system leadership made several key decisions that affected workload size projections for the next several years. Since the workforce could not be substantially increased immediately, the leadership decided to first improve the competency and quality of casework of the workforce that existed, concentrating on family strengthening, retraining and coaching strategies like greater family engagement and involvement in decision making, the use of family team meetings/conferences, individualized planning and allocation of flexible funds to pilot counties. Even with caseloads higher than desired, better practice with families and individualized plans supported with flexible funds began to keep more children safely with their own families and permit them to be reunified sooner. Modest caseload reductions occurred and savings in foster care costs were reinvested in system improvements, such as additional staff. Also, a specific "safe-case closure" process was employed to quickly address needs in low risk cases, further reducing caseload size. These steps alone were not enough to meet additional staffing needs but did permit practice improvement to not only begin earlier but also to reduce caseloads and, most important, begin to improve outcomes. The early Alabama experience illustrates the fact that budget constraints can also be an opportunity for long-needed creativity, permitting, for example, attention to interventions and programs that are not successful.

Public child welfare has a history of promoting from within, which while appropriately rewarding good performance and capitalizing on experience in the field, tends to make systems insular. State and county merit system rules can make it difficult for professionals outside the system to compete for employment with existing agency staff. At a time of major system change, agencies need access to new ideas and experiences in different settings that professionals from outside the system may bring.

In addition to addressing human resource rules that may be a barrier to accessing potential employees outside the system, a topic discussed later in this paper, systems inevitably will need some external technical assistance. That was certainly the case at the beginning of the Alabama reform, so much so that the parties agreed in the settlement that the Department would utilize outside consultants to assist in developing and implementing the implementation plan. This provision was particularly helpful in overcoming the resistance to paying "outside consultants" by political decision-makers. In using technical assistance it will be important to ensure that one of the consultant roles is to build internal capacity, not just to perform tasks agency staff are unable to do.

## ***Training and Coaching***

The need for additional and improved staff training is a common problem in child welfare reform efforts and often is focused on family-centered practice, which has various forms from state to state. Training is also likely to be needed in support of other specific areas like permanency initiatives, information system implementation or risk-assessment tools, for example. For systems adopting a practice model of any ambition, significant practice improvement training will be needed.

In assessing the design and quality of training across many states, The Child Welfare Group has found that current child welfare training may be limited in its ability to produce practice faithful to agency models of practice. Training is frequently focused on information and procedure to the relative exclusion of practice skill development, is delivered by trainers that may not yet have mastery of practice model skills, is disproportionately directed to new staff rather than the existing workforce and has not adequately prepared supervisors to mentor the practice desired.

Alabama, Utah and New Jersey are three states working within settlement agreements that focused heavily on training and coaching to build frontline practice skills. Each began with a concrete practice model and shaped training modules based on the natural process of family work – engagement, teaming, assessment, and planning/intervention rather than individual and often disconnected topics. Trainers were thoughtfully selected, and considerable attention was paid to training the trainers in the new curricula. Experienced staff as well as new staff received practice model training. This approach, the considerable training time devoted to each module and the provision of skilled coaching led to meaningful gains in practice quality and improved outcomes for children and families. In a more recent development, Los Angeles County Department of Children and Family Services is similarly responding to obligations under the *Katie A.* settlement, developing an ambitious practice model and planning for training and coaching in the same fashion. The lessons learned regarding training and coaching in these reforms can be instructive to other systems undertaking settlement implementation that involves building skills and competencies.

Coaching also is essential for new practice to become sustainable. Classroom training alone is not sufficient to assure that skills are effectively applied in work with families. Coaching development can be directed at supervisors, since this is a natural role. However, supervisory responsibilities must be adjusted to permit supervisors to have the time to coach new practice with actual children and families. Some systems designate full-time coaches who can mentor engagement, assessment, team facilitation, planning or other skills. Language in settlement agreements should directly address training content, trainer competency and coaching expectations.

## ***Human Resources***

Human resource/personnel issues and system policies are frequently overlooked barriers to reform. Responsibility for personnel policy may lie outside the child welfare agency but regardless of its placement, it is essential to enlist the human resource leadership into planning for the development of an effective child welfare workforce. Classifications may need to be changed, performance expectations will need to respond to obligations under the settlement and recruitment strategies may need adapting to respond to a need for diversity, different staff values and skills. One example of a system human resource barrier involves the need to recruit parent coaches to help other parents and foster parents deal with child behavioral issues. Because of the unavailability of “qualified” professionals, who had to meet professional licensing standards, the agency was unable to meet caregiver coaching needs. The credentialing criterion prevented the agency from using paraprofessionals and parent partners (who were

thoroughly trained) for this role, despite the fact that it is common practice in other systems. In a successful human resource intervention, Utah's Department of Child and Family Services (DCFS) revised the performance expectations for its staff to match the practice requirements of their practice model and Qualitative Service Review (QSR) design. This provided congruency between the practice model and frontline casework.

In Alabama, the settlement agreement contained a provision directed at addressing potential barriers that might be posed by the state's personnel system. That provision, which was never formally invoked but was occasionally referenced in discussions with recalcitrant personnel officials, read as follows:

*If necessary to address staffing needs identified in the Implementation Plan and/or to acquire staff needed to assure compliance, defendant may modify state government administrative requirements, especially those imposed by the state personnel system. When he determines that it is necessary to exercise his authority under this paragraph, defendant shall give prior notice to the State Personnel Director as soon as practicable, so as to give the State Personnel Director the opportunity to obviate the necessity for defendant's action.*

While there are limitations to the applicability of this language, the provision did prove helpful in addressing unnecessary personnel policy impediments to implementation.

## **Policy**

There is often early attention to creating conforming policy that is intended to guide compliance. Here, too, caution should be observed in not issuing policy materials or instructions to the workforce too soon. Where new practice and approaches are concerned, testing processes through practice should lead policy, not vice versa. As a general principle, the practice model should inform the content of policy. For example, if the practice model promotes individualized planning, does policy on flexible funding permit the creative design of interventions? If a form of family teaming is to be employed, does the reimbursement system for providers permit them to be compensated for participation in team meetings? When practice expectations cannot be met because of policy constraints, staff can easily become convinced that the leadership's vision for improved practice lacks conviction.

Several colleagues who were interviewed about this issue suggested that new formal policy development should be tested for practicality and fidelity to the practice model at the office or county level after training and coaching is completed. Molly Armstrong noted that in an interim environment, necessary minimal policy guidance should be issued by memorandum before incorporating it into official policy manuals. Utah's DCFS, for example, developed a simple practice guide that incorporated the primary guidance for practice model performance, which was a more accessible and flexible tool than the formal policy incorporated in administrative rules.

## **Service Array**

Assessment prior to settlement agreements may identify service gaps as a barrier to achieving desired outcomes. An insufficient number and diversity of family foster care resources is a common barrier, but more specialized services like trauma-informed therapy, home-based services and substance abuse treatment are also found to be in limited availability in many jurisdictions. Resource development should be a well-supported part of settlement agreements and implementation plans, but child and family needs should be clearly understood before committing financial resources to new services. The



*Brian A.* settlement in Tennessee addressed this issue in a novel way through a provision in which the Department agreed to set aside a specific sum annually for service expansion, with guidance on its use to be provided and assessed annually by a Technical Assistance Committee (TAC). The TAC conducted several initial annual needs assessments after which the Department assumed the function. That process permitted a more deliberate analysis of service needs, and as a periodic event, it allowed the system to adapt to changing needs over time.

In Tennessee's first needs assessment, the TAC found that rather than major gaps in services being the greatest impediment to better outcomes, the lack of a clear, functioning model of practice was a crucial barrier. As a result, the first TAC needs assessment recommended the creation of a well-articulated practice model, new practice model training and coaching and the use of additional dollars as flexible funds to be available to individualize child and family plans. As implementation of the settlement continued, other needs were identified in later years, such as supports for transitional age youth.

In some cases, litigation identifies specific areas where service deficits have led to poor outcomes. In Tennessee's *Brian A.* settlement, another novel remedy involved educational advocacy. Prior to the settlement, the state had many children who resided in group homes, attended in-house schools in small facilities and were provided insufficient resources to meet their educational needs. It was not unusual for the children living in group homes to have been expelled from local public schools because of the education system's strict disciplinary policies. In many group homes, the educational programs were inferior to public schools. A settlement provision resulted in hiring educational specialists and attorneys trained in educational advocacy to help the Department assure that the children's educational rights were protected. Another provision required that any congregate care in-house school meet state educational standards.

In Alabama, getting providers to the point where the flexibility to tailor services to individualized plans is available when needed involved a combination of close partnership, incentives and accountability. An important result of this transition to flexible funds and intensive home-based services was that the significant sums the Department had been spending on frequently ineffective office-based counseling and therapy declined significantly in favor of individualized, home-based mental health supports.

Procurement rules often focus mainly on ensuring fair competition, absence of conflicts of interest and a defensible vendor selection process. If procurement policies involve a protracted process before awarding contracts or lead to selecting poor quality providers, implementation can stall and outcomes will suffer. Regardless of the service expansion needs, part of the design of settlements, or at least implementation planning, should address the ability of the child welfare system to execute new service contracts quickly and creatively, and to be responsive to child and family needs.

### ***Quality Assurance and Quality Improvement***

The growth and capacity of child welfare information systems has permitted child welfare agencies to track performance for hundreds of indicators, ranging from the frequency of visits with children and families to the timely receipt of health services. In many systems, performance can be reliably tracked to the individual caseworker level, meaning that compliance monitoring can identify conformity with policy at the worker, supervisory, office and system level on a regular basis. Unfortunately, the ability of systems to determine what is most important to track lags behind the capacity for comprehensive monitoring, leaving systems vulnerable to overwhelming staff with compliance monitoring and unintentionally creating a rigid compliance-based culture of practice. Because such compliance-driven practice cultures result in rules being the ceiling for performance rather than the floor, they tend to drive out the more effective approach of "whatever it takes" that many practice models attempt to create.

The growth of quality measurement in child welfare, beginning with the Qualitative Service Review (QSR) process developed as part of the Alabama settlement, has provided important additional tools for assessing outcomes and system performance. The QSR has provided persuasive feedback for many systems about what is working, or not working, and why. It was a core element of both the Alabama and Utah settlements. The caution, suggested earlier, is that in employing these advances in monitoring compliance, assessing practice quality and evaluating outcomes, some balance should be struck among the demands to act on feedback from data sources. Utah is a state that due to its original settlement agreement committed to track approximately 180 different agency policy and procedural obligations. This proved to be impossible due to the volume of issues to be tracked and drove staff to see compliance rather than practice and outcomes as their most important job. Noonan, Sabel and Simon, in a study of the monitoring issues before and following the Development of Utah's Milestone Plan, noted regarding the original 180 obligations, "But a monitoring system that reports failure from all directions cannot direct efforts to improve."<sup>3</sup> When the original settlement agreement was replaced by a new practice model-driven/outcome focused settlement plan, the parties agreed that the state would be held accountable for many fewer case process measures and would add QSR findings and a limited number of outcome measures as exit conditions. This permitted Utah to focus more intensely on core issues, demonstrate improved outcomes and, ultimately, exit court oversight.

### ***Measuring Outcomes***

An additional caution should be heeded related to outcome measurement. Decisions about the outcomes to which the system should be held accountable should largely be based on what knowledge is needed to achieve needed outcomes, not on federal measures alone. Federal measures, while useful, provide an incomplete picture of performance. For example, in the Los Angeles County *Katie A.* settlement, the parties considered the federal measures in identifying outcome indicators to be tracked but selected measures that differed in some ways from federal measures, especially in the methodology used. Most of the *Katie A.* outcome measures are based on annual entry cohorts, and stability measures used both entry and exit cohorts to capture the universe of children subject to measurement. Obviously states have to conform to federal reporting requirements, but if the settlement is to be successfully implemented, systems shouldn't default to them exclusively. Development of outcome measurement capacity may need to be an explicit provision of the settlement agreement if internal capacity is insufficient. Parties may choose to include specific provisions related to building technical expertise, transfer of successful applications from other systems, use of consultants, or the sequencing of data collection.

In the Los Angeles settlement, which has a member class of children with mental health needs served by the child welfare system, an unintended statutory barrier became an obstacle to effective tracking of class members. Language in confidentiality statutes prevented the child welfare and mental health systems from sharing databases to identify and track the outcomes of children served by both systems. The barrier was solved using the federal court, which approved a stipulation between the parties permitting such cross referencing. As a result, outcomes for the class could be effectively tracked. Such a provision would have been helpful if contained in the settlement agreement had parties been aware of the confidentiality restriction at the time.

### ***Exit Conditions***

In structuring settlements, exit terms should be included in settlement language if negotiations permit. To the extent that the parties have clarity about the results to be achieved, implementation strategies

will be more relevant to their achievement. Utah's experience offers support for this argument. During negotiations on the Performance Milestone Plan, there was agreement on the process measures, qualitative indicators, implementation strategies, outcomes to be measured and the goals to be achieved as a condition of exit. Utah built their plan on their practice model and "taught to the test" to achieve the objectives. The *Brian A.* settlement agreement in Tennessee also contained explicit performance and outcome benchmarks that informed implementation planning and formed clear exit expectations.

As is the case with implementation plans, exit conditions may need adjustment over time as progress and implementation experience present new facts about system performance. For that reason it would be helpful to build into settlement agreements a process for the parties to revisit exit conditions after a period of implementation. Based on recent experience in several systems negotiating exit, it is likely that further adjustments will be made in exit discussions between the parties once settlement provisions have been substantially achieved.

One other approach in the Utah settlement provided an acknowledgement that exit standards reached years before might not have the same relevance today and that some exit targets may not have been fully based on tested and reliable standards. This somewhat controversial provision, which was created in part based on the experience of other court monitors, permitted the court monitor to inform the court and parties, assuming that certain achievements had been reached, that system performance was "close enough" to exit standards for the monitor to recommend exit consideration to the court. The level of performance needed to exercise this option was high and required significant duration and was specifically described in the enforceable plan.

### ***The Role of Leadership***

In even the most wisely crafted settlement agreement, achieving the objectives of the agreement is highly dependent on the quality of leadership exercised by defendants. The Child Welfare Group has worked in a number of systems operating under settlement agreements or pursuing voluntary reforms where passive, poor or antagonistic leadership in the public agency has slowed or stopped progress. There is no shortage of guidance in leadership literature about the characteristics of effective leaders where qualities like vision, accountability and empowerment are frequently referenced. However, an important lesson about leadership came from a staff member during one of the more stressful periods of the Alabama reform. One day, a staff member stopped me to ask if something was wrong. When I told her there was nothing wrong and inquired why she asked the question, she replied that I had been frowning. When I reassured her that nothing was happening to cause concern, she said, "You know we watch you all the time."

The most successful leaders I have observed, in addition to employing many important leadership practices relevant to all organizations, modeled with their language, attention and presence that the success of the reform was among the most important obligations for everyone in the organization. In addition to attending to conventional management duties, they accompanied staff on visits, sat in on family team meetings, participated in qualitative reviews and sought opportunities to engage families, frontline staff and stakeholders in solving the challenges of implementation. This interaction with practice not only signaled the importance with which they viewed frontline practice, it also informed them about the system challenges that needed attention at the management level. They knew staff were "watching them all the time" and took the opportunity to show staff that applying the practice model principles and achieving good outcomes for families and children was the most important part of their job.

## Conclusion

The experience of systems involved in settlement agreements described in this paper highlight some key lessons regarding the content of settlement agreements and their implementation. Those are:

- Candor about the problems faced by the child welfare system can enhance the possibility of reasonable state flexibility in implementing the settlement.
- Seek opportunities to assess the crucial areas of poor performance before committing to long-term strategies.
- Ensure that organizational capacity is not overwhelmed by having to complete numerous task deadlines that occur simultaneously.
- Provide for progressively more ambitious outcome expectations and benchmarks annually to permit opportunities for success throughout implementation.
- Define exit conditions through a balance of case process, practice quality, and outcome measures, all of which reflect the intent of the practice model.
- Provide for periodic examination of implementation strategies with agreement on the process that parties should employ for revising strategies that are not being effective.
- Employ a well-articulated practice model rooted in values and principles, with principles behaviorally anchored for clarity, to guide implementation.
- Attend to resource development needs by targeting service gaps where known and setting expectations for continuous refinement of the service array.
- Anticipate the need for the human resource functions to respond to implementation challenges, and create a placeholder to pay attention to human resource barriers.
- Involve key stakeholders in developing the implementation plan to help identify potential barriers, develop more effective strategies and enlist resistors in the vision of reform.
- When addressing capacity building, attend to central office capacity as well as skills and workloads of the frontline staff.
- Ensure that skill development is supported by providing training and coaching to all staff in the practice model content, and by paying attention to fidelity and results.
- For leaders, model the importance of the reform in the field by participating in implementation at the local level.

## ABOUT THE AUTHOR

### Paul Vincent

Paul Vincent is the director and founder of The Child Welfare Policy and Practice Group, a nonprofit technical assistance organization created in 1996. The Child Welfare Group directs its technical assistance toward improving outcomes for children and families through strengthening front-line practice. Current work involves child welfare systems in New Jersey, Florida, Pennsylvania, New York State, Tennessee, California and Virginia. Work in these systems includes strategic planning, curriculum development, training, front-line practice coaching and practice evaluation. He also leads the organization's participation in the provision of technical assistance in systems involved in class action litigation, such as in Los Angeles, where he serves as Chair of the *Katie A.* Advisory Panel in California, Tennessee, where he serves on the *Brian A.* Technical Assistance Committee. The Child Welfare Group was also court monitor in Utah through its exit from court oversight. Prior to the creation of The Child Welfare Group, Mr. Vincent was the director of Alabama's child welfare system during a period of successful class action litigation-driven reform, from 1989 to 1996. He was awarded National Association of Public Child Welfare Administrators' Annual Award for Excellence in Child Welfare Administration in 1994.

## ENDNOTES

<sup>1</sup> The content of this paper is significantly based on the author's experience as Director of Alabama's child welfare system during a period of child welfare class action litigation and 15 years experience providing technical assistance to localities and states, nine of which were involved in settlement agreements and in court monitoring/advisory roles in Utah, Los Angeles, New York City and Tennessee. Interviews with Molly Armstrong, formerly in a leadership role in the New Jersey child welfare reform and now with Public Catalyst; Leecia Welch, attorney for the National Center for Youth Law; Grace Lopes, currently monitor in the Olivia Y. case in Mississippi and experienced in many class action environments; Olivia Golden, former Director of the District of Columbia Child and Family Services Agency and now with the Urban Institute; Marcia Lowery, Director of Children's Rights, Inc., and George and Genie Taylor of The Child Welfare Group contributed richly to the content of this paper.

<sup>2</sup> A more complete description of the practice model concept may be found at <http://childwelfaregroup.org/resources.html>

<sup>3</sup> Kathleen G. Noonan, Charles F. Sabel, & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOC. INQUIRY 523-568 (2009).

# Role of Foundations in Child Welfare Litigation

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Steven D. Cohen, Chief Program Officer  
The Annie E. Casey Foundation

Foundations and nonprofits focused on improving public systems that affect disadvantaged children and families have played a substantial and evolving role in class action child welfare litigation over the past two decades.<sup>1</sup> This role has not, as might be expected, involved large sums of money nor has it taken the form of direct support for litigation.

Instead, these actors have entered discussions concerning litigation as informed neutrals who can help the parties in any or all of three ways:

- by facilitating negotiations that lead to settlement of the litigation;
- by providing and/or funding technical assistance to the jurisdiction after settlement; and
- by acting as the court's monitor, reporting on the jurisdiction's progress in implementing provisions of the settlement agreement, and sometimes also helping to mediate disputes between the parties after settlement.

These possibilities arise first and foremost from pre-existing relationships. In New York City, for example, individuals at the Annie E. Casey Foundation were well known by both plaintiffs and defendants as a longstanding lawsuit (*Marisol v. Giuliani*) neared trial in the late 1990s. Plaintiffs believed that the foundation shared their commitment to large-scale, sustained system reform. Defendants believed that foundation staff and consultants, who had themselves led child welfare systems, knew how long it takes to achieve reform and could be a credible source of advice as they encountered the problems that are inevitable with any effort at system change.

It was this credibility with both parties that made it possible for the foundation to assist in crafting a settlement that both sides could live with. That settlement included the establishment of a panel that would both offer technical assistance and publicly report on the city's progress. Although the circumstances and the nature of the agreements have varied widely across sites, the basic pattern of nonprofit actors entering at the request of both parties and helping to fashion a settlement has now been repeated in multiple jurisdictions, including Tennessee, New Jersey, State of Washington and Michigan. In most but not all of these jurisdictions, the settlements have included some kind of continuing role for these outsiders, as a provider of technical assistance, a monitor or both.

This role, repeated across multiple jurisdictions, has helped shape a rough consensus among the individuals and institutions involved about the strengths and weaknesses of class action litigation. On one hand, litigation is a powerful tool for compelling government attention to systems that all too often fail to attract the support they need to be successful. The issue is not simply that a lawsuit may produce a significant increase in funding for child welfare, which is often a necessary condition for progress (for example, to reduce caseloads to a manageable level), though money alone is never sufficient. Time is at least as important as money, in two ways. First, child welfare systems under court order routinely get more attention and support not only from the chief executive, but also from other parts of government they depend on, such as the budget office and the personnel department. Second, settlements compel some level of consistency over the many years typically needed to achieve lasting change. When a new elected official replaces the governor or mayor or county executive who agreed to the settlement, she cannot indulge in the all-too-familiar routine of reversing all of her predecessor's reforms and starting over.

There is, however, a significant constraint that, unchecked, will tend to limit the value of litigation over time. Defendants typically promise in settlements to do many things over many years. Some of these will turn out to be absolutely essential to reform; some will be very important, but trying to do them prematurely before other changes are in place will prove unsuccessful; and others may turn out to be unimportant or even counterproductive. No one can confidently predict in advance which reforms will fall in which categories. But a legal agreement is by its nature relatively inflexible; both parties want to know clearly what the government agency is required to do and when they are required to do it. Settlements can accordingly create a “dead hand” effect, in which child welfare leaders focus on compliance with the terms of an agreement signed many years ago rather than on those changes likeliest to lead to improvement in the future.

This challenge has helped shape the role of foundations and other nonprofits involved with child welfare litigation. In brief, their efforts to help promote successful reform have included the following elements:

- They have helped fashion settlements that include a mechanism for adjusting requirements in light of changing conditions. While these changes are occasionally formalized as revisions to the settlement agreement, they much more often involve informal agreements among the parties, in consultation with a technical assistance or monitoring body trusted by both sides.
- They have helped to fund expenditures that are difficult for government to undertake. Examples include taking system leaders to visit jurisdictions that have made substantial progress at reform, and making available the help of consultants with particular expertise more quickly and flexibly than would be possible if a government agency was contracting with those experts.
- They have directly provided technical assistance through their own staff and consultants (for example, by sending people with expertise in the recruitment of foster and adoptive parents to work with a jurisdiction at foundation expense).
- They have lent their own credibility to reform when local efforts have justified doing so, which is perhaps most important. Government agencies, especially those that have performed poorly in the past, are often viewed cynically by the media and the public – and this may be true nowhere more than in child welfare where news coverage is typically limited to periodic uproars when a tragedy occurs in a family known to the system. And even a system that is making good progress is sure to lag in some areas. When a respected and neutral party sends the message that the overall pace and direction of reform are positive, it buys time for system leaders to continue their efforts.
- They have, conversely, been able to facilitate attention to the need for more vigorous efforts when an outside monitoring or technical assistance body has lost confidence in a reform effort. They also even may facilitate a leadership change more rapidly than might otherwise occur.

Along with these contributions, some challenges that accompany the role of foundations and other nonprofits in child welfare litigation should be noted.

- The line between advice, monitoring and control can be blurred. When knowledgeable outsiders, in a role authorized by the court, offer their suggestions, are system leaders free to reject them? Must the advice be revealed to the plaintiffs? If the system doesn’t make progress in the areas involved, will their failure to heed the advice be used against them? This delicate issue can make it difficult for the people involved to build and maintain the trust they need for a productive working relationship.
- Under the best of circumstances, philanthropic partners can help build productive working relationships among the stakeholders in a system (for example, the government agency, private providers, and advocates). Under the worst of circumstances, stakeholders can attack those parts of a reform effort they dislike by claiming that they are really being imposed by outsiders – and it may be politically advantageous for government leaders, who are under pressure from plaintiffs and the monitor to produce results, to back this claim.

The other papers in this series speak in far greater detail about these challenges, along with the many others that are inevitable when litigation challenges a complex system like child welfare. The nonprofits

who have been involved in this work are heartened by the significant progress made by several such systems over the past decade, and continue to believe that outsiders can play a useful role in supporting system reform in the context of litigation.

## **ABOUT THE AUTHOR**

### **Steve Cohen**

Steve Cohen is Chief Program Officer at the Annie E. Casey Foundation. In this role, he works with the President of the Foundation in developing a strategic direction and ensuring that the Foundation's programmatic efforts are consistent with that direction. He also leads the team of Foundation staff working in the areas of research, evaluation and knowledge services. Mr. Cohen joined the Foundation in 1999, and his work there has included leading a variety of efforts to further the reform of child welfare systems affected by class-action litigation. He previously worked in senior management positions at the Jewish Board of Family and Children's Services in New York City, and in the child welfare and juvenile justice agencies in New York City government. He holds a Master's in Public Affairs from the Woodrow Wilson School at Princeton University.

## **ENDNOTES**

<sup>1</sup> Notably the Annie E. Casey Foundation; Casey Family Programs; the Center for the Study of Social Policy; and the Child Welfare Policy & Practice Group.



# Reflections on the Role of the Monitor in Child Welfare Litigation

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Andy Shookhoff, Attorney and former Juvenile Court Judge (Nashville)

*And some kind of help is the kind of help  
That helping's all about.  
And some kind of help is the kind of help  
We all can do without.*

— Shel Silverstein

## **Introduction**

Most child welfare system reform class actions that survive a motion to dismiss or a defense motion for summary judgment ultimately result in a court order (usually entered pursuant to a settlement agreement) requiring the child welfare agency to take specific actions, commit to specific improvements in system performance, and/or achieve certain outcomes. Frequently, these court orders (or their subsequent modifications) also provide for the appointment of a person or persons charged with monitoring the agency's performance and regularly reporting to the parties and to the court on the extent to which the agency is meeting its obligations.<sup>1</sup>

In some cases, the monitoring role is limited to information gathering and factual reporting on compliance. In other cases, the monitor is also expected to make recommendations to the parties and/or the court; to provide advice and technical assistance to the agency; to help develop, review and/or approve implementation plans or corrective action plans; to "flesh out" or resolve certain matters relegated to the monitor to decide and/or to mediate disputes between the parties.

Even when explicit responsibilities of the monitor are narrow in scope, effective monitoring requires more than simply providing the parties with periodic reports on whether or not the agency is meeting the expectations of the court decree. Especially during the early stages of a court ordered reform effort, when everyone recognizes (or should recognize) that compliance will not come quickly or easily, what the parties and the court need to know most from the monitor is whether the agency is taking appropriate steps to address the system's weak performance areas and is making reasonable overall progress toward compliance.

- Has the agency developed strategies designed to bring about the improvements envisioned by the court decree within a reasonable amount of time?
- Is the work on the various requirements of the court decree prioritized and sequenced appropriately and resourced adequately?
- Are the strategies implemented having the intended effect?
- Are there additional or different strategies that the agency might want to consider?

As work proceeds, effective monitors frequently assume additional responsibilities (whether explicitly provided in the court decree or not), including facilitating discussions between the parties, mediating disputes, and providing expert advice and technical assistance.

Child welfare system reform is always a difficult, multi-year effort, even when conscientiously pursued and ultimately successful, and it generally involves false starts and setbacks. The work can span changes in political administrations and in agency leadership, and these transitions can pose special challenges. Even when parties consistently work in good faith, concerns surface, perspectives differ, and disputes

arise. A monitor who has the confidence of the parties and the court can help keep the energy and resources constructively focused on the hard work of the reform and assist the parties in making adjustments to accommodate new circumstances and unanticipated developments. An effective monitor can help minimize the need for the parties to have further adversarial proceedings, which drain time and resources.

This paper draws on the collective wisdom of experienced participants in system reform litigation – lawyers, agency administrators, judges, and those who have served as monitors to provide guidance on how to increase the likelihood that monitoring in these cases will be helpful. Too often monitoring is perceived as ineffective and inadequate by plaintiffs’ attorneys trying to secure improvements promised by the court decree and as oppressive and unhelpful by agency administrators struggling to reform a troubled system. If structured properly, however, and carried out thoughtfully, the monitoring function can (and should) assist both the parties and the court in ensuring that the improvements envisioned are achieved.<sup>2</sup>

### ***Understanding the different perspectives of the parties***

In most cases, by the time a monitor is appointed, the agency leadership and the plaintiffs’ counsel have expressed a shared commitment to system improvement and have agreed on general principles to guide that improvement. However, the relationship between the parties at the outset of any court ordered reform (even one resolved by a settlement agreement) is typically characterized by antagonism, mistrust, and disagreement. This makes the early stages of the monitor’s work particularly challenging. Understanding each party’s perspective regarding the monitor’s role is essential both to be able to shape and respond to each party’s expectations regarding the monitor’s role and to carry out the monitoring responsibilities effectively.

#### **■ Plaintiffs’ perspective on monitoring**

For lawyers who represent the plaintiff class, the appointment of a monitor is seen as a necessary and important component of responsible client representation. Even when the agency, by signing a settlement agreement, acknowledges that its child welfare system is performing poorly<sup>3</sup> and commits to system improvement, plaintiffs’ lawyers often view the system as functioning far worse than the agency does and are skeptical of the agency leadership’s abilities to turn the agency around without additional expertise, guidance and support, and without continued external pressure.

Plaintiffs often worry, with good reason, that the agency’s strategic planning capacity is inadequate for broad system reform and that the agency’s data, which is required to accurately assess the present level of system performance and track improvement over time, is unreliable.

At the time that a settlement agreement is being negotiated (whether prior to trial or at the remedial stage of a case or as an effort to resolve a subsequent enforcement action), plaintiffs’ lawyers have generally invested significant time, energy, and resources in garnering evidence of poor performance sufficient to make their case in a court hearing. Once an agreement is entered and the agency is provided time to implement reforms, the plaintiffs’ evidence can become “stale.” Plaintiffs’ counsel are, therefore, concerned about ensuring that they will remain informed about the progress of the reform effort and that up-to-date information will be readily available should subsequent proceedings be necessary to enforce the settlement agreement.

From plaintiffs’ perspective, the appointment of the monitor helps address these concerns. The monitor provides an independent, ongoing external assessment of the reform effort based on

relevant accurate data and informed expert analysis. The plaintiffs' attorneys look to the monitor to "keep the pressure on" and to provide candid feedback to the agency (and discourage the wishful thinking about performance that the lack of accurate data often permits). To the extent that progress is inadequate, the monitor's reports can provide plaintiffs the up-to-date evidence and expert opinion that they need to go back to court for an enforcement action.

Plaintiffs' lawyers generally have fairly straightforward expectations for monitoring in the period immediately following the entry of the settlement agreement. They want the monitor to: establish a functioning "office" and create a monitoring plan (a description of the anticipated monitoring activities and timelines for carrying out those activities, and for submitting reports to the court and the parties); assess the current state of agency performance and establish "baseline" data against which the agency's progress can be measured; and take steps to ensure timely reporting on any specific actions or results that are required to be achieved in the first year following the entry of the settlement agreement.<sup>4</sup> Because the level of trust between the parties is generally low in the first year or two of a settlement agreement and because the monitoring approach is just being established, plaintiffs' lawyers generally seek more frequent contact with the monitor in the first year, including both formal meetings and informal conversations, in addition to the regular reporting that is contemplated in the settlement agreement.<sup>5</sup>

Plaintiffs' lawyers want the monitor to share their sense of urgency about having the agency meet the first determined "deadlines" (the term plaintiffs tend to use) or "target dates" (the term agencies prefer). They look to see how quickly and closely those early requirements of the settlement agreement are being monitored and how the monitor responds, both in advance of a deadline (when there are indications that the agency may not meet the deadline) and when an early deadline is missed.

The plaintiffs' lawyers also view the first monitoring activities as indicators of the competence and conscientiousness of the monitor with respect to gathering and reporting information. Plaintiffs' lawyers want the monitors to demonstrate a certain doggedness and compulsivity in their approach to data collection and a level of thoroughness and precision in their reporting.

#### ■ **Agency's perspective on monitoring**

For the state agency administrators and the lawyers representing them, the appointment of a monitor is generally seen, at least initially, as the lesser of evils. Appointing a monitor is better than appointing a receiver who would have direct administrative control over running the agency, and better than appointing a special master, who would be exercising active, ongoing judicial oversight of and authority over the agency. For the agency, however, the appointment of a monitor is not as good as simply being trusted to carry out the agreed upon reforms without additional external oversight. As a matter of principle, agencies often object to monitoring as an unwarranted encroachment by the courts on the authority of the executive branch.<sup>6</sup> In addition, in the period immediately following the entry of a settlement agreement, the agency leadership generally faces challenges, which ideally they would like the monitor to help them meet, but which at a minimum they hope the monitor will not add to.

Even when the monitor's role is limited to reporting on the agency's progress, the monitoring function is nevertheless intrusive: the monitor is generally given broad access to agency personnel, agency records and documents; and the information-gathering process, even if sensitively handled, involves a certain amount of disruption, distraction, and additional work for the agency. Having an "outsider" with that level of access who reports independently and publicly can be unsettling.

While the monitor may not have authority to tell an agency what to do, the monitor's reports can be (and often are) the basis for plaintiffs' counsel seeking more active court intervention, and the findings and opinions of the monitor are often relied on by the court. The monitoring reports also frequently generate media coverage, focus public attention, and invite political scrutiny of the agency. The agency is, therefore, naturally going to feel under some pressure to respond to the findings, opinions, suggestions, and sensibilities of the monitor, all of which can give rise to a sense (and accompanying resentment) that the monitor is trying to run the agency.

In most cases the agency leadership, by signing a settlement agreement, has committed the agency to an ambitious reform effort which, if it is going to succeed, requires broad "buy in" by the agency staff and by other stakeholders, including the private providers with whom the agency contracts for services and placements. Those agency leaders involved in the negotiations leading to a settlement agreement have settled on principles that will guide the agency and they have hammered out provisions consistent with those principles. They have a context for understanding the reasoning behind the provisions and, while recognizing that some provisions are the results of compromise, generally embrace the settlement overall as appropriate for the agency and good for the children and families they serve.

Negotiations that lead to a settlement agreement, however, are generally confidential and, therefore, most of the agency staff and external stakeholder groups regard the terms as being imposed upon them—developed without any input or feedback from them. While many staff will welcome the reform, inevitably some staff (including some in leadership and management positions) will not. And even for those who embrace the reform in principle, making the changes that the reform demands of them is often quite challenging. Similar mixed reactions to the reform are likely among members of other "stakeholder" groups (foster parents, private providers serving children though contracts with the state agency, juvenile court personnel).

For this reason a significant amount of time in the first year of the reform has to be spent on orienting staff and stakeholders to the contemplated reform, dealing with the range of responses—concern, confusion, anxiety, excitement, resistance, resentment—and getting sufficient "buy in" to move forward. At the same time, the agency leadership has to develop an "implementation plan" with both short-term and long-term targets laying out concrete steps (including tasks, timelines, persons responsible, and resources) for improving system performance and meeting the requirements of the settlement agreement.<sup>7</sup> A settlement agreement may contain goals and timelines for certain actions, but the sum of its provisions is not an implementation plan, and without such a plan—without a roadmap for getting the agency from its current practice to where practice needs to be—struggling child welfare systems tend to spin their wheels.<sup>8</sup>

An implementation plan is particularly challenging to develop if the agency lacks access to reliable data. While federal requirements have resulted in all states having capacity to produce some aggregate data, most systems that find themselves the subject of child welfare litigation struggle to produce data that can help drive a reform effort. In the first years of a reform, the agency has to figure out what data it can produce and use in the short term to guide the work and what data it ultimately needs to produce (and how it is going to do that).<sup>9</sup>

While the plaintiffs' lawyers look to the monitor to pressure the agency, the agency hopes that the monitor can serve as a buffer and provide the agency some breathing room in the early months of the settlement. During the initial few months it is not unusual for the agency to discover that it was overly optimistic about what it would take to meet some of the early timelines.<sup>10</sup> The agency looks to the monitor to be reasonable and realistic in what can be accomplished, to be more flexible and

accommodating of the agency in carrying out monitoring activities and to be more forgiving of early shortfalls in agency performance as long as the agency leadership is making good faith efforts and taking reasonable steps to move forward.

Finally, the agency also looks for the monitor to validate the agency and its reform effort to the public. As discussed in the next section, the agency's credibility with the media, with stakeholders, with political leaders and, thus, with the general public is generally quite low at the time of the settlement agreement, and the statements and assurances given by agency leadership tend to be viewed with skepticism. The agency may, therefore, have a hard time persuading the public both of the wisdom of the principles, policies, and practices embraced by the settlement agreement and of the competency of the agency leadership to carry out the reforms. The agency expects that the monitor's first public pronouncements, coming from an external, objective child welfare expert or panel of experts, will endorse the substance of the reform as being the right thing to do and will express some level of confidence in the agency leadership as the right people doing the right things to lead the reform.

- **Understanding the public context in which monitoring occurs**

The monitor's formal relationships are with the parties and the court; however, as just discussed, there is a broader public context in which monitoring occurs. That context both informs the monitor's relationship with the parties and requires some consideration of the monitor's relationship with various stakeholder groups.

Media coverage that generally accompanies (and sometimes precedes and encourages) child welfare class action litigation raises public awareness of the child welfare agency's failures, frequently by highlighting particularly tragic child abuse and neglect cases. Legislators who have a particular interest in children's issues or who serve on committees with budget or oversight responsibilities for the child welfare system express concern, call for action and often convene public hearings. Representatives of child advocacy groups and child-focused professional organizations weigh in. Public employee unions or associations see potential benefits and potential risks to their members and seek to position themselves accordingly as do private providers who contract with the child welfare agency. In the midst of public outcry, and with political leaders and representatives of stakeholder groups pressing their perspectives both publicly and behind the scenes, the challenges the monitor faces become more complex.<sup>11</sup>

At the same time that the monitor establishes his or her relationship with the parties, the monitor may receive requests and inquiries from the media, from legislators and from stakeholders and their representatives, who want information from and/or to share information with the monitor (and perhaps persuade the monitor to adopt their point of view on a particular issue). This can further complicate the relationships with the parties (who may each worry that someone they perceive as antagonistic might gain influence with the monitor). It can also create a controversy around the monitor, if a stakeholder, having failed to persuade the monitor to take some position, decides to try to publicly discredit the monitor.

In general, effective monitors provide opportunities for stakeholders to share concerns, experiences and opinions, and use stakeholder perspectives to inform their monitoring. Not only does that kind of communication identify areas for further, more formal monitoring, but it provides valuable information about the political climate surrounding the reform and the kinds of issues and concerns that may be important for the monitoring report to acknowledge or address.

The changes required by court-ordered reforms generally involve some shift in practice approach that creates new expectations and opportunities for stakeholders, and the potential for some stakeholders to benefit at the expense of others. A requirement that children not be placed in congregate care settings, unless the services they need only are available in that more restrictive environment, will provide opportunities for those private agencies that specialize in the recruitment and support of foster families, and create special challenges for those who are heavily invested in group homes and residential treatment centers. Adoption of a family team conferencing model for case planning and decision-making may be received enthusiastically by foster parents who relate easily to birth parents and want to be more involved in the process, but may worry foster parents who are uncomfortable meeting and interacting with birth parents. A practice approach focused on increased utilization and support of relative caregivers and kinship foster homes may be well received by some juvenile court judges but be resisted by judges who believe that “the acorn does not fall far from the oak tree.”

Monitors can help the parties think through ways to communicate the rationale behind the new policies and practice approaches and ways to help support stakeholders who want to make the shift. The monitor also can include in monitoring reports a discussion of the rationale for particular provisions of the court order and steps the agency is taking to help stakeholders adjust as a way to support buy-in for those stakeholders who are open to it and provide measured and thoughtful responses to those who are resistant.

Effective monitors generally make it a practice to express their findings and opinions through written reports and, by doing so, are better able to “remain above the fray.” Like a good umpire, they maintain both their objectivity and the appearance of objectivity.<sup>12</sup> If stakeholders understand the constraints relating to public comment under which the monitor is operating and at least feel assured that the monitor values their input and will use the information received from stakeholders, they are more likely to have a positive view of both the monitor and monitoring process.

Interactions between the monitor and legislators require some special consideration. Legislative support is often critical to the success of the reform effort. Not only is the agency dependent on the legislature for the financial resources to do its job, statutory changes may be required to remove barriers or create new options. There are certainly circumstances in which it is important for monitors to speak informally with legislators, and there may be some situations in which appearing before a legislative committee would be appropriate.<sup>13</sup> There is, however, general agreement that the monitor’s role is not one of legislative advocacy. Even if both parties lobby the legislature for funds to allow the agency to meet its commitments and want support from the monitor, the monitor should resist taking action that would undermine his or her stature as an objective source of information and assessment.

### ***Effective reporting on progress toward compliance***

The parties generally expect the monitor to develop a “monitoring plan” that sets forth how the monitor proposes to assess and report on compliance, what methods the monitor intends to use to gather data, what the intended time frames are for gathering and reporting data and how and with what frequency the monitor will communicate with the parties.

The most effective monitors structure their data gathering and reporting responsibilities in a way that supports, rather than distracts from, the reform effort by aligning monitoring activities with the agency’s implementation plan. In addition, effective monitors are often able to facilitate communication and mediate disputes between the parties and, thus, reduce the likelihood of further litigation.

### ■ **Gathering data to determine current level of compliance**

Monitors typically have a range of methods available to gather the information necessary to meet their reporting responsibilities, including:

- utilizing aggregate reports produced by or for the agency or drawing upon the aggregate data-reporting capacity of the agency to produce additional reports;
- conducting independent case reviews or drawing upon reviews conducted by the agency or by others assisting the agency;
- receiving briefings from and attending meetings with agency leadership and key staff;
- reviewing minutes and other materials generated from key agency committees, work groups or task forces;
- attending meetings of stakeholder groups, convening focus groups and/or conducting surveys;
- conducting site visits to local field offices; and
- receiving and reviewing complaints and referrals from stakeholders and the general public.<sup>14</sup>

Most settlement agreements recognize the importance of the agency having reliable and accessible data to understand current performance and track improvement and of having its own quality assurance process by which the agency monitors its own performance and identifies and responds to problems.<sup>15</sup> Nevertheless, it is not unusual for the parties at the time of settlement to be overoptimistic about what the agency's database and quality assurance processes are capable of producing, and the monitor often finds that the information that parties believed the monitor could easily access and rely on for reporting is unavailable, inaccurate or both.

Ultimately, a monitor must be able to report to the parties and to the court on the agency's compliance with each settlement agreement requirement; however, in developing the monitoring plan, the monitor should have the ability to prioritize and sequence the initial information gathering and reporting, and to make some decisions about the level of precision that the initial reporting requires. It is certainly important for the monitor to have some "baseline" understanding of the current state of agency performance at the outset, but that does not necessarily mean that the monitor should promptly gather extensive data on each and every provision of the settlement agreement.

There are a number of considerations that should guide monitors in deciding how to focus resources in the early stages of the reform effort, how to sequence reporting on particular provisions, and what information is sufficient to establish a "baseline" understanding.

*How important is the information to the agency's current management needs? Is the information that the agency already has, as incomplete or imprecise as it might be, sufficient for the agency's current purposes? Is there anything that the agency would do differently at this point if it had more complete or more precise information?*

For example, a settlement agreement might set a maximum caseworker caseload limit of 20 children and require face-to-face contacts with each child a minimum of two times a month. If caseloads are at 40, and the agency concedes that until caseloads are down to 20, significant numbers of children are not going to be visited regularly, there is little value to knowing precisely how infrequently children are being visited. If the agency has a plan to reduce caseloads by hiring more workers within a reasonably ambitious period of time, the focus of the monitoring should be on the extent to which the hiring plan is being implemented, and on ensuring that there is a process in place to track and report caseloads. Once the agency has reduced caseloads and is at a point at which workers can be reasonably expected to visit children with the required frequency, allocating resources to generate data on worker-child visits is important.

