Practitioner's Section: Juvenile Delinquent's Options and Rights

This portion of the *Journal of Juvenile Law & Policy* focuses on methods of addressing juvenile behavior and juvenile rights once in the system. The journal selected a judge to share her insight on the methods of addressing juvenile delinquent behavior and two attorneys to share their insights on the rights of juveniles who are in the juvenile system.

Judge Linda McFadden, the Presiding Juvenile Judge for the Stanislaus County Superior Court in Modesto, Calif., examines the different methods to address the delinquent behavior of juveniles. Jody Marksamer, a staff attorney and director of the National Center for Lesbian Rights (NCLR) Youth Project, and Melanie Rowen, a staff attorney at NCLR, discuss the abuses occurring in the juvenile system and the rights of juveniles who are in this system, including the right to be free from abuse.

The Practitioner's Section is followed by summaries of recent court decisions and congressional bills affecting juveniles in the areas of delinquency, dependency and education.

BRIDGING THE GAP BETWEEN RIGHTS AND REALITY FOR YOUTH INCARCERATED IN CALIFORNIA

Jody Marksamer[*]
Melanie Rowen[**]

From 2002 through 2005, Antoine D., a bisexual youth, was subjected to serious acts of physical and mental abuse at the hands of California Youth Authority (CYA) staff and wards based on his sexual orientation.[1] Although Antoine was never accused of or charged with a sex offense, CYA automatically placed him in a sex offender unit, simply because of his sexual orientation. Because Antoine was labeled a sex offender and was known to be bisexual, he was targeted for sexual assault. Wards regularly exposed

[*] Jody Marksamer is a staff attorney and director of the National Center for Lesbian Rights (NCLR) Youth Project, where he works primarily on challenging the overrepresentation and disparate treatment of lesbian, gay, bisexual, transgender (LGBT) youth in child welfare and juvenile justice settings. Jody also coordinates the Equity Project, a collaborative project between NCLR, Legal Services for Children, and the National Juvenile Defender Center, working to ensure fairness and respect for LGBT youth in delinquency courts. In 2006, Jody co-authored the Child Welfare League of America (CWLA) Best Practice Guidelines for Serving LGBT Out-of-Home Youth, the first comprehensive policy and practice guide for child welfare and juvenile justice professionals concerning LGBTQ youth. He joined NCLR in 2003 as an Equal Justice Works Fellow. He received his J.D. from Northeastern University School of Law and B.A. from Wesleyan University.

[**] Melanie Rowen is a staff attorney at NCLR, where she works on a variety of issues including transgender rights and marriage equality. Melanie received her B.A. from the University of Chicago in 1999, and her J.D. from the University of Chicago in 2004. While in law school, she participated in the Criminal and Juvenile Justice Project at the Mandel Legal Aid Clinic, representing low-income youth in the Cook County juvenile and adult justice systems.

The National Center for Lesbian Rights (www.nclrights.org) is a national legal organization committed to advancing the civil and human rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education.

[1] Interview with Antoine D., in San Francisco, Cal. (Aug. 9, 2005). *See also* In re Antoine D, 137 Cal.App.4th 1314 (2006).

themselves to him, threatened him on the way to the showers, and propositioned him for sex. When Antoine refused to comply with these sexual demands, he was physically attacked. On one occasion, a youth slashed Antoine in the face, resulting in a wound that required hundreds of stitches to close and will leave him permanently scarred. Staff exacerbated the problem, calling him homophobic names, making sexualized references toward him in front of the other wards, and failing to take any steps to protect him from abuse other than placing Antoine in isolation. On numerous occasions, CYA staff confined Antoine to his cell for up to 23 hours a day and excluded him from school and other group activities "for his own safety." Because he was unable to attend school, he completed less than half of the credits required to earn a high school diploma.

For over two years Antoine did not tell anyone about what was happening. It wasn't until he was slashed in the face that his attorney became aware of the extent of the abuse. She immediately filed a motion to vacate his CYA commitment on the ground that CYA had failed to keep him safe or provide him with adequate education and treatment services. The trial court agreed that CYA failed to keep him safe, but by the time the court granted his motion, Antoine was already out on parole.[2]

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All young people in juvenile justice facilities, including lesbian, gay, bisexual, and transgender (LGBT) youth, have a constitutional right to be safe in the institutions in which they are held.[3] While California's juvenile justice

[2] The trial court originally denied his motion based solely on concerns that it would lose jurisdiction over his case if it vacated his commitment. The court explained that without this concern, "[it] would have no problem doing what has been requested." In re Antoine D, 137 Cal.App.4th at 1320. On appeal, the court reversed and remanded the case holding that vacating Antoine's commitment would not affect the court's jurisdiction. *Id*. at 1324.

