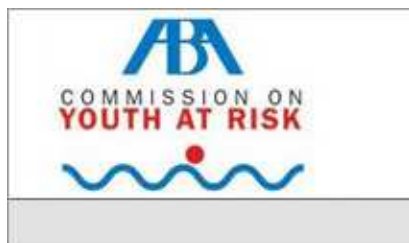




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FEBRUARY 2008 ABA POLICY AND REPORT ON CROSSOVER AND DUAL JURISDICTION YOUTH

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association urges the federal, state, territorial, and tribal governments to revise laws, court rules, policies, and practices related to “dual jurisdiction” youth (abused and neglected youth with juvenile “dependency” cases who are charged with acts of delinquency) to:

- a) Use diversion and intervention services for minor or low level acts of misbehavior committed while a youth is in foster care;
- b) Eliminate statutory and legal restrictions inhibiting dual jurisdiction;
- c) Create a legal preference enabling youth to have their dependency proceedings remain open with continued child and family support;
- d) Provide, when feasible, that a single judge hear post-adjudication dispositional matters involving dual jurisdiction cases and that continuity of legal representation for the child in both court proceedings be secured;
- e) Promote training for all juvenile defense counsel on foster care issues;
- f) Ensure that an adult responsible for the youth attend hearings in both proceedings to address issues related to the child and family;
- g) Encourage information-sharing among dependency and delinquency courts and agencies, establish confidentiality protections for all child welfare information shared, and restrict the use of information gathered from foster youth as part of screening, assessment, or treatment in the pending or future delinquency or criminal proceedings;
- h) Promote the prompt post-arrest involvement of providers, caseworkers, or advocates acting on the youth’s behalf; ensure fair treatment of foster youth in juvenile detention, incarceration, or probation decisions; and eliminate practices that result in detention or prolonged incarceration of youth due to foster care status or an absence of suitable placement options;
- i) Provide clear authority for continued social services/child welfare support for children and families when youth cross from dependency to delinquency court/juvenile justice, and eliminate funding barriers that inhibit multiple agency support of these youth and their families;
- j) Apply protections afforded foster youth under Titles IV-E of the Social Security Act to youth placed through delinquency or status offense proceedings, in foster care or other non-penal settings, under court authority or under the auspices of juvenile justice agencies; and
- k) Fully implement 2002 and 2003 amendments to the Juvenile Justice and Delinquency Prevention Act

and the Child Abuse Prevention and Treatment Act to: 1) make youths' child welfare records known to the juvenile court for effective treatment planning; 2) provide effective treatment and service continuity when youth transition between child welfare and juvenile justice systems; 3) assure that when youth are placed in settings funded through Title IV-E of the Social Security Act they receive full protections afforded under that law; and 4) collect state data on all youth transferred from one system to another.

REPORT

Introduction

As of September 30, 2005 (the latest national statistics available), across the country there were over 179,000 youth ages 13 through 17 in foster care. That constitutes over a third of the total foster care population.¹

Based on a Chicago study, we have learned that the average juvenile delinquency rate for youth previously abused or neglected is 47% higher than for children with no abuse or neglect histories. Researchers have found children who had at least one foster care placement (many children have multiple placements) significantly more likely to find themselves subject to a delinquency court petition.²

Practitioners agree: youth in foster care, whose lives have become the responsibility of state or local governments, face a strong likelihood of appearing at some point in time before a juvenile court, charged with some type of offense. The Child Welfare League of America (CWLA) noted that although the social problem of child maltreatment has, through extensive research, been clearly related to later delinquency, youth who find themselves crossing over from the care of a child welfare agency to the involvement of a juvenile justice agency too often *fall between the cracks* of the two systems. Youth services system fragmentation negatively affects these dual jurisdiction cases (also known as "crossover youth" cases), and it is a reason for these recommendations, which are being introduced with urgency due to the large numbers of youth currently affected by the lack of appropriate laws and policies related to crossover youth.

CWLA has found these crossover youth more likely to be detained upon an arrest than their non-abused/neglected peers and then remain longer in custody and under the jurisdiction of the delinquency (juvenile justice) system. Staying "out of trouble" is only one challenge facing youth in foster care. In addition to their maltreatment histories, they generally come from very disadvantaged families and neighborhoods. By adolescence, they have too often only achieved low educational outcomes, have few employment opportunities, frequently face mental health problems, and may "transition" at adulthood from the foster care system to homelessness. No surprise, then, that they are at high risk of juvenile delinquency infractions.