*Is there a dispute between the parties about whether the agency is presently complying with a particular provision?*

If the parties have very different views or beliefs about the current state of compliance with a particular settlement agreement requirement, it may be important for the monitor to gather information and weigh in on that issue. If the agency admits that its present performance with respect to a particular provision falls significantly short of compliance, however, there may be little value in the monitor expending time and resources to generate additional information to confirm that admitted non-compliance.

*How much precision is required to determine compliance?*

Precision is generally less important when the agency is not close to compliance. For example, if the agency is required to ensure that in 90 percent of cases, workers are visiting their children at least twice a month, a rough measure that establishes that twice-a-month visits are occurring between 20 percent and 50 percent of the time initially may be a good enough compliance measure. As agency performance gets closer to the required 90 percent, the precision of the monitor's measure becomes more important. Precision about levels of non-compliance also may be important when the agency is implementing strategies designed to improve performance and the monitor needs to be able to measure the impact of those strategies.

- **Aligning the monitoring plan with the implementation plan**

An agency taking on significant system improvement cannot succeed without a sound implementation plan that sets forth goals, objectives, strategies, actions steps, timelines, persons responsible, resources required and mechanisms for tracking implementation, measuring progress and adjusting and making appropriate course corrections in response. Monitoring and reporting on each settlement agreement provision can provide information on the level of present compliance, but in the early stages of the reform effort, it is the monitoring of the implementation plan—reporting both on the adequacy of the plan itself and the manner in which it is being carried out—that allows the parties and the court to know whether the agency is taking actions reasonably designed to bring about compliance.

While the plaintiffs and the monitor can provide valuable input into the planning process and valuable feedback to the agency, the implementation plan must be the agency's plan. If the agency cannot embrace the plan as its own or if the agency feels the plan is imposed on rather than generated by the agency, it is unlikely to be effectively implemented. For this reason the monitor must be skilled in providing helpful and candid feedback while avoiding the temptation (and often the invitation) to co-author the plan. The monitor provides a valuable function in thoughtfully questioning the agency, identifying areas in which the plan seems weak and, particularly, in scrutinizing how the agency will measure its progress and the impact of its work as the plan is implemented.<sup>16</sup>

The monitor should help an agency avoid the temptation to be overly optimistic about what it can achieve in the first year. It is much better to underpromise and overperform immediately following a settlement, than to be overambitious and face the consequences of a year of shortfalls and missed deadlines (consequences that include both diminished credibility with the plaintiffs and the public, and damage to staff confidence and morale).<sup>17</sup>

It is also important for the agency to experience some early success, and the monitor should, therefore, urge the agency to identify and include some things in the plan that are both substantively



significant and achievable within a relatively short period of time. Experiencing some success in the first year of the reform is key to creating momentum for change.<sup>18</sup>

Monitoring is most effective (and least disruptive) if the monitoring plan can be aligned with the implementation plan and if monitoring activities are structured and carried out in a way that supports the internal management needs of the agency and helps build the agency's capacity to meet those needs. If the monitoring appears to require activities, expend resources and produce information for purposes of "compliance reporting" that does not also serve some important purpose for the agency itself, and if the burdens of the monitoring activities exceed the value of the information to the agency, something is wrong. Either the agency is neglecting something that it should find important, or the monitor is pursuing something that is a waste of time and resources.

Monitoring activities that take agency staff away from their primary duties and require them to gather information by pulling files, by hand-collecting data or by compiling collections of existing reports may at times be necessary. The information, however, frequently can be more efficiently shared with the monitor by providing the monitor and the monitoring staff direct access to information, rather than have the agency staff "pull it together." When monitoring is efficiently organized and well integrated, the monitor and monitoring staff: have the ability to log into the agency's automated data system; have access to shared computer drives regarding a variety of relevant functions and reports; are included on agency list serves and distribution lists; and have the opportunity both to sit in on meetings and observe, and to receive and review minutes of meetings.<sup>19</sup>

- **Balancing the view from the top with the views from the field**

As important as it is to integrate the monitoring activities with the agency's own processes and to take advantage of existing structures to interact with agency staff, the data and information that are most readily available to the monitor tends to be quantitative data collected by the agency's central office, and the opportunities for regular interaction with staff that are most easily available are with the central office management staff. As a result, there is a danger (particularly in the early stages of monitoring, when interaction with the agency leadership and orientation to the agency's policies, management processes and information systems demands much of the monitor's time and attention) that the monitor's view of the agency's reform effort will be insufficiently informed by perspectives and experiences of managerial and frontline staff in the local field offices.

In many struggling child welfare systems, a major obstacle to successful reform is the dysfunctional relationship between the agency's central office administration and the regional or county offices where the critical day-to-day interactions between the agency staff and the children and families they serve take place. Implementation plans that seem clear, well reasoned and appropriate when described by the agency leadership who have developed these plans, are frequently unclear to the field staff that must ultimately carry them out. The plans, especially in the early stages of the reform effort, often fail to take account of or adequately address legitimate concerns of those in the field. As reforms proceed, things may seem to be going much better from the leadership's vantage point than it does from the vantage point of local staff. The leadership may feel positive about having successfully revised policies, created new forms, and improved the data system; however, the field staff may perceive the revised policies as unclear, unwise or unreasonably time consuming, may feel the new forms add time but little value to their work, and may find the data system slow to access, cumbersome to use, and/or prone to crashing. The agency leadership and central office staff may have "bought in" to the reform, but the view from the field, which has seen lots of "initiatives" come and go, is frequently more skeptical.

It is natural that agency leadership wants the monitor's view of how the reform is going to coincide with its own and will be most comfortable when the monitor is focused on the agency's message and its quantitative data. But it is ultimately the quality of the day-to-day interactions of workers with children, families, foster parents, and helping professionals that ensure that children are safe, healthy and able to develop and succeed. Unless the monitor has some sense of how the field is experiencing the reform—what is getting better, what is getting worse, what is working well, what is not, what is helpful and what is burdensome—the monitor will be unable to credibly comment on this critical aspect of successful reform.

Effective monitors frequently utilize periodic site visits to local offices as a way of gathering information from the field. These site visits generally include meetings or focus groups with local management, line staff, foster parents, local contract providers and representatives from local advocacy groups, birth families and members of youth advisory boards.<sup>20</sup> In a number of systems, the reforms have included implementation of a Quality Service Review (QSR) as a part of the agency's own quality assurance process. Some monitors find that participating in some capacity in these reviews provides additional opportunities for informative interactions with field staff and local stakeholders.

When site visits are skillfully handled, field staff and local stakeholders generally appreciate the monitor's interest in their perspectives, welcome the opportunity to share their concerns and embrace the principles of the reform, even if they are worried or confused about some of the ways in which the agency leadership is going about turning those principles into practice. From these site visits the monitor is often able to gain insights that can help the agency leadership better understand the view from the field and respond in ways that advance the reform.<sup>21</sup>

#### ■ **Facilitating communication and mediating disputes**

One of the most useful functions that a monitor can serve is to provide an orderly and efficient process for the parties to share information, raise and respond to concerns and resolve disputes.

Whether facilitating meetings between the parties to discuss progress or responding to concerns, requests for updates or for follow-up on particular matters, a monitor who has the trust and confidence of both parties can help plaintiffs get the information they need without unduly burdening the agency staff and can help limit the use of the more formal (and ordinarily less efficient) communications through lawyers.<sup>22</sup>

Many settlement agreements contemplate a role for the monitor in situations where concerns or disputes regarding compliance threaten to bring the case back into court. Even in cases that provide no specific requirement that the monitor mediate such disputes, effective monitors often serve that function.

Developing the level of trust from both parties, which is essential to effectively serve as a facilitator and mediator, is no small challenge. In general, even if, as in most cases, the monitor has been selected by agreement of the parties, there is a tendency, especially in the early period of monitoring, for the agency to view the monitor as more closely aligned with the plaintiffs.<sup>23</sup> That perception is frequently reinforced by the first monitoring report, which no matter how much it acknowledges the work of the agency, brings increased attention to the shortcomings of agency performance and the significant challenges ahead. There is a natural defensiveness that agency leadership and staff feel when a report is released, even if they do not dispute the findings and even if they share the concerns described in the report.

While the agency may value the advice and insights of the monitor, unlike a technical assistance provider who takes on an agency as a client the monitor is ultimately responsible for objectively reporting to the parties and the court. There are, therefore, always conflicting impulses of candor and caution that affect interactions between agency staff and the monitor.<sup>24</sup>

At the beginning, the monitor can lay the groundwork for a good working relationship with the parties by being transparent and open,<sup>25</sup> by communicating frequently, by being responsive to questions and concerns and by meeting the expectations established by the monitoring plan. A monitor's ability to effectively facilitate discussions and resolve disputes generally increases over time as the parties become more comfortable with and confident in the monitor.

### ***Appreciating the dynamics within the executive branch***

Although for purposes of the discussion thus far, it has been convenient to refer to the parties as "the plaintiffs" and "the agency," the actual defendants are generally the governor<sup>26</sup> and the chief administrator of the agency.<sup>27</sup> As a legal matter, they present a single "agency" position (determined by the governor and ordinarily represented by the state attorney general); however, even under the best of circumstances, there are tensions and conflicts inherent in the relationship between the governor (who is responsible for all of the executive branch agencies) and the agency administrator (who is competing to some extent with other agencies for time, for attention and for budgetary support from the governor).

The governor tends to be most involved at critical points of a court ordered reform. These critical points may include: the decision to settle or go to trial (either initially or when contempt proceedings are imminent), when significant budgetary issues arise and when the political stakes are high (including times when the agency is receiving a lot of bad publicity). In most other circumstances, the governor relies on the agency director to do his or her job. Thus, while at times a monitor may interact with the governor or members of the governor's staff, during a reform effort the monitor works most closely with the agency director and his or her leadership team.

In some cases the governor enthusiastically embraces system improvement as a top administration priority, appoints a competent and well-respected commissioner or agency director who shares this enthusiasm and enjoys a good working relationship with that person. In such situations there is less danger that conflicts will emerge between the governor and agency administrator that might result in the monitor being asked to align with one or the other. However, the monitor may be put in such a position when the relationship is not as strong, and almost certainly when the governor is dissatisfied with the agency administrator or the agency administrator is dissatisfied with the governor.

Effective monitors try to be cognizant of and sensitive to the dynamics within the executive branch. They try to avoid being put in situations that compromise their ability to maintain trust and credibility with both the agency administrator and the governor and their leadership teams. In some situations the agency administrator may enlist the monitor's support for additional state funding for the agency, or the administrator may simply seek some positive statements from the monitor to bolster the governor's confidence in the administrator, or the governor or the governor's staff may seek input from the monitor in decisions about whether the administrator should be replaced.

Monitors usually prefer to focus their reporting on the quality of the agency's plans, the conscientiousness with which the plans are being carried out and the extent to which the anticipated results are being achieved. They try not to have direct involvement in the internal negotiations

between the governor and the agency administrator. There are times, however, when it is appropriate to provide a candid assessment of the agency's leadership, whether in support of the administrator who is not getting what is needed from the governor to succeed, or in support of replacing the agency administrator who has become a major obstacle to successful reform.

### ***The challenges of a change in administration***

Court ordered child welfare reforms are multi-year efforts, and the agency is likely to experience at least one change in leadership, and often more than one change during the reform time period. Even within political administrations there may be more than one agency administrator, and when there is a change in political administrations, retaining the agency leadership of the previous administration is rare.

Change in agency leadership, particularly a change that accompanies a change in political administrations, brings its own set of challenges. Often a settlement agreement embraced by the leadership of a previous administration feels like it is being imposed on the new administration, even when the settlement agreement enjoyed bipartisan political support when it was entered and its requirements are generally viewed as reasonable and appropriate.

Even when the new administration ultimately adopts the reform as its own, some degree of discontinuity and some period of orientation are necessary before that happens. If the change in administration occurs early in the reform effort, before significant progress is evident, before the new policies and practices fully take hold and while proponents of the old policies and the old practices are still in positions of influence within the agency and among stakeholders, the new administration is more likely to be inclined to re-examine the settlement agreement itself and the actions taken by the previous administration.

On the other hand, if the change in administration occurs years into the reform effort, the agency has experienced considerable success, been well received publicly and by key stakeholder groups and the new policies and practices have taken hold throughout the agency, the new administration is likely to continue to support the reform.

The monitor, both through formal reports and through direct contact with the new leadership, can help orient the new administration to the current status of the reform and can provide a more objective history of the reform and the work done by the previous administration than representatives of the previous administration. When there is a good faith effort between the departing leadership and the new leadership to ensure a smooth transition, the monitor can play a useful role in supporting that transition.<sup>28</sup>

### ***Structuring and supporting the monitoring function***

#### **■ Single monitor or monitoring panel**

Among the approaches to selecting the monitor represented by the orders in cases are: a single monitor agreed on by the parties or selected by the judge if the parties cannot agree; a two-person monitoring team, with each party selecting a member of the team; a three-person team with each party selecting a member and those two selecting the third; a monitoring panel selected by the parties, sometimes with each party having a certain number of "picks," and sometimes with each party's selection being subject to veto by the other party.<sup>29</sup>

There are some potential advantages to having more than one person serving as a monitor. Well-constituted monitoring panels provide a range of experiences and expertise that one is unlikely to find in a single monitor. Having more than one person responsible for monitoring can make the selection process easier by allowing each party to select one or more panel members (even if subject to veto by the other party). A party might be more willing to “take a chance” on accepting the other party’s nominee than they would if the nominee were going to be the sole monitor.<sup>30</sup> The parties and the court also may be more confident in and comfortable with findings and recommendations that represent a consensus of a number of experts with different backgrounds and perspectives rather than the judgment of a single individual.

To be effective, multi-person monitoring teams have to work well together. There are challenges to organizing, allocating responsibilities and maintaining communication among the members of the panel and to coordinating meetings and producing reports.<sup>31</sup> Unlike single monitors, multi-person monitoring teams need to reach the consensus necessary to “speak with one voice.”<sup>32</sup> In addition, even when the monitoring body has reasonably good message discipline in public, there is always a risk with a multi-person team that people will interpret even chance remarks by a team member (during a phone conversation, in an email or in the hall following a meeting) as a view that represents the monitoring team generally.<sup>33</sup>

While there are panels that function efficiently (benefiting from division of labor and the ability to draw from internal expertise), panels can take longer to convene, respond, and report. Compensation for members’ time and travel expenses also can make panels more costly.

The advantages of greater expertise gained from monitoring panels are not necessarily sacrificed when the monitoring function is vested in a single individual. In some cases a single monitor chosen to serve in the monitor role is associated with a policy institute or consulting group that provides ready access to colleagues with a wide range of relevant expertise. Even when a single monitor does not have that kind of organizational affiliation, the monitoring provisions of the settlement and/or the contract supporting the monitor’s services ordinarily allow the monitor to retain additional experts if needed.

- **Providing staff and resources to support the monitor**

To effectively carry out their responsibilities, monitors generally need both staff support and an ability to engage expert consultants if aspects of the monitoring requires or would benefit from the input of persons with special expertise. Monitors who are employed by or affiliated with a policy center, academic institution or consulting group may be able to leverage administrative support and additional expertise from their organization and provide a level of cost effectiveness that a monitor without an organizational affiliation might find more difficult to provide.<sup>34</sup>

Some settlement agreements anticipate the development of a close working relationship between the monitor (and monitoring staff) and the quality assurance division of the agency and may even envision the monitoring staff being absorbed into the agency’s quality assurance unit as the agency moves toward exit. In at least one jurisdiction monitoring staff are agency employees who, while selected by and working under the direction of the monitor, are now functioning in many respects as an integral part of the agency’s overall quality assurance process.

## ■ Monitor qualifications

### *Relevant child welfare system practice*

A person who has little familiarity with child welfare law and policy and practice is likely to have great difficulty being an effective monitor. While relevant child welfare system experience alone does not mean that a person will be an effective monitor, the parties and the court expect those serving as monitors to have some child welfare expertise. Whether the settlement agreement simply makes reference to the monitor “having appropriate qualifications” or specifies the expertise to be represented on the panel – “at a minimum (1) a former public child welfare administrator, (2) a child welfare researcher, and (3) an expert in children’s mental health . . .”— generally the expectation is that those serving as monitors will have child welfare experience.

### *Philosophical agreement with the underlying principles of the settlement agreement*

The monitor may not need to agree with the wisdom of every settlement agreement provision, but a monitor should feel comfortable with the principles the settlement agreement embraces.

### *Previous monitoring experience*

Previous monitoring experience is not essential; however, a person being considered to serve as a monitor needs a good understanding of the responsibilities that he or she will be assuming, the range of activities monitors are ordinarily asked to perform, to be involved in or to oversee and the time demands and pressures of the work, which those who are new to monitoring frequently underestimate.

### *Evaluation skills*

Those who serve as monitors should have experience with evaluation. They have to be “data savvy” and comfortable with a variety of evaluation and monitoring methods (aggregate data analysis, case file reviews, focus groups, survey instruments). They must be able to present information and analysis in a coherent written report.

### *Good interpersonal/social skills*

A monitor can be great with data, wonderfully analytical, and a skilled technical writer, but if the monitor lacks good interpersonal skills, the monitor is going to have limited effectiveness. A monitor should have: the ability to relate easily and to communicate effectively with a range of people, possess good active listening skills, have sufficient ego strength to work with people with strong personalities (lawyers, agency leaders, judges, legislators) and sufficient self-confidence to be able to remain “above the fray” when tensions mount and conflict escalates.

### *Facilitation and mediation skills*

As previously discussed, effective monitors tend to be called on to facilitate discussions and resolve disputes even if they are not formally expected to by the settlement agreement. While monitors need not be certified mediators, effective monitors should have the problem-solving skills and even temperament that are characteristic of good mediators.

### *Understanding and sensitivity to the political context of child reform*

Monitors are responsible for conscientiously gathering data and providing accurate information and reasoned expert opinion to the parties and the court, but monitors also function in a broader political context. By understanding and being comfortable with functioning within that context, effective monitors are better able to remain above the political fray and ensure that their work is not misused or misconstrued to undermine or distract from the reform work.

### *“Intangibles”*

Almost everyone who is asked about the characteristics of a good monitor makes reference to “intangibles.” Some of these “intangibles” relate to personal integrity, some relate to interpersonal style and some relate to the level of professional commitment to improving the experience of children and families.

### **Conclusion**

Those with significant experience in child welfare system litigation can cite some cases in which the parties and the court have found the work of the monitor extremely helpful and can cite other cases where the monitor’s work fell short of what the parties had hoped. It is from those experiences, good and bad, that the reflections in this paper have been drawn. By better understanding the monitor’s role and the issues and challenges discussed in this paper, those who are tasked with drafting a monitoring provision in a court decree, selecting a monitor, and/or serving as a monitor can help ensure that monitoring is positive and productive.

In the end, however, as important as it is to structure the monitoring role thoughtfully and select the person or persons to fill that role carefully, it is good leadership, well-trained staff, adequate resources and just a heck of a lot of hard work day in and day out that ultimately brings about the improvements sought by child welfare class action litigation.

### **ABOUT THE AUTHOR**

#### **Andy Shookhoff**

Andy Shookhoff, a practicing attorney and former Juvenile Court Judge of Davidson County (Nashville), Tennessee, has been a progressive and effective advocate for children and families for over three decades. Shookhoff presently chairs a panel of national child welfare experts that provides technical assistance and monitoring in *Brian A. v. Haslam*, a class action brought on behalf of children in Tennessee’s foster care system. As a legal aid attorney and law school professor, Shookhoff represented children, parents, foster parents, grandparents and others in every kind of legal proceeding involving children. He was involved in more than twenty precedent setting cases in the juvenile law field, including a number of class actions on behalf of children in state custody, and was the principal author of three amicus curiae briefs filed by the American Bar Association in the United States Supreme Court in cases raising juvenile justice issues.

During his eight year tenure as Juvenile Court Judge, Nashville’s Juvenile Court earned a national reputation for innovative collaborative early intervention efforts with schools, health care providers, social services agencies and community groups. Shookhoff was honored as 1996 Judge of the Year by the National Court Appointed Special Advocate Association; and the National Council of Juvenile and Family Court Judges designated the Davidson County Juvenile Court as a “Model Court” for its handling of child abuse and neglect cases—one of only thirteen juvenile courts in the country at that time to receive that recognition.

As Associate Director of the Vanderbilt Child and Family Policy Center from 1998 through 2009 and now as a consultant for the Center for the Study of Social Policy, Shookhoff has continued his focus on child welfare and juvenile justice issues, including working on two national foster care initiatives: the Jim Casey Youth Opportunities Initiative, a youth driven project focused on improving child welfare policy and practice for youth transitioning from foster care to adulthood;

and Fostering Results, a policy initiative to improve outcomes for foster children and their families through more flexible federal financing of child welfare services and better judicial oversight of child welfare cases.

## ENDNOTES

<sup>1</sup> The terms designating the person or persons serving the monitoring function vary. Some orders (and this article) use the term “monitor” or “monitoring panel;” others use such terms as “accountability expert,” “oversight panel,” “technical assistance committee” and “advisory panel.”

<sup>2</sup> Because most of the child welfare class action cases that have resulted in court ordered systemic reforms have ultimately been resolved by settlement agreements, this paper discusses monitoring in the context of cases resolved by settlement agreement. However, much of what is discussed is equally relevant to the role of the monitor in cases in which the monitor is appointed by the court as part of a remedial plan ordered pursuant to a contested hearing rather than by agreement of the parties.

<sup>3</sup> This acknowledgement is at least implicit, even if the settlement agreement contains language that notwithstanding the settlement, the agency is not admitting any statutory or constitutional violations.

<sup>4</sup> These first-year requirements generally include addressing areas about which plaintiffs had raised serious, immediate safety concerns but otherwise focus on more “foundational” or “structural” improvements.

<sup>5</sup> Not only is the level of trust between the parties low during the first monitoring period, but in many cases, even when the parties have agreed to the person or persons selected as monitor, the parties are worried about how much they can trust the monitor to meet their respective expectations. The parties’ early contacts with the monitor and the initial activities undertaken by the monitor, therefore, take on heightened significance, and early steps taken by the monitor to orient him or herself and organize the work may become a test of credibility for one party or the other.

<sup>6</sup> Some cases, rather than providing for a monitor, have “monitoring provisions” that simply require the agency to periodically provide the plaintiffs’ lawyers with certain designated reports or updated information. Plaintiffs’ lawyers, especially those who have experienced the challenges of “monitoring” implementation of a court-ordered reform without a “monitor,” generally reject these kinds of provisions as impractical—verification of the information they receive from the agency is difficult, and corroborating that information and staying current on developments (and on the relevant experiences of the plaintiff class) often requires time and resources comparable to that spent initially developing the case.

<sup>7</sup> Settlement agreements typically include a mix of requirements: some structural improvements (e.g., increased salaries, reduced caseloads, revised training, improved data system, revised policies); some process requirements (e.g., implement case-planning process, hold periodic case reviews, improve the monitoring process for private contract agencies); and some outcome targets related to safety, permanency, and well-being (e.g., re-entry and repeat maltreatment rates, time to reunification or adoption, achievement levels for children aging out of foster care).

<sup>8</sup> For this reason many settlement agreements specifically provide time for developing an implementation plan after entry of the settlement agreement (and often include provisions for review and approval of the plan by the monitor and/or the court).

<sup>9</sup> Often the agency is limited in its ability to generate accurate data on its current level of compliance with the provisions of the settlement agreement from its existing databases.

<sup>10</sup> It is almost inevitable that some terms and timelines of the settlement agreement will prove to be overambitious: sometimes the agency agrees to provisions, based on inaccurate assumptions about current agency practice or capacity; sometimes unanticipated developments affect the agency’s ability to perform; and, sometimes because the agency has made the judgment that settlement is far better for the agency and the children and families it serves than going to trial, the agency agrees to provisions or timelines that it doubts can be fully achieved but sees as necessary to settle the case.

<sup>11</sup> While the plaintiffs frequently benefit from media coverage, there is always a danger that stakeholders or politicians with agendas not necessarily aligned with those of the plaintiffs may try to take advantage of the public outrage. Whether consciously or instinctively, plaintiffs’ counsel, not inclined to be “outflanked,” may be harsher about the agency in their public pronouncements and less forbearing about timetables for action during the first months of a court ordered reform—precisely the time when the monitor would hope to help the parties develop a decent working relationship. The agency leadership, feeling under siege on multiple fronts, may become even more convinced than they would be otherwise, that plaintiffs’ lawyers do not understand how complicated the work is and are more interested in scoring points against the agency than helping the agency improve. And, both the plaintiffs’ lawyers and the agency will tend to form their initial impressions about the monitor’s capabilities based on how thoroughly the monitor adopts their respective points of view.

<sup>12</sup> It can be challenging when stakeholders who candidly share their perspectives with the monitor want the monitor to be equally forthcoming in discussions with stakeholders about the monitor’s perspective. It is appropriate and often important



to share basic factual information about the court decree, explain (but not as an advocate might) the reasoning (to the extent that it is clear) behind particular policy choices of the court decree, and share information about the monitoring process to help stakeholders understand the monitoring role. Lawyers who serve as monitors tend to feel quite strongly about restricting public comment to written reports; non-lawyer monitors tend to be more open to responding to substantive questions from representatives of the media and to participating in public conversations.

<sup>13</sup> Because legislators themselves have a wide variety of interests, relationships and motivations, a monitor should not necessarily assume that any call from the legislature or legislative staff is a straightforward inquiry aimed simply at ensuring that legislators are well informed. Especially when there is a highly partisan atmosphere in the legislature or when an election is approaching and candidates and potential candidates are positioning themselves, monitors must be careful to avoid participating in public events that are more about scoring political points than about thoughtfully examining child welfare policy and practice. In most cases, effective monitors are able to find ways of avoiding these situations if they see them coming. While declining an invitation to speak at a public hearing can be a sensitive matter, most legislators respect the separation of powers and are able to understand that because the monitor's position is judicially created, the monitor's primary responsibilities relate to his or her role in the judicial proceeding and, that to the extent that public testimony in a legislative hearing might undermine that role, the monitor should appropriately decline to testify.

<sup>14</sup> At the early stages of a reform effort, especially when people become aware that the settlement agreement provides for a monitor, the monitor may be contacted by people with complaints and concerns. The contacts may come from parents, relatives, foster parents, lawyers and guardians ad litem or CASAs who have concerns about the way a particular case is being handled. They may come from agency or private provider staff raising concerns about the working environment and the way in which their supervisors are or are not responding to the requirements of the settlement agreement. There may be complaints about particular staff, particular foster parents or particular congregate care facilities. While it is not the role of the monitor to intervene in individual cases or investigate complaints of staff misconduct, these kinds of referrals can be helpful in identifying systemic issues and providing a context for discussing those issues with the agency. At a minimum, it is important for the monitor to ensure that as part of the agency's approach to quality assurance, the agency has clear and well-publicized processes to receive and respond to such complaints. Effective monitors are able to both encourage those with complaints and concerns to share them and to assure them that their complaints and concerns do, in fact, inform the monitoring, but at the same time, make the limits of the monitor's role clear.

<sup>15</sup> Settlement agreements often include requirements related to data collection and reporting capacity and implementation of quality assurance processes. Some agreements explicitly provide that the monitor rely, whenever possible, on the data that the agency already produces and make an effort to integrate the monitoring into the agency's quality assurance process. Development of a strong, appropriately staffed and supported internal quality assurance process is critical to the agency's ability to sustain any system improvement effort over time. Effective monitors, therefore, look for opportunities to help the agency develop strong quality assurance processes and try to support and supplement rather than supplant those processes.

<sup>16</sup> Monitors have to be careful in how they share their expertise, insights, and opinions, whether in helping the agency develop its implementation plan or in other situations when the monitor's advice is sought. The agency needs to take responsibility for the decisions it makes and own the results of those decisions. The risk of a monitor giving advice to an agency (rather than simply helping the agency think through its options) is that if the advice proves to be wrong or if it is ineffectively implemented, the monitor may be in the awkward position of the agency attributing its poor performance to having done what the monitor said it should do.

<sup>17</sup> There is, of course, a distinction between the requirements of the settlement agreement that the agency agreed to prior to the monitor becoming involved (and which the monitor, generally, is not in a position to change) and additional commitments, which the agency might make in the implementation plan that it is developing with feedback from the monitor. With respect to the former, if a particular settlement agreement provision is one that even an excellent leadership team would have a hard time meeting within a particular timeframe, the monitor inevitably must make a judgment call if that deadline is not met. Is the missed deadline a reflection of incompetence and/or bad faith, or is this a situation in which acceptable progress, in fact, has been made given how ambitious the original deadline was?

<sup>18</sup> In some cases, the agency has already done considerable work towards system improvement prior to the entry of the settlement agreement (with some activity beginning even prior to filing the lawsuit). Agencies that can build an implementation plan around work that has already begun are, generally, much better positioned to make some substantive progress and experience some success in the early stages of a reform. On the other hand, an agency that does not have an effort underway likely will be limited to making "infrastructure" improvements in the first year, which while necessary to support the reform, fall short of improvements in the areas of safety, well-being and permanence – improvements in the lives of children in foster care – that plaintiffs' lawyers often want to see evidence of early in the reform.

<sup>19</sup> Monitors can also structure their process for gathering information from key stakeholder groups in a way that is efficient for the members of those groups (for example, utilizing foster parent association conferences, private agency gatherings, youth board meetings or other regularly scheduled events as opportunities to be available to hear from older youth, foster parents and private agency staff).

<sup>20</sup> When youth advisory boards (or other organized groups or gatherings of youth in foster care or young adults who had been in foster care) are not functioning in a particular jurisdiction, monitors may need to look for other opportunities to solicit feedback from youth who have this special experience-based expertise in child welfare.

<sup>21</sup> Agency administrators may resist the idea of site visits, often citing concern for local staff that might find a visit by the monitor to be uncomfortable and disruptive; however, sometimes resistance is based on a worry that the monitor will be overly influenced by misinformation provided by disgruntled local staff opposed to the principles of the reform. Site visits can be structured to minimize potential disruption, and effective monitors are sufficiently sophisticated in their approach to these site visits that staff with ulterior motives cannot easily mislead them.

<sup>22</sup> Effective monitors who have well-established lines of communication with key agency staff recognize that responding to inquiries and requests from the monitor is time consuming, and they take this into account in the timing of requests and timelines for responses. Effective monitors can facilitate periodic meetings between the parties and can ensure that there is sufficient pre-meeting preparation and that the meetings themselves are structured to be productive.

<sup>23</sup> Frequently, those child welfare system experts who are selected to serve as monitors are better known to the plaintiffs' lawyers than to the agency. This is true especially when plaintiffs' counsel include public interest lawyers with a national practice. Plaintiffs' lawyers frequently have met the person serving as monitor in the course of other lawsuits or through advocacy-related policy work. This adds to the perception that the monitor is more closely aligned with the plaintiffs.

<sup>24</sup> For this reason, some suggest that the monitor's role should not include providing technical assistance and, if the parties deem some provision of technical assistance to be appropriate, that the settlement agreement should designate a separate person or panel to serve that role. Others worry that having both a monitor and a technical assistance panel operating at the same time creates a risk that the agency will receive conflicting messages.

<sup>25</sup> This does not necessarily require that the monitor share with one party the details of conversations with another; generally, there is value for each party to be able to share concerns candidly with the monitor and for the monitor to handle those conversations with appropriate sensitivity (when that can be done consistent with the monitor's responsibilities).

<sup>26</sup> Or in the case of class action against a city- or county-controlled child welfare system, the mayor or the county executive.

<sup>27</sup> Depending on whether the child welfare agency is its own cabinet-level department or whether it is one of a number of divisions within a cabinet-level department, the named defendants may include a division director in addition to a cabinet-level commissioner.

<sup>28</sup> There are times when a new administration wants to disassociate itself from a reform and is inclined to return to court in an effort to "undo" the court order that was agreed to by the previous administration. The monitor, in those circumstances, can be available to facilitate conversations among the parties or to mediate (if required by the settlement or requested by the parties or directed by the court). The monitor can provide the parties with his or her perspective on agency performance, the quality of the implementation plan and work being done under it and the potential risks and benefits of returning to court. But it is not the monitor's role to persuade the leadership not to go back to court.

<sup>29</sup> As indicated in footnote 6, there are also examples of "monitoring provisions" that do not include a monitor.

<sup>30</sup> Having a panel, rather than a single monitor, also allows the inclusion of someone with local expertise and experience. While local experts can be valuable to a panel, the potential for a real or perceived conflict of interest (based on past, present and/or potential future relationships with the agency, stakeholders or others) ordinarily prevents those persons from serving as a single monitor. The concern about possible conflict of interest if a local expert were to serve as a monitor is significantly diminished when that person is only one vote on a panel and, if need be, can recuse himself or herself from particular decisions or discussions that present a conflict of interest.

<sup>31</sup> Panels tend to function better when one member takes lead responsibility and assumes the various administrative functions necessary to support the group process and coordinate the work.

<sup>32</sup> Reaching consensus not only requires resolving disagreements among the monitoring team members before presenting the panel's position, but it also requires resisting the temptation to allow particular panel members to speak for the panel in their own areas of expertise without the level of discussion and review necessary for the decision to be properly characterized as one endorsed by the entire panel.

<sup>33</sup> This may be especially true when those interpreting the remark have an interest in attributing the statement to the monitor—they either like it (and can now tell others that the monitor agrees with them) or they dislike it (and use the comment to generate additional opposition from their colleagues). There also may be a higher risk with multi-person monitoring of "paralysis by monitoring." One or both parties may say they have not taken an action or addressed an issue because they wanted to wait for the monitor's opinion before doing so, which may be more plausible to say when members of a monitoring team have to reach consensus than when someone makes an inquiry of a person serving as a single monitor.

<sup>34</sup> While monitoring costs can vary widely among cases and at different stages in a case, at least initially, effective monitoring in the first years of a court ordered reform effort can reasonably be expected to cost somewhere between \$200,000 and \$500,000 annually.

# The Use of Data in Child Welfare Litigation

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## ***Introduction***

This paper addresses the use of data in child welfare reform efforts that are a direct result of class action litigation. Among the paper's premises are that those responsible for reform should have data that (1) have meaning and utility, (2) inform agency decisions and play an integral role in monitoring routine agency operations, and (3) inform all agency reform strategies to improve performance and achieve better and sustainable results. This discussion is neither a technical treatment of child welfare data nor an expert analysis of the various types of data; rather, it examines various issues that arise in planning and implementing reform measures and provides suggestions on integrating data that can help lead to better informed decisions in settlement agreements and assist to make the reform effort more manageable.

## ***Purpose of Using Data***

The goal of litigation-driven child welfare reform is to bring comprehensive change to the way agencies do business and to provide better protection and improved services for the children and families they serve. Reform is an arduous task for agencies as well as the state and local governments that support them. Data can help target areas that need reform and provide other critical information to identify the extent of improvement necessary.

## ***Role of Data***

All parties to a child welfare class action rely on data throughout its various stages from the initial litigation through exiting a settlement decree. Parties rely on data:

- **To make the case for legal action**  
The circumstances of named plaintiffs may prompt initial legal actions against agencies but both plaintiffs and defendants use data to support or dispute the actions. Agencies that routinely use data from their information systems to monitor, evaluate and guide their work are more likely to provide data that accurately reflect their performance and outcomes. Likewise, agencies that do not maximize the use of data, do not emphasize the quality and timeliness of data or have serious limitations in their ability to produce meaningful and useful data may force all parties to rely on other sources of information to make the case regarding the agency's performance.
- **To identify components of the agency's operations that require remediation**  
Class actions target specific improvements in child welfare programs such as changes in the service array, policies and case management procedures or interventions in areas such as adoption, foster care or child protective services. These changes may reflect assumptions about those areas that are most likely to affect outcomes for children and families. Although data are central to identifying needed changes, if an agency's programs are functioning poorly enough to result in a class action,

it follows that the agency may also lack the capacity to produce reliable and valid data on its performance. Substantial limits in the agencies' ability to produce data may require data collection from other sources, such as extensive case reviews.

- **To identify the strengths of the agency's practice and capacity**

Even agencies that settle lawsuits have strengths in their capacity to serve children that the parties identify when crafting settlements. Understanding what works well provides important information in designing large-scale improvement strategies. Correctly identifying these strengths helps to focus the settlement's design on the agency's capacity to perform effectively and to replicate successful initiatives. Further, the parties should build reform efforts on well-defined principles. Ideally, the data should point to areas where the agency's identified mission and principles are consistent or inconsistent with practice in the field and the outcomes for children and families.

- **To establish performance baselines and benchmarks of progress**

Settlements typically include a series of progress measures that the agency must achieve at established intervals. However, the parties may not always determine the measures in conjunction with the actual strategies that the agency will use to achieve the required progress. These "change strategies" are the vehicles that agencies develop or adopt to achieve the desired improvements in their programs. For example, agencies may decide to use strategies such as alternative response systems, "systems of care" approaches or child welfare practice models to improve the agency's business practices and outcomes. Whatever the change strategy, it is important to link accurate starting points and progress measures to the change strategy. However, the parties to settlements may not address change strategies until after a class action is settled and many data-related decisions that are made during settlement may or may not be compatible with the agency's approach or time frames for implementing the settlement. If agencies and the parties to settlements expect to realize lasting improvements, they should develop change strategies through a process of exploration and planning, decision-making and careful initial implementation leading to full implementation. If data measures are already in place, the parties should evaluate them carefully to determine how they may be used or if modification is required.

- **To determine exit criteria**

Plaintiffs, defendants and the courts should enter into settlement activities with a clear agreement on the criteria used to determine compliance and end oversight. The consequences of failing to establish these criteria and use valid and reliable data to monitor compliance include prolonged implementation periods and negotiations over goal attainment. Further, how the parties use data to determine exit criteria is central to ensuring that the agency's progress is "real" and not due to temporary changes, such as a surge in data entry, that may not reflect actual improvement. For example, incorrect data or interpretation of the data may lead an agency to continue ineffective strategies that will not lead to the actual improvements contemplated by the settlement.

- **To sustain progress once achieved**

None of the parties to a settlement has an interest in working through years of court-ordered activities only to lose ground after complying with requirements. When data are used effectively to measure progress and inform work during implementation, they are more likely to reinforce or create a culture of using data to inform work and sustain progress after implementation. For example, building in the use of accurate data through quality assurance processes and data systems may be one of the most effective means of helping agencies sustain improved services to children and families over time. Using data becomes a means of reinforcing the agency's fundamental principles and desired practices by helping staff and stakeholders remain on course and make necessary adjustments. Data are integral to all stages of settlement activity from bringing the action, during implementation, at exit and in sustaining progress over time. Successful reforms require identifying valid data indicators<sup>1</sup>, integrating them fully into the planning and implementation phases of change strategies and using them effectively throughout the process.

## **Data-Related Issues for Consideration**

Child welfare agencies are, by definition, action-oriented entities. Agency staff must constantly gather, record and evaluate information from a variety of sources and must act on the information to protect and meet the needs of children for permanency, stability and well-being. The information that caseworkers, supervisors and managers use to guide their actions must be in a usable format, easily retrievable and understandable to be effective. If data are collected for purposes other than to support the actions and decisions agency staff make every day, those data may be regarded as useless. Likewise, if staff must piece data together through multiple or cumbersome reports, they are less likely to use the data in their day-to-day work. If the data provide only one dimension or part of a variable or are not validated, however, staff may misuse or interpret them incorrectly. When staff and supervisors value and use data to guide their work, they are more likely to value the accuracy of the data. The primary data-related issues are discussed below.

- **Use caution in promoting a “data-driven” system.**

This may sound like sacrilege to ongoing national efforts to integrate data into the work of public child welfare staff. It is essential to integrate and use data in managing, allocating resources, and intervening with children and families responsibly. A danger in a class action is that agency staff may develop a compliance mentality that can be data driven, particularly when data are relied on only to tell stories that are multi-dimensional and not just numerical in nature. For example, staff may interpret the achievement of the settlement’s goals in terms of the frequency of certain activities without giving equal attention to the quality and outcome of the activities. The parties may find it easier to measure caseworker visits with children, holding family team meetings or conducting timely investigation of maltreatment investigations by how often those activities occur rather than by their substance and results. In complying with a settlement, supervisors and managers may feel pressure to ensure that staff carry out required activities without giving equal attention to how well they perform the work, which can lead to misinformed interpretations of progress. Improvements in data entry or documentation may become substitutes for improvements in practice. Even after years of implementation activities in settlements, agencies struggle to comply with requirements that are not easily measured by frequencies alone. It is probably not a coincidence that agencies in long-running lawsuits experience the most difficulty in complying with outcomes that are mostly qualitative in nature, such as the thoroughness and effectiveness of case plans and whether or not they meet the identified needs of children and families. When parties use process measures that are not outcome-focused to evaluate child welfare functions, the measures may drive practice in the wrong direction and limit the agency’s ability to meet important goals for children and families.

- **Plan to collect, use and integrate both qualitative and quantitative data.**

Quantitative measures tell how often, how timely, how much and, sometimes, how completely agencies perform activities. Less often do they tell how well or effectively agencies perform. A combination of quantitative and qualitative data provides insights that one or the other alone may fail to provide. For example, a data report that provides the agency’s percentage of timely completions of maltreatment investigations is not likely to provide information on whether the investigation identifies and addresses relevant safety and risk factors, obtains adequate information from collateral sources and leads to appropriate action. Similarly, a data report that provides the percentage of case plans the agency completes timely is not likely to report whether the plans identify appropriate activities, steps and services to meet the family’s needs. That kind of information, gathered through regular case reviews or other quality assurance processes, combined with accurate data reports provides staff and decision-makers with a more complete view of data indicators and outcomes. It also avoids the temptation to try to complicate data indicators with multiple variables and helps to balance concerns about both the quantity and quality of work.

- **Decide early what to measure and how to measure it.**

The desire to define measures and begin reporting on them before change strategies are firmly in place often disconnects data from the agency's change strategies and defined outcomes. It may result in data indicators that measure one thing while the change strategies emphasize different measures or a different pace of change. Worse, the agency may develop change strategies in response to pre-existing data indicators rather than through a well defined planning process. Linking data measures to the agency's principles and strategies, and planning for their joint implementation, will help the parties understand what they should measure and when they should expect progress. Further, agencies should understand what they are accountable for in settlements but also how they will achieve their goals and when and how parties will evaluate the results of their efforts. Some indicators may be best measured longitudinally, evaluating progress that occurs after change strategies are in place or as they are being implemented. Other indicators may require a point-in-time picture of the status of all children and families served by the agency. Agencies should understand how different types of measures and/or analysis would inform their work and performance. Making informed decisions about change strategies requires using data effectively with a logical planning process that integrates change and measurement strategies.

### ***Dangers of Data Use and Misuse***

Despite recent improvements in producing and using child welfare data, agencies and parties to settlements may still treat data as if they were more precise than they actually are. Any number of factors will affect the accuracy of the data, including user errors, programming issues, information systems functions and data definitions. In using child welfare data effectively, common deficiencies in data reporting and use that may surface during implementation should not be overlooked. Among the deficiencies are:

- **The infrastructure threshold is weak in developing and producing accurate data.**

It would be interesting to poll court monitors for class action settlements over the past 20 or so years as to their level of confidence in data that agencies' information systems produce. Many would probably indicate serious concerns and a need to collect data using a parallel data collection process. In fact, there are often inherent problems with agencies' information systems and data collection processes, ranging from outdated systems; cumbersome programming requirements; incorrect, untimely, or missing data entry; and lack of accountability in producing and using data. Early attention in settlements should focus on identifying these issues so that there is no interference with producing or using data during implementation.