[3] *See* A.M. v. Luzerne County Juvenile Detention Ctr., 372 F.3d 572 (3d Cir. 2004) (explaining facility is obligated to protect the welfare of

facilities are generally unsafe for all youth,[4] LGBT youth, like Antoine, must also deal with the ignorance and bias of staff members who lack a basic understanding of their particular safety risks and are too often outwardly hostile and abusive to them. Unfortunately, it is all too common for these facilities to isolate LGBT youth, place them in sex offender treatment because of their sexual orientation,[5] single them out for embarrassing treatment, or allow them to be the victim of verbal, physical, and sexual abuse.

There is extensive case law addressing the conditions of confinement for youth that clearly speak to these types of

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children in its custody); R.G. v. Koller, 415 F. Supp. 2d 1129, 1157 (D. Haw. 2006) (finding facility violated LGBT plaintiff's due process rights by allowing pervasive verbal, physical, and sexual abuse to persist); Alexander S. v. Boyd, 876 F. Supp. 773, 782 (D.S.C. 1995), *aff'd in part and rev'd in part on other grounds*, 113 F.3d 1373 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 880 (1998) ("[J]uveniles possess a clearly recognized liberty interest in being free from unreasonable threats to their physical safety."); A.J. v. Kierst, 56 F.3d 849, 854 (8th Cir. 1995); Gary H. v. Hegstrom, 831 F.2d 1430, 1431-32 (9th Cir.1987); H.C. ex rel. Hewett v. Jarrard, 786 F.2d 1080, 1084 - 85 (11th Cir.1986); Santana v. Collazo, 714 F.2d 1172, 1179 (1st Cir.1983); Milonas v. Williams, 691 F.2d 931, (10th Cir. 1982).

[4] *See* Barry Krisberg, *Safety and Remedial Plan*, pp 24-27 (Sept.7, 2007), a*vailable at*
http://prisonlaw.com/pdfs/DJJ5thSMReportAppAB.pdf;
California Office of Inspector General Report, *Special Review of High-Risk Issues at the Herman G. Stark Youth Correctional Facility,* (Feb. 2007), available at
http://www.oig.ca.gov/reports/pdf/HStark022207.pdf;
Barry Krisberg, *General Corrections Review*, expert report Farrell v. Hickman (Dec. 23, 2003), *available at*
http://prisonlaw.com/pdfs/CYA5.pdf.

[5] For example, in 2000, the N.A. Chaderijian CYA facility had the following published policy for its "Sex Treatment for Offenders Program (S.T.O.P.)": "The majority of young men in this program have been committed for sex offenses against others. This unit also houses young men who were committed for non-sexual offenses, but who, however have a history of being sexually victimized. In addition, the program provides an "Alternative Lifestyles" component for young men who have chosen to live a homosexual lifestyle." See Memorandum from N.A. Chaderijian (2000) (on file with author).

discrimination.[6] In addition to the right to protection from physical, emotional, and sexual abuse, young people in juvenile justice institutions have a right to be free from unreasonably restrictive conditions of confinement including isolation,[7] a right to receive adequate physical and mental health care,[8] and a right to be treated equally and without

[6] Youth in juvenile justice facilities are entitled to more protection than incarcerated adults, because like those who are involuntarily committed, they have not been "convicted of crime." Thus, most courts analyze their conditions of confinement claims under the federal Due Process Clause of the Fourteenth Amendment. *See* A.M. v. Luzerne County Juvenile Detention Ctr., 372 F.3d 572, 579 (3d Cir. 2004); Alexander S. v. Boyd, 876 F. Supp. 773, 782 (D.S.C. 1995), *aff'd in part and rev'd in part on other grounds*, 113 F.3d 1373 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 880 (1998); A.J. v. Kierst, 56 F.3d 849, 854 (8th Cir. 1995); Gary H. v. Hegstrom, 831 F.2d 1430, 1431-32 (9th Cir.1987); H.C. *ex rel.* Hewett v. Jarrard, 786 F.2d 1080, 1084 -85 (11th Cir. 1986); Santana v. Collazo, 714 F.2d 1172, 1179 (1st Cir. 1983); Milonas v. Williams, 691 F.2d 931, 942, n. 10 (10th Cir. 1982) ("[B]ecause the state has no legitimate interest in punishment, the conditions of juvenile confinement…are subject to more exacting scrutiny than conditions imposed on convicted criminals."). *But see* Nelson v. Heyne, 491 F.2d 352, 355 (7th Cir. 1974) (applying the cruel and unusual punishment test of the Eighth Amendment).