Even where minor offenses would not have involved police or the courts - if a youth had been living with their parents - a teenager in a foster home or congregate group care setting is commonly subjected to penal sanctions. A recent scholarly article concluded that there was a "child welfare system bias" in favor of processing misbehaving youth through the juvenile justice system.³

If police are contacted because of a foster youth's minor act of misbehavior, this policy promotes the youth's diversion from the juvenile justice system. It is hoped that foster parents and caseworkers will seek to have the child remain in foster care rather than detained in juvenile detention facilities, something that most biological parents of youth who commit similar infractions would want. Further, foster parents and caseworkers would also hopefully advocate for a noncriminal resolution of any minor acts committed by the youth.

From experiences in addressing crossover youth in New York City,⁴ Los Angeles,⁵ Ohio,⁶ and Pennsylvania,⁷

we have learned of law, policy, and practice related approaches to this issue that can help assure foster youth are fairly treated in terms of approaches taken in response to their misbehavior. Clearly, every youth who has committed a serious crime, such as a crime of violence, should be prosecuted as appropriate by the juvenile justice system. However, for minor acts of delinquency or juvenile status offenses (running away, truancy, difficult at-home behavior), it is important to learn from research and program advancements about better ways of legally addressing the needs of crossover youth.

Changes in Laws, Court Rules, and Prosecutorial Practices

In an August 2004 article in the *ABA Child Law Practice*, Center on Children and the Law attorney Andrea Houry proposed a set of guidelines to maximize the achievement of positive, permanent placement outcomes for youth involved in the delinquency and dependency systems.⁸ She suggested, as others have proposed, that, whenever appropriate, intervention for a youth's noncompliant actions or misbehavior be addressed through their existing abuse/neglect (dependency) court proceedings. Early provision of effective child welfare services can help such problems from escalating in seriousness. A report on this topic jointly issued by CWLA and Children's Rights, Inc. recommended an improved, unified and coherent response to crossover youth, with enhanced communication and collaboration across the systems.⁹

Therefore, this resolution addresses appropriate inter-court and inter-agency information sharing. Efforts to promote and further such information sharing are to everyone's benefit; the more we know about a youth in foster care, the better job we can do assessing and treating him or her and thereby protecting society.

However, we also express a concern about information gathered from foster youth in diagnostic decision-making being later used against them as evidence in court to support either a finding of guilt or to enhance punishment.¹⁰ It is critical not to compromise the therapeutic process intended to help troubled foster youth by using it as an opportunity for their self-incrimination rather than as a means to promote the process of rehabilitation and recovery from their victimization.

Treatment-related settings should create a "safe" environment, where these youth can feel free to reveal what could be incriminatory information, but not have that information used for additional purposes beyond protection of other youth from serious harm - if there are revelations of ongoing criminal behavior that would endanger other children. Allowing use of information in additional contexts will often simply result in information being held back - a result that no one benefits from and that further compromises our ability to treat the youth and thereby protect society in the long term.

These types of information protection measures have been urged nationally and are consistent with existing protections against self incrimination in other contexts. Indeed, the proposed language in the resolution was modeled after recommended reforms urged by the Juvenile Law Center. *See Protecting Youth from Self-Incrimination when Undergoing Screening, Assessment and Treatment within the Juvenile Justice System* (2007), available at <http://www.jlc.org/File/publications/protectingyouth.pdf>. Similar information sharing protections exist under federal law in the context of drug treatment - to encourage treatment and disclosures that can further the assessment and treatment process, we don't reveal and hold against individuals things they divulge as part of involvement in that therapeutic setting.

The resolution further urges improved child welfare-juvenile justice system linkages while at the same time suggesting that, whenever possible (likely in large, urban juvenile courts) a single judge hear dual jurisdiction cases under a special crossover case docket utilizing a "problem-solving court" or therapeutic jurisdiction approach. If a single judge is to hear dual jurisdiction cases, that judge should preferably be a specialized dependency court judge or a judge well-versed in dependency case issues.

There should also be a continuity of the youth's legal representation in both proceedings, assuming the attorney has been trained to effectively handle both dependency and delinquency cases. The CWLA also noted the importance of foster parents, caseworkers, and others attending both proceedings, so that is additionally incorporated into the resolution.

Articles addressing crossover youth have also recognized that these "system collisions" can ill affect the accessibility of funding to support the services foster youth and their families continue to need. Because of their complexity, crossover youth cases can drain scarce resources from child welfare and juvenile justice agencies alike, probation departments, behavioral health care systems, and the courts themselves. Child advocates believe it is therefore critical *not to close off* any significant funding source for services to a youth, especially the child welfare agency support that is contingent on the dependency court case remaining open, even after a juvenile delinquency charge or adjudication is made.