- **There are bad data or users that do not understand what the data mean.**

Data may be "bad" for many reasons. For example, if the agency has not traditionally used data effectively and few or no consequences existed for producing incorrect data, the problem may not change simply because a lawsuit is settled unless data are a specific focus of attention. When the federal government initiated the Child and Family Service Reviews and began using data submitted by states to federal databases<sup>2</sup> to evaluate state performance, many states faced the reality that data had been submitted that did not reflect their perceptions of practice and outcomes in their states. States previously had little incentive to clean up their data because no one used them to evaluate performance or to hold states accountable, and many states subsequently needed to make major corrections to their data or face scrutiny. The use of the data for accountability provided states with the focus and need to make improvements in their data submissions. In addition to not using the data, factors such as lack of understanding by users on how and where data indicators are captured, not exploring the assumptions and specifications of data indicator reports and misinterpretation of what the data mean contribute to bad data.

- **Data are produced without preparing staff to use it.**  
 Some agencies have a culture of using data to manage, make decisions and evaluate performance but such environments are not universal. Without preparing managers and supervisors to identify which data are important to their work, what the data mean and how data should be used, agencies risk ignoring or misinterpreting the data or acting in ways that do not support change strategies. For example, it is possible to interpret data indicating that an agency has a high percentage of children with short stays in foster care as a positive indicator requiring no changes in practice. Further analysis, however, may reveal that an unusually large percentage of children go into short-term emergency placements and are quickly reunified because few or no services were offered to prevent the placements. Supervisors and managers should know what questions to ask of the data and become adept at knowing how the data inform their work. In this way, staff will take ownership of the data and are less likely to view data as something produced for others such as plaintiffs and monitors.
- **Incorrect assumptions are made about underlying data indicators and reports.**  
 When agencies have existing reports or specifications for measures that are the subject of settlements, it is important to understand what the existing data represent. There may or may not be a record of how or why reports were created or of the parameters of the reports. For example, when measuring the frequency of caseworker visits, it is important to understand how the system captures a “visit,” whose visit is counted and which visits are not counted. It may prove more efficient to create new reports rather than track down specifications, stumble upon incorrect assumptions late in implementation or interpret existing reports incorrectly. Another concern is the need to periodically re-evaluate data indicators for their continuing relevance to reform efforts, particularly as reforms take hold, and the population of children that the agency serves changes over time. For example, data indicators focusing on length of time to achieve permanency may mean one thing at the beginning of a reform and quite another later on with fewer children entering care or if the characteristics of the children change substantially.
- **Non-validated data are used.**  
 When data are not verified for accuracy and completeness all parties risk making incorrect decisions. Data indicators are unlikely to be completely accurate on any given day if they involve large populations and depend upon hundreds or thousands of users. However, the agency can validate data to ensure that they capture the required information and represent an acceptable level of accuracy. Formal validation should occur independently of the user chain of command, and agencies should invest in the necessary resources to ensure adequate ongoing data validation. The agency also should use data to provide routine feedback to users as a means of supporting continuous quality improvement. Apart from formal validation processes, whenever a systematic data review can be built into the agency’s routine functions, such as supervisory or foster care reviews, it is likely that the multiple review levels will increase the accuracy of the data.
- **There is lack of data analysis capacity.**  
 Some settlements may rely upon simple counts of activities to make assumptions about very complex child welfare issues or upon information systems that are ill suited for data analysis to provide essential insights. While some agencies have the capacity to effectively analyze and report data, many agencies do not. This could be as simple as arraying data to provide insights into changes over time, differential performance across geographic areas and isolating variables by population or service. The analysis also may be more involved, such as creating multi-faceted variables from simple indicators, correlating performance across variables or tracking cohorts of children and families over time. Whatever the level of analysis, agencies need to understand how their practice, policies and resources affect their progress. Without the capacity to analyze data, the parties will be limited in their understanding of what they must do to improve performance. Even without up-to-date information systems or reporting capacity, the parties will benefit from devoting resources to fundamental analyses.

## **Discussion and Recommendations**

Class actions are, by nature, adversarial. They pit agencies and state and local governments against the plaintiffs, and the parties may have very differing views on what improvements are needed. Once settled, however, plaintiffs and defendants share a common interest in achieving established goals, and they must rely on data to inform their efforts. In using data effectively, the parties should integrate data indicators with planning and implementation strategies, align them with practice and quality assurance processes and use them internally and publicly in ways that promote accurate reporting and accountability. Recognized principles of implementing major reforms are critical to successful outcomes. Part of the planning and implementation processes involves articulating a vision of what the reformed system will look like, which principles will guide the reforms, how changes will occur and what and who are necessary to make the changes possible. This requires that the parties clearly address both the “what” and the “how” of achieving successful reforms and outcomes.<sup>3</sup> Intense settlement negotiations may overlook these critical planning elements. The parties may identify data indicators before the agency knows how it will implement the reforms and, consequently, may disconnect progress measures from the realistic time frames and expected outcomes of the change strategy. This can lead to a compliance mentality within the agency that may result in improvements in data indicators without achieving sustained practice improvements. For example, the agency’s data may show improvements in quantitative measures when it has not actually improved its quality of work.

Frontline staff and supervisors should use settlement-related data in their work, and the agency should make the data available to stakeholders so that data are fully integrated into child welfare operations. The agency’s ability to analyze data is essential to this process, as is integrating data into quality assurance, supervision and other accountability functions. Using data in accountability and decision-making activities should promote a culture of valuing and using data within the agency. With these observations in mind, below is a discussion of recommendations for using data in class action settlements in child welfare.

- **Craft settlements in ways that integrate principles, practices and evaluation.**

In maximizing the opportunities for success in class actions, a holistic approach to planning and implementation should (1) define the principles that the agency will use to guide its service to children and families, (2) distinguish practices and interventions that are consistent with the principles, and (3) identify the data indicators and other sources of information that the parties will use to evaluate the agency’s conformity with its principles and practices. Integrating principles, practices and evaluation provides a coordinated approach to compliance with the settlement and toward the reform of a child welfare system. Integration has the effect of unifying the agency’s response to children and families and helping staff and stakeholders understand their roles. All settlements should recognize the need for a viable quality assurance process that incorporates the data indicators and other sources of information that the parties will use to evaluate progress and integrates the data conceptually and technically with other parts of the reform efforts. Early in the settlement process, the parties should identify needed technical assistance and the sources of the assistance to reduce barriers and time frames from planning to implementation.

- **Devote the first year of implementing a settlement agreement to developing a carefully considered implementation plan.**

The implementation plan for some settlements is essentially a list of what to do, not how to accomplish established goals. In reality, agencies may approach changes in various ways, including phasing in new practices or programs, statewide implementation of changes, geographical phasing or prioritized implementation of required activities. A planning year allows the agency and other parties to develop its change strategy. From there, the parties can identify the data indicators



and progress benchmarks based on when and where changes are expected to occur and conflicts regarding expectations in the settlement and the actual pace of change can be avoided. Linking expected outcomes and benchmarks of progress to the change strategy allows the parties to make informed decisions about progress measures rather than establishing arbitrary benchmarks not linked to implementation activities. This connection helps to ensure that progress is “real,” based on a carefully considered approach to achieve goals rather than a mere reflection of compliance-oriented practices. Planning year activities should also focus on the agency’s capacity to produce meaningful data and to identify needed systemic changes to produce useful data. It is also the time for establishing accurate baselines in areas to be measured rather than waiting until implementation.

■ **The implementation plan should include a data plan.**

During the planning year, the parties should address data-related issues and produce a data plan for going forward. In addition to linking the data indicators to the agency’s change strategy, the data plan should identify and include strategies for addressing systemic improvements necessary for the agency to produce timely, accurate and complete data. These include information system barriers, data-related staffing, training and mechanisms for using the data. The data plan should describe how data would be used in implementation and monitoring, such as who will receive the data, the intended use of the data and how the data will inform monitoring activities and exit criteria. For example, a specified period of sustained performance on a given indicator should be achieved before releasing the agency from monitoring in that performance area. The data plan should also address the following areas:

- priorities for producing data such as indicators of egregious performance and indicators closely linked to outcomes of the settlement;
- sources of information that the parties will use to monitor and evaluate progress, such as the agency’s information system, quality assurance process, foster care reviews, etc.;
- an independent process for validating the accuracy of data;
- a plan to ensure the agency has or will develop the data analysis capacity it needs to evaluate and provide insights into its performance;
- a plan to train staff on the data indicators and how to use them, including the sources of the data and specific fields in the information system that capture the data;
- a plan to integrate data indicators with quality assurance processes; and
- a plan to disseminate data indicators within and outside of the agency.

■ **Require that data-related improvements and resources be put into place early in the implementation phase of the settlement.**

If the data plan identifies systems improvements that the agency must make, staffing issues related to the data or increased capacity related to timely and effective reporting of the data, then the implementation plan should require that those fixes occur very early in the implementation process so that they do not detract from programmatic improvements.

### **Summary**

The data components of child welfare settlements are critical to determining the direction of change and measuring progress. To be effective, however, they must be identified through broad planning efforts. Critical data-related issues require resolution at some point during settlements, and the overall goals and objectives of the settlements are best promoted when addressed early and in concert with other strategy-related decisions.

## **ABOUT THE AUTHOR**

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## **ENDNOTES**

<sup>1</sup> The term "data indicator" is used to reference a specific quantitative child welfare measurement used to measure progress, evaluate the agency's effectiveness or track a particular area of the status of the population served by the agency.

<sup>2</sup> The Adoption and Foster Care Analysis and Reporting System (AFCARS) and the National Child Abuse and Neglect Data System (NCANDS).

<sup>3</sup> Dean L. Fixsen, Sandra F. Naoom, Karen A. Blasé, & Frances Wallace, *Implementation: The Missing Link Between Research and Practice*, 19 APSAC ADVISOR, n.1 & 2 (Winter/Spring 2001).

# Qualitative Case Review in a Child Welfare Lawsuit

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## ***Introduction***

Over the 40 years that public impact lawsuits have been brought against the child welfare systems, the design of the resulting settlement agreements have changed. The changes are a reflection of – among other things – the knowledge gained by plaintiffs, defendants, the courts, the monitors and other key stakeholders on how to affect better outcomes for children in the system and their families.

Generally speaking, earlier lawsuits generated specific rules and procedures for child welfare agencies such as timelines or caseload ratios. Later cases, perhaps because important procedural protections had been established already, focused more on child and family outcomes and less on the day-to-day activities of child welfare workers and agencies.

As the approach of the lawsuits changed, so too did the monitoring methods used to measure compliance. Earlier suits used case record reviews to verify compliance with the terms of the decree. The counting in these reviews, often by hand, involved reading of hundreds of case files to develop quantitative data for systems that did not routinely – due to practice preference and capacity – collect it. Later decrees, starting in the late 1980s, added and in some instances, substituted entirely, qualitative monitoring methods such as client and worker interviews and focus groups. These methods use a very small sample of cases to measure adherence with decree requirements. The qualitative tools were turned to, in part, because of the limitations of case record reviews and the aggregate data collected by public systems. Qualitative tools, like the Quality Service Review (QSR) first used in child welfare lawsuits in Alabama and Utah, were viewed as alternatives to the case record file reviews that did not seem to be producing better outcomes for children and families.

This paper summarizes the development of child welfare lawsuits over the past 40 years focusing on the expanded use of qualitative methods to monitor compliance. It asserts that whether to use quantitative or qualitative methods is no longer a valid question given the dramatically improved child welfare information capabilities. Instead, systems need to collect and use both types of data on a routine basis – point-in-time and longitudinal data that measure and aggregate performance at the individual and system level, and qualitative data that provide unique insight into practice level performance, which contribute to, or constrain, better outcomes for children and families. This should be standard practice for all agencies, with or without a lawsuit.

## ***A Short History of Child Welfare Lawsuits***

In the 1970s, child advocates responded to the rise in child abuse reports and the perceived ineffectiveness of government in dealing with public agencies by filing class action suits. The earliest cases built on the civil rights protections for individuals in state custody. Later suits added statutory claims based on new federal child welfare legislation passed throughout the 1980s and 1990s.

The relief sought in these earlier suits was broad and prescriptive. Decrees described the state or city defendant's actions with regard to all aspects of the agency's core human service and administrative functions. Practice standards, such as determining the size of a worker's caseload, establishing education requirements for workers, and setting licensing standards for foster care homes were dictated as part of the settlement agreements. Day-to-day management decisions also were regulated by decrees, including how cases were transferred or reassigned, how specialized units were staffed and managed and how reimbursement rates for services were calculated. The decrees read like policy manuals, and not by accident since they were written by and for lawyers about the rules, regulations and directives for which the agencies were expected to conform according to the terms of the decree.<sup>1</sup>

While suits from the 1970s and 1980s sought to establish fundamental procedural protections and baseline standards for acceptable practice, a new settlement paradigm emerged in the late 1980s, which traded rules and procedural specificity for an agreement about the principles that would govern reform. The goal in these later settlements was to balance the prescriptive remedies found in earlier cases with professional standards of care that allowed both practitioners and agencies the flexibility and discretion needed to improve services for children and families. Settlements throughout the 1990s and the subsequent decade reflected this paradigm shift. Plaintiffs and defendants alike showed a preference for agreements that emphasized outcome measures related to more substantive case goals, such as the number of children reunified with their birth families or the number of children placed with relative caregivers. While procedural requirements still were incorporated into many decrees, in some cases, a state or city's ability to exit tended to be based on compliance with outcomes rather than on process. In other cases, compliance with outcomes and procedural safeguards were necessary to exit a decree.

### ***Qualitative Review and Its Emerging Role in Child Welfare Lawsuits***

Qualitative methods – like a case study, an interview, or focus group – are, according to research scientists, the best or only way of addressing questions to understand an area where little is known or where previously offered understanding is inadequate.<sup>2</sup> In particular, qualitative methods are particularly useful if the purpose of the review is to “make sense of complex situations, multi-context data and changing and shifting phenomena,” and/or “to learn from participants in a setting or a process the way they experience it, the meanings they put on it and how they experience it.” An overarching goal of qualitative methods is to generate “new ways of seeing existing data.”<sup>3</sup>

By the late 1980s, child welfare was in dire need of new ways to understand its data and practice. The field was changing dramatically because of the social context – crack and AIDS – but also due to the federal legislative and regulatory environment, which emphasized that systems, when at all possible, return children to their natural families and communities. The crack and AIDS epidemics were doubling the numbers of children in care (from approximately 20,000 children in New York City, for example, in the early 1980s to 40,000 children by the late 1980s). At the policy level, federal legislation was shifting from a model that focused primarily on what could have been deemed a “child saving” posture to a family preservation focus that required greater due diligence around keeping the child connected to his or her natural family.

In early lawsuits, monitoring a system's compliance required defendants to collect large amounts of data, typically quantitative in nature. In general, the compliance data were reviewed by plaintiffs and outside monitors. The role of the monitor was to determine whether defendants were in compliance with the requirements of the settlement. Interestingly, in the early decrees, monitoring data was not intended – at least as articulated through settlement agreements – to help child welfare systems learn how to perform better and/or to refine or shift practice in response to what was working and what was

not working. Rather, the decrees locked defendants into fairly inflexible practices (from a procedural perspective) that could not be changed without risk of recourse to the formal dispute resolutions under the decree, or worse, the court. In one early decree, for example, if the parties found that any provision of the agreement was unworkable, a modification of the agreement could be negotiated through counsel to the parties or, if that failed, by petition to the court. Other decrees had similar provisions making it difficult for the defendant public agencies to refine any of the activities required by a settlement.

And yet, the decrees as drafted, and the quality assurance and monitoring tools employed by the parties in the earlier suits, could not keep pace with changes in the field. There were simply too many complexities and unknowns about how to help children and families during the crack and AIDS epidemics for quantitative data to provide the answers. Child welfare needed additional monitoring and quality assurance tools. Parties began to recognize that compliance-oriented quantitative data, while necessary for some requirements of lawsuit settlements (e.g., how many children or cases were allowed for caseworkers), were woefully inadequate at helping systems understand how to modify practice at the field and system level to address the needs of children and families.

### ***The Shift: Qualitative Tools in Alabama and Utah Lawsuits***

The child welfare case that first employed a qualitative tool for monitoring was *R.C. v. Hornsby*, a class action brought in 1988 in the federal court in Alabama on behalf of all children in, or at risk of being in child welfare custody, who were behaviorally disordered or emotionally disturbed.<sup>4</sup> Plaintiffs made fairly typical federal statutory and constitutional claims that focused on the state's failure to develop proper case plans, to provide children proper care and to make effective services available.<sup>5</sup> The ultimate goal, however, was a remedy beyond merely expanding services and resources. Instead, the plaintiffs sought the adoption and expansion of a new human services model already being implemented in the mental health and developmental disabilities fields.<sup>6</sup>

*R.C.* envisioned a new child welfare model that brought together the values of family preservation within a system of care emphasizing prevention, home and community-based treatment and customized services.<sup>7</sup> However, the decree did not specify the exact means to accomplish this model. Instead, the settlement articulated a set of system goals and 29 operating principles to which the parties were committed.<sup>8</sup>

In addition, the parties intended a "bottom up" change strategy that gave flexibility to local systems to customize reform in a way similar to the way children and families would be treated. The decree, therefore, anticipated a phased implementation: "[n]ew concepts are to be piloted before going 'on-line.'"

Utah's *David C. v. Leavitt*, which was filed in 1992 and settled initially in 1994, expanded the approach used in *R.C.* In *David C.*, after four years under an initial settlement agreement that included over 100+ compliance measures, the parties returned to court in frustration. Despite increased state funding of more than 50 percent and an increase in the number of caseworkers, there was virtually no indication of progress on most of the measures stipulated in the agreement. The court found both a "breakdown in the Corrective Action Process" and that "the feedback mechanisms designed by the parties have proven unworkable or unrealistic." The result in Utah was a complete overhaul of the original settlement in favor of an outcomes-oriented decree that preferred diagnostic feedback through use of a new form of qualitative review like had been used in Alabama, the Quality Services Review (QSR). The tool was developed by Human Systems and Outcomes (Ivor Groves and Ray Foster) and implemented in Alabama

by then Child Welfare Director Paul Vincent who went on to serve as monitor in Utah. The QSR was chosen over case record reviews because its process incorporated opportunities for routine modification of practice norms based on a review of open cases. The hands-on nature of the QSR featured prominently in the Alabama and Utah parties' decision to use the tool.

The QSR relies heavily on face-to-face interviews to answer questions related to the child and family's status and system performance. The basic process begins with a stratified random sampling of cases. In Utah, the annual QSR review samples 72 cases for Salt Lake City (out of a total population of about 1,500), and 24 cases for the four less populated regions. In Alabama's county-run system, samples ranged from 68 cases for the largest county to 12 for the smaller ones. Both states' samples were adjusted so that each office had at least one review and no worker had more than one, and so that there was a balance of in-home and out-of-home interventions, of older and younger children and of boys and girls. Teams, with each team consisting of two members, review the cases. Ideally, new reviewers participate in a training curriculum that involves an explanation of scoring measures and practice case vignettes.

In contrast to an individual case record review, the QSR takes usually two days per case. The process starts with a case file review. The next step is to conduct interviews with the child, family members, non-family caregivers, professional team members and others (for example, teachers) who might have relevant information. The interviews are informal but structured by the basic norms of assessment and individual planning that guide primary casework. However, the reviewers must ultimately score the case for both child-level and system-level indicators.<sup>9</sup>

Both individual caseworker and "Grand Rounds" style feedback are core features of the QSR. In the "Grand Rounds" session, an expert discusses and answers questions on a region's performance with staff from the office under review. Reviewers meet with the caseworker and supervisor to discuss the findings and the scores. Caseworkers can appeal the scoring through a series of procedures that lead to central management. When cases are aggregated, a summary for the system or subsystem is created. The reviewers discuss the indicators and information from their cases that might explain their significance, and they meet collectively with personnel from the region to discuss the diagnostic importance of their findings. The final report sets out the aggregate scoring, generalizes about what appear to be recurring problems and presents illustrative examples from specific cases.

As identified by this author with co-authors Charles Sabel and William Simon in an article published in 2009,<sup>10</sup> the QSR serves three general functions. First, it is a form of clinical training for the caseworkers and their supervisors. The experience of presenting an actual case in its particularity and receiving critical feedback on it from peers and mentors is the core form of professional development in the social work tradition.<sup>11</sup> Accounts in Alabama and Utah suggest that the QSR has had major effects in changing the ways that the frontline experiences supervision and review, which has improved both learning and morale. A lawyer team member in one of the Utah cases we reviewed said, "The caseworkers used to think of quality assurance as a way for the central office to dump on them. Now they think of it as a way for them to show how good they are."

Second, the QSR process is a form of norm elaboration through peer review that engages all levels of the system, as well as outside experts. The meaning of adequacy with regard to goals like safety and permanence or practices like assessment and planning is, in the abstract, indeterminate. The QSR is a collaborative process for specifying norms through an analysis of cases. The scoring system forces the reviewers to formulate their judgments in ways sufficiently precise to permit comparisons across cases. The discussion among reviewers aimed at "inter-rater reliability" and the exchange between reviewers and frontline workers help to promote convergent understandings of how the standards apply

in particular cases. The integration of outsiders from other states or consultants with national practices promotes consistency across states. Where consistency is not achieved (i.e., there are currently different views among states as to when spousal abuse is tantamount to child abuse), discussion serves to surface issues for further consideration.

Third, QSR data function as a measure of performance and as a diagnostic tool of systemic reform. The scores can be compared over time and (in principle though not as yet in practice) across states. Moreover, they give rough but serviceable indications of where attention and remedial effort should be focused. Everyone recognizes that aggregate QSR data are crude as a measure of system performance. Because of the cost of reviews of this intensity, it is rarely plausible to obtain a large enough sample size for statistical validity, though the statistical deficiencies of QSR data are mitigated by the availability of other data. QSR data can be checked against and combined with denser quantitative data. Moreover, informal knowledge gained in the review process can add systemic perspective. Once the QSR process surfaces a problem and makes it a focus of discussion, frontline caseworkers or managers may be able to have a better sense of how pervasive the problem is. More fundamentally, for purely remedial or diagnostic purposes, precise systemic generalization is not necessary. For these purposes, it is more important to spot problems and remedy them than to characterize the current state of the system with statistical precision.

### ***Conclusion: Use Qualitative Data in Combination with Quantitative Data***

The QSR has been applied to child welfare programs in over a dozen states. In both the Alabama and Utah lawsuits, the QSR became the central measure of compliance in decisions to terminate court supervision. The QSR preserves the traditional social work commitment to forms of supervision that respect the complex context of frontline decisions and encourages workers to respond to clients as individuals. It is used to complement, but not supplant, quantitative data that is collected by the system, and, more specifically, data have been used to gain a better understanding of system performance to refine practice to meet client needs more effectively.

The QSR is not the only qualitative method available or being used by systems. The federal Child and Family Services Review (CFSR) combines a review of aggregate case processing and outcomes data with qualitative peer review, including client interviews from a sample of cases. Though the federal review only occurs once every two to three years, many states are using the CFSR case interview process as a regular qualitative tool. Similarly, a newer tool called ChildStat is being used in several jurisdictions in which qualitative information is used to supplement aggregate data. ChildStat involves an intensive review of one or two cases in a "Grand Rounds" style setting with agency management, supervisors and (in some cases) workers. Responsible management and supervisory staff are questioned about their decisions in specific cases as a means to tease out case-level decisions and system-level norms.

Best practice warrants that the QSR or other qualitative processes be used in combination with aggregate quantitative data sets. Qualitative data provide a snapshot into the current workings of a system and an opportunity for reviewers to understand more about why and how decisions are made. The data do not, however, provide longitudinal information about outcomes for children and families. While child welfare quantitative data have come a long way since the 1980s when case record reviews were sometimes the only aggregated information available, systems still rely heavily on point-in-time quantitative data that fail to say much about the long-term effectiveness of practice. More importantly, point-in-time quantitative data also fail to provide information about outcomes for children and families. As the information technology capabilities of public systems become more sophisticated, efforts to develop and use long-term quantitative cohort data with robust qualitative methods will be critical

factors in improving overall quality assurance and in understanding what is working well and not so well for children and families.

## ABOUT THE AUTHOR

### Kathleen G. Noonan

Kathleen G. Noonan, JD, recently joined the University of Wisconsin School of Law as Clinical Associate Professor. Prior to this appointment, Kathleen launched PolicyLab: Center to Bridge Research, Practice, and Policy at the Childrens Hospital of Philadelphia Research Institute (CHOP) as co-director with David Rubin. Kathleen remains a senior advisor to PolicyLab. While at CHOP, she was also Adjunct Faculty for the Robert Wood Johnson Clinical Scholars Program at the University of Pennsylvania. Prior to joining CHOP, Kathleen spent seven years as a Senior Associate and Engagement Manager with Casey Strategic Consulting, the consulting arm of the Annie E. Casey Foundation. While at Casey, Kathleen led engagements around the country aimed to produce significant public system reforms for the benefit of vulnerable children, families, and communities; in this role, she also served as mediator in large class action cases against human services agencies. Earlier in her career, Kathleen was a practicing attorney at the Boston firm of Hill & Barlow. She served as a law clerk to United States District Judge Morris E. Lasker and has worked in public policy positions in New York City with the Citizens' Committee for Children of New York, Inc., and Bank Street College of Education, Division of Social Policy.

## ENDNOTES

<sup>1</sup> For example, one settlement stipulation regarding parental preference instructed "the expression of a wish for in-religion placement [by a parent] trigger[s] the operation of the third sentence of paragraphs 23, 24, 28, or 30" of the decree."

<sup>2</sup> Norman Denzin & Yvonne Lincoln, *Handbook Of Qualitative Research* (Sage Publications 2d ed. 2000).

<sup>3</sup> Denzin, *supra*.

<sup>4</sup> Bazelon Ctr. For Mental Health Law, *Making Child Welfare Work: How The R.C. Lawsuit forged New Partnerships To Protect Children And Sustain Families* 85 (1998).

<sup>5</sup> Bazelon, *supra* note 4, at 15.

<sup>6</sup> The R.C. model was built on litigation brought pursuant to the Individuals with Disabilities Education Act on behalf of students with emotional disturbances emphasizing individualized care in de-institutionalized settings. The case, *Willie M. v. Hunt* was filed in 1979 against the State of North Carolina claiming there were no appropriate treatment programs available for children in state custody. The *Willie M.* settlement required North Carolina to develop what later became known as a "system of care" so that children could receive "placements and services as are actually needed as determined by an individualized habilitation plan rather than such placements and services as are currently available." The system of care model had the added benefit of overlapping extensively with the tenets of the family preservation movement to which both parties agreed. Finally, under *Willie M.* services that were not available were expected to be "developed and implemented within a reasonable period" in home and community settings whenever possible.

<sup>7</sup> Additionally, in Alabama, R.C. plaintiffs' counsel were involved in an ongoing class action *Wyatt v. Wallis*, requiring adequate care and community outplacement for adults committed to the state's psychiatric hospitals and developmental centers.

<sup>8</sup> Bazelon, *supra* note 4, at 30. Specifically, each year, 15 percent of the 67 counties were required to implement terms of the decree. The first pilot group included six counties. DHR invited all counties to compete for Stage I implementation. Incentives included additional funding, staff positions and the ability to be exempted from rules and procedures that would impede their ability to implement R.C. Counties had one year to convert except for biggest cities, which had two.

<sup>9</sup> Typically, half of the indicators concern "child and family status": they measure the well-being of the client and his or her family over the past 30 days. The other indicators concern "system performance" over the past 90 days. The principal QSR instrument is a 95-page booklet with a series of suggestive questions for each indicator (For example, for "Stability": "How many out-of-home placements has this child had in the past two years? For what reasons? Of the placement changes, how many have been planned? How many have been made to unite the child with siblings/relatives, move to a less restrictive level of care,



or make progress toward the permanency goal?”). Scoring for individual indicators is on a six-point scale with 6 optimal and 1 the worst; 4 is considered minimally acceptable. For aggregation purposes, some indicators receive more weight than others. Weighted average scores of 4 or higher for “child status” and “system performance” indicate that the case as a whole is minimally acceptable. However, the “safety” indicator is a trump for aggregation purposes; a case can be scored as acceptable only if safety is acceptable. After preliminary scoring, the reviewers meet to discuss their cases and particularly to surface and resolve any issues of scoring.

<sup>10</sup> Kathleen G. Noonan, Charles F. Sabel, and William H. Simon, *Legal Accountability In the Service Based Welfare State: Lessons From Child Welfare Reform*, 34 L. & SOC. INQUIRY 523 (2009).

<sup>11</sup> Carlton Munson, *Supervision In Social Work: Classic statements And Theoretical Issues* (1979).

# “Engagement is the Reform”: The Role of Youth, Foster Parents and Biological Parents in Child Welfare Litigation

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The defining professional norm among lawyers is service to clients. For as long as there have been lawyers, there have been attorneys who are as committed to causes and to social reform as to solving the problems of individuals seeking assistance. The lawyers who initiate class action child welfare litigation are dedicated advocates who wish to improve the lot of one of the most marginalized, powerless, voiceless groups in society. They take the individual stories of harm and move quickly to systemic analysis and solutions, using the stories as powerful anecdotes to illustrate broader system failures. As they develop a case, they move up the ladder of complexity, aggregating data, distilling common themes and identifying systematic causes that underlie the individual tragedies that draw them in.

This paper explores whether the voice of children, youth, and parents and other stakeholders gets lost as plaintiffs’ counsel move from individual stories toward a class-based systemic approach. More specifically, the paper examines the extent to which those constituents who are typically most involved in the initial outcry for reform retain a voice once the class action gets underway and the lawyers get down to business. It also explores whether the level of involvement of youth, families and foster parents has an impact on the outcome of the litigation and the prospects for lasting system reform.

Empowerment of child clients is a significant theme in child advocacy scholarship in recent years, as greater attention has been paid to the alienation and disengagement of foster youth from the very system designed to aid and protect them.<sup>1</sup> In 2006 amendments to the federal foster care statute, Congress required state courts to consult in an age-appropriate way with youth when reviewing their cases<sup>2</sup>, and at least 18 states now have some statute or rule requiring or strongly encouraging young people to come to court.<sup>3</sup> Victoria Weisz has documented the psychological benefits to foster children who participate in court, finding support for procedural justice theory in the dependency context.<sup>4</sup> Children’s dependency attorneys throughout the country are embracing a broader view of their advocacy to become critical lawyers<sup>5</sup>, focusing much of their work on empowering their clients, especially adolescents.<sup>6</sup>

There has been less attention paid to empowering clients in class action reform lawsuits.<sup>7</sup> This paper begins to fill that gap, with an empirical investigation of how attorneys interact with core constituency groups in child welfare reform litigation.<sup>8</sup>

## ■ **Developing Relationships With Constituents is a Fundamental Lawyering Activity in Child Welfare Litigation**

### *Young People*

All attorneys agreed that developing relationships with young people who are in foster care or are alumni of the system is critically important to successful child welfare litigation. While cases come to organizations pursuing class action litigation in a variety of ways, once lawyers begin an investigation, meeting with youth becomes a top priority because “youth are really yearning for their stories to be told,” and the information they provide can confirm the systemic issues uncovered

through data and other sources. Attorneys report that they make it a high priority to “research and reach out to groups and individuals who deal with foster children, however directly or peripherally” to identify youth. These may include juvenile or family court lawyers, service providers, case workers, foster parents (individually or an organized foster parent association) or advocacy groups.

If there is an organized body of youth, lawyers reach out to it and attempt to speak directly with members. Several attorneys identified the California Youth Connection as an excellent example of such an organization. However, most jurisdictions lack this type of group; if anything, they have a youth advisory board that is internal to the child welfare agency being investigated, making it difficult for plaintiffs’ lawyers to engage them. In addition to organized groups of youth, lawyers sometimes seek to meet face-to-face with young people by asking foster parent contacts to bring their age-appropriate wards to investigatory meetings.

For legal reasons, attorneys are very cautious about meeting with minors who are in the custody of the state. “We need to ensure there is an adult who provides support and the appropriate consent. We tell them it is anonymous and we do not take names.” In the pre-filing stage of the case, the lawyers are seeking background information about the system and thus do not have cause to know the identity of youth with whom they are speaking; they also want to protect young informants from having to participate in the subsequent litigation. Thus, in general, some attorneys tend to prefer speaking to youth who have been reunified with their parents, been adopted, or aged out of the system.

The Youth Law Center, for example, sometimes employs an alumnus of the foster care system to do outreach to youth who are still in care or who have recently left the system, finding that someone who has been through foster care can sometimes establish a firmer connection with young people and develop better information than an attorney.

Named plaintiffs play a special role in class action litigation, serving as legal and symbolic representatives of the claims at issue in the case. Thus, in addition to a general desire to speak with young people while investigating a case, lawyers are especially attuned to the need to locate potential named plaintiffs, and they report doing so through various means. In *Braam*<sup>9</sup>, a local attorney initiated the lawsuit intending only to seek monetary damages for 13 injured plaintiffs, and the case became a class action later when the National Center for Youth Law (NCYL) and Columbia Legal Services (CLS) became involved. In *A.S.W.*<sup>10</sup>, an organized and astute adoptive parent sought the Youth Law Center’s (YLC) assistance and became the named plaintiff. In other cases, attorneys use a snowballing approach to gathering information from key informants and constituency groups, and through this method find suitable named plaintiffs of varying ages. All attorneys reported speaking to potential named plaintiffs in an age-appropriate way about participating in the case and obtaining their assent, sometimes in writing (though it is unclear what legal effect such a document may have). In some instances, attorneys learn about a child from third parties, but are never able to meet her; qualified next friends may nevertheless consent on the child’s behalf to her becoming a named plaintiff. Without this mechanism, it may be impossible to initiate the litigation at all, considering how hidden and disconnected from advocates foster children usually are.<sup>11</sup>

#### *Foster Parents*

Foster parents are a critical source of information about child welfare systems for attorneys who are investigating possible litigation. Attorneys always seek out an organized foster parent association, though if the organization is affiliated with the child welfare agency or even partially financially supported by it, contacts with the group can be tricky. Sara Bartosz from Children’s Rights (CR) reported significant aid in her development of the *Dwayne*<sup>12</sup> case in Michigan from two groups

of foster parents, one statewide and one based in Detroit. Bill Grimm from NCYL developed an excellent relationship with a statewide foster parent group (which is now defunct, having lost its state funding) in Washington for the *Braam* case.

Indeed, if a foster parent group is not supported by the agency, it may not be very well organized. This was the case in *Olivia*<sup>13</sup>, according to Shirim Nothenberg of CR. Notwithstanding this, the foster parents she met with had a huge impact on the course of the litigation, telling her what the key problems in the system were.

#### *Birth Parents*

All attorneys expressed an interest in meeting with biological parents, but they universally noted that in most jurisdictions, organized groups do not exist, and given the many challenges they face, parents are rarely able to develop and maintain organized self-advocacy. In some jurisdictions, a public defender's office provides representation to parents in dependency matters, and these local lawyers can be good sources of information. In locations where parents are represented by solo practitioners, it is very hard to make contacts. After a case is filed, plaintiffs' counsel will sometimes receive an influx of phone calls from aggrieved biological parents. Sometimes their complaints validate allegations already raised in the suit concerning inadequate reunification planning and services, but overall "it is hard to know what to do with this information other than refer the parents" to others.<sup>14</sup>

#### *Additional Considerations*

Counsel located in the jurisdiction of the lawsuit can play a key role in developing local contacts, depending on whether the lawyers are close to the community or part of a large litigation firm. *Braam* was brought by a well connected local attorney and advanced later by the addition of an experienced community legal services group. The named plaintiff in *A.S.W.* recruited local counsel to join the YLC; he also recruited the other named plaintiffs, and so the local firm ended up being the primary liaison to the plaintiffs. In other cases, local counsel had very little to do with constituents, and essentially all contacts were developed and maintained by lead counsel from out-of-state.

Occasionally, attorneys do not believe it is necessary to have contact with constituents when investigating a case. This occurs when the case turns more on a "nice clean legal argument" concerning, for example, the state's failure to properly implement a federal statute or regulation. In such instances, the parties usually stipulate to the facts, and thus no communication with affected individuals is required. This is particularly true in California, where state law permits any taxpayer to initiate a suit against the state alleging misuse of funds. In such cases, attorneys do not have to recruit plaintiffs who themselves are impacted by the alleged violation of law. Attorneys in California see a benefit to this practice, because even when a youth is identified with a pseudonym, they have found that anonymity can be easily pierced, and some youth who do participate as plaintiffs have sometimes been threatened with retaliation. Attorneys from the YLC may try to find a taxpayer plaintiff who has some connection to the issue in the case, even though this is not required. For example, in the *Warren*<sup>15</sup> case (concerning the use of unlicensed county-run shelters), the taxpayer plaintiff was an alumnus of the foster care system.

## ■ Engaged Constituents Help Inform the Discovery and Settlement Processes

### *The Impact of Engagement*

Attorneys expressed wide agreement on the power of information from young people and foster parents to affect the course of litigation in three ways: a direct impact on the content of the settlement agreement; an indirect impact on settlement, via the intervening phase of discovery; and a clarifying impact on the allegations raised in the case.

Named plaintiffs and their next friends are especially important voices because they are meant to be representatives of the entire client class. For example, the inclusion in the *Olivia* consent decree of provisions regarding education and transitional living plans was largely due to counsel's relationship with the named plaintiffs. In *Braam*, the lawyers had extensive contact with named plaintiffs as a plan was being drafted to implement the settlement agreement; conversations with the named plaintiff youth concerning the importance of sibling visits and institutionalization of young people in adult facilities led to settlement agreement provisions directly affecting these issues. The lead plaintiff in *A.S.W.* (an adult adoptive parent) was very active throughout the case, and even attended mediation sessions. To Maria Ramiu, from the YLC, "having a real face of a person being impacted change[d] the tenor for the better among the lawyers."

The level of detail in consent decrees is sometimes directly related to the level of engagement of foster parents with class counsel. For example, CR attorney Shirim Nothenberg reported that the *Olivia* settlement contained eight different provisions concerning foster parent recruitment, including a requirement that foster parents be involved whenever the agency updates foster parent training materials. Advocacy for these requirements emerged from her contacts with foster parents around the state. Foster parents also identified as a problem the lack of information received from the state when new children are placed with them; this led to the inclusion of detailed requirements for an information "passport" for all foster children.

In some cases, the impact of foster parents on settlement details is more indirect, with the litigation discovery process being an intermediate step. After a case has been filed, counsel may find more foster parents who are willing to share information, and have less fear of retaliation by the agency. For example, foster parents might tell the lawyers that due to a shortage of foster homes, they received children in their homes before they had completed training. This is not the type of information likely to be revealed in a case record review or administrative data, so lawyers typically use this anecdotal information to inform other discovery practice, such as targeted document requests or interrogatories. The state's responses to these discovery requests then inform counsel about whether and how to address the issue in the consent decree.

Similarly, foster parents can help to clarify the complexity of issues. For example, Casey Trupin, an attorney at Columbia Legal Services, noted how the *Braam* case was at first focused on the outcome of multiple placement moves for children in foster care. However, foster parents helped counsel understand the reasons for these moves – such as children's unmet mental health needs and a reduction in the state's financial support for foster caregiving. The more children moved, the worse their mental health condition got, which only contributed to more moves, an increased likelihood of AWOLs and a decreased likelihood of adoption. As a result of these conversations with foster parents, the lawyers amended the complaint and developed a more expansive case theory at trial.

Ultimately, meaningful engagement can lead to a better settlement product. Kevin Ryan, who was the New Jersey Child Advocate and then the Commissioner of the New Jersey Department of Children and Families (and who is now the court-appointed monitor in *Dwayne*), noted that the

*Charlie and Nadine v. Christie*<sup>16</sup> consent decree required the development of a new practice model. The agency drafted the model, but instead of implementing it immediately, agency leaders spent a year in dialogue across the state with all stakeholders including providers, resource parents, youth and parents. The agency hosted over a dozen large and small public sessions, inviting people to critique the case practice model. Ryan observed:

It took a long time to get consensus, but the case practice model's ultimate publication was based on a deep understanding that we didn't have at the outset. Sometimes public leadership assumes that engagement is key for buy-in. That is true, but it is not the point I am making. What I am saying is this: our product was better because we listened.

### *The Challenges of Engagement*

While some ongoing contact with stakeholders continues during the post-filing phase of a lawsuit, attorneys sometimes struggle to maintain a significant level of contact because of the demands and deadlines of litigation. Nevertheless, the rewards of ongoing contact are numerous, and attorneys such as CR's Susan Lambiase cited the link between regular contact and their ability to craft a consent decree that is "real, with buy in, and that can work." Lawyers may maintain contact with a core group of about a dozen stakeholders, which may include an engaged foster parent, to check whether the issues the lawyers are addressing in the case remain current problems in the field. While the content of settlement talks is confidential, precluding lawyers from seeking feedback on specific proposals being considered at the negotiating table, the attorneys can nevertheless probe at a more generalized level.<sup>17</sup>

Additionally, in *Dwayne*, the mediator and the state permitted class counsel to disclose some information about the settlement negotiations with sources so long as those sources signed a confidentiality agreement, but these sources were typically not representative of youth, foster parents or birth parents. In the *R.C.*<sup>18</sup> case in Alabama, both plaintiffs' counsel and the defendants consulted with experts as part of the settlement process; these experts, in turn, had frequent contact with stakeholders.

### ■ **Settling For Engagement May Be Preferable to Engaging for Settlement**

Unique among the cases considered in this paper is *R.C.* *R.C.* is noteworthy because the focus of the parties during negotiations was on creating processes within the agency that would meaningfully involve constituents in the agency's own work going forward. For example, a quality assurance committee was created in each county, as well as at the state level. These committees included foster parents, teachers, police officers and others from the community who were not necessarily connected to the child welfare system – there were even members of the local Junior League. Through the committees, the agency ultimately developed a process for in-depth assessment of the quality of case practice, a model that came to be known as Quality Service Reviews (or QSR).<sup>19</sup> Additionally, experts hired by both sides were involved in training agency staff to do collaborative planning meetings with families. These child and family team meetings were modeled on work being done in mental health systems on engaging constituents.

The *R.C.* approach differed markedly from the focus in many other cases, where constituents were consulted on various reform proposals that were designed to lead to better outcomes, but the reforms did not particularly seek to change the way agencies interacted with children and families. It seems that it was possible in *R.C.* to have a settlement categorically different than most child welfare consent decrees because of a confluence of critical ingredients, namely an agency director

interested in a transformative approach and plaintiffs' counsel familiar with reform trends in the mental health system. As R.C. lead attorney Ira Burnim stated:

"Engagement was the reform."

I came [to the case] from the perspective that people lacked power. Mental health experts [whom we consulted] had experience transforming systems, and they understood that empowering and listening to families was the best way to do this. Paul [Vincent, the director of the Alabama agency at the time] said that too many families were being broken up who should be together. It wasn't that 'more case plans need to be written in 30 days.' It was a view about how poor people interact with the government. Families know a lot about themselves. The system knows about risk. If they put their heads together, [they] learn a lot from each other. . . If people think you're out to get them, and don't respect them, they won't talk to you.

Collaboration is the obvious place to go to reduce risk. [Parents] love their kids and don't want them hurt. Something may be wrong – the family may be in poverty, or they may need parenting skills – but lots of families can be helped.

#### ■ **Lawyers and Monitors Use a Variety of Strategies to Engage Constituents During the Monitoring Phase of Child Welfare Lawsuits**

##### *Focus Groups and Individual Contacts*

Many of the monitors assigned to provide accountability for court-ordered settlements use a variety of methods to infuse the views of constituents in their monitoring. In the District of Columbia, the Center for the Study of Social Policy (CSSP) as monitor reaches out to known constituency groups through "listening tours." These feel "anecdotal" even though they use a rigorous focus group model. Focus groups are also being used extensively by Kevin Ryan and his monitoring team in *Dwayne*, particularly with homeless youth who have aged out of the system and with biological parents who are seeking to reunify their families. Ryan commented, "We believe in the critical relevance of voices of consumers as we draw judgments for the court about the state's commitments." With the alumni, the *Dwayne* monitors explored the extent to which the agency has complied with certain "safety net" provisions in the consent decree, such as health insurance and efforts to connect older teens with supportive adults in the community. "This is not the exclusive lens," Ryan noted – they also do a case record review and analyze administrative data – "but it is very helpful to get into the field and talk to the kids the reform is about."