[7] Youth in juvenile detention or correctional facilities should not be placed in conditions that amount to punishment. With the understanding that some restrictions of liberty may be constitutional, a court will look at whether a particular restriction is "reasonably related" to a legitimate governmental interest to determine if there is a violation. If it is not, it may be inferred that the purpose of the restriction is punishment. Bell v. Wolfish, 441 U.S. 520, 539. *See also* Milonas v. Williams, 691 F.2d 931, 942 (10th Cir. 1982) ("Any institutional rules that amount to punishment of those involuntarily confined …are violative of the due process clause per se."). Courts have found even short periods of isolation unconstitutional. *See* Milonas v. Williams, 691 F.2d at 941-42 (use of isolation rooms for periods less than 24 hours violated the 14th Amendment); Hewett v. Jarrard, 786 F.2d 1080 (11th Cir.1986) (juvenile isolated for seven days was entitled to damages for violation of 14th Amendment); Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973) (solitary confinement of young adults held unconstitutional); Inmates of Boys' Training Sch. v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972).

[8] *See* Youngberg v. Romeo, 457 U.S. 307 (1982); Burton v. Richmond, 276 F.3d 973 (8th Cir. 2002); *A.M.*, 372 F.3d 572, 585 n.3; Jackson v. Johnson, 118 F. Supp. 2d 278 at 289; *Alexander S.*, 876 F. Supp. at 788.

discrimination.[9] Courts have found that facilities violate youths' constitutional rights by placing LGBT youth in segregation or isolation "for their own safety"[10] or by ignoring a particular youth's substantial risk of harm because the youth is young, has a mental illness, or is openly LGBT.[11] In addition, facilities should not label a youth as a sex offender or

[9] Young people in the juvenile justice system have a right to equal protection. *See* In re Gault, 387 U.S. 1, 13 (1967) (recognizing that due process rights of Fourteenth Amendment apply to children as well as adults). Although there is not a large body of equal protection case law in the juvenile justice context, the right to equal protection for LGBT youth has been clearly established in the public school context. *See* Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1137-38 (9th Cir. 2003) (holding that students could maintain claims alleging discrimination on basis of sexual orientation under Equal Protection Clause where school district failed to protect the students to the same extent as other students); Nabozny v. Podlesny, 92 F.3d 446, 458, 460 (7th Cir. 1996) (holding student could maintain claims alleging discrimination on basis of gender and sexual orientation under Equal Protection Clause where school district failed to protect student from harassment and harm by other students to same extent that it protected other students due to student's gender and sexual orientation).

[10] *See R.G.*, 415 F. Supp. 2d at 1154-56. In *R.G.*, the court stated:

> After examining expert opinions and case law regarding the use of isolation on children, the court concludes that the defendants' use of isolation was not within the range of acceptable professional practices and constitutes punishment in violation of the plaintiffs' Due Process rights….
>
> The likely perception by teenagers that isolation is imposed as punishment for being LGBT only compounds the harm…
>
> Consistently placing juvenile wards in isolation, not to impose discipline for violating rules, but simply to segregate LGBT wards from their abusers, cannot be viewed in any reasonable light as advancing a legitimate nonpunitive governmental objective.

Id.

[11] *See, e.g.*, *A.M.*, 372 F.3d at 580-81 (finding sufficient evidence that facility was deliberately indifferent to substantial risk of harm to thirteen-year-old boy with mental illness who was placed in general population); *R.G.*, 415 F. Supp. 2d at 1156 (finding that placement of vulnerable LGBT youth in unit with aggressive boys amounted to deliberate indifference).

house a youth with sex offenders without adequate due process protections, such as a hearing and an opportunity to appeal.[12]

Unfortunately, for many years, the California Youth Authority, now called the Department of Juvenile Justice (DJJ), has denied many of the youth in its custody these most basic and fundamental rights.[13] Many of the youth in DJJ custody are not aware of their rights or what to do to enforce them. This should not be surprising, because California has not had a law that articulates the basic rights of youth in DJJ facilities or requires that DJJ inform youth about these rights.