As mentioned earlier, the practice of dismissing dependency court proceedings and ceasing child welfare case jurisdiction even upon a youth's juvenile detention, incarceration, or placement on probation can have seriously negative effects. Thus the recommendation calls for foster youth to be treated fairly and not simply to have their dependency case and foster care support ended because they happened to be in foster care at the time of their offense. Moreover, detention and incarceration decisions should not be driven by the youth's foster care status and/or the availability or absence of a placement for the youth.

This resolution, while suggesting the importance of not using arrest, detention, and delinquency prosecution for low-level acts of youth misbehavior, recognizes the importance of public safety and concerns about crime victims' rights concerns when any youth, including those in foster care, commit serious criminal acts. Thus, we have balanced those important concerns in crafting policy that would be applicable only to "minor acts of misbehavior" by foster youth. We believe that society can, by avoiding the use of delinquency system sanctions for these young people, better attend to youth who commit lower level offenses, alter their path at an early stage, and better protect society as a whole.

Andrea Khoury, in her *ABA Child Law Practice*

article, also noted that "many delinquency cases have dependency overtones due to gross problems in the adolescent's home life." If the teen's dependency issues are not addressed, then he or she will likely continue down the delinquency road and never receive the services they need to live a law-abiding and productive life. Therefore, this resolution calls upon those who professionally encounter delinquent youth to quickly find out if they have a current or past history of being abused or neglected, as well as whether a child welfare agency has ever been involved with them or their family.

If the delinquency or status offense charges are minor in nature, juvenile court judges have authority to dismiss the delinquency proceedings and cause a dependency petition to be filed. The youth may then be better able to access more appropriate aid, while avoiding the stigma of being labeled a "delinquent".

Clarification of Federal Law and Policy

Federal laws, including the Child Abuse Prevention and Treatment Act (CAPTA),¹¹ Title IV-B and IV-E of the Social Security Act,¹² and the Juvenile Justice and Delinquency Prevention Act (JJDP),¹³ provide funding streams to support both residential and nonresidential services for troubled youth. Services funded under one law may not be available to youth not in the "system" funded through that law. This fragmentation of services and funding has been mentioned above.

At the 2006 Annual Meeting, the House of Delegates approved a policy resolution sponsored by the Colorado Bar Association that urged timely and effective services for at-risk youth and their caretakers through public child welfare, youth services, mental health, schools, and other agencies. That resolution also called for such services to be available without tying them to the necessity of formal juvenile justice agency jurisdiction. In August 2007 the House of Delegates approved a resolution on juvenile status

offenders, calling for laws, policies and programs that divert alleged juvenile status offenders from court jurisdiction while mandating development and implementation of targeted evidence-based programs that provide juvenile, family-focused, and strength-based early intervention and pre-court prevention services and treatment.

One way to help assure that all avenues of support for needed youth and family services remain open is to eliminate funding stream barriers that can inhibit blended, multiple agency financing of those services. The resolution therefore calls for clear authority of multi-agency funding when youth cross over from dependency to delinquency systems.

Since many youth who commit relatively minor delinquent acts are placed with foster families or in small group placements, their placements may qualify for a share of placement costs to be borne by the U.S. Department of Health and Human Services through the Title IV-E program of the Social Security Act. In order to receive such funding, the federal Adoption and Safe Families Act (ASFA) requires specific judicial findings (remaining at home is contrary to the youth's welfare; reasonable efforts have been made to avoid the need for placement and to speed reunification), court hearings (periodic reviews and special permanent placement hearings), notices to interested adults such as foster parents and relative caretakers, and special documents in every case for which the state claims IV-E dollars.

Applying ASFA to youth involved in delinquency cases but still in foster care, according to Andrea Khoury, is very important because a) ASFA's goals of safety, permanency, and well-being for youth are similar to the rehabilitative goals of the juvenile justice system, b) delinquent youth often have underlying issues of abuse or neglect within their families that ASFA is intended to help address, and c) even if a youth is in a detention facility (which doesn't qualify for IV-E funding) they may later be placed in a IV-E eligible setting.

Finally, the resolution calls for implementation of five to six year-old federal JJDPA and CAPTA amendments, through which Congress intended improvements to be made related to crossover youth. The JJDPA includes a provision that ties federal funding to states to a requirement that states, to the maximum extent practicable, implement a system to ensure that if a juvenile is before the juvenile delinquency court that public child welfare agency records will be made known to the court. Also, relevant past child protection records related to the youth must be incorporated into their juvenile justice records to help assure an effective treatment plan.

The JJDPA amendments also called for a national study of youth who, prior to their juvenile justice placements, were under the care and custody of child welfare agencies, as well as of youth who couldn't return to their families after completing their juvenile delinquency sentences. Data collected was to include numbers of youth in each category as well as information on inter-system coordination of services and treatment, funding streams utilized, barriers to services, post-placement services for these youth, frequency of youth having formal case plans and case plan reviews, and how permanency issues are identified and addressed.