Ivor Groves, the monitor in R.C., also sought to do focus groups with young people, but found it challenging to arrange them, with the exception of those counties with a system of care grant that required the county to develop an organized group of youth consumers.<sup>20</sup> Groves noted that foster parents had good attendance at R.C. monitoring focus groups, but the "less satisfied" ones tended to dominate, and that this was something he had to account for in his reporting. In general, though, foster parents were the "backbone of the system. If they felt that their needs were unmet, we tried to make [addressing] that a priority." Birth parents were less likely to attend focus groups, because of the many challenges in their life, and those who did come also tended to have the most complaints.

The *Dwayne* monitoring team collects data from foster parents, in small clusters or pairs. One provision of the consent decree is that foster parents should be provided the medical passport of children newly placed in their homes within a short time frame. Talking directly with foster parents is

an important way Ryan and his team test whether this is being done. Formal focus groups with this constituency are planned within the next six months. After that, the specific manner in which the voices of consumers will be solicited and incorporated into the monitoring will be reviewed.

Post-agreement, even when there is an appointment by the Court of an independent monitor, most plaintiffs' counsel maintain an ongoing fact finding presence. In *Olivia*, attorney Nothenberg reported keeping in touch with teenaged named plaintiffs, but not with any other foster parents or youth. Sara Bartosz has occasional contact with members of the foster parent association in Michigan or with a next friend who is very involved in the lives of some of the named plaintiffs. Nothenberg reported that most of her core group of ongoing contacts is with service providers, who provide useful feedback on the progress of reforms. The relationships with her clients are typically less about monitoring the state's compliance with the consent decree. Instead, they are personal, and have been extremely rewarding. She enjoys hearing when clients are doing well and noted that "they often get a kick out of knowing that their experiences mean something to someone outside of Mississippi." She noted it can be challenging to be in the role of a lawyer but constrained from providing concrete help in their individual situations, especially for those who have aged out of foster care.

Sometimes monitors welcome calls from constituents who can alert them to systemic problems by their experiences, but for the monitor to be perceived as a "back door" complaint center has risks. Judith Meltzer does not want to undermine the agency's leadership by stepping in on individual cases, but notes that monitors have to be open to hearing and investigating individual complaints. "We always ask first: 'Have you tried to resolve the issue through the system?' We encourage that. 'If you don't get anywhere with the official channels, then come back to us.' We want to build system capacity to respond to consumer complaints." However, if the system does not take complaints seriously, then the monitor may have no choice but to create what is essentially a parallel system for resolving case-specific problems. It can also be dangerous to draw too straight a line between a single case with poor performance and specific problems in the system, Meltzer said. As long as the monitor is careful not to assign causation and respects the anecdotal nature of the information, "It is important to [hear these stories] and do it consistently and widely." That said, most of the current court monitors believe that there are always things one can learn from talking directly to children and families to provide a context for viewing quantitative data.

#### *Constituent Surveys*

The *Braam* monitoring panel has made wide use of foster parent surveys. Panel member Jess McDonald had found the use of such surveys to be very helpful when he was Commissioner in Illinois, and he brought this idea to *Braam*. Initially, the surveys (conducted by Washington State University) were done annually, but they are now done quarterly. When the surveys first began, the agency was unable to produce reliable and valid data on many important measures (for example, monthly visits to children by caseworkers), so the survey filled a critical information gap. The panel found that the survey results reflected what people were saying anecdotally about the functioning of the system. Now that the agency's administrative data is more reliable, the emphasis in the foster parent surveys is to focus on measures that are difficult to automate, such as asking respondents if they have foster children placed with them who are sexually aggressive, and if so, whether the respondent has received specialized training.

The *Braam* panel also investigated the experiences of young people in the Washington child welfare system, conducting a telephone survey of 706 respondents as well as three focus groups in 2008. Researchers attempted to contact every single youth aged 15 to 18 in the agency's care during an 18-week period; the contact rate was 42 percent, and 89 percent of those reached agreed to participate.<sup>21</sup> This supports the idea that young people want to talk about their experiences in foster



care and offer suggestions for system improvement. Among other things, the survey was used to assess compliance with a consent decree requirement that the agency conduct staffings with youth who were 17-and-a-half years old, a measure for which there was no administrative data available. However, the survey does not appear to have been put to wider use, nor are there current plans to repeat it. Plaintiffs' counsel in *Braam* were very interested in having the survey done quarterly, along with the foster parent survey.

#### *Monitoring in Public*

The monitoring model in *Braam* is notably different from most other cases in two ways. First, rather than naming a specific individual or organization as the monitor, the court appointed a panel of experts. The panel includes a social work professor, a mental health administrator, a former director of a large public child welfare agency, a politician and a law professor. Second, the work of the *Braam* panel is remarkably public. The panel hosts regular public meetings around the state of Washington that function much like a legislative hearing – part of the meeting involves the panel doing its regular work in the open, and part of the meeting is dedicated to soliciting public input. The panel maintains a robust website containing detailed information about its work; minutes of all meetings are posted, as are its reports, key court documents and the schedule of upcoming meetings.<sup>22</sup> The early public meetings were very well attended (though only a few foster care alumni ever came), but interest has seemingly waned more recently.

The *Braam* panel also “believes that it is important for the agency to take the lead in self-monitoring. Our job is to get them to the point of taking it on themselves and being good stewards of accountability.” Indeed, in retrospect, McDonald worries that the public nature of the panel’s work was a mistake, because “it does not allow people to admit honest errors and move on. Instead they had to posture for the press.” McDonald suggested that it may take longer for a public agency director to appreciate the positive impact of litigation if the post-judgment reform work takes place in an environment where mistakes are punished instead of used as learning opportunities.

#### *QSRs: Encouraging Agency Competence to Engage Constituents*

A key monitoring tool in *R.C.* was the Quality Service Review (QSR), described by Ivor Groves, the court-appointed monitor in *R.C.*, as “an organized protocol for looking at processes and outcomes to see how well the system is functioning. The purpose is to understand what’s really going on because case records don’t always reflect reality.”<sup>23</sup> The QSR also becomes an important tool for adding constituent voice to an assessment of how a system is functioning. The QSR, as it developed in Alabama, typically reviewed at least 25 cases in each county, soliciting the views of parents, youth and foster parents involved in each case. Among other things, they were asked if their needs were being met and about their overall level of satisfaction. According to Groves, this process never yielded a shortage of rich and useful information for the system, the monitor and for local quality assurance committees.

#### ■ **The Greatest Legacy of Child Welfare Litigation is a Changed Agency Culture of Engagement**

One question explored with the attorneys and monitors interviewed for this analysis was whether there are specific structures that have been developed in child welfare class action cases to create lasting community involvement. Many of the lawyers and monitors interviewed agreed that from the start of litigation it is important to pay attention to what will be left behind when the case ends. Meltzer said that in its monitoring role, CSSP promotes the development of an engaged community. “When external monitoring ends, you need community accountability and oversight.”

Trupin and McCann noted that the public had become very engaged in the *Braam* reform efforts and that there were several new groups of key constituencies that had become organized since the

*Braam* monitoring panel was created. There is a new group of biological parents, and they recently met with the parties and two members of the monitoring panel to express their support for the *Braam* decree's help for their children as well as their desire that additional attention be paid to the need for reunification services. There is also a newly created group of foster parents, replacing the one that dissolved earlier in the litigation. Lambiase reported that in *G.L.*<sup>24</sup> in Kansas City, the agency developed a cadre of "master" foster parents, whose role (among other things) included training the trainers of new foster parents and hosting recruitment events. "The consent decree empowered them. They had a lot of untapped knowledge."

Most notably in *Braam*, the Mockingbird Society – an organization that combines youth services and advocacy – found enormous opportunity with the litigation to engage and organize young people. Mockingbird staff attended the panel meetings from the beginning, constantly urging the panel to talk to youth; according to Trupin, this pressure led directly to the youth survey described earlier. The youth survey in turn established the need for the system to listen to youth in an ongoing way. Mockingbird has created a youth group, Ask Y (Advocates for System Kids and Youth), which among other things takes regular lobbying trips to the Legislature.<sup>25</sup>

Monitors generally do not appear to define nurturing or encouraging the development of constituency organizations as part of their formal role. According to Nothenberg, the *Olivia* monitor makes herself available to consumers with complaints about the system but does not see her job as including nurturing their "voice." McDonald stated that the *Braam* panel does no outreach to the community and makes no attempt to help develop constituent groups, choosing to focus instead on helping the agency develop internal methods to sustain reform. Making a descriptive observation, Meltzer said, "I do not see lawsuit monitors as the focus for promoting the development of constituent organizations." She added, normatively, "But they should be encouraging the systems to do that themselves."

Attorneys had a difficult time pointing to any specific organizing that has occurred among constituents around child welfare reform in which a lasting movement of engaged communities outlived the litigation. Many commented on how disempowered and disorganized biological parents, in particular, are, as they have far too many immediate challenges (not least of which is to get their children back) to organize. Burnim said that biological parents don't want to be involved in the child welfare system at all. As for young people, Ryan observed that they are simply not ready, developmentally, for organizing work. "Look at where they are on Maslow's hierarchy of needs," he said.<sup>26</sup> "They still need safety. They are trying to survive."

#### *Change Happens on the Inside*

Nevertheless, an increasingly used approach combines the desire of monitors and plaintiffs for agencies' reformed practices to outlast the sunset of litigation with the need for constituents to be involved and have their voices heard. This approach is essentially what Burnim described: making engagement itself the heart of the reform. Meltzer noted that the child welfare field has, in general, paid greater attention in recent years to engaging youth, foster parents and families of origin.<sup>27</sup> Indeed, in multiple cases, respondents identified ways in which community members are brought to the table by the public agency under the supervision of the litigation process. For example, in addition to the involvement of community members on quality assurance committees and the QSR process in *R.C.* described earlier, the Alabama case also led to the widespread use of child and family team meetings.

Family team meetings are also a feature of the *Dwayne* consent decree. Members of the community have also become engaged in reform efforts in Washington, D.C., under the *LaShawn*<sup>28</sup> litigation.

There, an active group of community-based providers participates regularly in the QSR process as well as the local child fatality review team. Meltzer sees this participation as having a lasting impact even after the litigation ends. Lambiase noted that as the *G.L.* litigation in Kansas City was getting closer to termination, an exit plan was negotiated that intentionally included “sustainability measures,” one of which was the establishment of a community quality assurance committee, with a representative from each of various constituencies.

### ***Discussion and Recommendations***

The last 30 years have seen many changes in social services, but perhaps the most striking is the increased commitment by professionals to engage the clients they serve in a manner going well beyond merely providing direct aid. The systems of care philosophy, which developed first in mental health, has begun to take root in other spheres as well. Constituents are now involved in the planning, design and evaluation of programs. At the case level, their views are solicited and often made central when agencies consider what services to offer.

Lawyers are notoriously slow to change, so it may not be a surprise that “cause lawyers”<sup>29</sup> have only more recently begun to grapple with how to meaningfully engage with constituents. Some important work is being done in this arena within child welfare reform litigation. The literature and this paper suggest multiple reasons why a continued focus on involving young people, foster parents and biological parents in the litigation is a good thing. Engagement is good for the case; it is good for consumers themselves; and it is good for the system.

The three principal conclusions from this analysis are that:

- Effective constituent engagement informs all stages of the lawsuit, including the investigation, settlement negotiations, monitoring and implementation of reforms.
- Engagement of constituents in class action litigation can begin to empower them to have influence far beyond the litigation itself, although the evidence for the creation of a social movement to improve child welfare system outcomes in the jurisdictions reviewed is minimal at this time.
- Engagement IS the reform.

The most lasting form of change is one that fundamentally reshapes the agency from the inside, changing its very culture and approach to its work. Little is more radical in child welfare than shifting the agency’s orientation from bureaucracy-centered to child-, youth- and family-centered. An internal mechanism that demands continuous outside pressure (or at least participation) is the surest guarantee of ongoing fidelity to reform.

And so the Quality Service Reviews and the Family Team Meetings (or similar mechanisms) seem to hold the most promise, both for what they accomplish and who is involved in them. The QSR builds into daily agency practice a commitment to self-learning. The FTM repositions the agency’s service array so that it solves actual problems, not generic ones. Each succeeds because each puts the community in the middle of the conversation. Litigation that results in implementation of authentic QSR and FTM processes has the promise of populating the system with a permanent community of constituents. Potentially, these changes can take such strong root that one day the agency looks like it is administered by the people it aims to serve. That is power. That is the result of engagement. Engagement is the reform.

## ABOUT THE AUTHOR

### Erik Pitchal

Erik Pitchal has had a varied career in and around the law, as a trial attorney, scholar, and teacher, with most of his work focused on advocacy for children and their families. He has represented children in juvenile court cases; litigated federal class action civil rights cases; managed a university-based policy institute; and created a law school clinical education program. He writes, lectures, and appears on television as an expert commentator on current legal issues. He currently serves as an independent consultant to child-serving non-profit organizations, offering strategic advice, professional training, and program evaluation, and he is a Lecturer in Law at Northeastern University. He is a graduate of Yale Law School and Brown University.

## ENDNOTES

<sup>1</sup> See, e.g., Theresa Hughes, *Representation By Proxy: Adolescent Courtroom Participation in Child Welfare Proceedings*, 30 CHILDREN'S LEGAL RTS. J. 1 (2010); Erik S. Pitchal, *Where Are All the Children? Increasing Youth Participation in Dependency Proceedings*, 12 U.C. DAVIS J. JUV. L. & POL'Y. 233 (2008); Victoria Weisz, et al., *Children and Procedural Justice*, 44 COURT REVIEW 36 (2007); Andrea Khoury, *With Me, Not Without Me: How to Involve Children in Court*, 26 CHILD L. PRAC. 129 (2007); Miriam Aroni Krinsky and Jennifer Rodriguez, *Giving A Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings*, 6 NEV. L.J. 1302 (2006).

<sup>2</sup> Pub. L. 109-288, § 10, 120 Stat. 1223, 1255 (2006) (codified at 42 U.S.C. § 675(5)(C)(iii)).

<sup>3</sup> Hughes, *supra* note 1, at 8-9.

<sup>4</sup> Weisz, *supra* note 1.

<sup>5</sup> According to Kevin Johnson, "Critical lawyering aims to provide subordinated people with greater access to legal representation and to promote more social change. Critical lawyers collaborate with clients who, through lessons learned in the litigation process, may in the future act on their own behalves in other spheres, such as community organizing and politics. Reformers by nature, critical lawyers differ from traditional impact litigators in their methods which focus on collaboration with clients to empower them, rather than lawyer-driven litigation goals." Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer To Do?*, 5 MICH. J. RACE & LAW 201, 222-23 (1999).

<sup>6</sup> For example, the annual training conference of the National Association of Counsel for Children, which draws some 700 dependency attorneys, typically features a session about how to increase the participation of child clients in court proceedings.

<sup>7</sup> *But see* Martha Matthews, *Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class Action Cases*, 64 FORDHAM L. REV. 1435 (1996).

<sup>8</sup> The empirical aspect of this project was limited to 12 semi-structured interviews with 14 members of three key types of informants: lead counsel for plaintiffs in child welfare litigation; plaintiffs' local counsel; and court-appointed monitors. These three informant groups were selected because of a belief that they would be most knowledgeable about the extent and manner of participation by youth, foster parents and biological families in all stages of complex child welfare litigation. Consideration was given to interviewing stakeholders themselves, but the logistical complexities involved with such work were too hard to overcome given time and resource constraints. In order to identify common themes, as well as to validate as much data as possible, five specific class action cases were identified with the goal of interviewing each of the three informant types on each case. Several criteria governed the selection of cases. First, I wanted to consider cases that had been brought by different lead counsel organizations. Several different nonprofit law firms have prosecuted child welfare reform cases, and it seemed important to study examples from more than one or two of them. Second, I wanted to ensure geographic diversity, to identify any possible impact that regional variation might have on the question at issue. Third, I was interested in a mix of cases in terms of these variables: how long ago or how recently they were filed; whether they are still ongoing or are closed; and whether they addressed "soup to nuts" in the defendant agency's practice or were more limited in substantive coverage.

To enrich the data and to provide a more longitudinal perspective on child welfare reform practice, interviews were also conducted with key informants with experience in multiple cases over many years – three attorneys for lead counsel organizations (one solo interview and one with a pair of attorneys from the same organization) and one monitor.

All interviews were conducted by telephone over a three week period. The interviews were semi-structured, using protocols that varied slightly depending on the informant type. For the case-specific interviews, major domains of interest were the background context for the case; the investigation phase of the case; the process of negotiating a settlement agreement; and the post-judgment, monitoring phase of the case. For the additional interviews with key informants, the same domains were covered.

However, in these interviews, questions were designed to elicit thematic responses and to investigate whether there have been changes in practice since the respondents have been doing this type of work.

At the start of each interview, respondents were told the nature of the project. All were asked for permission to use their names in this paper, as well as to attribute direct quotations to them, and all consented. The attorneys who were interviewed were careful, however, not to reveal privileged or confidential client or case-related information.

One limitation of this study is potential researcher bias. I was formerly an attorney at Children's Rights. Many of the people interviewed are former co-workers and personal friends. At the time the interviews were conducted, I was still co-counsel (with Ira Lustbader and Shirim Nothenberg) on one of Children's Rights' ongoing cases, *Kenny* in Georgia. Additionally, the Center for the Study of Social Policy commissioned this study, and the Center's deputy director, Judith Meltzer, is a respondent in this project. Though I have attempted, to the best of my abilities, to approach this work from a neutral position, it is possible that relationships with some of the people interviewed influenced the data collection and the analysis.

<sup>9</sup> Braam v. State, 81 P.3d 851 (Wash. 2003).

<sup>10</sup> A.S.W. v. Mink, 424 F.3d 970 (9th Cir. 2005).

<sup>11</sup> See Sam M. v. Carcieri, 608 F.3d 77 (1st Cir. 2010). One law firm that was not included in this study is the Legal Aid Society of New York City. Legal Aid's Juvenile Rights Practice has a special litigation unit dedicated to impact cases in both child welfare and juvenile justice matters. In contrast to most of the other organizations whose attorneys were interviewed (the exception being Columbia Legal Services), Legal Aid also represents children in individual dependency cases. This fact might very well affect the level of engagement of youth in Legal Aid's class action cases compared to the others discussed in this paper. It certainly makes it less difficult for Legal Aid to locate named plaintiffs for their class action lawsuits.

<sup>12</sup> Dwayne B. v. Snyder, No. 2:06-cv-13548 (E.D. Mich. Jul. 18, 2011) (modified settlement agreement).

<sup>13</sup> Olivia Y. v. Barbour, 351 F.Supp.2d 543 (S.D. Miss. 2004).

<sup>14</sup> One attorney thought that it is a "potential conflict" for a lawyer for children in child welfare litigation to help a parent of a putative class member.

<sup>15</sup> Warren v. Saenz, No. 317487 (Cal. Super. Ct., S.F. County, Dec. 18, 2000)

<sup>16</sup> Charlie H. v. Christie, 83 F.Supp.2d 476 (D. N.J. 2000).

<sup>17</sup> It is possible that class members, as clients, would be entitled to know the specific details of settlement negotiations even without signing a confidentiality agreement. Matthews, supra note 7, discusses ways in which this could be accomplished.

<sup>18</sup> R.C. v. Nachman, 969 F.Supp. 682 (M.D. Ala. 1997).

<sup>19</sup> The QSR, or Quality Service Review, is a case reviewing model developed during the R.C. case. See Kathleen G. Noonan, Charles F. Sabel, and William H. Simon, *Legal Accountability In the Service Based Welfare State: Lessons From Child Welfare Reform*, 34 L. & SOC. INQUIRY 523 (2009) (hereinafter "Noonan, *Legal Accountability*"). See also infra at 18 (comments of R.C. monitor Ivor Groves). The QSR later served as the model for a new approach used by the federal government to audit states' child welfare performance. See OLIVIA GOLDEN, REFORMING CHILD WELFARE 82 (2009).

<sup>20</sup> "System of care" is a philosophy for the delivery of services, particularly with respect to children's mental health. It places great emphasis on involvement by children and their families in service design. As stated on the Substance Abuse and Mental Health Services Administration website, in a system of care, "Families and youth work in partnership with public and private organizations to design mental health services and supports that are effective, that build on the strengths of individuals, and that address each person's cultural and linguistic needs. A system of care helps children, youth and families function better at home, in school, in the community and throughout life." See <http://www.systemsofcare.samhsa.gov/> (last visited Oct. 22, 2010). See also infra n. 27 and accompanying text.

<sup>21</sup> John Tarnai and Rose Krebill-Prather, *2008 Survey of Washington State Youth in Foster Care*, available at <http://www.braampanel.org/YouthSurveyDataReport2008.pdf> (last visited Oct. 22, 2010).

<sup>22</sup> <http://www.braampanel.org>. According to data provided by the panel's executive director, Carrie Whitaker, the website averages about 400 visits per month. (Data concerning unique visitors was not available.) Additionally, about 500 people have signed up for an e-mail list Whittaker maintains. She notifies subscribers whenever new material is posted to the website or whenever a panel meeting is scheduled.

The Braam plaintiffs' lawyers maintain their own website at [www.braamkids.org](http://www.braamkids.org). When last visited on Nov. 17, 2010, it appeared to be several months out of date, highlighting the panel's October 2009 report (two have been published since then) and advertising the next panel meeting as occurring on March 9-10, 2010 (there have been two meetings since then, with another scheduled for December 6-7, 2010). This suggests the difficulty that plaintiffs' lawyers might have in maintaining a website that has real utility for the community.

Another major class action involving needy children, *Rosie D.*, also led to the development of a website, [www.rosied.org](http://www.rosied.org), also maintained by plaintiffs' counsel in that case. *The Rosie D.* case concerned mental health services for children, and the website

contains detailed information about the litigation and the state's plans to implement the court's rulings. Much of the information is dense and geared towards professionals or those with a sophisticated understanding of government benefits generally and children's mental health care specifically. One page within the site contains a comprehensive list of resources for families to consult, including links to other organizations and agencies.

<sup>23</sup> See also Noonan, *Legal Accountability*, supra n. 19.

<sup>24</sup> G.L. v. Sherman, No. 77-CV-0242-DW (W.D. Mo. Feb. 1, 2006) (order of dismissal with conditions).

<sup>25</sup> See <http://www.tndev.net/mbs/ask.php> (last visited Oct. 25, 2010). The agency has also created its own internal youth advisory council, Passion for Action. Trupin reported that since *Braam*, the number of youth AWOLs has plummeted, though he was reluctant to assign causality. Rather, he speculated that the adolescent survey and the public feedback offered to the panel at its meetings (often organized by Mockingbird) may have impelled the agency towards greater progress in this area.

<sup>26</sup> ABRAHAM H. MASLOW, *MOTIVATION AND PERSONALITY* (3d Ed. 1970).

<sup>27</sup> Many jurisdictions are implementing a system of care approach to their child welfare work and are thus attempting to elevate family involvement to a core operating principle. See, e.g., National Technical Assistance and Evaluation Center for Systems of Care Resources, *A Closer Look: Family Involvement in Public Child Welfare Driven Systems of Care* (Feb. 2008), available at <http://www.childwelfare.gov/pubs/acloserlook/familyinvolvement/familyinvolvement.pdf> (last visited Nov. 23, 2010).

<sup>28</sup> LaShawn A. v. Gray, No. CIV-89-1754 (D. D.C. May 2, 2011) (monitoring report).

<sup>29</sup> Cause lawyering is generally understood to mean a process by which attorneys advocate for a cause instead of, or as much for, a specific client or clients. AUSTIN SARAT AND STUART A. SCHEINGOLD, *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (1998). Cause lawyers are stereotypically involved in "public law" litigation, cases in which the functioning of large, public, bureaucratic system is challenged as violating rights. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

# Establish the Finish Line at the Start: The Importance of a Disengagement Plan

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Grace M. Lopes, Court-Appointed Special Arbitrator and Monitor

Experience has shown that institutional reform litigation involving public sector entities, including child welfare systems, is a marathon and not a sprint. Even after the initial liability issues have been resolved and the case enters the remedial phase, it can take many years, sometimes decades, to achieve and sustain required outcomes. While court involvement has contributed to substantial reforms, some lawsuits have had limited success. This article suggests that litigants consider a strategic approach to termination of the court's orders and dismissal of the lawsuit at the outset of the remedial stage, by adopting disengagement standards, procedures and strategies that are incorporated into the initial consent decree. By establishing the finish line and defining how to get there at the start, a successful outcome within a shorter time period may be possible.

## **Background**

Case law related to institutional reform litigation involving public sector child welfare systems speaks powerfully to the reasons why advocates seek relief from the courts.<sup>1</sup> Substantial reforms have been accomplished in the wake of court involvement.<sup>2</sup> However, some commentators point out that these lawsuits can have limited success, as well as unintended negative consequences.<sup>3</sup> To promote success, it is crucial for litigants to establish a framework at the start of the remedial phase that incorporates an efficient and practical approach to termination and dismissal.

A review of child welfare reform litigation suggests that many factors, both directly related to and/or independent of the litigation, have contributed to positive outcomes.<sup>4</sup> A key ingredient for success is within the control of the litigants: they can work collaboratively, but non-collusively over time,<sup>5</sup> within a remedial framework that encourages them to consider and share information about system performance, marking progress toward clearly defined outcomes on an ongoing basis, and subject to an informed, efficient, and informal adversarial testing process that has a clearly articulated finish line and a roadmap for getting there.<sup>6</sup>

This model minimizes the risk of serial enforcement proceedings.<sup>7</sup> Enforcement actions can be a double-edged sword: prodding compliance if an institutional defendant is recalcitrant,<sup>8</sup> but inevitably protracting the lifespan of the lawsuit.<sup>9</sup> As a general matter, no one is well-served when a lawsuit extends longer than reasonably necessary to achieve and sustain required outcomes. And this is especially true in the child welfare context because there is a substantial risk that children who may have been very poorly served will "age out" of the system without receiving the full benefits of a court-ordered remedy.

According to some commentators, responsibility for the duration of these lawsuits rests with judges, plaintiffs' lawyers, elected officials and public agency managers, because each has a stake in continuing, as opposed to ending, these lawsuits.<sup>10</sup> Even assuming this observation hits the mark, all participants also have a countervailing interest in ending these lawsuits within a reasonable period of time.<sup>11</sup> Defendants' lawyers have an interest in maximizing their client's management flexibility and budgetary discretion – critical tools for elected officials that can be affected, directly or indirectly, by the lawsuit's

mandates.<sup>12</sup> Similarly, plaintiffs' lawyers have an interest in obtaining, and demonstrating that they can obtain, meaningful results for their clients.<sup>13</sup> It is precisely these interests that should animate the development of a collaborative and strategic approach to court disengagement at the outset of the remedial stage or at the earliest opportunity thereafter.

### ***Meeting the Challenge at the Starting Point***

Institutional reform litigation involving public sector child welfare functions is complex, fact intensive, and remarkably consuming for virtually all participants. The litigation process that culminates in the remedial phase can continue for many years, and often it does not resolve the issue of liability.<sup>14</sup> As a general matter, once the liability issues are out of the way, adversaries must ultimately work together to shape the contours and content of the remedy, which is typically embodied in a consent decree or some other type of settlement agreement that is enforceable by the court.<sup>15</sup> Following on the heels of a demanding liability phase, negotiations related to remediation can tax the problem-solving capacity of even the most creative participants. The challenges can become even more daunting when litigants attempt to reach agreement on the standards and procedures related to termination of the court's orders and the dismissal of the lawsuit.

Nonetheless, there are strategies that may help both sides address these challenges. First, like all negotiations, litigants ought to consider their adversaries' perspectives. Institutional defendants often seek several types of termination provisions in the initial consent decree: 1) unconditional sunset provisions (i.e., a date by which the consent decree automatically terminates and a dismissal with prejudice is entered),<sup>16</sup> 2) automatic termination when the underlying legal violations are remedied and there is no likelihood of a recurrence, and/or 3) the concrete terms that must be satisfied in order to end the lawsuit.<sup>17</sup> Defendants contend that sunset provisions serve to focus and accelerate the reform process. They point out that basic fairness requires notice at the beginning of precisely what must be achieved to end the lawsuit.<sup>18</sup> Defendants emphasize that if specific requirements are not defined at the outset, the risk is years spent investing in a compliance effort that chases an ever-moving target. In addition, defendants maintain that the law requires termination based on remedying the underlying legal violations regardless of compliance with the precise terms of the consent decree.<sup>19</sup> According to defendants, it is this type of automatic termination provision that protects against lawsuits continuing for lengthy time periods based solely on the failure to satisfy decree requirements that are not otherwise required by law.

In contrast, plaintiffs often are unwilling to agree to unconditional sunset provisions. This reluctance is based on the recognition ". . . that injunctions are not self-executing" because court orders do not, in and of themselves, translate into compliance with the law.<sup>20</sup> Because each case is unique and reform is a dynamic process, plaintiffs argue that the duration of the remedial stage cannot be calculated. Plaintiffs contend that automatic termination based solely on correction of the underlying legal violations and a finding that there is no likelihood of recurrence would violate the governing legal standard.<sup>21</sup> According to plaintiffs, these types of termination provisions would deprive class members of the full benefits of a remedy that is presumptively tailored, to the greatest extent permitted by the negotiation process, to address their best interests. For many plaintiffs' attorneys, endorsement of either an unconditional termination date or automatic termination provisions such as those described above, represents an abrogation of their ethical obligations to their clients. If the exit criteria are set too early, plaintiffs maintain that there is a risk the "end game" will become the defendants' sole focus.<sup>22</sup>

As a general matter, plaintiffs, and at times, defendants, believe that at the outset of the remedial stage it is not possible to define with sufficient specificity the concrete terms that must be satisfied in order to



terminate the consent decree and dismiss the lawsuit. Proponents of this position explain that baseline data related to the outcomes established by the consent decree must be collected. They maintain that exit criteria, which must be based on real-time performance, can only be crafted after the reform process gives rise to measurable progress.

Notwithstanding these varying perspectives, it is important for litigants to consider incorporating a disengagement scheme into the initial decree that reflects a strategic approach to termination and dismissal. Not only can this promote reform and reduce the incidence of enforcement actions, it may also minimize the risk of litigation related to whether the court should terminate its jurisdiction and dismiss the lawsuit – issues that are litigated with some frequency in these types of cases.<sup>23</sup> Like enforcement litigation, this form of litigation may divert public agency managers from reform efforts and undercut the momentum necessary to achieve and sustain progress.<sup>24</sup>

Consent decrees in child welfare reform cases reflect the variety of ways litigants have reconciled their divergent viewpoints in an initial settlement agreement<sup>25</sup> and throughout subsequent stages of the remedial process.<sup>26</sup> Although many initial consent decrees do not incorporate fully developed termination standards and related procedures, consent decrees have been modified to incorporate standards and procedures related to termination and dismissal as the remedial stage of some lawsuits has evolved.<sup>27</sup> This phenomenon, referred to by some litigators as a *collaborative refinement process*, signals that many litigants ultimately work to accommodate their differences by reaching agreement on a strategic approach toward ending the lawsuit.

Therefore, even if litigants cannot agree on the precise terms of disengagement in the initial consent decree, they may wish to consider adding an obligation to eventually craft a disengagement scheme. One way to accomplish this objective is by adding a provision that affirms the parties' agreement to develop a disengagement scheme on a prospective basis and to submit it for court approval by a specific date. Alternatively, the initial decree could include a provision indicating that the obligation to develop and submit the disengagement scheme is triggered by a finding, or the parties' agreement, that certain specific requirements have been satisfied.<sup>28</sup> As explained in the next section of this article, incentives of this sort can be key features of a disengagement scheme.

### ***Design a Framework for Disengagement***

Regardless of whether incorporated into the initial decree or developed later, a disengagement scheme should be anchored by a strategic framework, which in this context translates into incentives that recognize and reward progress as well as enforcement mechanisms to address noncompliance. Indeed, in this type of litigation, the value of the proverbial "carrot and stick" should not be under-estimated. The mighty "stick" of enforcement through contempt sanctions must be balanced by a strategically sequenced series of "carrots" that incentivize progress.

A review of consent decrees related to the reform of child welfare systems indicates that various models have been adopted by litigants and the courts to guide the incremental diminution of court oversight.<sup>29</sup> These models assume enforcement actions are not pending and generally establish that court oversight will end in one of two ways: through phased reductions after achieving compliance with most if not all substantive requirements,<sup>30</sup> or incrementally as individual requirements are achieved and performance is sustained.<sup>31</sup> Although additional research is necessary to assess the efficacy of these models, the anecdotal evidence suggests that each approach, at least in some instances, served to promote required reforms.<sup>32</sup>

Various factors unique to each specific lawsuit must be weighed as litigants explore the types of incentives to include in a disengagement scheme. By definition, incentives must be customized to the peculiarities of each case. Although there is no viable “one size fits all” approach, as a general matter, consideration should be given to deliberately sequencing the achievement of pivotal requirements with the award of incentives so that it is likely progress can begin to be recognized and rewarded in the early part of the remedial stage. In turn, this type of strategic design may help to build momentum and accelerate the overall pace of the reform process.<sup>33</sup>

### ***Establish the Finish Line and Map Out How to Get There***

Clearly defining the finish line and mapping out how to get there as early in the remedial phase as possible can help to promote a successful outcome within a shorter time period. For this reason, litigants should consider squarely addressing the legal standards for termination of the consent decree and dismissal of the lawsuit by including in the initial decree provisions that:

- describe the decree’s requirements and purposes, and identify the exit criteria, or alternatively, specify any conditions that must be fulfilled prior to translating the decree’s requirements into exit criteria;
- define the legal standard for measuring whether the decree’s requirements have been satisfied;
- establish the fact-finding process and related procedures that will govern the determination of whether the decree’s requirements have been satisfied and include a streamlined mechanism for adopting corrective action or applying incentives if indicated;
- delineate the factors that should be taken into account in determining the durability of the remedy and address the fact-finding process and related procedures relevant to the durability determination; and
- provide for reassessment and modification subject to certain limitations.

Each of these components is discussed below.

#### **■ Describe the Requirements and Purposes of the Decree**

In considering whether termination is appropriate, courts determine whether the decree’s requirements have been satisfied and its purposes fully achieved.<sup>34</sup> Thus, in addition to ensuring that the decree’s substantive requirements are crafted clearly, the requirements set out in the initial decree must be formulated so that a baseline measurement can be conducted and progress tracked, monitored, assessed, analyzed and reported to the parties and the court.<sup>35</sup> Assuming exit criteria have not been developed,<sup>36</sup> litigants should address the process that will be used to translate the decree’s substantive requirements into exit criteria and incorporate a provision into the initial decree that reflects their agreement about when and how exit criteria will be adopted. There are many ways to approach this determination, but it should be guided by an overall plan that treats the formulation of exit criteria in a strategic way.<sup>37</sup>

Often the result of a vigorous negotiation process, exit criteria can serve as the ultimate yardstick for measuring whether the decree’s purposes have been fully achieved. Exit criteria should be informed by practical considerations, based on reasonable expectations, crafted with fidelity to the law of the case, and balanced with appropriate safeguards.<sup>38</sup>

Additionally, in order to establish a necessary framework for a court’s termination inquiry, the initial decree should define its core goals or purposes in a clear and unambiguous fashion.<sup>39</sup> Consent decrees that have been entered in the child welfare reform context do not uniformly include an express recitation of the decree’s purposes;<sup>40</sup> however, it appears that more recently entered

decrees tend to do so.<sup>41</sup> Beyond its usefulness in the court's termination inquiry, a cogent statement of the decree's purposes that is developed jointly by the litigants can serve as an effective dispute resolution tool throughout the remedial phase because it can be used to focus both sides on their shared vision of the litigation's objectives.

- **Define the Legal Standard**

In considering whether a consent decree should be terminated, courts rely on any termination provisions that are set out in the decree to guide their deliberations.<sup>42</sup> As an important first step, courts determine whether the decree adopts an express standard for measuring whether its requirements have been satisfied.<sup>43</sup> A review of termination provisions in consent decrees entered in the child welfare reform context reveals certain variations,<sup>44</sup> but as a general matter, most adopt the legal standard of substantial compliance<sup>45</sup> with all or most provisions for defined time periods, ranging from a minimum of six months to a maximum of five years.<sup>46</sup>

Because a determination of whether a compliance standard has been satisfied is case-specific and generally fact-intensive, disputes about whether the requisite standard has been met are not uncommon and can contribute to extending the lifespan of the lawsuit. It is especially important for the initial decree to include a termination provision that clearly addresses the following matters: 1) the standard required to measure whether the decree's requirements have been satisfied, i.e., full compliance, substantial compliance, etc.; 2) how long the requisite compliance standard must be sustained; 3) whether the requisite standard must be achieved and/or sustained for all requirements simultaneously; and 4) the factors that will inform the determination of whether the standard has been satisfied.

- **Establish the Fact-Finding Process and Related Procedures to Determine Whether Requirements have been Satisfied and Include a Mechanism for Adopting Corrective Action or Applying Incentives**

Institutional defendants and plaintiffs have a mutual interest in ensuring that both sides have confidence in the fact-finding process that governs the remedial stage. If there is a shared understanding of the facts related to the defendants' performance, disputes can be minimized.<sup>47</sup> Like other types of litigation, child welfare reform litigation offers many illustrations of factual disputes that contribute to an unduly protracted remedial stage.<sup>48</sup> Thus, in the initial decree, litigants may wish to incorporate an approach to fact-finding that produces timely and reliable information through a streamlined process. The fact-finding provisions can be linked to the disengagement framework by including procedures for awarding incentives or prescribing corrective action, if appropriate, without requiring, at least in the first instance, time-consuming motions practice.<sup>49</sup>

Consent decrees that have been entered in child welfare reform litigation mostly require fact-finding by an independent, neutral entity selected by the parties, who is often, but not always, directly accountable to the court.<sup>50</sup> Many decrees offer little if any guidance on how disputes related to fact-finding will be addressed. It is important for litigants to adopt a practical approach to fact-finding in the initial decree in order to limit the delays that can result from disputed factual findings. For this reason, litigants should consider incorporating an alternative dispute resolution ("ADR") process into the initial decree.<sup>51</sup> Litigants may also wish to weigh the benefits of adopting standards of review that place reasonable limits on their respective abilities to challenge the fact-finders' determinations.<sup>52</sup>

It is important for litigants to recognize that defendants, plaintiffs and the fact-finder have a mutual interest in ensuring the accuracy of the determinations made by the fact-finder. For this reason, litigants may wish to assess whether the initial decree should include informal procedures for challenging determinations made by the fact-finder before they are filed with the court. For example, the procedures can require the fact-finder to submit her/his findings to the litigants in draft form for review and comment.<sup>53</sup> If a litigant contests any aspect of the findings, the litigant can be required to explain the grounds for the objection and to produce all supporting evidence within a prescribed time period. This approach provides the fact-finder with an opportunity to reconcile inconsistent evidence, conduct any follow up assessment or investigation that is warranted, and modify the findings if s/he deems it is appropriate.

Finally, litigants can structure the fact-finding process in a way that is likely to maximize resources and accelerate progress. Neutral fact-finders collect and analyze information from a variety of sources, including data reports and other records maintained by the public child welfare agency. Subject to the fact-finder's independent validation and determination about the reliability of the data, the extent to which the fact-finder may rely on system performance data generated by the defendants is an issue the litigants may wish to resolve in the initial decree.<sup>54</sup>

Equally important is determining how factual findings are formulated, presented, and reported to the parties and to the court. The underlying data can be collected and analyzed in a way that does not simply rate the defendants' performance, but also explains the evidence in a manner that can help to promote operational improvements.<sup>55</sup> This approach can conserve resources, inform agreements between the litigants about prospective remedial strategies, provide necessary insights about performance to the court and convey important information for agency managers to use in their ongoing reform efforts.

- **Delineate Factors Related to Durability and Address Fact-Finding and Procedures Relevant to the Durability Determination**

In order for a court to terminate a consent decree and ultimately dismiss a lawsuit in the institutional reform context, the remedy must be durable.<sup>56</sup> In large part, this is because the purpose of the litigation is to accomplish systemic reform that can be sustained after court oversight terminates.<sup>57</sup> A review of child welfare reform litigation indicates that certain initiatives appear likely to accelerate the pace of the remedial phase, promote the institutionalization of required reforms and provide a reasonable assurance that key reforms will be sustained after court oversight ceases. Because these initiatives require long-range planning and ongoing activities, it is important for litigants to address durability considerations in the initial consent decree, or as soon thereafter as possible.

A court's durability inquiry considers many case-specific factors, such as the length of time compliance has been sustained, and whether there is any evidence that defendants plan to abandon the principles of the consent decree.<sup>58</sup> Other key indicators of durability in the child welfare reform context include defendants' capacity for self-monitoring and self-correction<sup>59</sup> and implementation of public accountability mechanisms.<sup>60</sup> Because of their importance, self monitoring, self correction and public accountability mechanisms are addressed in further detail below.

*Self Monitoring and Self Correction: Quality Assurance/Continuous Quality Improvement*

The capacity to self-monitor and self-correct is relevant to the durability of the remedy and it can be demonstrated by the efficacy of a public sector child welfare agency's quality assurance ("QA") and/or continuous quality improvement ("CQI") program. Evidence of an effective QA/CQI program can support a finding that limited shortcomings in the ability to sustain required performance levels

should not prohibit termination and dismissal.<sup>63</sup> Many, albeit not all, consent decrees entered in the child welfare reform context require independent monitoring, and recent decrees have begun to address the interplay between independent monitoring and the development of defendants' self-monitoring and self-correction capacities.<sup>64</sup> A review of consent decrees, decree modifications and/or their implementation plans indicates that QA/CQI requirements that are established by these lawsuits may vary in some significant respects.<sup>65</sup>

The precise terms of QA/CQI requirements must be determined by the parties negotiating a consent decree on a case-specific basis. However, there are at least four types of considerations related to QA/CQI functions that litigants may wish to include in the initial decree: 1) the appropriate administrative and management structure for the QA/CQI program,<sup>66</sup> 2) identification of the core functions that will be required and how implementation will be measured,<sup>67</sup> 3) the interplay between independent monitoring and defendants' QA/CQI program,<sup>68</sup> and 4) how QA/CQI activities can inform and/or promote disengagement strategies.<sup>69</sup>

A viable QA/CQI program in a public child welfare agency plays a pivotal role in the reform process, but it cannot be developed overnight. It must be supported by an appropriate infrastructure, including a clear program design, dedicated staff, administrative capacity, linkages to ongoing training and technological as well as management support. In light of its basic functions, such a program necessarily demonstrates the effectiveness of self-monitoring and self-correction capacities over time. By identifying shortcomings in performance, generating corrective action strategies and ultimately contributing to improvements in agency practices, an effective QA/CQI program constitutes key evidence that required reforms can be sustained after court oversight ends. For these reasons, litigants should consider including the implementation of a QA/CQI program as part of a disengagement strategy embedded in the initial consent decree.