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[12] In the adult context, the classification of an inmate as a "sex offender" has been found to have such stigmatizing consequences that unless the inmate has a sexual offense history, additional constitutional requirements must be met before this classification can take place. *See* Neal v. Shimoda, 131 F.3d 818, 829 (9th Cir. 1997) (holding that inmates have a liberty interest at stake in being labeled a sex offender, particularly because the court could "hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling of a prison inmate as a sex offender"). Juveniles are entitled to greater protections than adult inmates, and branding a juvenile with a sex offender label clearly would have the same, if not an even greater, stigmatizing effect.

[13] *See supra* note 4. In January 2003, the Prison Law Office filed a class action lawsuit against CYA in response to the horrendous conditions in state juvenile justice facilities. *See* Farrell v. Harper, No. RG 03079344 (Cal. Super. Ct. Alameda County amended complaint filed Sept. 23, 2003). In 2004, CYA officials signed a consent decree, agreeing to remedy the serious ongoing problems with conditions in CYA's facilities. The decree requires CYA to provide youth with adequate and effective care, treatment and rehabilitation services, including reducing violence and the use of force, improving medical and mental health care, reducing the use of lock-ups and providing better education programs. Subsequently, DJJ has finalized several remedial plans to correct problems with the system, and the Court has ordered DJJ to implement the plans. In addition, the case Special Master has filed five quarterly reports detailing current conditions at DJJ facilities, the most recent of which was filed October 2007. Unfortunately, DJJ has instituted few of the essential court ordered reforms over these last three years. On November 3rd, the Prison Law Office filed papers asking the court to appoint a receiver to assume key management functions over DJJ. *See* Brandon Bailey, *Activists Urge Court Takeover of State's Youth Prisons Too Little Accomplished After Three Years, They Say*, SAN JOSE MERCURY NEWS, November 4, 2007. For more information about this case visit: www.prisonlaw.com.

Without doing in-depth research of state and federal case law, state statutes, regulations, and policies, no person would understand all of the legal limitations on how facilities must treat young people day to day. Realistically, even older youth with a high school education are unlikely to have access to the kinds of research resources they would need in order to learn what their rights are. This in turn prevents youth from identifying and reporting violations to their families or attorneys or filing grievances or complaints with the facility.

Many advocates and organizers are working hard to address the unconstitutional and unsafe conditions in California's juvenile justice system.[14] While much needed reforms are now underway, including new legislation that limits the number of young people who can be sent to these facilities[15] and expands the purpose of DJJ to be more focused on family reunification,[16] none of these efforts specifically address the problems of LGBT youth or respond to the difficulties that confined youth have in enforcing their basic rights on a day to day basis.

In 2006, the National Center for Lesbian Rights (NCLR) began working with Equality California to develop legislation to ensure that all youth in state juvenile justice

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[14] i.e. Ella Baker Center, Books Not Bars http://ellabakercenter.org/page.php?pageid=2; the Prison Law Office www.prisonlaw.com; the California Youth Justice Coalition http://www.youth4justice.org/; the Youth Law Center www.ylc.org; Center of Juvenile and Criminal Justice http://www.cjcj.org/jjic/reforming.php.

[15] *See* Sen. Bill 81 (Reg. Sess. 2007-2008) (August 24, 2007). Effective September 1, 2007, youth may not be committed to DJJ facilities unless they have been found to have committed a serious and violent offense listed as one of the offenses for which a juvenile may be tried as an adult. Youth who are already in DJJ custody, but who would not be able to be committed under the new law, may now be recalled by their counties on an individual basis.

[16] See Assem. Bill 1300 (Reg. Sess 2007-2008) (October 11, 2007), the Family Connection and Young Offender Rehabilitation Act. These amendments to the California Welfare & Institutions Code provide that DJJ services should promote family ties, require DJJ to consider proximity to family when making placement decisions, and make postage stamps and phone calls more accessible.

facilities are protected from bias and animus and are better equipped to identify and report violations of their rights. The result of this effort was the passage of SB 518, the Juvenile Justice Safety and Protection Act.[17] The governor signed SB 518 on October 13, 2007 making California the first state to adopt a comprehensive bill of rights for young people confined in juvenile justice facilities[18] and one of the only states to statutorily prohibit discrimination and harassment based on sexual orientation and gender identity in juvenile justice facilities.[19]

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[17] The bill was authored by Senator Carole Migden, sponsored by Equality California, and had broad support from youth and LGBT advocates from across California. SB 518 will go into effect on January 1, 2008.