In CAPTA, permissible uses of federal funding were expanded to include support and enhancement of interagency collaboration between the child protection and juvenile justice systems for improved delivery of services and treatment. Such funding can also be used for methods of continuity of treatment plans and services as youth transition between systems. The CAPTA amendments also encouraged states to collect annual data on the number of youth under the care of the state's child protection system who are transferred into the custody of the state's juvenile justice system.

Little has been done at the federal or state level to apply these innovative JJDPA and CAPTA reforms. For this reason, there is a final recommendation urging that these provisions be fully acted upon.

Conclusion

Both federal and state governments must address the important issues raised in this resolution. Youth facing both the dependency and delinquency systems are seriously in need of assistance and greatly at-risk. A court's closing of their dependency case can shut off a vital source of support and protection that may include adequate care, supervision, and housing. Whatever system they're in, their history of abuse and neglect, mental and emotional problems, and other family difficulties remain. The law, court rules, and agency policies should provide for optimal flexibility that can help assure they have the scholarship aid, mentorship assistance, community resources, housing opportunities, mental health and substance abuse services, and other care and treatment they need. The ABA is calling for laws and legal policies that look upon troubled youth holistically: these young people need help that is not limited by artificial or rigid barriers that merely focus on a youth possessing a specific legal or court "status".

1

Adoption and Foster Care Analysis and Reporting System (AFCARS) Report, See: http://www.acf.dhhs.gov/programs/cb/stats_research/afcars/tar/report13.htm.

2

Leslee Morris, "Youth in Foster Care Who Commit Delinquent Acts: Study Findings and Recommendations," *The Link* (Child Welfare League of America), Summer/Fall 2004, 1; Denise C. Herz, Miriam Krinsky, and Joseph Parent Ryan, "Improving System Responses to Crossover Youth: The Role of Research and Practice Partnerships," *The Link* (Child Welfare League of America), Summer 2006, 1.

3

Joseph P. Ryan, Denise Herz, Pedro M. Hernandez, and Jane Marie Marshall, "Maltreatment and Delinquency: Investigating Child Welfare Bias in Juvenile Justice Processing," 29(8) *Children and Youth Services Review* August 2007, 1035.

4

Project Confirm, a program of the Vera Institute of Justice in New York City, has collaborated with the NYC child welfare agency to study crossover youth and then help the various agencies work together to reduce "detention bias" against children in foster care who commit delinquent acts and help assure that foster parents and caseworkers are informed of and appear at delinquency hearings.

5

The Children's Law Center of Los Angeles has done considerable work to help address one aspect of California law unique to the country, a requirement that a youth's dependency case be terminated upon their being found delinquent. They helped in the passage of AB 129, a law that allows a youth to be designated "dual status" thereby permitting for simultaneous dependency and delinquency jurisdiction.

6

The Children, Families, and the Courts Committee of the Supreme Court of Ohio and the Ohio Department of Job & Family Services, in the Summer-Fall 2005 issue of their Bulletin, addressed this topic in an article entitled "Effectively Intervening with Dual Jurisdiction Youth in Ohio". The National Center for Juvenile Justice reported on work they had done to research the crossover youth issue in the state and various county reforms to improve the handling of dual jurisdiction cases. This article also reports on related reforms in two large counties in Arizona and Minnesota.

7

For several years the Juvenile Law Center, based in Philadelphia, has conducted a "dual status project" and both statewide and county reforms are changing practices where youth have both dependency and delinquency cases. Personal communication with Robert Schwartz, director, Juvenile Law Center,

December 19, 2007.

[8](#)
Andrea Khoury, "The Delinquency Factor in Permanency Planning for Adolescents," 23(6) ABA Child Law Practice 85 (August 2004).

[9](#)
Youth Involvement in the Child Welfare and Juvenile Justice Systems: A Case of "Double Jeopardy?" Available from Child Welfare League of America at:
<http://www.cwla.org/pubs/pubdetails.asp?PUBID=10250>.

[10](#)
See, Lourdes M. Rosado and Riya S. Shah, "Protecting Youth from Self-Incrimination When Undergoing Screening, Assessment and Treatment Within the Juvenile Justice System," Juvenile Law Center (Philadelphia), January 2007, available at:
<http://www.jlc.org/File/publications/protectingyouth.pdf>.

[11](#) 42 U.S.C. 5106a(a).

[12](#) 42 U.S.C. 622 et seq. and 42 U.S.C. 670 et seq.

[13](#) 42 U.S.C. 5633 and 5661.

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