#### *Public Accountability Mechanisms*

Consent decrees in child welfare reform cases often incorporate requirements that establish public accountability mechanisms as part of a disengagement strategy. These types of requirements often rely on various forms of public accountability to accelerate the reform process during the remedial stage.<sup>70</sup> For example, decrees often require periodic independent monitoring reports that address defendants' performance relative to decree requirements and expressly designate the reports as public records.<sup>71</sup> As part of a progressive disengagement scheme, public reporting based on defendants' self-monitoring activities has been mandated during the remedial stage, after a finding that decree requirements have been satisfied and are no longer enforceable.<sup>72</sup> Moreover, a number of disengagement schemes include an assortment of public accountability mechanisms that are designed to serve as substitutes for court oversight.<sup>73</sup>

Like QA/CQI provisions, litigants should determine on a case-specific basis the precise terms of any public accountability mechanisms addressed in the consent decree. In doing so, it is important to evaluate when and how public accountability mechanisms should be introduced during the remedial stage of the lawsuit. The case law indicates that many public child welfare agencies undergoing a fundamental reform process as the result of court intervention have shortcomings in management and administrative capacities.<sup>74</sup> A consent decree itself places significant, and what the parties presumably view as necessary, demands on these agencies, especially during the early stages of the remedial process. Although public accountability mechanisms can serve to focus attention and resources on problem solving, unless introduced, sequenced and managed in a deliberate and strategic way, these mechanisms can give rise to substantial challenges that may complicate and at times undercut *bona fide* reform.<sup>75</sup>

- **Provide for Reassessment and Modification of Disengagement Standards and Related Procedures**

Because of the duration of institutional reform cases, courts recognize there is an increased likelihood that changes in law or fact may occur during the pendency of a consent decree that is entered in these types of lawsuits.<sup>76</sup> On this basis, courts have adopted a “flexible approach” toward achieving the goals of consent decrees entered in the institutional reform context. This approach recognizes that decrees are final judgments but allows for court approval of modifications that are “suitably tailored” to changed circumstances in certain defined instances.<sup>77</sup> Like litigation related to enforcement of the decree or its termination, litigation related to a proposed modification to a consent decree is likely to involve disputes that implicate complex issues of law and/or fact that may take a relatively long time for a court to resolve through formal motions practice.

For these reasons, litigants may wish to consider whether the initial decree, or any subsequent modification, should adopt procedures that allow for the parties to resolve by agreement, subject to court approval, or through an informal dispute resolution mechanism, proposed modifications and refinements to the decree’s disengagement standards and procedures.<sup>78</sup> If informed by accurate performance data regarding the decrees’ required outcomes, subject to the prevailing legal standards and constructive adversarial testing, such an approach may be helpful in promoting the reform process and accelerating the remedial phase of the lawsuit.

## **Conclusion**

The resolution of the liability phase of a lawsuit related to the institutional reform of a public sector entity presents a unique opportunity for litigants to formulate a strategic approach to termination of the consent decree and dismissal of the lawsuit. By incorporating into the initial consent decree the disengagement standards, procedures and strategies addressed in this article, a successful outcome to the litigation within a relatively shorter time period may be possible.

## **ABOUT THE AUTHOR**

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Grace M. Lopes has served as a court-appointed Special Master, Arbiter, and Monitor, as well as counsel for both defendants and plaintiffs, in a series of class action lawsuits related to child welfare, public education, mental health, juvenile justice and adult corrections. Ms. Lopes currently serves as a court-appointed Special Arbiter in a class action lawsuit concerning the District of Columbia juvenile justice system and as a court-appointed Monitor in a class action lawsuit related to the reform of Mississippi’s child welfare system. Prior to her current appointments, Ms. Lopes was employed as the managing director of the D.C. Appleseed Center for Law and Justice; the general counsel, and as special counsel for receiverships and institutional reform litigation, to former District of Columbia Mayor, Anthony Williams; and as the founding executive director of the D.C. Prisoners’ Legal Services Project, Inc. Ms. Lopes also has worked as a clinical law professor and as a litigator in a general practice law firm. She has authored journal and law review articles and been active in community and pro bono projects. In addition to awards she has received for outstanding government service, Ms. Lopes was the recipient of the John A. Wilson Community Service Award by the Trial Lawyers Association of Washington, D.C.

## ENDNOTES

<sup>1</sup> See, e.g., *LaShawn A. v. Dixon*, 762 F. Supp. 959, 960 (D.D.C. 1991) (In *LaShawn A.*, the court provided a perspective on the reasons why plaintiffs may seek judicial relief, stating: “This is a class action. . . about thousands of children who, due to family financial problems, psychological problems, and substance abuse problems, among other things, rely on the [government] to provide them with food, shelter, and day-to-day care. It is about beleaguered city employees trying their best to provide these necessities while plagued with excessive caseloads, staff shortages, and budgetary constraints. It is about the failures of an ineptly managed child welfare system, the indifference of the administration of the former Mayor . . . and the resultant tragedies for . . . children relegated to entire childhoods spent in foster care drift. Unfortunately, it is about a lost generation of children whose tragic plight is being repeated every day.”); *L.J. v. Massinga*, 699 F. Supp. 508, 538 (D.MD. 1988) (noting preliminary injunction issued upon a finding of “serious systemic deficiencies” in the foster care system that threaten and are likely to result in “severe physical and emotional injury” to children in foster care).

<sup>2</sup> See, e.g., *R.C. v. Walley*, 475 F. Supp. 2d 1118, 1184 (M.D. Ala. 2007) [hereinafter *R.C. II*] (finding decree “. . . served its useful and critical purpose in successfully effectuating the overhaul and reform of. . . [the Alabama] child welfare system”); *David C. v. Huntsman*, Civil No: 2:93-CV-206TC (D. Utah Feb. 25, 1993), May 11, 2007 Agreement to Terminate the Lawsuit at 2 (“Significant reforms to Utah’s child welfare system have been achieved.”); *Kenny A. v. Perdue*, Civ. Act. No. 02-CV-1686 (N.D. Ga., June 6, 2002), October 14, 2008 Consent Order to Terminate Consent Decree and Compliance Monitoring [for DeKalb County] at 2 (acknowledging finding by court-appointed fact-finder that Child Advocacy Center was a national model). See also SUSAN GLUCK MEZEY, PITIFUL PLAINTIFFS: CHILD WELFARE LITIGATION AND THE FEDERAL COURTS 169 (University of Pittsburgh Press 2000) [hereinafter MEZEY, PITIFUL PLAINTIFFS] (examining the impact of *B.H. v. Samuels*, No. 88 C 5599 (N.D. ILL. 1988), on the Illinois child welfare system and concluding, among other things, “that federal court involvement was crucial in the child welfare policymaking process, playing an instrumental role in reforming the child welfare system.”).

<sup>3</sup> ROSS SANDLER & DAVID SHOENBERG, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 6, 86-97 (Yale University Press 2003) [hereinafter SANDLER & SHOENBERG, *DEMOCRACY BY DECREE*]; See also *id.* at 240 note 11, citing Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 659 (1993); MARK F. TESTA & JOHN POERTNER, *FOSTERING ACCOUNTABILITY: USING EVIDENCE TO GUIDE AND IMPROVE CHILD WELFARE POLICY* 18-19 (Oxford University Press 2010) [hereinafter TESTA & POERTNER, *FOSTERING ACCOUNTABILITY*] (describing certain negative consequences that may have been related to the B.H. lawsuit).

<sup>4</sup> In finding that federal court intervention was instrumental in advancing the child welfare system reform process in Alabama, the District of Columbia, and Utah, one researcher identified multiple characteristics of the reform litigation that could serve as lessons for public officials trying to reform child welfare agencies without court involvement, including the moment of opportunity the court orders provided to change relationships between agency staff and external stakeholders as well as court orders that afforded recognition for interim success and not just failure. OLIVIA GOLDEN, *REFORMING CHILD WELFARE* 169-173 (The Urban Institute Press 2009) [hereinafter GOLDEN, *REFORMING CHILD WELFARE*]; see also TESTA & POERTNER, *FOSTERING ACCOUNTABILITY* at 19, 21 (describing a framework for results-oriented accountability, which was adopted as a part of a modification to the monitoring provisions in the B.H. consent order and designed to promote improvement in the Illinois child welfare system through five stages: outcome monitoring, data analysis, research review, evaluation and quality improvement).

<sup>5</sup> Collaboration can be the harbinger of success during the remedial stage of institutional reform litigation. See, e.g., John Barlow Weiner, *Institutional Reform Consent Decrees as Conservers of Social Process*, 27 COLUM. HUM. RTS. L. REV. 355, 376 (1996) (“success in implementing a consent decree depends on one key factor: the parties must preserve the spirit of consent that gave birth to the decree,” including their continued commitment to the goals of the decree.”) (quoting Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 729); *R.C. v. Walley*, 270 Fed. Appx. 989, 991 (11th Cir. 2008) (affirming district court’s ruling terminating consent decree in class action involving reform of Alabama child welfare system, and stating: “[t]he significant improvement of Alabama’s child welfare system over the last twenty years is as much a testament to the exemplary judicial oversight of these judges as it is to the collaborative efforts of the parties.”).

<sup>6</sup> See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1068-1069 (2004) [hereinafter Sabel & Simon, *Destabilization Rights*] (addressing, among other things, deliberative negotiations related to the remedial regime that have consensus as the goal and the parties’ shared recognition of the need for a remedial process that allows for reassessment and revision).

<sup>7</sup> Enforcement actions are usually undertaken through the filing of a motion requesting that the court make findings of noncompliance and civil contempt for failure to comply with consent decree requirements. These motions generally request some form of court-ordered relief, which can include the imposition of civil contempt fines to compel compliance on a prospective basis as well as intensified forms of judicial intervention.

<sup>8</sup> One federal judge, using a vivid analogy to comment on the efficacy of contempt proceedings during the remedial stage of a long-standing jail conditions lawsuit, voiced a perception that can be difficult to overcome in the wake of serial enforcement proceedings: i.e., that “nothing is done except at the end of a cattle prod . . .” J. Bryant, *Transcript of Hearing on Plaintiffs’ Motion for an Order to Show Cause Why Defendants Should Not be Held in Contempt*, Vol. I at 10, *Campbell v. McGruder*, C.A. No. 71-1462 & *Inmates of D.C. Jail v. Jackson*, C.A. No. 75-1668 (D.D.C. Apr. 6, 1993).

<sup>9</sup> Indeed, critics of institutional reform litigation point out that these lawsuits often drag on for decades with no end in sight. SANDLER & SHOENBERG, *DEMOCRACY BY DECREE* at 86-97, 130-132. One of the reasons for this is the delay attributable to

multiple enforcement actions. Enforcement actions not only take time and resources to litigate, but they also can undercut an ongoing reform effort, extending the lifespan of the lawsuit.

<sup>10</sup> SANDLER & SHOENBERG, *DEMOCRACY BY DECREE* at 130-132.

<sup>11</sup> It is common for judges who preside over these cases to comment on their interest in ending the lawsuit as soon as the appropriate legal standards have been satisfied. See, e.g., *R.C. v. Walley*, 390 F. Supp. 2d 1030, 1059 (M.D. Ala. 2005) [hereinafter *R.C.*] (finding the legal standard for termination had not been satisfied, the court commented that “. . . it would like nothing more than to be free from the immense burden of monitoring” the public child welfare agency and was “more anxious than Defendants to return this case to the State[.]”).

<sup>12</sup> Some commentators argue that institutional reform litigation places undue limits on the flexibility elected officials also need to respond to the electorate. SANDLER & SHOENBERG, *DEMOCRACY BY DECREE* at 12; see also Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 297. In contrast, other commentators claim that this type of litigation can be “more compatible with electoral mechanisms of democratic accountability” than opponents recognize because “the transparency they induce facilitates related forms of democratic intervention, including electoral ones” and because they “expose public institutions to pressures of disciplined comparison that resemble the market pressures enforced by common law norms.” Sabel & Simon, *Destabilization Rights* at 1100.

<sup>13</sup> In large part, success for lawyers on both sides translates into being able to deliver the results their clients want.

<sup>14</sup> Like other forms of complex civil litigation, institutional reform litigation often, but not always, results in a settlement before there is a final determination of liability, but after a protracted litigation process. See, e.g., *L.J.*, 699 F. Supp. at 518. In its September 1988 opinion approving the initial consent decree, in which the defendants expressly denied liability after a preliminary injunction was granted, the *L.J.* court commented: “[t]he history of this action is long and arduous. Since the complaint was filed in December, 1984, the court has issued over seventy orders and held a dozen status conferences with the parties. The docket, now seventeen pages long, lists over two hundred entries.” *Id.* at 510.

<sup>15</sup> Consent decrees and settlement agreements that are eventually mandated through some form of a consent order embody agreements negotiated by the parties that are construed as contracts and enforceable as court orders. *Frew v. Hawkins*, 540 U.S. 431, 437 (2007). They save the time, expense and risks associated with litigation, and can reflect both the benefits and shortcomings of negotiated compromises. It is not unusual for judges to require litigants to work together, at least in the first instance, in a good faith effort to craft the terms of the remedy.

<sup>16</sup> See, e.g., Leonard Koerner, *Institutional Reform Litigation*, 53 N.Y.L. Sch. L. Rev. 510, 514-515 (2008-2009) (endorsing the use of sunset provisions in institutional reform litigation as a tool to promote reform and avoid costly and protracted litigation, stating: “. . . the presence of the sunset provision encourages the parties to intensively focus on the substantive provisions during the sunset period. A time-limited decree encourages the [defendants] to comply with the court-ordered obligations as quickly as possible so as to end the litigation by the sunset date.”).

<sup>17</sup> SANDLER & SHOENBERG, *DEMOCRACY BY DECREE* at 218-221.

<sup>18</sup> *Id.* at 219 (stating: “Although decrees make concrete what governments must do for plaintiffs, they often fail to make concrete the terms upon which full control can be restored to officials accountable to the voters.”).

<sup>19</sup> Defendants rely at least in part on *Horne v. Flores*, 129 S. Ct. 2579 (2009) to support their position. This type of provision would allow for termination regardless of compliance with the provisions of the consent decree provided the underlying violations of law have been remedied and recurrence is unlikely.

<sup>20</sup> Susan P. Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U.PA. L. REV. 805, 807 n.3 (1990).

<sup>21</sup> Relying at least in part on *Frew*, 540 U.S. at 442, which requires that consent decrees be enforced according to their terms, plaintiffs contend that conditioning termination on correction of the underlying violations of law, notwithstanding noncompliance with the terms of the decree, turns the law on its head, and opens the door to relitigating the question of whether there is a violation of the underlying law.

<sup>22</sup> At least in some respects, this may reflect concerns about “paper compliance” or changes in process-related outcomes versus true reforms that impact the quality of case practice. In considering how to shape accountability mechanisms in the child welfare reform context, one researcher has observed: “[t]he literature of accountability is replete with examples of goal displacement, opportunistic gaming, and outright fraud when policymakers and administrators try to hold agents accountable for production quotas, response times, and output targets.” TESTA & POERTNER, *FOSTERING ACCOUNTABILITY* at 6.

<sup>23</sup> See, e.g., *United States v. City of Miami*, 2 F.3d 1497 (11th Cir. 1993); *Johnson v. Florida*, 348 F.3d 1334 (11th Cir. 2003); *Wyatt by & Through Rawlins v. Rogers*, 985 F. Supp. 1356 (M.D. Ala. 1997); *Juan F. v. Rell*, 2010 U.S. Dist. LEXIS 135238 (D.C. Conn. 2010); *LaShawn A. v. Fenty*, 701 F. Supp. 2d 84 (D.D.C. 2010), *aff'd sub nom LaShawn A. v. Gray*, No. 10745 (D.C. Cir. Feb. 28, 2011).

<sup>24</sup> As a general matter, because litigating termination issues is in large part a fact-intensive enterprise, it has the potential to divert defendants from reform-related activities. For example, there may be substantial demands placed on agency managers



and their staff to collect and produce performance data and other relevant evidence for their attorneys, as part of a court-ordered discovery process, or in anticipation of an evidentiary hearing. Even if these data are maintained in the regular course of agency operations, the process of amassing and interpreting it can be time consuming and may shift management focus from ongoing reform activities. Moreover, the pendency of this type of litigation can make it more difficult for the institutional defendant to recruit and retain qualified managers and staff and it can undercut momentum in other ways.

<sup>25</sup> See, e.g., *L.J.*, *supra* note 14, September 27, 1988 Consent Decree at ¶¶34, 40 (initial decree limited to two provisions addressing termination standards and related process: 1) two years following entry of decree, defendants permitted to file a final report showing implementation of and compliance with the decree; and 2) court retains jurisdiction until terms of the consent decree are fully implemented); *Braam v. State of Washington*, No. 98-2-01570-1 (Wash. Supr. Ct. Whatcom County, Nov. 3, 1998) July 31, 2004 Final Settlement at §VIII.1. (providing for the Settlement Agreement to remain in effect for 84 months unless there is a pending enforcement action but allowing for earlier termination by mutual agreement of the parties; requiring dismissal of the lawsuit and termination of the settlement agreement when the required outcomes are achieved and sustained for a two-year period); *B.H.*, *supra* note 2, July 15, 1997 Restated Consent Decree at ¶69 (silent on termination of consent decree and dismissal of the lawsuit, but providing for the submission of a joint or unilateral petition to the court for termination of monitoring upon satisfaction of two conditions: 1) fully achieved compliance with all provisions of the decree maintained for at least five years; and 2) a judicial determination that defendants have implemented and are maintaining a system that complies with the consent decree).

<sup>26</sup> See, e.g., *Joseph A. By Wolfe v. N.M. Dept. of Human Services*, 575 F. Supp. 346 (D.N.M. 1983). The initial 1983 consent decree in *Joseph A.*, one of the earliest child welfare reform lawsuits, provided for the decree to remain in effect for five years. *Id.* at 364. It was structured to reduce defendants' reporting obligations after two years upon a finding of substantial compliance with the decree's terms. Thereafter, if substantial compliance was maintained for an additional year, the decree authorized termination of defendants' reporting obligations, at least conditionally. *Id.* The decree recognized plaintiffs' right to seek an extension of the five-year period "as otherwise permitted by law." *Id.* Court oversight terminated 22 years after the initial decree was entered, following years of litigation, including appellate proceedings. The entry of a stipulated exit plan in 1998 replaced the initial decree and was superseded by a revised stipulated exit plan in 2003. The revised stipulated exit plan established a handful of exit criteria, addressing both substantive requirements and the time period within which compliance was required to be sustained. September 27, 2003, Revised Stipulated Exit Plan at §VIII.B. During February 2005, a stipulated order of dismissal without prejudice based on a finding of compliance with the stipulated exit plan was entered. February 24, 2005 Stipulated Order of Dismissal. Pursuant to the revised stipulated exit plan, defendants were required to maintain a specified program for a one-year period following the dismissal and plaintiffs retained the right to enforce this requirement. September 27, 2003 Revised Stipulated Exit Plan at §VIII.C. The case was dismissed with prejudice on February 14, 2006. February 14, 2006 Stipulated Order of Dismissal.

<sup>27</sup> See, e.g., *Jeanine B. v. Doyle*, No. 93-C-0547 (E.D. Wis. June 1, 1993), November 14, 2003 Modified Settlement Agreement at §V. (providing for an incremental approach to termination of the consent decree through a specified arbitration process that is binding upon the parties and subject to judicial review based on a clearly erroneous standard; upon a determination by the arbitrator that decree requirements have been satisfied for specific time periods, the requirements are rendered unenforceable but remain subject to independent monitoring and public reporting); *Juan F. v. Rell*, Civ. Act. No. H-89-859 (D.C. Conn., Dec. 19, 1989), July 11, 2006 Revised Exit Plan (identifying exit criteria and prerequisites for termination of court jurisdiction, describing process for determining compliance and establishing temporal requirements for sustained compliance); *David C.*, *supra* note 2, May 1999 Performance Milestone Plan at 81-90 (providing for a flexible approach to termination that affords substantial discretion, based on delineated standards, to the Monitor), June 28, 2007 Agreement to Terminate (providing for a dismissal without prejudice, imposition of sustainability requirements for prescribed time period, a limited enforcement mechanism and conditions for the entry of a dismissal with prejudice).

<sup>28</sup> A decision about the entity responsible for making such findings is generally reflected in the terms of the decree. As a practical matter, the parties should consider models that will streamline decision-making related to these determinations. See, e.g., *supra* note 27 for a discussion of the arbitration provision adopted in *Jeanine B.*

<sup>29</sup> See, e.g., *Jeanine B.*, *supra* note 27, November 14, 2003 Modified Settlement Agreement at §V.A. (recognizing defendants achieved "needed reforms significantly improving the safety and well-being of the plaintiffs class" and providing that upon a determination of compliance with a specific requirement of the agreement for two consecutive six-month intervals, the provision that is the subject of the compliance finding is no longer enforceable, but monitoring related to it continues until the settlement agreement is terminated); *Brian A. v. Bredesen*, Civ. Act. No. 3-00-0445 (M.D. Tenn., May 10, 2000), November 10, 2010 Modified Settlement Agreement and Exit Plan, at §XVIII.D. & XIX. (achievement and sustained simultaneous compliance for a 12-month period with all substantive requirements results in partial termination followed by continuing court jurisdiction for an 18-month period limited to requirements concerning external accountability reporting structure); *Braam*, *supra* note 25, July 31, 2004 Final Settlement Agreement at §III.5.e. (upon a finding of compliance for two consecutive years with the outcomes and benchmarks in any of six areas covered by the agreement, the area is removed from active monitoring, but it may be reinstated upon a demonstration of non-compliance).

<sup>30</sup> The reduction can include relaxation or the cessation of independent monitoring, the vacatur of specific decree provisions, and/or dismissal of the lawsuit without prejudice subject to reopening if specified conditions have not been satisfied. See, e.g., *David C.*, *supra* note 2, June 28, 2007 Agreement to Terminate Lawsuit, at ¶¶11-12 (basing dismissal without prejudice on recognition of significant system reforms and significant progress in improving case practice and ensuring strong system performance; thereafter discontinuing formal monitoring as well as limiting enforcement for a discrete performance period to determine whether specified mechanisms, systems and resource allocations have been sustained, and if so, requiring dismissal

with prejudice); *G.L. v. Sherman*, No. 77-0242-CV-W-1, (W.D. Mo., Mar. 28, 1977), February 1, 2006 Conditions of Dismissal without Prejudice at Part I & Part II. §§VI.B. & VII. (discontinuing formal monitoring by plaintiffs and external entity, but substituting internal monitoring requirements and a community quality assurance committee; recognizing significant gains due to reforms required by consent decree that were implemented in whole or in part and sufficient progress to support dismissal of the lawsuit subject to reinstatement if specified conditions are not satisfied for a multi-year period, and if conditions are satisfied, mandating automatic dismissal with prejudice); *Juan F.*, *supra* note 23, July 11, 2006 Revised Exit Plan at ¶¶5-6, Introduction (sustained compliance with all enforceable outcome measures for two quarters (i.e., six months), triggers requirement to maintain through termination finding); *Joseph A.*, *supra* note 26, September 27, 2003 Revised Stipulated Exit Plan at §VIII. (establishing criteria for exit from monitoring and other requirements followed by one-year enforcement period limited to enforcement of specific requirement); *Brian A.*, *supra* note 29, November 10, 2010 Modified Settlement Agreement and Exit Plan at §XVIII.D. (requires achieving and simultaneously sustaining maintenance status standards for all requirements for 12-month period in order to terminate jurisdiction over all provisions except for requirements related to external accountability reporting center for which jurisdiction is maintained for an additional 18-month period); *Charlie and Nadine H.*, Civ. Act. No. 99-3678 (D.N.J., Aug. 4, 1999), July 18, 2006 Modified Settlement Agreement at §VI. (permitting defendants to seek a ruling terminating jurisdiction after a prescribed date based on a demonstration that compliance with the agreement has been achieved and maintained for a continuous period of at least two years but allowing court to retain jurisdiction upon a showing that continued jurisdiction is necessary to accomplish purposes of the agreement).

<sup>31</sup> See *Jeanine B.*, *supra* note 27. Many plaintiffs' lawyers contend that limiting enforcement or vacating specific requirements as compliance is achieved and sustained for a set period is inappropriate in the child welfare reform context because decree requirements address systemic functions that are inextricably inter-related. On the other hand, from defendants' perspective, not all requirements are inextricably inter-related. Defendants emphasize that partial termination may accelerate compliance with all decree requirements because it rewards progress in a demonstrable and meaningful way. For a discussion of certain factors that have been applied to this determination in other contexts, see, e.g., *Freeman v. Pitts*, 503 U.S. 467, 491 (1992) (permitting partial termination of consent decree in school desegregation context before full compliance in every area is achieved and identifying factors that should inform this determination, including "whether retention of judicial control is necessary or practicable to achieve compliance with the decree" in other areas"); *Wyatt by & Through Rawlins v. Rogers*, 985 F. Supp. 1356 (M.D. Ala. 1997) (ordering partial termination of decree in institutional reform litigation involving mental health facilities, and establishing piecemeal approach to court's prospective compliance determinations in order to facilitate more careful focusing by the parties and the court in an attempt to expedite full compliance).

<sup>32</sup> See, e.g. *Jeanine B.*, *supra* note 27, November 14, 2003 Modified Settlement Agreement at §V.A. (modified settlement agreement includes express recognition of progress and provides that upon a determination of compliance with a specific requirement during two consecutive six-month intervals, the requirement is no longer enforceable but monitoring related to it continues until the settlement agreement is terminated), May 24, 2010 Period 7 Corrective Action Plan, (indicating that only three requirements in the *Jeanine B.* Settlement Agreement remained enforceable); *David C.*, *supra* note 2, October 31, 2008 Sustainability Report, The Child Welfare Policy and Practice Group (finding good faith in sustaining significant gains made in implementation of settlement agreement); *id.* at 5, triggering entry of January 5, 2009 order of dismissal with prejudice; *G.L.*, *supra* note 30, February 1, 2006 Conditions of Dismissal without Prejudice (finding significant gains made in child welfare system, stipulating to entry of dismissal without prejudice, and subject to certain conditions, requiring the automatic entry of a dismissal with prejudice).

<sup>33</sup> For insight into how successes in child welfare system reform litigation can support a public agency's reform efforts, see GOLDEN, REFORMING CHILD WELFARE at 48-49.

<sup>34</sup> See *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 247 (1991); *R.C. II*, 475 F. Supp. 2d at 1123-1125; see also FED. R. CIV. P. 60(b)(5).

<sup>35</sup> Substantive requirements, among other types of provisions, often include a mix of qualitative and quantitative indicators that are expressed as interim benchmarks and outcomes.

<sup>36</sup> As explained in the text, given the nature of exit criteria, it is possible, but unlikely, that an agreement on specific exit criteria can be forged at the threshold of the remedial stage.

<sup>37</sup> See, e.g., *Braam*, *supra* note 25, July 31, 2004 Final Settlement at §§III. & VIII. (establishing panel with authority to specify prospectively, at specific intervals, the outcomes that are intended to serve as exit criteria).

<sup>38</sup> As explained in the text, plaintiffs' lawyers are often reluctant to agree to exit criteria early in the remedial stage because there is a danger exit criteria will become the defendants' sole focus. There are safeguards that can be designed to address this concern.

<sup>39</sup> At the outset of the remedial phase, the parties should consider developing a joint recitation of the decree's goals, which can also be relied upon to help guide the negotiations, subject to refinement by the parties, as indicated, throughout the course of the negotiation process.

<sup>40</sup> See, e.g., *R.C. II*, 475 F. Supp. 2d at 1125 (noting, with respect to a consent decree entered in 1991, that "[t]he core purposes of the consent decree are not subject to precise definition.").

<sup>41</sup> See e.g., *Kenny A.*, *supra* note 2, March 23, 2006 Consent Decree Between Plaintiffs and DeKalb County, Georgia at ¶12

(citing case law governing substantial compliance determination, reiterating standard established by case law and summarizing parties' agreement of decree's purpose for the express purpose of applying standard); see also *Charlie and Nadine H.*, *supra* note 30, July 18, 2006 Modified Settlement Agreement at §I. (requiring interpretation of Settlement Agreement to be guided by delineated principles).

<sup>42</sup> See, e.g., *Joseph A.*, 69 F.3d. at 1085-1086; *R.C. II*, 475 F. Supp. 2d at 1124-1125; *Gonzales v. Galvin*, 151 F.3d 526, 531 (6th Cir. 1998).

<sup>43</sup> See, e.g., *Joseph A.*, 69 F.3d 1081-1086.

<sup>44</sup> Some decrees require full compliance with all provisions that must be sustained for a specific time period, see, e.g., *B.H.*, *supra* note 2, July 15, 1997 Restated Consent Decree at ¶69 (requiring fully achieved compliance with all provisions that is maintained for a minimum of five years and implementation and maintenance of a system that complies with the decree to terminate monitoring, but silent with respect to termination of the decree itself and the dismissal of the lawsuit); *L.J.*, *supra* note 1, No. JH-84-4409 (D.Md., December 8, 1984), September 27, 1988 Consent Decree at ¶40 (court retains jurisdiction until decree fully implemented), *modified*, October 9, 2009 Modified Consent Decree at Part I §§V.A. & V.F. (decree vacated when defendants found in "certified compliance" with each outcome; certification by independent entity that exit standards for each outcome met for three consecutive six-month reporting periods). Other decrees require different standards. See, e.g., *Braam*, *supra* note 25, July 31, 2004 Final Settlement at §VIII (requiring dismissal of the lawsuit and termination of the Settlement Agreement when outcomes achieved and sustained for a two-year period); *Dwayne B. v. Granholm*, No. 2:06-CV-13548 (E.D. Mich. Aug. 8, 2006), October 24, 2008 Settlement Agreement at §XVIII.C. (requiring termination of agreement upon finding of compliance with its terms for a period of 18 months with burden expressly placed on defendants to demonstrate compliance).

<sup>45</sup> The question of what constitutes substantial compliance requires a case-specific inquiry. See, e.g., *R.C. I*, 390 F.Supp.2d at 1044 (reviewing case law related to the substantial compliance standard in context of termination inquiry related to child welfare reform decree wherein decree required substantial compliance and a demonstration defendants would remain in substantial compliance); *Joseph A.*, 69 F.3d at 1085 (relying on contract law to interpret the substantial compliance standard in termination clause of consent decree, stating: "the touchstone of the substantial compliance inquiry is whether Defendants frustrated the purpose of the consent decree – i.e. its essential requirements" and recognizing that "[t]he phrase 'substantial compliance' is not susceptible of a mathematically precise definition.>").

<sup>46</sup> The temporal requirements are sometimes defined in terms of the reporting periods established by the decree. See, e.g., *Kenny A.*, *supra* note 2, March 23, 2006 Consent Decree Between Plaintiffs and DeKalb County, Georgia at ¶11 (requiring termination of the consent decree upon a finding of substantial compliance for three consecutive reporting periods).

<sup>47</sup> Indeed, reliable data can be an antidote for needless adversity because it can inform a collaborative approach toward addressing any shortcomings in defendants' performance. As such, its usefulness in minimizing needless disputes and promoting constructive problem solving should be explored.

<sup>48</sup> See, e.g., *Joseph A.*, 69 F.3d at 1088-1089 (in child welfare reform lawsuit that had been pending in the remedial stage for 13 years, appellate court vacated order terminating consent decree and remanded for further proceedings based in part on failure of Special Master to outline methodology for considering whether decree requirements were satisfied; among other limitations, this omission rendered appellate court unable to consider plaintiffs' objections to specific factual findings).

<sup>49</sup> See, e.g., *Braam*, *supra* note 25, July 31, 2004 Final Settlement at §§III. & V. (establishing oversight panel with authority, *inter alia*, to make findings with respect to compliance with required outcomes and benchmarks; in the context of enforcement proceedings, recognizing rebuttable presumption that panel's factual findings are correct; conveying authority to the panel to approve or reject compliance plans for failure to implement action steps or satisfy annual benchmarks).

<sup>50</sup> Because these lawsuits are factually complex, independent monitoring is typically required and the entity serving in this capacity conducts the fact-finding.

<sup>51</sup> See, e.g., *Jeanine B.*, *supra* note 27, November 14, 2003 Modified Settlement Agreement at §IV.C.-D. (disputes regarding compliance submitted to arbitrator agreed upon by the litigants for a determination of compliance or noncompliance as well as any corrective action; arbitral determination binding upon the parties and subject to judicial review based on clearly erroneous standard).

<sup>52</sup> *Id.*

<sup>53</sup> In some instances, litigants submit comments to the fact-finder on an *ex parte* basis and they remain confidential. In others, the comments are also provided to opposing counsel and eventually made part of the record. There are benefits and limitations associated with each approach.

<sup>54</sup> *Charlie and Nadine H.*, *supra* note 30, July 18, 2006 Modified Settlement Agreement at §IV.B. (requiring the Monitor to review defendants' data and analysis in the first instance to avoid duplicating work and to build defendants' capacity, but authorizing the preparation of new reports as the Monitor deems necessary).

<sup>55</sup> This is not intended to imply that the fact-finder should disclose the identity, or provide information that is likely to reveal the identity, of witnesses who provided information to the fact-finder on a confidential basis. Confidentiality protections play an important role in this context.

<sup>56</sup> *Horne*, 129 S.Ct. at 2595; *Dowell*, 498 U.S. at 247.

<sup>57</sup> See, e.g., *Dowell*, *id.* (holding termination required in school desegregation context when purposes of the litigation have been fully achieved and it is unlikely the defendant will “return to its former ways.”); *Joseph A.*, 69 F.3d at 1086 (holding substantial compliance standard contemplated more than a one-time 12 month period of compliance in consent decree requiring systemic reform of public agency child welfare functions).

<sup>58</sup> See, e.g., *R.C. I*, 390 F. Supp. 2d at 1058. The length of time compliance has been sustained is a factor that is taken into account by the substantial compliance determination. See, e.g., *Joseph A.*, 69 F.3d at 1086.

<sup>59</sup> See, e.g., *David C.*, *supra* note 2, May 1999 Performance Milestone Plan at 82-90 (six years following the adoption of the initial settlement agreement, court approved remedial plan, restructuring monitoring to support continuous quality improvement and introducing, among other exit criteria, a requirement “that internal quality improvement processes [demonstrate the] capacity to identify and take action on negative performance trends.”). *Id.* at 87-88.

<sup>60</sup> See, e.g., *G.L.*, *supra* note 30, February 1, 2006 Conditions of Dismissal without Prejudice at §VII. (as a condition for dismissal without prejudice, establishing a community quality assurance committee “to provide external advisory and advocacy feedback to the [public child welfare agency] concerning its functioning and operations and to ensure, through independent community advocacy, that program, policy and practice improvements gained through the implementation of the . . . Amended Modified Consent Decree are continued.”).

<sup>61</sup> As a general matter, the terms “QA” and “CQI” are used interchangeably in the context of child welfare reform litigation to denote a system designed to promote improvement in agency performance through ongoing assessments of practices and outcomes using qualitative and quantitative measures to inform operational strategies and decision-making. The system provides a framework for informing management decisions, and requires the active participation of agency staff and managers as well as external stakeholders. For background information on CQI systems in the child welfare context, see, e.g., O’Brien, Mary and Watson, Peter, A Framework for Quality Assurance in Child Welfare, National Child Welfare Resource Center for Organizational Improvement, Edmund S. Muskie School of Public Service, March 2002.

<sup>62</sup> See, e.g., *David C.*, *supra* note 2, June 28, 2007 Agreement to Terminate the Lawsuit at Parts II and III §§A, D and E (incorporating into disengagement plan requirements addressing QA/CQI functions and activities necessary to support sustainability finding).

<sup>63</sup> See, e.g. *R.C. II*, 475 F. Supp. 2d at 1183 (finding decree requirement that defendants “will remain” in substantial compliance was satisfied in child welfare reform lawsuit despite evidence of backsliding in over 25 percent of sampled counties based in large part on efficacy of QA functions, including evidence that defendants were: 1) continually implementing refinements in order to improve; 2) assessing their own performance and targeting needed interventions; 3) demonstrating a proven ability to improve deficient areas of performance, detect shortcomings and restore compliance; and 4) continually improving the capacity to collect and analyze data).

<sup>64</sup> See, e.g., *Charlie and Nadine H.*, *supra* note 30, July 18, 2006 Modified Settlement Agreement at §IV.G.; *Dwayne B.*, *supra* note 44, October 24, 2008 Settlement Agreement at §XVII.J. (monitors in these cases required to develop plans to transfer upon termination, or earlier if the parties agree, the primary monitoring functions to defendants’ quality assurance units; monitors required to work collaboratively with defendants in building defendants’ quality assurance capacities).

<sup>65</sup> See, e.g., *Kenny A.*, *supra* note 2, October 28, 2005 Consent Decree [State Defendants] at §18 (requiring the maintenance of an “appropriate quality assurance system” that meets federal requirements and State monitoring of certain counties’ compliance with policies and decree requirements through case reviews); *B.H.*, *supra* note 2, July 15, 1991 Restated Consent Decree at ¶159 (mandating the establishment of a quality assurance unit administratively independent of agency operations; among other functions, requiring that the unit evaluate services and care, conduct specified investigations, review and assess individual service plans, evaluate quality of public and private child welfare agency operations, conduct mortality reviews and monitor the disposition of unusual incident reports; specifying that the unit provide copies of all evaluations, reports and reviews to public agency management and in turn directing management to initiate such action as necessary to address the issues identified therein); *Dwayne B.*, *supra* note 44, October 24, 2008 Settlement Agreement at §XIV (mandating statewide QA program directed by a QA unit within the central office of the human services agency with the director of the QA unit required to report to a Cabinet-level government official; requiring the QA unit to develop the human services agency’s capacity to perform the following functions: data collection, verification and assessment; case record or qualitative service review; and, in coordination with Monitor, other oversight and reporting functions that facilitate ongoing assessment of child welfare agency performance relative to performance requirements and goals of the settlement agreement; QA unit directed to support management by: 1) identifying systemic strengths and weaknesses and formulating strategies to improve performance; and 2) providing ongoing critical evaluation and oversight of design and implementation of strategies to improve services and outcomes); *Charlie and Nadine H.*, *supra* note 30, July 18, 2006 Modified Settlement Agreement at §III.C.6. (requiring development and implementation of “a well functioning quality improvement program consistent with the Principles of this Agreement and adequate to carry out the

review of case practice set forth” in the Settlement Agreement); *David C.*, *supra* note 2, May 1999 Performance Milestone Plan at 64-90 (establishing requirements related to the following, among other, ongoing performance monitoring/improvement functions: 1) specific internal and external accountability structures; 2) trend data analysis of defined indicators with reasonable action undertaken to address areas identified as needing improvement; 3) case process reviews to examine performance in core practice areas according to defined outcome measures, identify problems that are difficult to solve, and, among other things, inform office-by-office corrective action strategies; 4) qualitative case record reviews through in-depth interviews with individuals associated with a case for direct assessment of current status of children and families as well as assessment of system performance related to core functions; and 5) the establishment of regional and state quality improvement committees to utilize trend and quality review data as well as case process information to formulate recommendations for defendants to address by taking reasonable action with respect to the problems identified by the committees).

<sup>66</sup> This includes whether the QA/CQI unit will be independent or subordinate to the executive management of the child welfare agency as well as the QA/CQI committee structure and the parameters of stakeholder participation. While institutional defendants may point out that this decision is a management prerogative, as a practical matter, litigants may wish to remain cognizant of the fact that a timely durability finding may be contingent upon the parties’ mutual confidence in the integrity and efficacy of QA/CQI processes.

<sup>67</sup> Essentially, public sector QA/CQI programs have the following functions: 1) to routinely collect accurate quantitative and qualitative data related to specified indicators of system performance (i.e., specified decree requirements) through a variety of methodologies; 2) to use appropriate methodologies to review, analyze and interpret the data in order to identify successes, shortcomings and obstacles to achieving required standards; and 3) to develop remedial recommendations based on these processes that are considered by management in the design and implementation of corrective action strategies, which are monitored and adjusted, as indicated, to promote improvements in performance on an ongoing basis.

<sup>68</sup> See, e.g., *G.L.*, *supra* note 30, January 30, 2001 Amended Modified Consent Decree at §VI.G.2.b. (requiring the transfer of independent monitoring to defendants’ internal QA unit immediately after designated compliance levels are achieved and sustained for specified time periods).

<sup>69</sup> The district court opinion in *R.C. II*, 475 F. Supp. 2d at 1177-1185, may be helpful to litigants as they think through this issue.

<sup>70</sup> Institutional reform litigation may result on occasion in the public disclosure of both unsubstantiated as well as irrefutable shortcomings in the operation of public child welfare agencies. Such disclosures may impact the scrutiny public sector child welfare agencies receive from a host of overseers and, in turn, affect the reform process. See, e.g., Office of Legislative Audits, Department of Legislative Services, Maryland General Assembly, Performance Audit Report, Department of Human Resources, Social Services Administration, Certain Aspects of Child Welfare System (December 2005) (audit conducted by auditing entity at the request of legislative body found, *inter alia*, that certain reports filed by the public child welfare agency pursuant to consent decree requirements in *L.J.*, *supra* note 1, were unreliable; in wake of audit, statutory provisions consistent with certain decree requirements were promulgated, see MD. Code Ann. §5-1310 (2006), mandating the hiring and retention of qualified child welfare staff, the development of a methodology for calculating caseload ratios in consultation with an entity with appropriate expertise, and independent annual reviews of the public child welfare agency’s caseload calculations by an entity with subject matter expertise). Although public scrutiny may advance the reform effort, it may also undercut it. For a discussion of this issue, see GOLDEN, REFORMING CHILD WELFARE at 176-184. Litigants must be mindful of the role the media can and does play in this context. For insight into this matter, see *id.* at 176-177 (commenting on potential positive and negative consequences of media coverage related to child fatalities that occur during litigation-related reform).

<sup>71</sup> See, e.g., *Kenny A.*, *supra* note 2, October 28, 2005 Consent Decree [State Defendants] at §16.A. (requiring accountability agents to issue public record reports on defendants’ performance); *Braam*, *supra* note 25, July 31, 2004 Final Settlement Agreement at §III.5.f. (requiring independent oversight panel to publish report to the public and the parties at six-month intervals regarding defendants’ progress and compliance with specific provisions of the settlement agreement); *id.*, February 1, 2008, Final Settlement Agreement, Amendment 1 (requiring oversight panel to conduct public meetings at least four times per year, record the minutes of nonpublic meetings and make them available to the parties and to the public, and produce to the public all draft versions of reports and any written comments submitted by the parties, upon request, after the public release of the final version of the documents; minutes of the oversight panel’s meetings are publicly available through a website, see <http://www.braampanel.org/Minutes>). Monitoring entities established by consent decrees are often afforded broad access to defendants’ employees, contractors, facilities and records. Such access can be essential to the monitoring and reporting function, but it carries with it important duties and responsibilities which litigants may wish to consider as they develop the decree’s monitoring and reporting requirements.

<sup>72</sup> *Jeanine B.*, *supra* note 27, November 14, 2003 Modified Settlement Agreement at §§III.A., B. &V.A. (disengagement scheme requires continued monitoring and public reporting after specific requirements are no longer enforceable). Similarly, decrees in child welfare reform cases have recognized that reports prepared by defendants’ QA/CQI programs constitute public records. See, e.g., *Dwayne B.*, *supra* note 44, October 24, 2008 Settlement Agreement at §XIV.D. (requiring that all reports “provided” by the defendants’ QA unit shall become a public record subject to the redaction of individually identifying information).

<sup>73</sup> The disengagement scheme adopted in *David C.*, *supra* note 2, provides for external oversight “to ensure continued progress and to minimize system regression.” *Id.*, June 28, 2007 Agreement to Terminate the Lawsuit at Part III.F. The external oversight provisions address: 1) an Office of Child Protection Ombudsman and Child Fatality Review Committee; 2) public dissemination of

information on system performance via the child welfare agency's website as well as dissemination to legislative and other entities that directly oversee the child welfare system, including information addressing any increase in caseloads or performance areas that have experienced a "marked decline" in the level of performance; 3) dissemination of performance information and collaboration with specified child welfare system stakeholders; and 4) collaboration with institutions of higher education for staff training, and as appropriate, reliance on such institutions' resources for research, independent reviews of system performance, and for studying areas of "marked decline" in performance. *Id.* at ¶¶33-38. See also *G.L.*, *supra* note 30, January 20, 2006 Conditions of Dismissal without Prejudice at §VII. (requiring establishment of community quality assurance committee to ensure program, policy and practice improvements attributable to the lawsuit continue by providing oversight through systemic review and evaluation of child welfare practice areas); *R.C. II*, 475 F. Supp. at 1182 (as part of durability inquiry, addressing promulgation of executive order establishing a child welfare commission to oversee the child welfare system for an undefined time period following termination of the consent decree).

<sup>74</sup> As part of a strategy to address such operational limitations, some decrees have mandated the establishment of an ombudsperson unit to respond to complaints from the public during the remedial stage. See, e.g., *B.H.*, *supra* note 2, July 15, 1997 Restated Consent Decree at ¶61.a.

<sup>75</sup> See GOLDEN, REFORMING CHILD WELFARE at 176-184.

<sup>76</sup> *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380 (1992).

<sup>77</sup> *Id.* at 393. In order to justify modification, the changed factual conditions must make compliance "substantially more onerous." *Id.* at 384. Additionally, "[m]odification is also appropriate when a decree proves to be unworkable because of unforeseen obstacles... or when enforcement of the decree without modification would be detrimental to the public interest." *Id.* at 384-385.

<sup>78</sup> The parties may wish to consider a variety of possible models. See, e.g., *Braam*, *supra* note 25, July 31, 2004 Final Settlement at §III.5.g. (authorizing oversight Panel to modify or augment outcomes, benchmarks or action steps in order to achieve goals of the settlement agreement, subject to certain specified conditions, at the request of either party, or on its own initiative, "in collaboration with [Defendants], and with substantial input from the Plaintiffs, and other stakeholder as necessary.").

# Is Child Welfare Class Action Litigation a Viable Tool to Achieve Race Equity?

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As scholars, practitioners and policymakers continue to focus on issues of race equity in child welfare, there have been only a few class action lawsuits that have included race-based claims and outcome measures. This paper explores what happened in those cases, why plaintiffs' counsel chose to include or not include such claims and what evidence exists to suggest that bringing race-based claims and establishing race-based outcome measures can help achieve race equity in child welfare.

It is widely documented that the number of children of color in child welfare is greater than their representation in the general population. Research has shown that children of color have less favorable outcomes and stay in foster care longer than white children. The story behind the data is still fiercely debated among researchers, advocates and practitioners. This article will not provide an analysis of that ongoing debate.<sup>1</sup> Instead, it will focus on how litigation can and cannot be used as a tool to work toward race equity in child welfare.

## ***Brief Overview of Race Equity in Child Welfare***

The issue of race equity is not new in the United States. Historically, the U.S. has grappled with racial inequalities, discriminatory laws and practices, as well as social unrest arising from the failed policies and practices of Indian Wars, slavery, reservations, Jim Crow laws, Japanese internment, separate but equal policies and most recently immigration reform. As government systems were developed to provide services for children and families, they have faced an unending state of reform to mirror the race-based changes taking place in society at large. Thus, over the past 20 years, policymakers, researchers, practitioners and families have explored the connections between race and ethnicity with involvement and outcomes for children and youth in child serving systems.

Research and debate regarding the widening educational achievement gap between African American children and white children took root in the 1950s as separate but equal policies were challenged all the way to the Supreme Court. As school systems became integrated, issues of achievement gap became even more evident. To date, the U.S. Department of Education continues to hold states accountable for the achievement of minority and low-income students through its policy of the No Child Left Behind Act.<sup>2</sup>

Likewise, in juvenile justice, issues surrounding the disproportionate representation of children of color necessitated a 1988 amendment to the Juvenile Justice and Delinquency Prevention Act (the Act).<sup>3</sup> The amendment required all states receiving formula grant funds to address disproportionality among detained and confined youth of color. In 1992, what came to be known as Disproportionate Minority Contact (DMC) became a core requirement under the Act. By 2002, the Act was again amended to require DMC efforts at every point in the juvenile justice system. A state's failure to demonstrate efforts now can result in a loss of up to 20 percent of its formula grant funds in the following year.<sup>4</sup> Researchers, policymakers and practitioners continue to delve deeply into the causes and solutions to DMC. Current debates about the reauthorization of the Act include some advocates requesting even more stringent accountability measures for states who do not show progress in curbing DMC.

In addition to disproportionality<sup>5</sup>, child welfare race equity discussions also focus on disparate treatment and disparity in outcomes for children of color once they enter the foster care system. In 2008, the United States Government Accountability Office (GAO) issued a report entitled *African American Children in Foster Care: HHS and Congressional Actions Could Help Reduce Proportion in Care*.<sup>6</sup> The report cites the following data:

*African American children were more likely to be placed in foster care than White or Hispanic children in 2006, and at each decision point in the child welfare process the disproportionality of African American children grows. Nationally, although African American children made up less than 15 percent of the overall child population in the 2000 Census, they represented 26 percent of the children who entered foster care during fiscal year 2006 and 32 percent of the children remaining in foster care at the end of that year.<sup>7</sup> (See *African American Children in Foster Care, 2007*, Washington, DC: Government Accounting Office [www.gao.gov/cgi-bin/getrpt?GAO-07-816](http://www.gao.gov/cgi-bin/getrpt?GAO-07-816))*

Thus, for over 20 years, child welfare, like other child serving systems, has been the subject of research and policy debate regarding race equity. Researchers disagree as to the causes of disproportionality and disparate treatment; however, there is common agreement that the reasons are as complex and multifaceted (institutional racism, racial bias coupled with distrust of the child welfare system, higher rates of poverty, challenges in accessing support services and difficulties in finding appropriate permanent homes) as issues of race in the larger society.

The fact is that children of color are more likely to enter foster care in the United States. Once in care, they also receive fewer supports, have higher occurrences of placement changes, remain in care for longer periods of time and are less likely to be reunited with their families or adopted.<sup>8</sup>

Two distinct philosophies exist that guide race equity work. The first is described by the old adage, “a rising tide lifts all ships.” In other words, if broad sweeping systemic reforms throughout the entire child welfare system are initiated, issues of disparate treatment for children of color will improve. The second approach is much more deliberate and focused. Advocates of this approach believe that without specifically addressing issues of race equity, the same biases and institutional racism that led to the disproportionality and disparate treatment of children of color will continue to impact them throughout the reform efforts.

As we explore class action litigation as a means to achieve race equity in child welfare, case studies will demonstrate how these two philosophies have had impact on legal strategies and also have led to vastly different outcomes.

### ***Brief Overview of Child Welfare Class Action Litigation***

Since the landmark *Wilder*<sup>9</sup> case in New York in 1973, class action litigation has been used in an attempt to force comprehensive reforms in the child welfare system.<sup>10</sup> The cases are brought on behalf of classes of children in foster care and are typically against states and the agencies that oversee the systems. Allegations involve depriving children of their constitutional guarantees and entitlements under federal and state policy. Class action cases that survive typically result in negotiated consent decrees that contain measurable outcome goals across the continuum of services offered to children and families.

When lawyers consider the feasibility of bringing a child welfare class action lawsuit, they consider: (1) case facts, (2) state and federal statutes, (3) the constitution, and (4) controlling case law. Each one of these factors is extremely comprehensive and complex. Thus, no two lawsuits are the same and



the legal strategy that is available in a particular case often leaves advocates and others less than enthusiastic about the cases or their outcomes.

In spite of the large number of child welfare class action litigation cases filed over the past 37 years<sup>11</sup>, only a few cases have included specific allegations of racial discrimination and injustice. Some plaintiffs' lawyers believe that the disproportionate number of children of color in child welfare systems across the U.S. makes child welfare litigation, in and of itself, racial justice work. For example, the landmark *Wilder* case alleged that private and public foster care agencies were unconstitutionally discriminating on the basis of religion and race in violation of the Equal Protection Clause. The consent decree, however, broadened the scope of the reforms to improve systemwide services for all children. This was most likely premised on the belief that improving the system for all children will improve the system for children of color. Today, however, many advocates and stakeholders maintain that race equity issues continue to exist in New York. In fact, the Administration for Children's Service (ACS) in New York City, has established a Task Force on Racial Equity and Cultural Competence.

Several stakeholders interviewed for this paper cited evidence that even when broad system reform efforts are implemented, they do not necessarily improve outcomes for children of color. They argue that without addressing systemic and institutional racism and bias, states can conceivably meet their measurable goals as set forth in consent decrees without having a positive impact on all children of color in a particular system. These advocates argue that specific race-based claims and/or race-based measurable outcomes must therefore be an integral aspect of any race equity strategy linked to class action litigation.

### ***Race-Based Claims in Class Action Litigation***

As with other child serving systems, the legal avenues to address race-based allegations in child welfare are extremely difficult to successfully pursue. Title VI of the Civil Rights Act<sup>12</sup> prohibits any state program that receives federal financial assistance from utilizing criteria or methods of administration that have the effect of subjecting individuals to discrimination based on their race, color or national origin or have the effect of defeating or impairing the accomplishment of the objectives of the program with respect to individuals of a particular race, color or national origin. Only intentional discrimination, however, can be prohibited under the Act. In other words, one cannot merely point to the data on disproportionality and disparate outcomes; rather, specific allegations and intent must be proffered to support an allegation that a government system has discriminated on the basis of race.<sup>13</sup>

Given the complex nature of racially motivated discrimination, proving that an agency or municipality has intent to discriminate is virtually impossible. This is especially true when in most individual cases, a non-discriminatory public policy justification can be argued. For example, even if facts show that African American teenage boys are disproportionately placed in congregate care instead of family foster homes, is this intent to discriminate, or is it difficult for agencies to find family foster homes willing to accept this particular demographic?

Other remedies for race-based claims are derived from federal legislation. In child welfare, specific legislation includes the Multiethnic Placement Act of 1994 (MEPA)<sup>14</sup>, as amended by the Inter-ethnic Adoption Provisions of 1996 (Count XV)(IEP) and the Indian Child Welfare Act of 1978 (ICWA).<sup>15</sup>

Two years after the passage of MEPA, the IEP was passed to clarify certain provisions and strengthen the enforcement and compliance process. If a state is found in violation, the federal government can withhold federal funds and any aggrieved individual can seek relief in federal court. States have three mandates under MEPA-IEP.

- States and other entities that are involved in foster care or adoption placements and receive federal financial assistance under title IV-E, title IV-B<sup>16</sup> or any other federal program are prohibited from delaying or denying a child’s foster care or adoptive placement on the basis of the child’s or the prospective parent’s race, color or national origin.
- States and entities are prohibited from denying to any individual the opportunity to become a foster or adoptive parent on the basis of the prospective parent’s or the child’s race, color or national origin.
- In order to remain eligible for federal assistance for their child welfare programs, states must diligently recruit foster and adoptive parents who reflect the racial and ethnic diversity of the children in the state who need foster and adoptive homes.<sup>17</sup>

Prior to either of these two Acts, Congress passed the Indian Child Welfare Act of 1978 (ICWA) to “protect the best interests of Indian children and promote the stability of Indian tribes and families.”<sup>18</sup> Accordingly, ICWA provides “minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture...”<sup>19</sup> The Act provides relief for individual plaintiffs who challenge a court’s refusal to transfer a case to tribal court as well as cases in which tribal children are placed in non-tribal homes. ICWA also has been cited in cases in which a tribal community believes that a state child welfare policy had or has the potential to violate the intent of the law. Unlike the passage of MEPA-IEP, in which supporting testimony mainly focused on African American children in child welfare, Congress continues to recognize the unique political relationship that Indian children have with their tribal governments and how this relationship forms the basis for giving protection under ICWA to an Indian child. This political status is distinct and separate from a racial classification that forms the basis for other federal or state policies, as tribal communities are sovereign nations. Thus, although there have been a few challenges to ICWA on constitutional grounds, neither Congress nor the courts have repealed or amended the Act since its passage in 1978.

### **Case Studies**

With very little in the way of supporting case law and legislation to gird specific race-based claims, only a few child welfare class action cases (Georgia and Tennessee) have included specific race-based allegations.

#### **Georgia**

In June 2002, Children’s Rights, a nonprofit organization in New York City, along with local counsel, filed a child welfare class action complaint against the State of Georgia, specifically the Department of Family and Child Services (DFCS) offices in DeKalb County and Fulton County (both encompass the City of Atlanta). The case, *Kenny A*, alleged:

*African American foster children are frequently delayed or denied placement in adoptive homes on the basis of their race or color, despite the availability of willing and suitable adoptive parents, because their prospective parents are not also African American. As a result, African American foster children remain in state custody unnecessarily for long periods of time.*<sup>20</sup>

In the complaint, plaintiffs alleged that the class consisted of children who have been, are or will be alleged or adjudicated deprived who (1) are or will be in the custody of any of the DFCS defendants, and (2) have or will have an open case in Fulton County DFCS or DeKalb County DFCS. In addition, they

also set forth the factual basis for the inclusion of a subclass consisting of all children in the class who are African American and who have had, or are subject to the risk of having, their adoption delayed or denied on the basis of their race or color.<sup>21</sup>

Plaintiffs made their legal argument based on violations of: the Equal Protection Clause of Article I, Section I, Paragraph II of the Georgia State Constitution; and the federal Multiethnic Placement Act of 1994, as amended by the Inter-ethnic Adoption Provisions of 1996, 42 U.S.C. §§ 671(a)(18), 674, 1996b.<sup>22</sup>

Based on the case facts, and the legal arguments set forth by plaintiffs' counsel, the federal court certified the class and the subclass in August 2003. After several more years of motions, a proposed settlement was announced in July 2005 and final approval was granted in October of that same year.

Curiously, in tracking the legal documents during the years of motions and discovery, the subclass of African American youth seemingly disappeared from discourse. In fact, by the time the settlement was announced, there was no mention of a subclass or race-based allegations at all.

Several stakeholders were interviewed for this paper to ascertain what happened to the certified subclass and the race-based claims asserted in the original complaint. As with many child welfare class action litigation cases, the parties originally named in the complaint, such as the governor, the commissioner for the Department of Human Resources and the state director of the Department of Family and Children Services, are no longer in their roles. Due to the length of time between filing a complaint to approving a consent decree, the cases get transferred from one administration to the next.

Several people in Georgia's current child welfare administration had no recollection of the original subclass of African Americans. Likewise, a few people in the advocacy community had vague recollections of these race-based allegations, but had no idea why and how they seemingly disappeared in the process. Finally, Ira Lustbader, Associate Director of Children's Rights, who worked on the Georgia class action litigation since its inception, provided insight into what occurred in the process.

During the intervening years between filing the complaint and drafting the proposed consent decree, the discovery process continued to shed light on the viability of the race-based claims. "We realized that even though the court had certified the Subclass, 97 percent of the Primary Class consisted of African American youth and didn't make sense to continue differentiating the subclass," stated Lustbader. In addition, Lustbader alluded to how difficult the race-based claims would be to prove in federal court. When the consent decree was finally negotiated and approved, there was no mention of racial discrimination in violation of MEPA-IEP, and none of the measurable outcomes were or are now reported by race. Findings from a 2008 study commissioned by Georgia's Department of Family and Children Services indicate that the overwhelming majority of counties in Georgia have a disproportionate number of African American children in care and that the outcomes for these children are less favorable than their white counterparts.<sup>22</sup> Without continuing the originally outlined race-based claims, it is now difficult to ascertain whether focused efforts potentially promulgated through the class action litigation and monitoring process would have made a difference in the current data or on outcomes by race.

### **Tennessee**

In yet another Children's Rights' class action lawsuit, a complaint was filed against the State of Tennessee and its Department of Children's Services (DCS) in May 2000. In addition to alleged systemwide failures, the complaint set forth a subclass of African American youth who were allegedly subjected to discriminatory practices based on their race, color or national origin.<sup>23</sup> The complaint cited specific acts as stated in a 1997 Comptroller's Report indicating that the State made fewer efforts to secure appropriate placements and services and permanent homes for African American children in foster

care than they did for Caucasian children and that according to DCS statistics, “while the percentage of all foster children statewide who have been in care for four years or longer was 17%, the percentage of such children was 29% in Shelby County where African American children comprise over 88% of all foster children.”<sup>24</sup> Finally, the complaint cited findings from the report indicating that permanency and adoption services were offered to Caucasian children at rates much higher than African American children in care.

Based on the data available and the facts of cases, which were analyzed by advocates and plaintiffs’ counsel, the complaint alleged violations of Substantive Due Process, Procedural Due Process, the First and Ninth Amendments, the Adoption Assistance Act, Federal Common Law and the Americans with Disabilities Act of the Rehabilitation Act of 1973. On behalf of an African American subclass, plaintiff’s counsel alleged violations of Title VI of the Civil Rights Act of 1964 and regulations issued by the United States Department of Health and Human Services pursuant to Title VI.

With unprecedented speed, a settlement in *Brian A.*<sup>25</sup> was reached and a consent decree was approved by the court in July 2001, merely one year and one month after filing the original complaint. Unlike the Georgia consent decree discussed in the previous section, the race-based claims remained a key part of the negotiated settlement. The approved consent decree specifically include issues of race equity in its principles, its requirements on placement and supervision of children; its plans to recruit, license, and support foster parents and its quality assurance activities.<sup>26</sup> The *Brian A.* settlement also included a specific provision on the problem of the overrepresentation of African American children in child welfare systems and the commitment to ensuring that there is no disparate treatment of or disparate impact on African American children in the plaintiff class. The Agreement required the Tennessee DCS to retain an independent expert, jointly agreed to by the parties, to conduct a statewide evaluation of the Tennessee foster care program to determine whether there are disparities concerning the placement, services or treatment provided to African American children in foster care and their families and the recruitment and retention of foster and adoptive families, as well as foster care payments provided for foster parents for the care of African American children in foster care. The evaluation was to include a plan and timetables within which the recommendations would be implemented.<sup>27</sup>

By agreeing to the consent decree, including the provisions specifically dealing with race and disproportionality, the State of Tennessee became the first state to enter into a legally binding contract to directly address issues of race equity in its child welfare system.

The parties agreed to retain Dr. Ruth McRoy to conduct a study exploring the existence of racial disparities throughout Tennessee’s foster care system. Dr. McRoy, a research professor and Ruby Lee Piester Centennial Professor Emerita at the University of Texas at Austin, School of Social Work, is a nationally known expert on issues related to race and child welfare, and spent 18 months completing a 928-page comprehensive study that included child protective services, foster care, kinship care and adoption practices. The report, submitted in December 2003, contained recommendations and called for the Department to produce an implementation plan, including timetables within 90 days.

As a result, the Tennessee Department of Children’s Services’ Path to Excellence Implementation Plan includes a section entitled “Implementation of the Racial Disparity Study,” which was approved by all parties to the lawsuit. In that plan, the department committed to complete a cultural competency planning process that included the development and delivery of training, and nine additional recommendations related to Dr. McRoy’s recommendations were incorporated into the consent decree and monitoring process.<sup>28</sup>

In part, as a result of Dr. McRoy's recommendation to report data by race (as well as improve its overall data collection and management), DCS engaged the University of Chicago's Chapin Hall. Chapin Hall conducted a follow-up comprehensive study of entry and exit rates by race and ethnicity to help DCS better understand specific areas in which the experience of African American class members differed from their white counterparts. Both the race disparity study led by Dr. McRoy and the Chapin Hall study found that minority children were overrepresented in Tennessee's foster care system. The comprehensive studies enabled the state to focus its efforts regarding age, geography and the points where disparities seemed more likely to occur within the system.

In an interview with Dr. McRoy, she indicated that while she continues to be engaged in race equity work and training throughout the country, the Tennessee study was by far her most intensive and extensive body of work. After completing the study, Dr. McRoy was brought back to Tennessee to help staff and stakeholders understand the implications and recommendations. To date, she has not been involved in the implementation plan or the monitoring process. While Dr. McRoy is a national expert in race equity, and admittedly not an expert in child welfare class action litigation or the feasibility of its impact on race equity issues, she did theorize, however, that the race equity studies in Tennessee have brought about a great deal of attention and focused efforts on the issues, which certainly should yield positive results. Moreover, those efforts are regularly monitored by the Brian A. Technical Assistance Committee (TAC) and their findings are reported to the federal court. When asked her opinion regarding the two philosophies of race equity work (the broad reform approach v. focused efforts), Dr. McRoy stated, "We must do both. We absolutely have to be concerned about the outcomes for all children in the foster care system, but we must also specifically target the unique needs of particular groups of children."<sup>29</sup>

A member of Dr. McRoy's research team continued working for DCS following the publication of the studies. "Since the lawsuit and the disparity studies, there have been more cultural competency training opportunities offered to employees of the agency. The lawsuit has created a lot of activity and numbers crunching. The issues of race equity, however, do not seem to be getting better. It seems like African American children are overrepresented at every decision point in the process, and they seem to stay in care a lot longer than white children."

Using data and case reviews, the TAC has issued two monitoring reports that measure the state's progress regarding implementation of the Race Equity Study Recommendations. The first report was issued in January 2007<sup>30</sup> and a more recent report was filed with the court in November 2010.<sup>31</sup> In the 2010 report, the TAC indicates that DCS "continues to respond appropriately" and has "substantially implemented" nine of the ten recommendations set forth in the race equity study and incorporated them into the consent decree and its Implementation Plan.<sup>32</sup> The only area that the TAC found DCS had not formally addressed was the issue of African American children being diverted into the juvenile justice system. Unlike the other recommendations, this was not based on the data presented in the disparity study; rather the basis was general concerns and the evidence in other states regarding the issue. Although the TAC did not explore any data on this concern, they also report that throughout the monitoring process, this issue has not specifically been brought to their attention.

If the recommendations contained in the disparity study are effective in actually reducing disparity, the State of Tennessee should be progressing toward race equity in its child welfare system. Unfortunately, while the TAC has fulfilled its role of monitoring progress toward completion of required activities, there is no emphasis on actual change in the disparity data in its two published reports. Data are reported by race as is a diversity workforce gap analysis. The latest TAC report, however, does not track the key outcome measures and performance indicators by race from the beginning of the process to the present. To truly understand any potential difference that the race equity focused efforts and activities may have

on reducing racial disparity, the TAC may consider conducting this analysis in its future reports. This will be especially important prior to the state exiting from its consent decree.

When asked to compare the two approaches, Ira Lustbader, Children's Rights plaintiffs' attorney for both the Georgia and Tennessee cases, commented, "Class action litigation is an imperfect tool. Each case requires an examination of the facts and the legal tools that are available to us. Race equity was deliberately considered in both of these cases, but the dynamics necessitated different approaches." In the end, while the data are not yet available, Mr. Lustbader acknowledged that the more that class action cases can focus attention on race equity issues, the more people will be motivated to deliberately work toward reducing disparities.

### ***Other Instances of Race Equity in Child Welfare Litigation***

As previously discussed, child welfare class action litigation that survive motions to dismiss, usually result in negotiated consent decrees. The monitors that are selected to provide oversight for these agreements are individuals and organizations that have expertise in some aspect of child welfare. In a few instances, in spite of the absence of race-based allegations or outcome measures, the monitor has chosen to report data and outcomes by race. This may be due to the way in which the data are presented or due to the interest, experience or expertise of the monitor.

In the state of New Jersey, Children's Rights filed a lawsuit in 1999.<sup>33</sup> The court-appointed monitor for the case is the Center for the Study of Social Policy (CSSP) based in Washington, D.C. Neither the complaint, the negotiated settlement nor the consent decree set forth specific race-based allegations or outcome measures, but in recent years, CSSP has requested data by race.

Kristen Weber, a lawyer and member of the CSSP monitoring team, noted that the first step was working with the agency to accurately capture the race of the child in their files. She observed, "Approximately 20 percent of the files had unknown race, even though throughout the remainder of the file there were clear indications that the race of the child was actually known to the agency." As the agency improved its data collection the issues of disproportionality and disparity found in other jurisdictions became more apparent. For example, as the Department of Children and Families (DCF) identified the 100 teens waiting the longest to be moved toward permanency and who as a part of the reform became the subject of intense permanency activity, they found them to be overwhelmingly African American males. In places where data points to disparate outcomes, the monitor brings these to the attention of agency leadership. The agency, however, is legally bound only to complete the measurable goals outlined in the consent decree. Any efforts to achieve race equity are, therefore, optional. Moreover, as human and fiscal resources are dedicated to exiting the lawsuit, it becomes increasingly difficult to focus on race equity, even if there is acknowledgement on the issue. As CSSP continues to report its findings by race, advocates across the country (especially those in New Jersey) should consider utilizing data on disparities and disproportionality in their efforts toward reform.

### ***Summary***

Is child welfare class action litigation a viable tool for achieving race equity? The answer is "maybe." The inherent complexities of litigation, coupled with the complexities of any perceived or realized connections between race and involvement in child welfare, are difficult to analyze. It appears, however, that the two philosophies that drive race equity work (broad system reform approach and more focused targeted efforts), are each potentially applicable in litigation strategies.

The facts, the lawyers, the state leadership, the class, the local advocacy community and the law all play significant roles in determining whether race-based claims are appropriate for a particular lawsuit. As observed in Tennessee, the deliberate, targeted approach keeps the issue of race equity in the forefront of reform efforts. Eventually, the state will have to satisfy the monitors and the federal judge that it has improved in the areas of disproportionality and disparity. In other states, such as Georgia and New Jersey, the issues are being discussed, but the high level of accountability for results is not present. It will be up to the advocacy community to keep the issues prioritized and to find ways to hold those states accountable.

Child welfare class action litigation is not a perfect tool as Ira Lustbader indicated, but it can be effective in exploring issues of race equity. By improving the system for all children, while continuing targeted approaches to have impact on the children and families who are overrepresented, states have an opportunity to rebuild systems that will yield more positive results.

### **Recommendations**

- Plaintiffs' lawyers should explore all options for including race-based claims in complaints and subsequent consent decrees, and to keep race equity at the heart of reform efforts, court oversight may be required. At minimum, plaintiffs and advocates should request that monitoring reports aggregate data by race to provide a more accurate account of whether the system reform effort is having impact on all children, including children of color.
- Race equity advocates should be involved in the litigation process and participate in the fairness hearings prior to settlement approval. Keep track of the monitoring reports issued in these cases. If the data are not reported by race, request further information. In states where race equity is part of the consent decree, ensure that the outcomes are being met and that the data are actually showing improvement.
- Monitors should consider tracking outcomes by race. This not only adds to the robust body of research regarding race equity in child welfare, it also enables agencies to target their efforts in more successful ways.
- States, by cooperating with requests for data by race or by including race-based outcomes in a negotiated consent decree, will gain more information about its agency's service delivery. Litigation is contentious, but all the parties want a better system and better outcomes for children and families.

### **ABOUT THE AUTHOR**

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Karen Baynes-Dunning is a former Juvenile Court Judge and most recently served as Associate Director for the Carl Vinson Institute of Government at the University of Georgia. She has dedicated her career to improving child serving systems through research-based practice and policy development. Her work has included serving as a federal monitor in a class action foster care case in Georgia; developing a multi-disciplinary Child & Family Policy Initiative at the University of Georgia; and most recently assisting in the development of college supports for students in foster care. A graduate of Wake Forest University and the Boalt Hall School of Law at the University of California at Berkeley, Baynes-Dunning now serves as a faculty member in the College of Human and Environmental Sciences at the University of Alabama.

## ENDNOTES

<sup>1</sup> Readers who do not believe that race equity is an issue within child welfare, or those who want more information regarding race equity in child welfare are referred to the comprehensive compilation of research recently commissioned by the Center for the Study of Social Policy's Alliance for Race Equity in Child Welfare (<http://www.cssp.org/publications/child-welfare/alliance/synthesis-of-research-on-disproportionality-robert-hill.pdf>). Readers who are more interested in other aspects of child welfare litigation are referred to the remaining papers in this series as well as a few websites ( [www.childrensrights.org](http://www.childrensrights.org), [http://www.youthlaw.org/publications/fc\\_docket/](http://www.youthlaw.org/publications/fc_docket/), or <http://www.cwla.org/advocacy/consentdecrees.pdf> ). For information about a current case within a specific state, contact that state's Department of Human Services or other state-based child welfare advocacy organizations.

<sup>2</sup> No Child Left Behind Act of 2001, 20 U.S.C. § 6319 (2008).

<sup>3</sup> Juvenile Justice and Delinquency Prevention Act Amendments of 1988, 42 U.S.C. § 5601 et seq

<sup>4</sup> See OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE (D.F. Hawkins and K. Kempf-Leonard ed., University of Chicago Press, 2005).

<sup>5</sup> Disproportionality is defined by comparing the percent of a particular race of children within the system with their percentage of representation in the general population.

<sup>6</sup> Kay Brown, General Accounting Office. (2008). *African American Children in Foster Care: HHS and Congressional Actions Could Help Reduce Proportion in Care* (GAO/08-1064T). Washington, DC: General Accounting Office.

<sup>7</sup> The report also notes the following regarding children of other races and ethnicities: "Although racial disproportionality is most severe and pervasive for African American children, Native American children also experience higher rates of representation in foster care than children of other races or ethnicities. It is also important to understand local variations for Hispanic and Asian children, since they are underrepresented in foster care nationally and in most states but are overrepresented in some counties and states. For disproportionality rates for African American, White, Hispanic, Asian, and Native American children by state in fiscal year 2004. (See appendix II of GAO-07-816)."

<sup>8</sup> See *Policy Actions to Reduce Racial Disproportionality and Disparities in Child Welfare: A Scan of 11 States, June 2010*, [http://www.cssp.org/publications/public-policy/top-five/1\\_policy-actions-to-reduce-racial-disproportionality-and-disparities-in-child-welfare.pdf](http://www.cssp.org/publications/public-policy/top-five/1_policy-actions-to-reduce-racial-disproportionality-and-disparities-in-child-welfare.pdf). This study also asserts that children of color have less access to mental health services, drug treatment services, and are more likely to be referred to the juvenile justice system for minor infractions while in care. (*Id.*, p.2). As long as data continues to highlight such vast differences based on race, there will be advocates, researchers, practitioners and policymakers trying to understand why and developing evidence-based practices and policies to prevent this from happening.

<sup>9</sup> *Wilder v. Bernstein*, 385 F. Supp. 1013 (S.D.N.Y. 1974).

<sup>10</sup> See N. BERNSTEIN, *THE LOST CHILDREN OF WILDER* (Vintage Books: New York 2001).

<sup>11</sup> See *Child Welfare Consent Decrees: Analysis of Thirty Five Court Actions from 1995 – 2005*, Child Welfare League of America and the American Bar Association Center on Children and the Law, October 2005.

<sup>12</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

<sup>13</sup> The case law that outlines the need to prove intentional discrimination is set forth in *Washington v. Davis*, 426 U.S. 229 (1976) and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) then reaffirmed by *McCleskey v. Kemp*, 481 U.S. 279 (1987). In *Village of Arlington Heights*, the court states "Our decision last Term in *Washington v. Davis* made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination."

<sup>14</sup> The Multi-Ethnic Placement Act of 1994 , as amended, P.L. 103-382 [42 USC 622].

<sup>15</sup> Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996, P.L. 104-188, codified in 42 U.S.C §671(a)18. Indian Child Welfare Act, P.L. No. 95-608, codified at 25 USC §§ 1901-1963.

<sup>16</sup> Title IV-E of the Social Security Act, 42 U.S.C. § 670 et seq. Title IV-B of the Social Security Act, 42 U.S.C. § 670 et seq.

<sup>17</sup> See Joan Heifetz, *A Guide to The Multiethnic Placement Act of 1994 As Amended by the Interethnic Adoption Provisions of 1996*. (1998).

<sup>18</sup> See 25 U.S.C. §1901 et. seq. (1978).

<sup>19</sup> See *Mississippi Band of Choctaw Indians v. Holyfield*, *supra* note, 490 U.S. at 37, 109 S. Ct. at 1602, 104 L. Ed. 2d at 36(1989).



<sup>20</sup> Kenny A. v. Perdue et. al., 218 F.R.D. 277 (N.D. Ga. 2003).

<sup>21</sup> *Id.*

<sup>22</sup> John O'Looney & Richard Clarke, A Study of the Potential for Disproportionality in the Georgia Child Protection and Foster Care Systems. (2008) Carl Vinson Institute of Government, University of Georgia.

<sup>23</sup> See Complaint, p. 75

<sup>24</sup> See Complaint, §213 p. 77

<sup>25</sup> *Brian A. v. Bredesen*, 149 F. Supp. 2d 941 (M.D. Tenn. 2000).

<sup>26</sup> *Id.* at Sections I., A.6, VI, u.; IX, H and XI-E.

<sup>27</sup> See *Brian A.*, 149 F. Supp. 2d 941.

<sup>28</sup> The recommendations of the McRoy report were:

1. Report *Brian A.* outcomes by race on a regular basis effective immediately and will, subject to TAC review and approval, identify and report on relevant performance measures by race, and will monitor and report private provider outcome and performance data by race where appropriate;
2. Expand the relative caregiver program (including necessary funding) to all 12 regions by May 2006;
3. Increase the number of nonrelative African American foster and adoptive families, kinship foster homes and relative caregivers through targeted recruitment efforts and regional recruitment plans will identify outreach and recruitment strategies (e.g., partnering with African American churches and historically black colleges and universities) and will establish recruitment targets;
4. Explore whether there is an inappropriate use of unfunded/underfunded relative placements for African American children and address any disparities in support for African American relative caregivers (DCS will revise policies and procedures to correct or reduce such inappropriate use. DCS will give particular focus to the extent to which DCS staff is trained and knowledgeable about all financial options for potential African American relative and kinship caregivers, including kinship foster care and relative caregiver program options, and the manner and extent to which these options are communicated to African American kinship and relative caregivers);
5. Ensure that children in kinship foster homes are visited with the same frequency as children in non-kinship foster homes;
6. Explore the issue of whether DCS case managers or staff engage in or support practices which divert dependent and neglected African American children into the juvenile justice system and present a plan subject to TAC review and approval to appropriately address any such practices;
7. Develop and implement recruitment and hiring strategies designed to increase diversity of staff at levels of the organization that lack such diversity and to maintain and support diversity at those levels of the organization that reflect such diversity;
8. Develop and deliver cultural competency training throughout the organization and set standards for cultural competency that is expected of staff; and
9. Explore options, including applying for IV-E waiver and drafting legislation for the governor's consideration, to create an additional permanency option of subsidized guardianship.

<sup>29</sup> It should be noted that these observations were not based on actual data or required outcome measures.

<sup>30</sup> *Monitoring Report of the Technical Assistance Committee in the Case of Brian A. V. Bredesen*, January 19, 2007, Section 1, Retrieved from Children's Rights Legal Documents Online: [http://www.childrensrights.org/wp-content/uploads/2008/06/2007-01-19\\_tn\\_briana\\_tac\\_report.pdf](http://www.childrensrights.org/wp-content/uploads/2008/06/2007-01-19_tn_briana_tac_report.pdf).

<sup>31</sup> *Monitoring Report of the Technical Assistance Committee in the Case of Brian A. V. Bredesen*, November 6, 2010, Section 11(E), Retrieved from Children's Rights Legal Documents Online: [http://www.childrensrights.org/wp-content/uploads/2010/11/2010-11-10\\_tn\\_tac\\_monitoring\\_report.pdf](http://www.childrensrights.org/wp-content/uploads/2010/11/2010-11-10_tn_tac_monitoring_report.pdf).

<sup>32</sup> *Id.* at 318.

<sup>33</sup> *Charlie and Nadine H. v. Corzine*, 83 F. Supp. 2d 476 (D.N.J. 2000); 213 F.R.D. 240 (D.N.J. 2003).

## SECTION 2

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# Litigation Leads to Sustainable Reform: A Case Study of Utah's Success

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## **Introduction**

On June 28, 2007, a federal court agreed to end *David C. v. Leavitt*, a 14-year-old lawsuit filed by the National Center for Youth Law (NCYL) to reform Utah's child welfare system. After many years of bitter legal battles and discord, the parties and court monitor were finally in agreement that reform efforts had been so successful that active federal court oversight was no longer necessary.

"This is a big day," U.S. District Court Judge Tena Campbell said during the hearing on the parties' joint motion. "It looks like you finally did what I never thought you'd get done."<sup>1</sup>

Since NCYL filed the *David C.* lawsuit in 1993, Utah's child welfare system had been transformed from one of the most dismal, financially starved systems in the country to a system that was well-regarded and emulated by other states in many key respects. Data showed that the state was investigating abuse and neglect reports more rapidly, caseworkers were visiting children monthly, foster children were receiving timely and appropriate health care services and children were moving more quickly to adoption instead of languishing for years in foster care. In addition, comprehensive policies were in place; a state of the art data management system drove decision making; and caseworkers were better trained and supported.

How did Utah move from having an abysmal system to the point that child welfare experts determined the system was functioning well? What were the major pitfalls and turning points? This paper explores these questions. The second part chronicles the litigation history to provide context for why certain reforms succeeded in Utah and others did not. The third part then distills some of the key lessons learned during the reform process. It is hoped that this paper and these lessons can be applied to assist other reform efforts across the country.

## **History of the *David C.* Litigation**

### **Plaintiffs file *David C. v. Leavitt* and have some early successes.**

On February 25, 1993, NCYL filed *David C. v. Leavitt* on behalf of all Utah children in foster care and children who had been reported as abused and neglected.<sup>2</sup> Named plaintiffs included David C.—who was severely abused by foster parents and whose older brother died in foster care—and sixteen other children whose life stories illustrated the flagrant dysfunction of the state's child welfare system.

Study after study dating back to the mid-eighties documented deep-rooted problems with nearly every aspect of Utah's system. Caseworkers lacked training and carried high caseloads; foster homes were insufficient in number and poor in quality, if not outright dangerous; foster parents were not supported; there was no guardian *ad litem* (GAL) program; and foster children were virtually ignored, separated from siblings, seldom allowed visits with parents and left to drift in a dysfunctional quagmire. Moreover, throughout NCYL's year-long investigation of Utah's system prior to filing the lawsuit, NCYL lawyers were receiving calls on a daily basis recounting new horror stories of children being abused by the system.<sup>3</sup>

As a result of zealous advocacy in partnership with local child advocates and stakeholders, some key successes came relatively quickly. Plaintiffs prevailed on a motion for class certification less than three months after filing the case, and the Utah Attorney General's office soon agreed to meet to try to settle the case. In addition, within a year after the case was filed, the Utah legislature appropriated an additional \$16 million for child welfare services, enacted the Child Welfare Reform Act of 1994 (House Bill 265), increased the budget for guardians *ad litem* three-fold<sup>4</sup> and established new standards for GALs.<sup>5</sup>

By August 1994, the settlement agreement was finalized. Defendants were facing the continuing burdens of discovery, the damning results of a legislative audit and public pressure fed by media accounts of the tragic deaths of several children due to failures by the child welfare agency. Governor Michael Leavitt wanted to make the case go away.<sup>6</sup> The agreement was to remain in effect until August 29, 1998, although as the third part of this paper explores, a four-year timeline would eventually prove overly optimistic.

The parties' settlement agreement—structured mainly by the parties' counsel—consisted of 93 provisions requiring reforms in virtually every facet of the state's protective services and foster care systems.<sup>7</sup> The agreement addressed ten substantive areas (protective services, shelter care, out-of-home placements, health care, mental health care, education, case planning, court processes, the Division of Child and Family Services (DCFS) workforce and monitoring/system accountability), and also included a section on monitoring and enforcement of the agreement's requirements.

Under the terms of the agreement, a three-member monitoring panel was created. The panel was charged with monitoring the agency and publishing quarterly reports documenting defendants' compliance with the settlement agreement provisions. The agreement allowed the agency to make whatever structural changes were necessary to achieve the substantive requirements agreed to by the parties. Plaintiffs' counsel were hopeful that through implementation of the settlement agreement, the agency would re-orient the values and daily practices of staff and move quickly to ensure staff quality and commitment to reform.<sup>8</sup> Unfortunately, this hope was soon dashed.

### **Defendants' compliance with the settlement agreement falters.**

Despite Governor Leavitt's public praise of the settlement, the agency did not appear committed to investing the hard work necessary to achieve the reforms required by the parties' settlement agreement. From 1994–1997, the monitoring panel reported noncompliance with the settlement agreement in four consecutive reports. Data showed that performance was actually declining rather than improving. Implementation of the settlement agreement was plagued by delay, disputes over monitoring data and serious and persistent levels of noncompliance.

Following the third panel report, NCYL filed a motion with the court seeking a remedy for the agency's non-compliance. In March 1997, Judge David Winder of the United States District Court for the District of Utah found that "serious problems remain in the state's child welfare system" and that "some level of court intervention is warranted."<sup>9</sup> At NCYL's urging, he ordered the monitoring panel to create a comprehensive plan to address the areas of noncompliance.<sup>10</sup> This court order would prove to be the first major turning point in the case. The development of a blueprint for reform was a critical step towards translating the settlement agreement from a legal document to an action plan that resonated with the social services administrators charged with implementing the reform effort.

To carry out the court's order, the monitoring panel secured the assistance of the Child Welfare Policy and Practice Group (CWPPG), an Alabama-based nonprofit technical assistance organization experienced in evaluating and improving child welfare practice. Paul Vincent, who had nearly 30 years

of experience providing, managing and administering services to children and their families headed CWPPG. As the former director of Alabama's Division of Family and Children's Services, Vincent also had been a defendant in a child welfare reform lawsuit. Based on his personal experiences, Vincent understood both the challenges and opportunities presented by child welfare reform litigation. The involvement of CWPPG was the second major turning point in the case.

To provide crucial data necessary for the development of a comprehensive plan, CWPPG conducted a case audit of Utah's child welfare system, examining 1,484 child protection, home-based care and foster care case records for compliance with the requirements of the settlement agreement. CWPPG also conducted an in-depth qualitative review of 48 cases.<sup>11</sup> Based on the audit, the monitoring panel concluded in their fourth report that defendants were in compliance with only 20 percent of the settlement agreement's terms.<sup>12</sup>

With the expiration deadline in the parties' settlement agreement looming just months away, however, time was running out. Accordingly, NCYL filed a motion asking the court to extend the parties' agreement beyond its August 1998 expiration date. Judge Tena Campbell (who had taken over the case after Judge Winder moved to senior status) agreed that the defendants were seriously out of compliance with the agreement, but reasoned that there was no "persuasive rationale for pumping more money into a settlement that has, according to its strongest proponents, completely failed."<sup>13</sup>

Following the court's refusal to extend the time frame of the settlement agreement, plaintiffs tried a different approach. Plaintiffs filed a second motion requesting that the Court order defendants to follow the comprehensive plan they had been ordered to develop by Judge Winder, with the assistance of CWPPG.<sup>14</sup> The court agreed and ordered the defendants to finalize the comprehensive plan within eight months.<sup>15</sup> Judge Campbell was sympathetic to the state's arguments that the plan still had some rough edges. Judge Campbell's order indicated that the court would not demand enforcement of an unworkable document and would give the state considerable flexibility both in adopting initial revisions to the plan and in changing it as needed during implementation.<sup>16</sup>

Notably, the court made clear that it intended to hold defendants' feet to the fire regarding systemic reform and not allow them to continue some of the foot-dragging tactics of the previous four years.<sup>17</sup> The court ordered CWPPG to monitor defendants' progress in implementing the plan until the agreed upon termination conditions were met.<sup>18</sup>

This court order was the third major turning point in the case. With this order, the court recognized that the plan driving the reform needed to be a workable one, that it needed to be developed by those responsible for its implementation and that it needed to have the benefit of outside experts who were experienced with the components and sequencing of successful child welfare reform efforts. The court also made it clear to all parties that flexibility in implementing reforms was crucial and that her door was always open if changes in approach became necessary. As discussed in the third part, all of these factors were crucial to a successful reform effort.

### **Defendants finalize and publish the Milestone Plan.**

In May 1999, DCFS published its revised comprehensive plan, calling it the Milestone Plan. On October 19, 1999, the court ordered DCFS to implement the Milestone Plan and retained jurisdiction over the implementation with CWPPG serving as court monitor.<sup>19</sup> The Milestone Plan included nine major objectives ("milestones")<sup>20</sup> that DCFS was required to meet in order to be deemed in compliance with the agreement.

Within each objective, DCFS was required to comply with a list of tasks—112 in total. These tasks

represented commitments by DCFS in the form of specific action steps, strategies and interventions, with each task being assigned a particular deadline. CWPPG assessed whether the tasks were completed through on-site observation, interviews with key DCFS staff and review of relevant documents.

The Milestone Plan also set up a number of mechanisms for measuring and improving system performance. One mechanism, the case process reviews, involved reviewing 900 cases to see if certain core practices were being performed. Another mechanism, the qualitative case reviews, involved an in-depth analysis of a small sample of cases using a structured interview protocol to analyze the quality of the work being achieved by the child welfare system. The Milestone Plan also required the development of regional and state office quality improvement committees to ensure stakeholder input in the process of improving the child welfare system.<sup>21</sup>

### **Defendants make slow progress while legal battles continue and attorneys' fees mount.**

Rather than channeling their full energy into implementing the Milestone Plan, however, Utah instead spent the next two years filing appeals and motions in an attempt to end court oversight. Among other objections, they attempted to challenge the district court's power to modify the four-year termination provision in the original settlement agreement—appealing to the Tenth Circuit and then the Supreme Court—and they filed additional motions to dismiss on the grounds of sovereign immunity and abstention. None of these efforts were successful.

Plaintiffs were forced to dedicate thousands of attorney hours opposing Utah's appeals and shifting legal arguments, which ultimately came back to haunt defendants in the form of a considerable legal fee motion. In response to plaintiffs' fee motion, defendants contested nearly every time entry and claim, wasting hundreds of additional hours on both sides. Defendants' approach to the fee motion highlighted to the court their poor judgment and unreasonable approach. Defendants lost on virtually all issues, and were ordered to pay plaintiffs nearly \$1.25 million.<sup>22</sup> The legal fees battle was a crushing defeat for Utah, and marked the fourth major turning point in the case. Following the agency's defeat, new counsel for defendants came on the scene and a more collaborative period soon followed.

Not surprisingly given defendants' legal strategy, the court monitor's annual reports during this time period showed lagging progress, including fundamental failures to develop training and policies.<sup>23</sup> Moreover, in response to a state budget crisis in 2002, the legislature approved budget cuts that DCFS proposed without conferring with plaintiffs or the monitor. The proposal resulted in a 70 percent cut to the court monitor's budget, major cuts to providers, major cuts to adoption subsidies and the loss of 48 full-time employees. As a result, NCYL sought court intervention in August 2002. Shortly thereafter, defendants restored the court monitor's budget.

At a hearing on November 21, 2002, Judge Campbell expressed her concern about defendants' lack of progress, made it clear that the court would not accept such unilateral budget cuts and stressed that the court had the power to order them to fulfill their obligations.<sup>24</sup> Rather than impose a detailed order on the defendants, however, the court instead forced the parties to work together to address the court monitor's recommended priority areas, including the lack of adequate staffing, the need for additional training of DCFS caseworkers and the development and implementation of policies to improve the consistency of DCFS practice.<sup>25</sup> The court also acknowledged the agency's arguments that some aspects of the Milestone Plan were proving burdensome and asked the parties to discuss the possibility of "trimming" the Milestone Plan.

Once again, the court's wise approach resulted in a turning point in the litigation. Relying on the considerable expertise of the court monitor as a starting point, the court required the parties to develop a workable solution to the problems. By also acknowledging defendants' frustration with some

components of the Milestone Plan, Judge Campbell showed that her previously stated commitment to flexibility was not simply rhetoric. Subsequently, the parties met several times in the spring and reached a mutually acceptable stipulation to address the priority areas identified by the monitor.<sup>26</sup>

Following the court's ruling on plaintiffs' enforcement motion, the agency appeared to shift its approach and began making genuine efforts to implement the Milestone Plan. Over time, the parties were also able to negotiate four additional modifications to the Milestone Plan without resorting to court intervention.<sup>27</sup> After ten years of litigation, the legal battles ceased and the focus from all fronts was finally on implementation of the agreed upon reforms.

From 2003 to 2006, several key developments occurred in the lawsuit that further contributed to progress in implementing *David C.* reforms. Significantly, as already mentioned, the defendants' lawyers who appealed to the Tenth Circuit, filed the cert petition and filed the motion to dismiss were replaced with another team of attorneys who took a less adversarial approach. In addition, leadership at the Utah Department of Human Services changed in 2005, and the new director, Lisa-Michelle Church, seemed determined to move reforms forward so that Utah could reclaim ownership over its child welfare system and end court oversight. She relied on the strong foundation for change established by former DCFS Director Ken Paterson, who had developed the Milestone Plan with the assistance of CWPPG.

Plaintiffs' counsel at NCYL also changed leadership and new local counsel joined the team who was a Utah native and an experienced civil rights advocate. The combination of new leadership within the Department of Human Services and new lawyers representing both defendants and plaintiffs helped open the lines of communication and foster a more collaborative working relationship among the legal teams. As plaintiffs' counsel began to see sustained commitment and follow through on various components of the Milestone Plan that had previously stalled, NCYL became more hopeful that Milestone Plan implementation might be within the agency's reach. These leadership changes on all sides played a pivotal role in moving reform in a new direction.

### **The parties negotiate a new agreement allowing Utah to exit from court oversight.**

By the end of 2006, DCFS had made such substantial progress on its obligations under the Milestone Plan that NCYL agreed to enter into negotiations for a new agreement that would provide for dismissal of the lawsuit. The parties finalized their Agreement to Terminate the Lawsuit in May 2007.

Under the terms of the agreement, defendants were permitted to run their system without the involvement of the court monitor or active oversight of the plaintiffs for a period of 18 months. CWPPG then conducted a final review of the defendants' compliance with the parties' agreement during that 18-month grace period. Based on the results of CWPPG's review,<sup>28</sup> plaintiffs agreed to final dismissal of the case on December 31, 2008. Thereafter, defendants agreed to continue operating their system in accordance with key aspects of the Milestone Plan until December 30, 2010, to establish a number of sustainability mechanisms, and to operate in accordance with a set of core principles to ensure sustainability of reforms into the future.<sup>29</sup>

Through intensive focus on the Milestone Plan tasks, DCFS had transformed Utah's child welfare system. The transformation could be seen both in terms of improvements to the system's infrastructure and services, and in terms of sustained positive outcomes for children and families. Among Utah's accomplishments, data demonstrated that the state was investigating abuse and neglect reports more rapidly, caseload averages ranged from 13–15 per worker, caseworkers were visiting children monthly, children were receiving timely and appropriate health care services and children were moving more quickly to permanency. In addition, Utah had developed a state-of-the-art data management system and quality case review process lauded by child welfare experts across the country.

## ***Lessons learned from successful reform of Utah's child welfare system***

As discussed above, the process of reforming Utah's child welfare system was fraught with challenges and setbacks. Along the way, NCYL attorneys learned a number of important lessons that they would subsequently apply to their work in other jurisdictions. These lessons include: (1) manage expectations about the pace and pitfalls inherent in reforming large bureaucracies, (2) develop an effective team to advocate for plaintiffs and move reforms forward, (3) pay attention to how the settlement agreement is structured and implemented, (4) rely on outside expertise, (5) understand the role of the judiciary in advancing reforms, (6) evaluate the political will and internal capacity to move reform forward, and (7) keep in mind that sometimes you get lucky and sometimes you don't. Each of these lessons is explored below.

### **Manage expectations about the pace and pitfalls inherent in reforming large bureaucracies.**

One of the key lessons learned from *David C.* is that reforming dysfunctional child welfare systems that have been chronically resource-deprived takes time and requires a great deal of patience.<sup>30</sup> Advocates who choose to initiate the reform process should be open to pursuing a combination of legislative and regulatory changes, grass roots efforts and litigation, but they should do so with their eyes open. Reforming a child welfare system is not an easy task—but it is a vital one and one that can be done.

Setting aside the obvious litigation battles that will arise on the road to negotiating a settlement and/or winning at trial, advocates should not expect their troubles to cease once the court has signed off on the settlement agreement. Indeed, that is when the most difficult work really begins.

It is important to keep in mind that the process of implementing the settlement agreement is an exceedingly challenging task for even the most sophisticated defendants. They are being asked to overhaul their system while simultaneously continuing the important job of keeping children safe, helping struggling families and meeting the needs of vulnerable children who have been taken from their homes in the wake of abuse or neglect. Defendants don't have the option of shutting down their operations and starting fresh; they must change their jobs as they do their jobs.<sup>31</sup> For these reasons, experts stress "the importance of realistic time frames, phased implementation and experimentation."<sup>32</sup>

Advocates working to reform child welfare systems should expect problems with implementing the settlement agreement. On top of the inherent challenges with large-scale reform, some system administrators and caseworkers will resist reform simply because of an ill-conceived notion that if they actually change what they have been doing, it will somehow be an admission that all the criticisms and negative things being said about their work were true. Middle managers or frontline workers doing their very best in a broken system may have difficulty seeing how various reform efforts will actually improve things in the long run. Rather, they may see change as simply making their day-to-day jobs more challenging. Others in the system may actually want to change their practice but may lack the knowledge or competence to do so. And, still others may actively resist because they do not agree with the reforms or they dislike those who brought the lawsuit.

For all of these reasons, advocates must be persistent and recognize that meaningful reform, even in the best of circumstances, takes many years to achieve.

### **Develop an effective team to advocate for plaintiffs and move reforms forward.**

NCYL's reform efforts in Utah also underscored the importance of developing an effective legal team with the capacity both to pursue the litigation and to develop and implement the settlement. From the outset, plaintiffs' counsel should have realistic expectations concerning the amount of time and resources that will be necessary to achieve success. It is also important to consider the personality and



temperament of counsel at various stages of the litigation, and to ensure that the right people are at the table at the right time. Moreover, it is crucial for plaintiffs to partner with local stakeholders and advocates in developing the case, implementing the settlement agreement and working to ensure reforms are sustained.

NCYL did not hesitate to commit fully to the litigation in Utah. NCYL invested more resources into the *David C.* case than any other case in its 40-year history. For many years, NCYL devoted four attorneys to pursuing the litigation. In addition, NCYL partnered with Jones Waldo, the largest law firm in Utah, and Morrison & Foerster, one of the largest, most prominent law firms in the country. Both firms enlisted some of their most talented, seasoned attorneys to work on the case.

In addition to developing a legal team with the skills and resources necessary to pursue hard-fought, complex litigation, it is equally important to ensure that the right team is in place when it comes time to pursue settlement. Plaintiffs' legal team must have attorneys who are skilled at formulating a remedy, implementing the parties' settlement agreement and monitoring defendants' reform efforts. Commentators have noted the importance of "preserv[ing] the spirit of consent that gave birth to the decree in the first place" by "maintaining good relations, communicating openly, remaining committed to the goals of the decree and recognizing that implementing a complex decree can be very difficult."<sup>33</sup> Some litigators may be ill-suited to working collaboratively with defendants throughout this process. After spending many years in an intensely adversarial posture, some lawyers may find it difficult to switch gears and move into a problem-solving, cooperative mode. As the old adage goes, those who waged the war might not be the best choice to make the peace.

In Utah, reform efforts were aided by the fact that new attorneys representing both defendants and plaintiffs began working on the case during the final years of settlement implementation. Without the baggage that inherently comes from spending years in an adversarial juggernaut, plaintiffs' and defendants' counsel were better able to take a collaborative approach. The parties were able to work together both to make needed improvements to the Milestone Plan and draft an agreement designed to ensure the sustainability of reforms.

### **Pay attention to how the settlement agreement is structured and implemented.**

Although the initial *David C.* settlement agreement was considered "state-of-the-art" at the time, in retrospect, NCYL has realized some of the shortcomings of the approach. First, because the lawyers were the driving force behind much of the agreement, the agency leaders and middle managers charged with its implementation felt minimal ownership over the reform efforts. Second, the agreement was not sufficiently focused on the outcomes sought for children and was overly focused on process. Third, the parties' agreement did not call for the development of a new practice model with corresponding policies and training to instill the new reforms in frontline workers. Fourth, the agreement did not go far enough in terms of requiring system transparency and analysis based on good data.

NCYL's experience with implementing the *David C.* settlement reinforced the importance of ensuring that there is agency ownership of the settlement agreement. Although plaintiffs' lawyers often feel that they must control all details of the settlement agreement down to the minutest degree, the *David C.* experience taught that such an approach can have unforeseen consequences. Without agency formulation and buy-in of the reforms, even the most detailed, well-crafted settlement agreement will likely fail.<sup>34</sup> The experience in *David C.* instructed that rather than bending the agency to the will of plaintiffs' lawyers, a phased-in approach that ensures agency ownership over the process, in accordance with specified principles, has a much greater chance of success.<sup>35</sup> Although Governor Leavitt lauded the parties' initial settlement agreement and the work of plaintiffs' attorneys, defendants were not actually committed to its implementation. Faced with the monitoring panel's reports showing that agency

performance was worsening rather than improving, defendants sought to justify their inaction by arguing over how the panel reached its conclusions, stonewalling requests for data and turning the panel into a fierce adversary.

The promise of the parties' settlement agreement did not start to be fulfilled until the court ordered the defendants to develop their own comprehensive plan (later named the Milestone Plan) to implement the settlement agreement's detailed requirements. As discussed above, this process, which took over two years to complete, was necessary (but not sufficient) to move reforms forward. Not only did the agency have to take a hard look at how its practices needed to change in order to achieve the settlement agreement objectives, it was also crucial to ensuring that defendants felt that they controlled their destiny. With the Milestone Plan, the agency moved closer to a model of reform that was "grounded in social work knowledge and values, not just legal requirements and compliance."<sup>36</sup>

The Milestone Plan also ensured that greater emphasis was placed on improving outcomes for children in foster care and their families. As discussed above, as part of their Milestone Plan commitments, defendants were required to conduct qualitative case reviews to evaluate the experiences of children in the system. The plan also required defendants to monitor key trend indicators relating to child welfare.

Another crucial step in moving reforms forward was the development of the agency's practice model with corresponding policies and trainings for staff.<sup>37</sup> The parties' initial settlement agreement did not include provisions for such policies, training and mentoring. These tasks were all laid out in the Milestone Plan in 1999, but defendants took much longer than they should have to achieve them. Indeed, ten years into the reform effort, plaintiffs' counsel and the court monitor were still pressing defendants to complete the process of drafting policies and training workers. Without such policies in place to guide practice, defendants had little hope of implementing the Milestone Plan. Moreover, until all staff actually received training on the policies, reforms were bound to stall. Frontline workers could not be expected simply to learn new policies by osmosis. Training and mentoring were crucial components to reforming Utah's system. Once policy and training reforms had firmly taken hold it is not surprising that the pace of progress improved.

The Utah experience also underscored the prime role of reliable data to ensure continuous system improvement.<sup>38</sup> When the case was first settled, data system technology was still in its early stages, but development of a state-of-the-art data system became an important component of the Milestone Plan. Having good data was crucial to driving decision making and evaluating whether the reform effort was working.<sup>39</sup>

### **Rely on outside expertise.**

Another important lesson learned from *David C.* was the need for outside expertise in formulating a remedy, as well as overseeing its implementation.<sup>40</sup> Given the complexities inherent in reform, the parties should involve outside child welfare reform experts sooner rather than later. Moreover, in choosing a neutral third party to support defendants' reform efforts, it is important to identify someone with the right knowledge and expertise, as well as the right style and temperament to fit the circumstances.<sup>41</sup>

In Utah, reform efforts were at an impasse until CWPPG came on the scene. Paul Vincent, along with George Taylor and others from CWPPG, played a key role in reforming Utah's child welfare system. CWPPG built solid relationships with both plaintiffs and defendants, helped bring the parties together and worked tirelessly to include a wide array of stakeholders in the reform process. CWPPG assisted defendants with developing the Milestone Plan, implementing key components of the plan and tracking system performance. Paul Vincent, as well as his colleagues, had a style and temperament well-suited to

this challenging task. Based on his personal experiences as a former head of a child welfare system (and a defendant in a similar lawsuit), Vincent understood the realities of child welfare reform litigation. The CWPPG team also understood the importance of changing a system through collaborative guidance and building on community strengths rather than insisting on a one-size-fits-all approach. Defendants were beleaguered from many years of failed reform efforts. CWPPG understood that they needed to treat the agency leaders as partners rather than subordinates and that the way reforms were communicated could make or break them. The strength-based approach, similar to the type of approach most successful in working with families, utilized by Vincent and others at CWPPG was crucial to their success.

### **Understand the role of the judiciary in advancing reforms.**

*David C.* also provides a case study on the importance of the judiciary in advancing reforms. It should come as no surprise that the judge assigned to the case can play a pivotal role in determining whether reform efforts will succeed or fail.<sup>42</sup> Although parties obviously have little control over the judge assigned to their case, they should assess early on the likely role the judiciary will play in settlement implementation. Some judges may clearly signal their willingness to play an active role; others may take more of a hands-off approach.<sup>43</sup> Understanding the role of the court will help in shaping the monitoring and enforcement provisions of the parties' settlement agreement.<sup>44</sup>

In Utah, strong leadership from the federal bench played a key role in achieving the reforms. Both U.S. District Court Judge David Winder and Judge Tena Campbell held each side accountable for reforming the child welfare system and demonstrated considerable wisdom in their rulings.

As discussed above, in 1997, Judge Winder took the important step of ordering defendants to prepare and implement a single comprehensive plan for reforming DCFS.<sup>45</sup> Judge Winder recognized that the settlement agreement provisions were not adequate to provide DCFS with a roadmap for reforming the system, and that the defendants needed a plan that social workers (and not just the lawyers) could understand. Judge Campbell subsequently ordered defendants to complete the process of developing the comprehensive plan with the assistance of CWPPG.<sup>46</sup> She allowed defendants a substantial amount of time to develop a workable plan that they could call their own. She also stressed to the parties that the plan should be flexible, and that her door would always remain open if modifications to the plan were necessary.

In 1999, after completion of this plan, Judge Campbell ordered CWPPG to act as monitor, and the court retained jurisdiction over the implementation of the plan.<sup>47</sup> Judge Campbell's decision to retain CWPPG to assist DCFS was key in implementing the reforms. She recognized the magnitude of reforming the child welfare system and saw that, after many years of struggling, defendants needed outside expertise and support from a neutral third party.

Judge Campbell again reinforced the importance of agency ownership of the reforms in 2002 in ruling on plaintiffs' enforcement motion. Rather than simply ordering defendants to meet their obligations under the Milestone Plan, she ordered the parties to work together with the monitor to figure out why Milestone Plan obligations were not being met. Moreover, as defendants made substantial progress in reforming the system, the court clearly signaled to the parties that it was time to start discussing the end of court oversight.

### **Evaluate the political will and internal capacity to move reform forward.**

*David C.* also afforded NCYL a lesson in the political dynamics involved in tackling system reform. In charting a course to child welfare system reform, advocates must assess whether the political will and internal capacity exist to drive a challenging multi-faceted reform effort. In pursuing a litigation strategy,

advocates should evaluate the leadership at the state and local level with an eye towards identifying leaders with the skills and power to move reforms forward. If an investigation reveals that there are not such leaders in either the legislative or executive branches, advocates should think long and hard about how their reform strategy will address this major deficit.<sup>48</sup>

In Utah, Governor Leavitt drove the initial effort to settle the lawsuit, but it quickly became clear that he and the other defendants lacked the political will to make the changes necessary to develop a well-functioning system. NCYL soon concluded that the inclusion of the four-year expiration provision in the settlement agreement had led defendants to believe they could simply wait out the clock.

Reform efforts began to make some progress in the late 1990s when the new DCFS Director, Ken Patterson, made the wise decision to work with CWPPG to develop the Milestone Plan. He was committed to reform, understood good social work practice and worked hard with CWPPG to formulate the Milestone Plan. Unfortunately, however, the governor's litigation strategy continued—with defendants fighting tooth and nail not to implement defendants' own reform plan. This adversarial legal strategy drained away focus and resources from the actual reform effort. Although internal capacity to achieve reform was building, the political will remained weak.<sup>49</sup>

It would take a series of crushing legal defeats, a \$1.25 million legal fees order and a new governor before defendants finally changed course and pursued a strategy of implementing the Milestone Plan rather than attempting to thwart it. In the mid-2000s, the stars finally aligned with the combination of:

- a DCFS Director, Richard Anderson, willing to focus on Milestone Plan implementation;
- a new DHS director, Lisa-Michelle Church, who saw that by actually following the Milestone Plan and the expert advice of the court monitor, defendants would be able to run their system once again;
- a new governor who seemed committed to children's issues;
- the expertise of CWPPG, which had considerable knowledge of and commitment to Utah's child welfare system;
- a wise judge who held the parties accountable for working together to advance the Milestone Plan; and
- counsel on both sides who were willing and able to take a cooperative rather than adversarial approach.

The combination of these factors and relatively stable funding from the legislature ushered in a period of collaboration and focus on a common goal. Moreover, it is not a coincidence that the parties ultimately were able to come to the table to discuss ending the lawsuit at a point in time when all of these factors were in place.

### **Keep in mind that sometimes you get lucky and sometimes you don't.**

A final lesson learned from NCYL's experience with *David C.* is the role of good old-fashioned luck in achieving reforms. Although it is important to evaluate each of the factors discussed above in advance of filing a lawsuit, because reform litigation can take many years to achieve success, advocates should anticipate that one or more of the factors may change over time. Some of these changes may be welcomed; others may not. It is not difficult to predict that agency leadership or the political climate or the assigned judge may change over time, but it is impossible to predict in advance how these changes will impact the reform effort.

Over the course of *David C.*, there were changes in state and agency leadership, changes in lawyers and changes in the assigned judge. Many of these changes helped advance the reforms. For example, after the departure of Judge Winder, the reform effort benefited from the fact that Judge Campbell was assigned to the case and continued to provide the parties with similar wise, effective guidance.

As discussed above, the reform effort also benefited from various changes in agency leadership and changes in counsel.

Accordingly, while advanced planning is essential, some element of luck will inevitably affect the pace of the reform effort. Given the inevitable bumps along the way, effective advocacy requires commitment, flexibility and taking advantage of each opportunity to advance the ultimate goal of ensuring that children are safe and have the greatest possible chance to reach their full potential.

## **Conclusion**

After more than fourteen years of reform efforts, Utah's child welfare system has come a long way. Although the jury is still out on whether the state can sustain the impressive reforms to the system, initial progress reports have been promising. NCYL attorneys and local advocates continue to evaluate the system's work on behalf of children and families and expect that the state will remain committed to the promises laid out in the parties' agreement ending the lawsuit.

NCYL's understanding of the challenges inherent in reforming child welfare systems has also evolved, and many of the lessons learned from Utah have been applied to our work in other states. Although each case brings its own set of challenges, we have attempted to learn from both our missteps and our successes as we work to transform systems to ensure that children's safety, health and well-being are paramount.

## **ABOUT THE AUTHORS**

### **John F. O'Toole**

John F. O'Toole has served for 30 years as the Director of the National Center for Youth Law (NCYL). Under his leadership, the Center has built a national reputation for its successful advocacy on behalf of tens of thousands of poor children and youth in states throughout the country. In 2004, John was named among California's 100 most influential attorneys by the Daily Journal, California's statewide legal newspaper. In 2007, he was appointed by California Supreme Court Chief Justice Ronald George to serve on the Blue Ribbon Commission on Children in Foster Care. John also sits on the board of Legal Services for Children in San Francisco. Prior to joining NCYL, he was a staff attorney for California Rural Legal Assistance in Marysville, CA, where he was responsible for a broad range of individually oriented civil cases involving poverty law. John earned his undergraduate degree from UCLA in 1971, and his law degree from the University of California, Berkeley (Boalt Hall) in 1974. He joined NCYL in 1980, becoming its Director a year later.

### **Leecia Welch**

Leecia Welch is a senior attorney at the National Center for Youth Law in Oakland, specializing in child welfare and education issues. For three years, she was lead counsel on *David C. v. Huntsman*, a class action lawsuit in Utah that resulted in significant reforms of the foster care system. She was also lead counsel on NCYL's litigation team in *Dyer v. CIF*, in which the court ordered that youth in foster care must be afforded equal access to extracurricular activities. In addition, Leecia oversees several projects to improve the educational opportunities of youth in Oakland's foster care system, including the training of law students at UC Berkeley Boalt Hall School of Law to become educational representatives for youth in foster care. In recognition of her work on behalf of youth in foster care, Leecia was awarded the 2007 ABA Young Lawyers Division Child Advocacy Award. Prior to joining NCYL in 2004, Leecia was an associate in the litigation department at San Francisco's Morrison & Foerster LLP, and spent three years

focusing her time nearly exclusively on *Williams v. State of California*, a class action aimed at improving California's public school system.

## ENDNOTES

<sup>1</sup> Kirsten Stewart, *Foster Care Hits Milestone*, SALT LAKE CITY TRIB., June 29, 2007. Under the terms of the parties' Agreement to Terminate the Lawsuit, final dismissal of the case occurred on December 31, 2008. From June 2007 until December 2008, the case remained on the court's docket to ensure that plaintiffs would be able to enforce the terms of the parties' agreement without having to re-file the case.

<sup>2</sup> Complaint, *David C. v. Leavitt*, No. 93-C-206W (D. Utah Feb. 25, 1993).

<sup>3</sup> Bill Grimm, *Triumph in Utah Child Welfare Litigation: Long Road Ahead in Implementing Reforms*, YOUTH LAW NEWS, Sept.-Oct. 1994, at 4-7.

<sup>4</sup> Although it is not the focus of this paper, it is worth noting that the Utah Guardian *ad Litem's* office, which now represents all children in Utah's dependency system, played a crucial role in ensuring that the reforms achieved through *David C.* improve the lives of children and families. Guardian *ad Litem* attorneys have been instrumental both in advocating for their clients' needs in the courtroom and in the larger community.

<sup>5</sup> Grimm, *supra* note 3, at 1.

<sup>6</sup> Martha Matthews, *David C. Settlement Now 'State of the Art,'* YOUTH LAW NEWS, Sept.-Oct. 1994, at 12-15.

<sup>7</sup> Settlement Agreement, *David C. v. Leavitt*, No. 93-C-206W (D. Utah May 24, 1994).

<sup>8</sup> Matthews, *supra* note 6, at 14. Although plaintiffs' counsel viewed the settlement agreement as state of the art at the time it was negotiated, we later came to conclude that the agreement was overly focused on process and not sufficiently focused on child outcomes.

<sup>9</sup> Memorandum Decision and Order Granting in Part and Denying in Part Plaintiffs' Motion to Enforce Settlement Agreement and Appoint Receiver at 29, *David C. v. Leavitt*, No. 93-C-206W (D. Utah, Mar. 17, 1997).

<sup>10</sup> *Ibid.*

<sup>11</sup> Jeanne Finberg, *Utah Plaintiffs Ask Court to Extend Settlement Agreement*, YOUTH LAW NEWS, May-June 1998, at 21-22.

<sup>12</sup> *Id.* at 20.

<sup>13</sup> Order at 13, *David C. v. Leavitt*, No. 93-CV-206C (D. Utah Aug. 4, 1998).

<sup>14</sup> See Order, *David C. v. Leavitt*, No. 93-CV-206C (D. Utah Sept. 17, 1998).

<sup>15</sup> *Id.* at 4.

<sup>16</sup> See *id.* at 5. The Court noted: "If the court orders implementation of the completed plan, it invites and fully expects defendants to move for modifications whenever they are reasonably necessary. What the court will not find acceptable is for defendants to ignore this remedy available to them, as they did with the settlement agreement, and then complain that the plan is unworkable whenever their performance is called into question."

<sup>17</sup> *Ibid.*

<sup>18</sup> *Id.* at 4, 6.

<sup>19</sup> Order, *David C. v. Leavitt*, No. 93-CV-206C (D. Utah Oct. 19, 1999).

<sup>20</sup> The Nine Milestones were: (1) Practice Model Development, Training and Implementation; (2) System Investments; (3) System Management Structures; (4) Priority Focus Areas; (5) Accountability Structures; (6) Trend Data Analysis; (7) Case Process Review; (8) Quality Case Record Review; and (9) Quality Improvement Committees. DIV. OF CHILD & FAM. SVCS., THE PERFORMANCE MILESTONE PLAN (1999).

<sup>21</sup> DIV. OF CHILD & FAM. SVCS., THE PERFORMANCE MILESTONE PLAN 78 (1999).

<sup>22</sup> Order at 2, *David C. v. Leavitt*, No. 93-CV-206C (D. Utah July 9, 2002).

<sup>23</sup> See CHILD WELFARE POLICY AND PRACTICE GROUP, ANNUAL COMPLIANCE REPORT: THE PERFORMANCE MILESTONE PLAN, UTAH DIV. OF CHILD & FAMILY SVCS. 15 (2000); CHILD WELFARE POLICY AND PRACTICE GROUP, ANNUAL COMPLIANCE REPORT: THE PERFORMANCE MILESTONE PLAN, UTAH DIV. OF CHILD & FAMILY SVCS. 24 (2002).

<sup>24</sup> See Hearing Transcript at 52-58, David C. v. Leavitt, No. 93-CV-206C (D. Utah Nov. 21, 2002).

<sup>25</sup> Ibid.

<sup>26</sup> See Stipulation to Enter Order to Enforce the Court's 1999 Remedial Order and Settlement Agreement, David C. v. Leavitt, No. 93-CV-206C (D. Utah Mar. 17, 2003).

<sup>27</sup> See Order Granting Stipulated Motion to Enter Order to Amend the Milestone Plan, David C. v. Leavitt, No. 93-CV-206C (D. Utah June 9, 2004); Order Granting Motion to Amend the Milestone Plan, David C. v. Leavitt, No. 93-CV-206C (D. Utah July 13, 2005); Order Granting Stipulated Motion to Amend Milestone Plan, David C. v. Leavitt, No. 93-CV-206C (D. Utah Jan. 31, 2006); Order Granting Motion to Amend Milestone Plan, David C. v. Leavitt, No. 93-CV-206C (D. Utah Sept. 26, 2006).

<sup>28</sup> CHILD WELFARE POLICY AND PRACTICE GROUP, DAVID C. SUSTAINABILITY REPORT 4 (2008).

<sup>29</sup> These core principles include: (1) maintaining and improving upon the Practice Model and guidelines for its implementation; (2) maintaining sufficient resources to sustain the infrastructure created by the Milestone Plan; (3) maintaining a trained workforce with a reasonable caseload; (4) ensuring that the child welfare system is transparent, relies on data and quality assurance mechanisms to measure system functioning, and engages in self-critique and analysis to improve practice; (5) ensuring that there is organized and informed community involvement in the child welfare system; and (6) maintaining sufficient oversight mechanisms to help sustain system reforms. Agreement to Terminate the Lawsuit at 7-17, David C. v. Huntsman, No. 93-CV-206TC (D. Utah May 11, 2007).

<sup>30</sup> See OLIVIA GOLDEN, REFORMING CHILD WELFARE 172 (2009) (noting that "turning around a large agency with a history of failure takes years" and "multiple building blocks" are necessary).

<sup>31</sup> See BAZELON CENTER FOR MENTAL HEALTH LAW, MAKING CHILD WELFARE WORK: HOW THE R.C. LAWSUIT FORGED NEW PARTNERSHIPS TO PROTECT CHILDREN AND SUSTAIN FAMILIES 85 (1998) (noting the importance of beginning to make changes "rather than endless planning" and analogizing to "fixing a bicycle while riding it").

<sup>32</sup> See CENTER FOR THE STUDY OF SOCIAL POLICY, NEW ROLES FOR OLD ADVERSARIES: THE CHALLENGE OF USING LITIGATION TO ACHIEVE SYSTEM REFORM 11 (1998); see also PAUL VINCENT, CHILD WELFARE POLICY & PRACTICE GROUP, IMPLEMENTATION OF ALABAMA'S R.C. CONSENT DECREE: CREATING A NEW CULTURE OF PRACTICE 1, 3 (2008) (describing the phased implementation of the consent decree).

<sup>33</sup> See Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. Rev. 725, 729 (1986).

<sup>34</sup> See Ellen Borgersen & Stephen Shapiro, *The Role of Class Action Litigation in Achieving Child Welfare Reform: A Study in Public Conflict Resolution*, 13 NEGOTIATION J. 283, 287, 291 (1997) (noting a problem when attorneys "who were 'not capable of talking programmatically'" were shaping the reform plan and importance of agency leader's involvement in shaping reform); Anderson, *supra* note 33, at 727. ("Defendants are also more likely to comply with a decree they have helped to formulate than with a decree imposed upon them by a federal judge."); CHILDREN'S RIGHTS, INC. & NAT'L CENTER FOR YOUTH LAW, IMPROVING THE CHILD WELFARE WORKFORCE: LESSONS LEARNED FROM CLASS ACTION LITIGATION 34 (2007) (quoting interviewee feedback that it is "important to engage caseworkers and supervisors early on in the reform process and to sustain that connection . . ."); ROBERT C. DAVIS ET AL., VERA INST. OF JUSTICE, TURNING NECESSITY INTO VIRTUE: PITTSBURGH'S EXPERIENCE WITH A FEDERAL CONSENT DECREE 64 (2002) (noting the critical nature of the city's "embrace of the reforms" and the police chief's "determination . . . to make the decree part of his own reform agenda" in a lawsuit involving police practices).

<sup>35</sup> See CENTER FOR THE STUDY OF SOCIAL POLICY, *supra* note 32, at 3 (noting that "fundamental system change cannot be imposed from the outside. It must grow out of a process that engenders 'ownership' of the reform plan by those charged with implementing and sustaining it"); Kathleen G. Noonan, Charles F. Sabel, & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOC. INQUIRY 523, 536 (2009); Vincent, *supra* note 32, at 1, 3 (describing the use of a phased-in implementation plan); BAZELON CENTER FOR MENTAL HEALTH LAW, *supra* note 31, at 86 (stressing "the value of stakeholder participation at every level ('all politics is local') and "the fragility of even positive change").

<sup>36</sup> See Wendy Whiting Blome & Sue D. Steib, *Strategies for Empowering the Child Welfare Administrator Facing Class Action Litigation*, 1 J. PUB. CHILD WELFARE 5, 24 (2007).

<sup>37</sup> See Paul Vincent, *supra* note 32, at 15 (noting the importance of establishing principles that formed the basis of the system's first practice model and training in achieving reforms).

<sup>38</sup> See Noonan et al., *supra* note 35, at 534 (praising the qualitative review processes in Alabama and Utah and the emphasis on "a system's capacity for self-assessment and self-correction over compliance with judicially derived substantive standards").

<sup>39</sup> See, e.g., GOLDEN, *supra* note 30, at 10, 146 (recounting how on multiple occasions the use of data revealed gaps in services and helped the agency identify where improvement was needed).

<sup>40</sup> See also Borgersen & Shapiro, *supra* note 34, at 284 (“The chances of success are greatly enhanced by the presence of a credible, neutral third party who can overcome the mistrust bred by adversarial combat, and marshal the multidisciplinary expertise and political resources essential to sustainable reform”); Blome & Steib, *supra* note 36 at 14 (noting that because “plaintiffs and the defendants need to look for a common vision that allows them to come together in a collaborative spirit . . . the administrator may want to engage the service of an external, trusted party who understands both perspectives”); CENTER FOR THE STUDY OF SOCIAL POLICY, *supra* note 32, at 4 (noting the importance of “neutral, trusted outsiders who can bring former adversaries together and help marshal the technical assistance and other resources essential to sustainable reform”); CHILDREN’S RIGHTS, INC. & NAT’L CENTER FOR YOUTH LAW, *supra* note 34 at 10, 48 (noting that experts can ensure that plans “are based on best practices and are feasible and practicable” and that they “may have the added benefit of reducing acrimony between the parties”).

<sup>41</sup> See, e.g., DAVIS ET AL., *supra* note 34, at 11-12 (“Allowing the city to play the primary role in making the selection [of the court monitor] likely increased the confidence of city officials in the monitor and facilitated his work.” The article also notes that the monitor was praised for his neutrality, for listening to the parties and for never being adversarial).

<sup>42</sup> See, e.g., Borgersen & Shapiro, *supra* note 34, at 296 (noting that a contempt order from the judge was crucial to reform efforts in Kansas City child welfare litigation and that the judge’s “findings of fact broke through layers of bureaucratic misinformation and denial”); CENTER FOR THE STUDY OF SOCIAL POLICY, *supra* note 32, at 13 (proposing “a role for the court as a civic incubator” that will have a presence for longer than the individual political stakeholders).

<sup>43</sup> See Anderson, *supra* note 33, at 761 (noting three potential roles for the court: non-interventionist, meditative and adjudicative).

<sup>44</sup> See, e.g., GOLDEN, *supra* note 30, at 169-74 (noting that the federal court was “instrumental” in the reform efforts in Utah, Alabama and Washington, D.C. The book asserts that the courts were critical for five reasons: for providing “moments of opportunity” when the parties were deadlocked, for bringing a vision of reform that could be shared by the plaintiffs and defendants, for its “relatively long-run timeframe,” for operating as a good faith accountability holder and for having the “power to influence or coerce other important stakeholders”).

<sup>45</sup> See Memorandum Decision and Order, *supra* note 9, at 23, 29-30.

<sup>46</sup> See Order, *supra* note 14, at 2-4.

<sup>47</sup> See Order, *supra* note 19, at 1-2.

<sup>48</sup> See CENTER FOR THE STUDY OF SOCIAL POLICY, *supra* note 32, at 6 (noting that “achieving real reform requires a strong internal champion within the agency”); CHILDREN’S RIGHTS, INC. & NAT’L CENTER FOR YOUTH LAW, *supra* note 34, at 8, 32 (noting “leadership of the child welfare agency” as one of the top four most cited factors in reform success and quoting one interviewee as saying, “A consent decree without strong leadership won’t make a difference”); DAVIS ET AL., *supra* note 34, at 7, 12, 64 (noting that a key factor in the city’s decision to settle rather than continue fighting the lawsuit was “the arrival of a new, reform-minded police chief who wanted to make changes similar to those proposed by the Justice Department” and was able to use the litigation to implement reforms he wanted); GOLDEN, *supra* note 30, at 193, 210 (describing her personal experience that a shift in agency culture cannot happen absent leadership cooperation and pointing out that agency leaders “can make the difference to the lives of thousands within the current system, . . . [can make] the case for resources, and in some cases for policy reform, in their jurisdictions . . . [and] can form the backbone of a case for national change”).

<sup>49</sup> See also Borgersen & Shapiro, *supra* note 34, at 296 (noting that “a receptive political climate” following the election of a new governor was a key element to the success of reform efforts in *G.L. v. Stangler*, a child welfare reform lawsuit in Kansas City).



# Child Welfare Settlement Compliance in the State of Kansas: Conditions for Success

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Teresa Markowitz, Vice President and Chief of Staff  
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In 1989, a class action lawsuit was filed locally in Topeka, Kansas, charging that the Kansas Department of Social and Rehabilitation Services (SRS) was not adequately providing services and placements needed for children in the state's custody within Shawnee County, Kansas. In early 1990, this lawsuit was joined by Children's Rights, Inc. and was amended to include the entire state.

In June 1993, after being court ordered into mediation, a Settlement Agreement was reached between the parties. And while the Agreement was viewed by most as a reasonable guidepost for good practice in child welfare, the complexities created by the monitoring process were overwhelming and yielded very little measured success. In April 1997, the lack of demonstrated progress prompted the plaintiffs to file a motion to reopen the case.

At this juncture, instead of reopening the case, the presiding judge ordered the creation of a "Non-Adversarial Task Force" to resolve the issues blocking compliance and to more effectively measure progress. The Task Force, made up of local advocates, state representatives and child welfare experts, led the way for a more streamlined and understandable monitoring process. As a direct result of the work of this Task Force, in June of 2002 (after more than 12 years), the State was able to successfully terminate the monitoring requirements set out by the lawsuit and, more importantly, newly developed outcome measures were showing steady improvements in the well-being of children in the state's custody.

A set of ingredients/conditions for success came together to both achieve better outcomes for children in the State's custody and to strengthen the confidence of key decision-makers, stakeholders and advocates, leading to the exit of the Settlement Agreement.

The following combined conditions for success contributed to the system achievements in Kansas.

- **Less Adversarial Approach**

It was only after the Task Force was created that there was space and opportunity to talk about improving the lives of the State's most disadvantaged children. Prior to the Task Force, discussions were so adversarial that the only people allowed to negotiate the elements of best practice for the agreement were lawyers with little field worker perspective, resulting in a fairly process-laden agreement filled with complex formulas to measure compliance. And this "compliance" approach culminated in a focus on completing forms and not necessarily on improving practice – this was best exemplified in the two separate manuals field workers utilized during this period of time, one that directed how to achieve compliance for the settlement and one for best practice.

The advent of the Non-Adversarial Task Force led the way to a much more reasonable approach to reforming the child welfare system in Kansas. It allowed for advocates and stakeholders to become more educated about the complexities of child welfare and it allowed state workers the opportunity to join in the conversation about reform in a way that did not condemn current practice. It opened

the door for candid and creative conversations about how best practice could be achieved. When blaming and finger pointing were removed and when the focus remained exclusively on improving outcomes for children, a great deal was accomplished.

■ **Neutral Facilitation That Reappears at Critical Times**

Of course, there were times when the parties simply had a difference of opinion about best practices. In those instances, having a strong content expert, seen as a neutral party available to facilitate the differences, was key. It was critical to have someone that both parties trusted, not only to quickly find common ground but to keep the newly formed partnership moving forward.

■ **Leadership**

Leadership was key to the reform in Kansas. Leaders were willing to take risks, they provided the vision, they were honest brokers of information, they knew what to say and when to say it, they were passionate, they displayed the flexibility to change directions when necessary, they promoted data driven decision-making, they were humble and led by example, they valued the past and built on system strengths not deficits, they displayed a high tolerance for criticism and were committed to continuous quality improvement, they knew when to take the lead and when to let others and they were resilient and strong.

These leadership skills were central to the Kansas initiative. State leadership was committed to making a difference for children and their families and exerted a pressure to “get it done.” There was willingness and a commitment on the part of the State to attain true reform, to “do whatever it takes” to create a sustainable platform for system improvements that would transcend the current leadership.

■ **Political Support from the Governor and Key Policymakers**

From the Governor, to the President of the Senate, to the Secretary and the Commissioner, there was a visible and public commitment to improving the child welfare delivery system in Kansas. For example, the Governor’s inaugural address in 1999 prominently featured his commitment to children and families and children’s issues.

Additionally, the Governor and policymakers were able to imagine a radically different delivery system that would improve the lives of Kansas children and families and were willing to take the risks necessary to make these changes. And equally, if not more important, they stood by these commitments and supported an increased budget that promoted change.

■ **Service Delivery Changes**

The State Secretary of Social Rehabilitation Services and the State Commissioner for Children and Family Services wanted to redesign the service system, not just to meet the Settlement Agreement requirements, but to dramatically improve the life chances for children being served by the state.

The Settlement Agreement was the impetus for needing change, but it was the willingness of the State to create a vision broad enough to accomplish significant change, not just modify current practices, but to revisit how the entire child welfare system was designed.

Goals identified as part of this reform included the following:

- embrace a focus on permanency for all ages of children,
- assure equitable services across the state (not just urban centers),

- free-up public agency workers to focus primarily on child protection,
- reduce congregate care (and eliminate incentives to keep beds filled),
- support team decision-making, and
- manage system improvements through an outcome-based, data driven system.

#### ■ **Commitment and Cooperation of the Provider Network, Advocates and Stakeholders**

A desire to improve the child welfare system was a view held by many, not just the state agency. The local provider network was not only willing to be part of the solution but was intricately involved in the design of the new delivery system. Providers were willing to take risks, to take responsibility for helping improve the system and wanting to be part of the solution. This meant long-standing traditional congregate care providers had to re-invent themselves, to carefully manage a shift from being historically very successful group home providers to successful providers focused on permanency and a much broader continuum of care.

Providers, advocates and other key stakeholders were no longer on the “sidelines,” they were part of the solution and as a result were invested in the success of the reform. The breadth and depth of the commitment from those agencies and organizations (not directly affiliated with the public agency) was phenomenal and contributed mightily to the success of the reform.

#### ■ **Data and Accountability Systems**

Data and accountability systems were a critical part of the Kansas reform. Data was used to inform the decision-making as changes were being contemplated. The ability to define and support with data the problems needing to be addressed was vital and without it would have forced many decisions to be based on subjective beliefs rather than fact. Once reform initiatives were in place, the ability to track achievement and performance was also essential. This level of monitoring was used to assess benchmarks for improvement and to make mid-course corrections in the design as necessary.

Equally important was the use of data to build confidence with key stakeholders and policy makers. For the first time, on a regular basis legislators were informed of the improvements and accomplishments in the child welfare system with data and child outcome achievement rather than anecdotal stories. This was a significant shift in how the department was perceived and raised the profile of the child welfare delivery system in an encouraging way → what was once seen as an ineffective, broken child welfare system was now being viewed in a more positive and optimistic light and there was data to support that view.

### **Conclusion**

With the right elements in place, public child welfare system reform is possible. While the above conditions for success are not absolute, they were instrumental in changing the delivery system in Kansas.

### **ABOUT THE AUTHOR**

#### **Teresa Markowitz**

Teresa Markowitz is a Vice President and Chief of Staff at the Annie E. Casey Foundation and is responsible, through the Office of the President, for the coordination of the day-to-day operations of the

Foundation. Prior to coming to the Foundation in 2001, Teresa owned and operated her own human services consulting firm, On the Mark. From 1995 to 1999, Teresa was the Commissioner of Children and Family Service for the Kansas Department of Social and Rehabilitation Services. During Teresa's tenure as commissioner, major initiatives were implemented in service delivery as the department moved to an outcome based public-private partnership. Prior to her service in the State of Kansas, Teresa was employed in the private sector working primarily in the child/family mental health arena. She has ten years experience in managing and operating psychiatric facilities across the country. Teresa worked as a family therapist in a mental health center and for five years with the juvenile offender population. Teresa received her Masters Degree in Social Welfare from the University of Kansas and her Bachelors Degree from Emporia State University in Kansas.

# New Jersey: A Case Study and Five Essential Lessons For Reform

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In January 2006, when New Jersey's recently elected governor appointed us as members of a new child welfare leadership team, we came to the helm of a statewide system at a crossroads. The challenges were plentiful.

- The frontline staff were demoralized and burdened by unmanageable caseloads. They had a laundry list of expectations with an inadequate support system and too few resources, and, all too often, they awakened to alarming headlines about their child welfare system and that raised questions about their commitment and competence.
- There was a sharp rise in the number of foster children legally available for adoption, which was paired with a seismic gap in the system's capacity to complete adoptions. In addition, there was a severe shortage of available foster homes, and the shortage was only increasing despite a large public investment in recruitment and advertising.
- Scores of paper reports existed – mostly outdated – but there was little capacity to collect and verify, analyze and communicate critical, accurate and usable data to the field or to key stakeholders.
- The system was in a 30-month-old federal class action lawsuit settlement with a pending contempt motion by plaintiffs who were demanding a federal takeover of the system in the wake of the court-appointed oversight panel's report of significant state noncompliance with settlement terms.
- Most importantly, there was evidence that the children in the system were not safe, were not achieving permanency and were not receiving care to meet their own or their family's basic needs.

Shortly before the new governor's election, the lawsuit generated stinging headlines in no fewer than three television networks and seven newspapers, including the *New York Times*, the *Philadelphia Inquirer* and the *Star Ledger*. While at first we viewed the inherited bad press as yet another of our challenges, we came to view the widespread news reports of system failures and the public skepticism it wrought, as an opportunity lever to push for change.

By January 2006, there was no serious stakeholder voice in New Jersey arguing that the existing reform plan was working for children and families, or that the large public investment had magically produced good outcomes. The consent decree, which frontloaded a variety of process and outcome improvements for children, had not had the desired effect. To the contrary, the most invested child welfare stakeholders yearned for a new way, a new plan and a new consent decree. The responsibility fell to us to negotiate with plaintiffs' counsel and work with them in partnership to build a bridge from chaos to reform, which would enable us to realize the outcomes of safety, permanency and well-being for children.

The talks between the plaintiffs' counsel and our team led to a modified settlement agreement, which radically redesigned the course of the reform. It made possible wide-ranging improvements for the state's vulnerable children and families. By the end of our tenure as a public leadership team, less than three years after we first assembled, New Jersey had:

- achieved consecutive annual state records for the most children to be adopted from the foster care system and reduced the number of legally free children awaiting adoption by 44 percent;

- achieved annual net gains in the number of foster families, more than 1,700 over three years and stemmed the downward spiral in the number of licensed homes, without spending additional funds on recruitment and advertising;
- safely reduced the number of children who were removed from their families, which led to a significant overall reduction of the children in placement;
- reduced the incidence of maltreatment in care dramatically, which took the state from among the nation's worst performers to among its very best;
- improved staff morale and achieved a steep drop in the turnover rate, reduced worker caseloads to appropriate, manageable levels, and refocused the central office to be "of service to the field;"
- distilled agency reporting to a focused set of public reports with reliable data that became a working tool for agency staff and began to address stakeholders' desire for information; and
- four successive positive reports from the court-appointed monitor for building a stable platform for enduring reform and setting state records on a variety of important outcomes.

In leading the effort that achieved these and other positive developments for children and families, we applied certain core practice values that nurtured the reform movement in its infancy and led to a sustainable trajectory for change. The five most important lessons from our work are discussed below.

■ **Lead "in service to the field."**

Staff members who are treated with disrespect, who lack the basic tools necessary to get their work done – including training, working telephones and cars, manageable caseloads, access to services and a leadership team that is open to hearing what the staff need and what they think is wrong – will struggle. As a result, children and families will not get what they need.

From the beginning, we believed that an effective approach to work with staff should mirror a model for how we wanted staff to treat the children and families we served. We needed to act with respect, to listen and to turn bureaucracy on its head so that instead of creating burdens, the central office resolved problems. We prioritized resources and support so that the field got what it needed first.

Achieving manageable caseloads took some time, and we needed staff good will in the interim to slow the turnover rate and improve staff morale. We secured this good will by making ourselves available and doing whatever was necessary to provide immediate relief to the field. Getting a mechanic on site quickly after staff reported that there were broken cars sitting idle because of paperwork delays is not the stuff of policy papers, but resolving problems of bureaucracy and displaying day-to-day support for the staff made them believe in the possibilities of change. It also made it possible for them to complete their investigations in more timely fashion, visit families more frequently and secure more and better services for their clients.

We decentralized authority to local management, removing layers of low-value centralized reviews, committed to clear communication of priorities and ensured that the staff knew we would hold ourselves responsible when something went wrong and not place the blame on them. We committed to accountability – and that accountability began at the top. Borrowing on a strategy from Bill Bratton, the former New York City police commissioner, we seized media opportunities to get the message out that we valued our staff. Our busy staff may or may not have read newsletters from the Department of Children and Families Commissioner, but we knew with certainty that either they or their families would read the *Star Ledger* or the *Philadelphia Inquirer*.

■ **Focus on the fundamentals.**

Repairing a public system is like building a house: it begins with the foundation. A sense of urgency

is critical to any reform movement, but taking the time to develop a strong infrastructure is the only way to create positive change that endures. We must be urgent about the right things in a sensible order, and too often, we are urgent for outcomes at the expense of the fundamentals that make those outcomes more likely. The road to reform involves a logical sequencing of key initiatives that leaves behind the chaos and disappointment of the old, flawed system in order to travel toward a system that achieves positive outcomes for children and families. New Jersey's revised consent decree embraced this principle, bifurcating the work into two phases: the first phase focused on the fundamentals (e.g., massive efforts in recruiting, hiring, training and mentoring staff and aggressive foster and adoptive home growth). The second phase followed with service expansion and practice model implementation – ultimately leading to improved results. To our surprise, the strength of some of the early work hastened positive results elsewhere. For example, as the net number of foster and adoptive homes in New Jersey increased, caseworkers had better placement options for children, and existing homes became less strained. This led to a lower rate of maltreatment while in care.

- **Be strategic about quick wins.**

Every system has strengths despite the popular caricature of child welfare systems. Diagnosing system strengths quickly and leveraging them to achieve important early accomplishments for children and families is critical to maintaining public support for a reform that, in the early going, is focused on infrastructure-heavy fundamentals that do not translate well into the public narrative. For example, New Jersey had a strong adoption history that had been compromised in 2004 and 2005. Among our system's many latent strengths, there was a cadre of committed, trained adoption staff ready to focus on permanency for children if we could provide supports to them and remove structural and resource barriers. We made commitments to ensure that legally free children were adopted in significant numbers throughout 2006 and 2007. And then we over-delivered on those promises.

We changed the training delivery system almost overnight – something we could do from the central office. We committed and delivered on ensuring that newly hired staff entered training in under two weeks when previously, they had sometimes waited months for training. Existing staff were provided with a focused, organized in-service training menu, the content of which reflected our reform priorities with a rational delivery schedule that ensured office coverage. And, as previously stated, never underestimate the impact that working computers, cell phones and cars have on both morale and service delivery. Strategic, quick wins early in a reform movement can reinvigorate staff and the reform process by allowing time to breathe, to grow and to focus steadily on the fundamentals.

- **Be suspicious of conventional wisdom.**

New Jersey spent significantly in 2004 and 2005 to recruit new foster homes, yet the system lost more homes than it gained in each of those years. Still, conventional wisdom in January 2006 urged us to address our foster home deficit by spending more public money to market aggressively to prospective families across the state. We resisted, despite considerable pressure, and instead worked to diagnose and understand the recruitment and licensure pipeline. Three months of intensive investigation and data analysis, followed by targeted piloting of model approaches, revealed structural communication and culture gaps that caused severe delays and poor customer service.

A scenario that best exemplifies this problem came to our attention in the winter of 2006. Licensing inspectors were frequently failing applicant homes when they discovered stale batteries in the homes' smoke detectors. The existing structure dictated a process in which inspectors would leave

the home with its non-working smoke detector intact and send the licensing application back to the recruitment team. The recruitment team, in turn, scheduled a second appointment at the home, installed new batteries, and then returned the application to the licensure team for a third home visit and inspection. These inefficiencies took months and, worse, frustrated families, many of whom simply dropped out of the application process. Our pilot work allowed us to design a new model, which merged the licensure and recruitment divisions under one manager and created a single team that was deployed regionally to the field. Licensing inspectors were provided with tool kits that contained batteries and other common necessities, and they were authorized and expected to solve problems on the spot. It worked – more homes got licensed. No one was clamoring for that solution early on, but it proved much more effective than the popular solutions being heralded at the time.

Similarly, we resisted trying to dictate change by issuing new policies, which was the standard response. Our agency already had hundreds of pages of policies, some of which were confusing and contradictory, and our busy staff did not have much time to read. We limited new policy to critical issues – keeping that list short – but we mostly focused on achieving change by making the priorities clear, and encouraging creative responses that defied traditional structural silos – letting “a thousand flowers bloom.” There is more than one good way to reach a good outcome, and our staff were in better positions to identify what would work. We decided it was best to pilot and test, and discard or tinker with what did not work, and grow what did. Policy development could follow later.

- **Everything cannot and should not be counted.**

Absent the type of comprehensive reform process required by a federal consent decree or, less frequently, willed by a committed chief executive, child welfare reform efforts are often piecemeal. They frequently culminate, for example, in a blue ribbon commission’s recommendation for the agency to begin disclosing performance on a new set of measures or legislation with a raft of new reporting requirements. The trouble is that these requirements are frequently layered on top of the agency’s existing reporting obligations, which accrue over time by statute, regulation, stakeholder request or each time a new agency head takes over. If, as a result, the child welfare system finds itself developing and publishing hundreds of regular data reports, as New Jersey did in January 2006, there is a real danger that the avalanche of information will have exactly the opposite of its intended effect: the system will not become more accountable; it will stay unfocused and ignore most or all of the information. Essential to our reform work was a commitment to manage by data, which began with identifying essential data that needed to be tracked followed by the often painful task of unmasking quality challenges with the data and developing solutions. We peeled back the rest and stopped publishing a multitude of reports.

When determining which measures to use going forward, we considered three inter-connected sequential questions.

*First*, seeing our staff as data consumers, we considered the pedagogical value of information to drive performance. In other words, we determined what we wanted our staff to view as important, and we worked hard to make data accessible – both conceptually and literally – on all desktops. We also ensured that the data were easy to understand. We used the data to set achievable but aggressive targets that were widely shared and used to celebrate success. Everyone knew how everyone else was doing, and that knowledge encouraged healthy competition and peer-to-peer learning.



*Second*, we considered what managers need to know to navigate the change process. In New Jersey, that included everything from the most basic demographic data on children in placement to office staffing levels, training enrollments, newly licensed foster homes, and child adoptions, among other measures.

*Third*, we considered the data needs of core constituencies whose good will was essential to the success of the reform: the governor, the legislature, advocates, plaintiffs' counsel and the court-appointed monitor. When the list of reports got too long, we did our best to scale back to produce only the core ones. Our chief goal was to create an appetite in our staff for managing by data, not continuing to churn reports for reports' sake.

The change process we helped launch in New Jersey in 2006 is now touching children and families in ways that seemed unimaginable back then. If this level of reform is possible in a state whose children struggled as mightily as they did in New Jersey, positive change in the foster care system is possible everywhere. A sick system in need of reform requires equal doses of strategy, forbearance, passion, discipline and an outcome plan that focuses first and foremost on the fundamentals.

## **ABOUT THE AUTHORS**

### **Molly Armstrong**

Molly Armstrong served as the Director of Policy and Planning for New Jersey's Department of Children and Families. She focused on re-engineering the foster and relative home recruitment and licensure process; designing a healthcare system for children in placement; and with the DCF team, building and implementing a reform process grounded in data and QA. She is currently leading the managing by data initiative in New Jersey; working with a variety of stakeholders in New York City on improving the connections between the education and justice systems; and supporting the child welfare reform effort in Michigan. Molly is a partner in Public Catalyst ([www.public-catalyst.com](http://www.public-catalyst.com)) and received her undergraduate degree from Yale; a law degree from NYU; and a masters in law from Georgetown.

### **Eileen Crummy**

Eileen Crummy spent her 33 year career in public child welfare in New Jersey's Division of Youth and Family Services (DYFS) where she rose through the ranks to become the agency's Director prior to serving as the Acting Commissioner of New Jersey's Department of Children and Families. As DYFS Director, Eileen led a workforce of 6,000 staff focusing them intently on achieving child welfare reform. Those efforts led to the creation of New Jersey's first case practice model, a systemic rethinking and reorientation of practice away from compliance towards outcomes, with an emphasis on family engagement. Eileen is a partner in Public Catalyst ([www.public-catalyst.com](http://www.public-catalyst.com)) and currently serves as a monitor of Michigan's federal child welfare consent decree. She provides technical assistance to states and jurisdictions regarding the development of outcome-focused child welfare and human service programs.

### **Kevin Ryan**

Kevin Ryan served as New Jersey's first Child Advocate and as the state's first commissioner of the Department of Children and Families, successfully launching a reform of child welfare and juvenile justice services. During his tenure, the State set successive state records in adoptions, foster family recruitment and safety for children in placement. He also shepherded the development of a model

family preservation and child abuse prevention network across the State. At Covenant House, he spent more than a decade on the frontlines with homeless, runaway and trafficked youth, and now serves as the agency's international president. He is a partner in Public Catalyst ([www.public-catalyst.com](http://www.public-catalyst.com)) through which he serves by appointment of the federal court as a monitor of Michigan's child welfare consent decree and mediates dispute resolution between state agencies and advocates for children in foster care. A former Harvard Wasserstein Fellow and Skadden Fellow, he received his undergraduate degree from Catholic University; a law degree from Georgetown; and a masters in law from NYU.

**Lisa Alexander-Taylor**

Lisa Alexander-Taylor served as chief of staff in New Jersey's Department of Children and Families, deputy police director in Newark, NJ, and as a prosecutor in New York City. She has expertise in building and implementing public investigation, monitoring, and accountability systems; infrastructure design and support, and training system design, logistics and execution. Lisa is a partner in Public Catalyst ([www.public-catalyst.com](http://www.public-catalyst.com)) and is currently leading sections of the managing by data initiative in New Jersey, and supporting the child welfare reform effort in Michigan.

# Perspectives of a Child Welfare Administrator: Managing Change While Under a Consent Decree/Court Order

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Uma Ahluwalia, Director  
Montgomery County Department of Health and Human Services

Administering a child welfare system is definitely not work for the faint-hearted. Child welfare systems each have their own culture and myths, often fueled by local tragedies. When I took my first assignment in Washington State as the Assistant Secretary for Children's Services following in the footsteps of a much revered predecessor, I hoped to become a successful change agent, building on many lessons I learned from watching reform unfold at a frenetic pace in Washington, D.C., under the superb leadership of Dr. Olivia Golden and her team.

Child welfare policy and practices I knew well, having been taught by talented leaders, my skills enriched through involvement in the national Family to Family initiative and my experience with the *LaShawn* Consent Decree in Washington, D.C. Before accepting the job in Washington State, I reviewed the *Braam* lawsuit, a class action suit focused on multiple placements of children in foster care. I assumed the solution was foster care reform. In reality the entire child welfare system had areas needing improvement and extraordinary strengths. Prior to beginning work at the Children's Administration, I did not fully comprehend the complexity of the system or the practice. Hence, my optimism, while perhaps misplaced, helped me to begin from a place of strength.

## ***Settling the Braam Lawsuit and Aligning Reform Efforts***

Early tasks in Washington State involved settling the *Braam* lawsuit. At the same time, however, the Children's Administration was going through accreditation through the Council on Accreditation and the State was coming up for its very first Federal Child and Family Services Review (CFSR). Key to our success and our ability to create conditions or system reform was our ability to align all three activities to make the work seamless across multiple priorities.

Based on the assessment of the State's attorneys and a thorough scan of our practice and our systems, we determined that settling the lawsuit before it went to trial was the best strategy. Reaching a Settlement Agreement, however, would require skillful negotiations. Finding a mediator who had the trust of both the Defendants and the Plaintiffs was a critical task. We agreed that Judith (Judy) Meltzer of CSSP was the right person for the job and reached out to Judy who, along with Kathleen Noonan of the Annie E. Casey Foundation, invested time and skill in helping us reach a negotiated settlement.

Picking the state's negotiation team was also essential. Having the right mix of internal practice experts, leadership voices and legal support was a key task. The support from the Attorney General's Office was especially critical in the negotiations. The process of reaching an agreement was a hard and arduous journey with give and take on both sides. The Agreement required a Monitoring Panel and we were fortunate that Casey Family Programs, the Seattle-based child welfare-focused philanthropic organization, stepped up to help. Both Ruth Massinga, its president at the time, and William Bell, her successor, were incredibly supportive as the lawsuit moved to settlement and beyond.

Having a Monitoring Panel led by child welfare experts and an agreement built on best practices with a defined exit strategy were essential requirements for the state. It was also important to manage costs, which was a difficult selling point with policymakers. The settlement would bring the State more in line with national best practices. It also required the State to address certain key areas where state policy and practice would need to change, such as response times for Child Protective Services, and adding foster parent supports, such as respite care and multidimensional treatment foster care.

Considerable thought from both the Plaintiffs and the State went into the selection of the Oversight Panel members. Based on my understanding and experience in the District of Columbia, we worked hard to have clear exit benchmarks built into the *Braam* Settlement Agreement. In order to operationalize the Settlement Agreement, we built the same key provisions into our federal Performance Improvement Plan (PIP) related to our first round CFSR. We were thus able to successfully align the Settlement Agreement provisions with the CFSR PIP, relieving staff of the burden of complying with two separate initiatives. Our federal partners were very supportive and helpful in this process.

### ***Implementing Reform***

Having negotiated the Agreement, we began the very hard task of implementing reform – advocating for funding, training staff and foster parents and bringing our advocates and provider partners in alignment with the provisions of the reform effort. We developed elaborate tracking and project-based tools to manage deadlines, a massive overhaul of our policy framework began and training of child welfare staff began in earnest.

The deliverables related to reform deadlines were beginning to emerge, when another crisis hit the leadership team of the Children’s Administration. At this critical juncture, the budget went into deficit. The pressures of reform and the unfavorable fiscal picture created a very difficult change environment that resulted in my departure from the State. Leadership for the Children’s Administration passed on to a native and proven State human services leader. Reform continues in Washington but at a pace that is slower but probably more aligned with the resilience for change among the staff and partners of the Children’s Administration.

### ***Taking Lessons Learned to another Jurisdiction (the District of Columbia)***

My professional life was at a crossroads after my tenure ended in Washington State. It happened that the Senior Deputy at the Child and Family Services Agency in Washington, D.C., was leaving. Director Brenda Donald recruited me and in June 2005, I returned to the District Child and Family Services Agency (CFSA). In a strange twist of circumstances, four months later Director Donald became the Deputy Mayor for Health and Human Services and recommended me as interim CFSA Director. I was given this leadership role several years into implementation of the restructured and reformatted *LaShawn* Remedial Order, known now as the LaShawn Implementation Plan. This Plan was developed under Dr. Golden’s leadership when CFSA came out of Receivership as an independent cabinet level District Agency.

The challenge at CFSA as compared to Washington State was not to build the case for reform, but rather to deepen the practice of reform and demonstrate sustainability. The culture of CFSA was used to rapid change and reform. The infrastructure was still weak but the senior leadership team was well experienced in a rapid response model. The big challenge, however, was to change the practice culture to reflect best practice principles and to become less reactive and crisis focused.

## **Focus on Data**

CFSA had one of the few, federally certified Statewide Automated Child Welfare Information Systems, known as FACES. The data in FACES were mature and there was much emphasis placed on its integrity. Every week, there were data focused meetings to measure our progress against the Implementation Plan.

Our goal was to move towards probationary exit from the *LaShawn* court order. We began planning activities around performance based contracting, a key strategy of reform. The community based Collaboratives began to assume a stronger partnership role in the community. Generally the indicators started showing improvement. The Interstate Compact on the Placement of Children with Maryland and a Memorandum of Understanding (MOU) with Maryland was managed with fidelity. Family Team Meetings at intake, replacement and permanency were implemented. Multi-systemic treatment, mobile crisis and respite care supports for children in foster care and their caretakers were implemented. Family Preservation was strengthened with the implementation of Structured Decision-Making. Staff recruitment and retention showed improvement. Training was strengthened. Considerable efforts went towards improving the administrative infrastructure although contracting and contract monitoring remained areas of vulnerability. Vendor performance data were closely monitored and performance based contracting was seen as the next step towards improving overall Agency performance. Court improvements continued at a steady pace.

## **Reform Goes On**

Overall there was a sense of optimism and hope. Discussion was beginning around the possibility of developing a probationary exit strategy when Mayor Adrian Fenty was elected. He was supportive of my continuing as CFSA's leader and becoming a permanent member in his cabinet. However, the District of Columbia's residency requirement for Cabinet Directors in the District of Columbia Charter could not be waived. This would have required me to take residency in the District of Columbia, which my family situation did not permit. Once again I found myself leaving a job I loved, short of achieving my goal to prove that reform could be successfully delivered on and a Consent Decree exited under my watch. It was with much regret and disappointment that I left CFSA and the incredible leadership team that supported our shared reform efforts. Shortly after my departure, a multiple child death case reverberated through the Agency. It is a testament to the strength and resiliency of CFSA, its leadership, staff and partners that reform was not permanently derailed by the death of the Jacks children.

Four years later, from my position as Director of the Department of Health and Human Services in Montgomery County, Maryland, I look back on the lessons learned from my child welfare tenure in Washington State and the District of Columbia. These are high-risk jobs, but the payoff is always great. The impact of making a difference in the lives of children who are so often the innocent victims of poverty and family dysfunction is a powerful motivator. It is our moral obligation to protect the vulnerable and create the best opportunity for children to succeed in safe, loving and stable families. I am grateful for the opportunities I have had and continue to have to fulfill that obligation.

## **ABOUT THE AUTHOR**

### **Uma Ahluwalia**

Uma Ahluwalia is currently the Director of a fully-integrated Health and Human Services Department in Montgomery County. The department is the largest agency in Montgomery County Government and

includes Aging and Disability Services; Behavioral Health and Crisis Services; Children, Youth and Family Services; Public Health Services; and Special Needs Housing. Ahluwalia holds a Masters in Social Work from the University of Delhi in India and a Post Graduate Degree in Health Services Administration from George Washington University. She has over 20 years of experience in the field in various frontline and executive management capacities.

# New York City's Administration for Children's Services Reform Effort: When Solutions Are the Problem

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Linda I. Gibbs, Deputy Mayor  
New York City Health and Human Services

When I joined the newly created Administration for Children's Services in New York City in 1996, it was truly a child welfare system in disarray. The high-profile fatality of Elisa Isquierda prompted the child welfare function to be severed from the city's larger public welfare benefits agency, and Nicholas Scoppetta to be appointed as its first commissioner. The charge I was given by Mayor Rudy Giuliani was to assess the current operations, research best practice in the field and recommend necessary fixes.

As is typical of large child welfare systems, there were several class action orders and settlements in place. This included *Wilder*, which was a much-litigated consent decree of 25 years, the result of a terrible practice of discrimination based on children's religious affiliation, a proxy for their race. Children of color routinely had received lower quality care, and the intent was to remedy the situation. The *Wilder* "solution" was to take the human discretion out of placing children into care by making the judgment through complicated mathematical formulas off a "wheel," like dropping a child into the spinning roulette to determine where they would be best served. The legacy of this court-appointed process was a three-member panel staffed by several technicians, not experts, who reported to a judge. The judge was unrelentingly critical of the agency and controlled agency decisions around the placement process.

The panel itself functioned poorly – a fairly distant group who met infrequently with agency leadership, and a staff that exercised day-to-day decision making. The panel shaped the agency's scope of work and hired high-cost consultants to do their analysis with little accountability for timeframes or deliverables or cost. The agency had no choice but to pay these court-ordered expenditures. In fact, years of work and millions of dollars in expenditures had produced no placement system by the time Commissioner Scoppetta arrived in 1996 – 23 years after the case was brought and a decade after the court charge was given. Worse still, was the panel's high resistance to change. There was little willingness to recognize that altering how the core function of child placement worked was integral to a vision for reform, and they needed to adapt accordingly.

Our inquiry into best practice, facilitated by site visits sponsored by the Annie E. Casey Foundation's child welfare practice, brought the compelling virtues of neighborhood-based services to Commissioner Scoppetta's attention. Realigning the nonprofit agencies to narrow their focus to particular neighborhoods, and working to keep children as close to home as possible, became the foundation of reform the Commissioner chose to put in place. This implied a placement process that would successfully make those matches and meant that the *Wilder* fix, decades in formation, millions spent on consultants, and still unfinished, would have to be thrown out. The *Wilder* "solution" was now the problem. And the answer from the *Wilder* panel was, "No can do. Lovely idea, your neighborhood-based approach, but it doesn't satisfy the *Wilder* charge, and it is not a process you have the discretion to control. So sorry." It was a classic case of the adversarial nature of litigation creating stalemates that delay reform.

Meanwhile, a key consideration for the placement formula was the quality of performance by the nonprofits in providing services. Thus, the *Wilder* panel appropriated the process of determining

how agencies were performing as a component of the placement decision. Years had been spent on gathering data from agencies, and agencies spent enormous resources feeding information to the panel. Yet no system was recommended and no product was complete. When I arrived, my first meeting was one in which I was asked to give the go ahead on spending another \$10 million-plus for consultants to continue their evaluation protocol development. When I balked, I was summarily told that I had no discretion and was chastened by the consultant who told me she had “successfully worked with many commissioners before me, and she was sure she would work with many after me as well!”

The performance of the nonprofits and the need for a real-time evaluation system that gave them feedback on performance and provided the agency with information to determine which nonprofits should be allowed to work with the agency was another key component of reform. But the panel said their work could not go faster, could not accommodate the commissioner’s policy direction, and could not be made more than what was needed to support the placement function. Once again, the solution had become the problem. Ossified decisions – impervious to systems they work within, immune from accountability for performance and divorced from management innovation – had stripped managers of authority and control over the very systems for which they were responsible. The effect was that public managers abdicated their own responsibility for action.

Fast forward to two years later. With the collaboration and support of The Annie E. Casey Foundation, and with the consent of the same plaintiffs (Children’s Rights) in the new class action (*Marisol*), a different approach was taken. A new Special Master Panel of experts was appointed to help the new public agency devise a strategic plan of reform. The panel had a clear charge of areas of practice to explore and defined the success of the public agency managers as inherent to the goal. These managers, in turn, were aided by strong guidance from the panel, and they were free to express their own opinions about the weaknesses in the system and their ideas for solutions. The panel collaborated to put a new system in place that was based on a comprehensive vision of best practice and one that emanated from the strong values needed for creating a high quality system.

What also made the settlement unique was that there were no detailed settlement exit markers with deliverables and timeframes. Instead, the panel was required to determine if the efforts of the agency were being conducted in good faith. There was also an agreement to close out *Wilder* and not initiate any new class actions during the reform period. Quarterly reports and a final close-out document by the panel at the end of the two-year period endorsed our efforts, which led to remarkable changes and award-winning reforms that happened quickly. And, the improvements have been sustained for over a decade and a half. Since that time, the system has been free of class action and court-ordered supervision.

Class actions are sometimes, unfortunately, required to push public agencies to behave responsibly. The class action solution, however, can be as bad as the problems it is intended to fix. While litigation may be necessary to instigate action, real reform requires much more. Political will and substantive expertise in managing large systems must be brought to the table, and litigants and courts must not be allowed to substitute their judgment for that of expert managers within the agency.

## **ABOUT THE AUTHOR**

### **Linda I. Gibbs**

Linda I. Gibbs was appointed Deputy Mayor for Health and Human Services by Mayor Michael R. Bloomberg in January 2006. In this role she oversees nine city agencies with a combined budget of over \$20 billion. Upon appointment, Linda created the Center for Economic Opportunity to design and



implement evidence-based initiatives to reduce poverty. The Center was the first to develop an updated poverty measure that has been adopted by the Obama Administration and is the first in North America to create a conditional cash transfer program. Through her collaborative approach to management, Linda has made it easier and more cost-effective for non-profit organizations to work with the City through reforms in the contracting and procurement process. She is also known for developing HHS-Connect, a data integration and exchange system that links data from a dozen City agencies, easing the burden on the caseworkers and clients to collect information and informing better case practice.

Prior to her appointment as Deputy Mayor, Linda served as Commissioner of the New York City Department of Homeless Services and was the chief administrator of the Mayor's ambitious strategy to end chronic homelessness. During the Giuliani Administration, she served as the Deputy Commissioner for Management and Planning for the New York City Administration for Children's Services. Since her graduation from SUNY Potsdam and SUNY Buffalo School of Law, Linda has also served in the New York City Council as Special Advisor to the Director of the Finance Division and at the Mayor's Office of Management and Budget as Deputy Director for Social Services. She and her husband Thomas McMahon live in Dumbo with their two children, Ryann and Leo.

# From a Commissioner's Perspective: The Double-Edged Challenges of Managing Under a Consent Decree

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Dr. Page B. Walley, Managing Director of Strategic Consulting  
Casey Family Programs

On January 16, 2007, U.S. District Judge Ira DeMent issued an order of national significance. After 19 years of federal court oversight, Alabama's child welfare system not only met the high expectations of the court, but also demonstrated an unsurpassed ability to provide for the safety and well-being of children and families in distress. With that, the Judge dissolved the *R.C. v. Walley* settlement agreement, which made Alabama's comprehensive exit from federal oversight a national story. While the ruling that allowed the State to exit garnered national attention, the child welfare system that was created and sustained in Alabama was the story. The change of practice philosophy and values, employee training and development, caseload standards, citizen oversight committees and performance measurement, all undergirded with improved technology and additional financial and personnel resources, represented a metamorphosis, which few imagined possible 20 years earlier.

In 1986, Jefferson County (Birmingham) Circuit Judge Sandra Storm ordered a child, initials *R.C.*, into Alabama's foster care system. In what Storm described later as a "nightmarish, long journey through hospital mental wards, psychotropic medication and separation from his family," *R.C.* experienced shameful maltreatment that symbolized the shortcomings of an entire system.

At that time, a governor-appointed commission discerned that the average caseload of child welfare caseworkers in Alabama was 65 families. There was inadequate training for caseworkers, uninvestigated child abuse allegations, antiquated equipment for caseworkers' use and multiple additional systemic inadequacies. Indeed, the child welfare system was failing Alabama's most needy children and families.

The Bazelon Center sued the state on behalf of *R.C.* at the request of his father, and Alabama agreed to enter into a consent decree requiring radical improvement or "conversions" of its child welfare system in each of the state's 67 counties. It is probably fair to say that, at least in the early years of the decree (in the pre-Child and Family Services Review (CFSR) era), change was provoked by a few committed and visionary internal child welfare advocates, coupled with the actions of the plaintiffs and the court. While not necessarily formally allied, they found themselves simultaneously confronting a common enemy... a grossly dysfunctional child welfare system. As the person whose name was identified as the defendant representing the State of Alabama, I occupied a somewhat unique position from which to experience and assess the benefits and shortcomings of class action litigation as a mechanism designed to compel compliance and engender continuous quality improvement.

Interestingly, but possibly not surprisingly, the benefits of using litigation as a lever of reform evolved over time to shortcomings as the system reforms moved closer to the amorphous "substantial compliance" exit criteria that would return the system to the citizens of Alabama.

Possibly the most beneficial element of a consent decree is the "motivation" the enforced legal and political compliance that is imposed upon the state legislative and executive branches. Resources adequate to support the system changes must be provided in order both to avoid a contempt citation and to merit eventual return of the system from oversight of the Court. Having served as a state legislator in Tennessee during the early "threat" of and eventual entry into a similar consent decree, the

political “cover” provided by the decree allowed reluctant legislators to make difficult fiscal decisions, which they otherwise might have avoided.

Secondly, the consent decree provides the commissioner of the public child welfare agency with the supplemental authority to take the action, particularly personnel actions, which are necessary to implement the agreed-upon system and practice reforms. Having this latitude within state and departmental personnel systems, often designed more for protecting and maintaining the status quo, is vital. Given that practice change depends more on staff who share the values, embrace the mission and implement the strategies than upon compliance with innumerable process measures, this authority is important.

Finally, the consent decree provides the framework, which if well defined and time limited, can yield a relatively useful “global positioning service” by which to plan and evaluate progress. Unfortunately, as noted, the same elements which can be highly useful on the front end can create unintended but real impediments on the back end of the consent decree based upon strict compliance with the agreed-upon outcomes.

As a clinical psychologist, I have been critical of the overutilization of counseling services for children and families who enter the child welfare system. Too often, the recommendation for children and families to have counseling or therapy with no or poorly identified referral issues, treatment goals, expected outcomes and re-assessment intervals is viewed as a panacea. Unfortunately, counseling can become a life sentence, with nobody knowing when there has been optimal goal attainment and with unnecessary diagnoses carried into perpetuity. Investing the time during the initial meeting with the client to identify mutually-agreeable “discharge criteria” toward which the therapeutic interventions/skill development will be applied, provides a road map by which progress can be measured and post-discharge challenges anticipated and addressed. This can be the reality of consent decrees as well.

Too often, plaintiffs’ hyperbole and overgeneralization of system failures, accompanied by self-protectionist denial of shortcomings by system administrators, lead to plans that are concocted in the adversarial cauldron of the legal process. The consent decree becomes heavy on process measures, light on evidence-based outcomes for children and ill-defined as to how will we all know with certainty when we have arrived at the optimum ‘therapeutic’ outcome? This can lead to years of unnecessary spending for legal and monitoring fees, as well as contributing to deteriorating political support for the process.

Even with the best of planning, as a reformed child welfare system approaches “substantial compliance” – just as when a therapy client approaches optimal treatment gains – “discharge” from a consent decree can be difficult for some. Like the Wizard of Oz responding to Dorothy when she provided him with the broomstick of the Witch of the West as a condition of earning her trip home to Kansas, a child welfare system can symbolically be told, “Come back tomorrow...” due to concerns about sustainability. Another metaphor I have heard used is, “If we remove the gun from your head, how do we know you will keep doing right?”

It is my belief that a new paradigm is necessary. Building upon the ongoing evolution of the ability of the CFSR process to measure desired systemic outcomes, as well as state’s associated CQI systems, courts ought to consider new strategies to incentivize child welfare system reforms in egregious cases. One example might be for the court to mediate system improvement agreements by integrating National Resource Centers and/or private foundations into the process. This strategy would allow for the de-escalation of the current lawyer-driven, adversarial reform process and permit a focus on the best of child welfare research and evidence-based practice remedies.

This paradigm shift could allow for jurisdictional and foundation investment in the reform efforts on behalf of children and families rather than requiring the same jurisdiction to divert scant fiscal resources to excessive court monitoring, attorney's fees, private consultants and the like.

My conviction is that all parties want safe, permanent, loving homes for children. Our strategies for designing, financing and implementing the systems to provide this continue to evolve. We each must look for bold solutions that might offer a better way.

### **ABOUT THE AUTHOR**

#### **Dr. Page B. Walley**

Dr. Page B. Walley serves as Managing Director of Strategic Consulting for Casey Family Programs. Dr. Walley previously served as the Commissioner of the Alabama Department of Human Resources. He helped advance the Department to national recognition as a leader in providing for the safety, permanency and well-being of children and families and presided over Alabama's successful exit from long-standing federal oversight of its child welfare program

Prior to coming to Alabama, Dr. Walley was Commissioner of the Tennessee Department of Children's Services and a member of the Tennessee State Legislature. Dr. Walley is a licensed clinical psychologist with over 25 years experience in the field. He is also a licensed minister.

# Life Under a Consent Decree: A Conversation with Viola Miller

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Dr. Viola Miller, Former Commissioner  
Tennessee Department for Children's Services

In late 2003, Tennessee Governor Phil Bredesen tapped Viola Miller to lead the state Department of Children's Services (DCS) as it reformed itself under a federal consent decree known as *Brian A.* Although the consent decree was still in force when Miller recently departed with the rest of Bredesen's term-limited administration in January 2011, the department and the plaintiffs had already mapped the final details of the *Brian A.* exit strategy. This is a summary of questions and answers from Viola Miller about leading the DCS reform.

## ***How hard is it to reform a child welfare system?***

Reforming child welfare is like moving a mountain with a plastic shovel and a pail. You look around for the heavy earth-moving equipment. It's not coming, and you realize that you need to start digging.

Inertia too often is indigenous to a bureaucracy. There is a sense that it is safer to keep one's head down and not disturb the status quo or to challenge current laws or policies. It is impossible to reform a system without disappointing some and angering others. A federal consent decree is a valuable tool to drive change, if for no other reason than it gives those upset people a target for their blame, while allowing the important work to get done.

## ***Could states reform their systems without consent decrees?***

One of the more frequent arguments against consent decrees in child welfare is that states do not need the courts to tell them what to do. They can reform child welfare on their own. It is possible but extremely rare. Did I like having a settlement agreement? Absolutely not. Do I think we would have or could have made the accomplishments we did without it? Doubtful, at best.

The systemic change needed to build a strong high-quality infrastructure takes time, often a great deal of time. State administrations function in four- to eight-year frames. Even with a dedicated Governor, a supportive legislature, and excellent child welfare leadership, this simply may not be long enough to institutionalize sustainable change. Many politicians and influential community leaders bring their own ideologies to child welfare – as they have every right to do. But reconciling all those beliefs and suggestions about what is best for children is tough. As I see it, the only avenue to achieve real reform is based on sound, best practice principles, defensible research and reliable data to inform decision making. It can be a hard sell in state capitols, but it's the truth. Creating a political environment willing to embrace this tedious work without exogenous pressure and within circumscribed time frames is seriously challenging.

### ***What are the toughest parts of working through a consent decree?***

A practice model developed by outside consultants is rarely a good idea. When I came to Tennessee to lead the Department, I inherited a settlement agreement along with a practice model – all 120-plus pages of it developed by an outside consultant. I’m speaking for myself here, but I found it difficult to sell something to my staff that we had not helped to develop. To be fair, the plaintiffs had not dictated that we use a consultant. Also, I think that we would have ended up close to the same place had we created the new model. I just think we would have been more emotionally involved and engaged had we done it at the start.

When I led the reform effort in Kentucky, I enjoyed the flexibility to do it my way. We went through an agency-wide change management process that resulted in a level of staff commitment that was more challenging to achieve in Tennessee. This difference perhaps can be expressed in “Learn to love it and let’s do the work together” versus “Do what I say do and learn to love it.” The end result was not appreciably different, but the process to get there was.

The nature of the adversarial relationship of litigation creates a barrier to effective problem solving and engagement in the negotiation process. Even once the settlement agreement is final, a consent decree is not a viable mechanism for leading a reform initiative. Staff are unlikely to be inspired by a court order. It cannot provide those “flags to march under,” which are needed to engage child welfare staff in systemic change.

The right leadership team is the number one factor when you are undertaking change. I was blessed with some of the best leaders, and I expended enormous energy developing additional ones. Having the settlement agreement bought me considerable freedom within the administration to construct a leadership team with the scope of skills and abilities to support reform.

### ***What was it like working with the plaintiffs?***

Children’s Rights is an interesting group of folks. Early on, it was obvious that the plaintiffs were not just painfully legalistic; they brought their “A” game and didn’t cut us any breaks. At the same time, there was never cause to question their motivation. They wanted exactly what we wanted – good outcomes for our kids and families. We were always candid with them about the agency. They respected us, and we respected them. I don’t know how anyone could survive this process without that mutual respect and shared common goal.

### ***And what about the court monitor?***

In Tennessee, our Technical Advisory Team was a blessing. Rather than a single monitor, we had a five-member team of public child welfare experts. This approach, although probably a challenge for the team, served the reform process extremely well. They were our mentors and advisors as well as our monitors. We didn’t always agree, and there were stressful times. Not everyone could work in this frame, but it was one of our greatest assets.

I must also say that Fred Wulczyn and the Chapin Hall folks at the University of Chicago were with us from the beginning. They have the ability to analyze data in a rich variety of ways that provides clarity in how to improve outcomes and allocate resources.

**What are the most important things you accomplished under the Brian A Settlement Agreement for children and families?**

In Tennessee, children are now being placed in congregate care only for specific treatment needs and only when intensive in-home services are not adequate to address the child's needs. There are many fewer children in state custody, and their out-of-home placements are considerably more stable. Permanency through reunification, adoption and subsidized permanent guardianship is happening more quickly for increasing numbers of children – even some of our most challenged kids. And, siblings are kept together close to their home, and parents are engaging in the process. When I hear parents expressing thanks for the services they have received, my heart is glad. As long as even a single child is not safe and must enter state custody, there will always be opportunities for improvement, but there is no doubt that the settlement agreement proved a driving force to improve outcomes for our children and their families.

**What does the future hold for reform by consent decree?**

Moving the child welfare reform mountain because of a consent decree scares me. What will happen when the Decree goes away? Unless the process results in an extremely strong infrastructure that includes a culture of change, it will not take long to tear down all of that hard work. Administrations change, and the public has a very short memory.

I think national accreditation, codified into law, can help keep those changes in place. I would also like to see national advocacy for states to create professional boards to oversee child welfare. These boards would be tasked to recommend qualified individuals with some option for job security to lead agencies. It is impossible to remove politics from state government appointments and state child welfare needs to be a part of the executive branch reporting to the Governor. However, any effort that minimizes the political process, particularly in selecting individuals for leadership positions, would be helpful.

Have I enjoyed the experience of working under a consent decree? Sort of. It's like a wart on my nose. Not particularly attractive but it gives me character.

**ABOUT THE AUTHOR**

**Dr. Viola Miller**

Dr. Miller has over 40 years of professional experience working with and advocating on behalf of children and families. For 15 years she served as a chief executive officer for public child welfare. From 1996 to 2003 she served as the Secretary of the Cabinet for Families and Children (CFC) in the Commonwealth of Kentucky. The CFC was a comprehensive human services agency with approximately 7,500 children in custody. From 2003 to 2011 she was Commissioner of the Department for Children's Services in Tennessee. The department serves approximately 5,500 foster children. Dr. Miller led major reforms in organization, administration, quality assurance, and direct service delivery, taking both child welfare agencies to national accreditation by the Council on Accreditation. While Commissioner, she was a named defendant in *Brian A vs. State of Tennessee* and was responsible for the agencies compliance efforts for the court ordered Settlement Agreement. She retired in January 2011.

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