[18] Other states, such as Michigan and Virginia, have departmental policies that articulate the rights of youth in state juvenile facilities. *See* Michigan Department of Human Services, Bureau of Juvenile Justice, Rights for Youth under our Care, Custody and Supervision (available at http://www.michigan.gov/documents/FIA-BJJ-Rights_117329_7.pdf) (providing that "in addition to respect for all human rights prescribed by law," all Michigan Bureau of Juvenile Justice staff must follow conduct guidelines, including: "We will always provide for youth's basic needs; including food, clothing, shelter, medical care and security" and "We will always ensure that our staff maintain the highest ethical behavior including reporting of any[. . .]bias or prejudice because of race, ethnicity, gender, age, religion, disability, sexual orientation, or national origin"); [Commonwealth Of Virginia Board Of Juvenile Justice Policy Governing The Operation Of Programs And Facilities, Policy Number: 17-001: Summary Of Youth's Rights (available at http://www.djj.state.va.us/About_Us/Initiatives/ombudsman.cfm) (providing that, among other rights, youth shall "be protected from personal abuse or humiliation, corporal or unusual punishment, mental abuse or punitive interference with the daily functions of living, such as eating or sleeping; and from personal injury, disease, property damage and harassment").

[19] In 2007, as part of a more expansive discrimination bill, Oregon also passed a law that prohibits discrimination based on sexual orientation and gender identity in juvenile justice facilities. *See* Oregon Statutes SECTION 20. ORS 179.750 (2) (prohibiting discrimination in state institutions, including juvenile justice facilities). In addition, other states such as Rhode Island and Minnesota have nondiscrimination statutes that although not specifically directed at the juvenile justice system, are enforceable in these systems. *See, e.g.*, R.I. GEN. LAWS § 28-5.1-7 (a) ("Every state agency shall render service to the citizens of this state without discrimination based on race, color, religion, sex, sexual orientation,

There are four interconnecting parts to SB 518:

First, SB 518 establishes statutory protections from harassment and discrimination based on actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, and HIV status.[20]

Second, SB 518 codifies the expansive nature of rights for all youth confined in DJJ facilities by creating a Youth Bill of Rights. The Youth Bill of Rights enumerates 17 basic fundamental rights, almost all of which are also referenced in Constitutional case law or DJJ regulations.[21]

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gender identity or expression, age, national origin, or disability. No state facility shall be used in furtherance of any discriminatory practice nor shall any state agency become a party to any agreement, arrangement, or plan which has the effect of sanctioning those patterns or practices."); MINN. STAT. § 363A.02 (4) (prohibiting discrimination in public services based on race, color, creed, religion, national origin, sex, marital status, disability, sexual orientation, and status with regard to public assistance).

[20] *See* CAL. WELF. & INST. CODE **§** 224.73 ("All facilities of the Division of Juvenile Facilities shall ensure the safety and dignity of all youth in their care and shall provide care, placement, and services to youth without discriminating on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status."); CAL. WELF. & INST. CODE **§** 224.71(i).

[21] Section 224.71 of California's Welfare and Institution Code provides:

> It is the policy of the state that all youth confined in a facility of the Division of Juvenile Facilities shall have the following rights:
>
> (a) To live in a safe, healthy, and clean environment conducive to treatment and rehabilitation and where they are treated with dignity and respect.
>
> (b) To be free from physical, sexual, emotional, or other abuse, or corporal punishment.
>
> (c) To receive adequate and healthy food and water, sufficient personal hygiene items, and clothing that is adequate and clean.
>
> (d) To receive adequate and appropriate medical, dental, vision, and mental health services.
>
> (e) To refuse the administration of psychotropic and other medications consistent with applicable law or unless immediately necessary for the preservation of life or the prevention of serious bodily harm.

(f) To not be searched for the purpose of harassment or humiliation or as a form of discipline or punishment.

(g) To maintain frequent and continuing contact with parents, guardians, siblings, children, and extended family members, through visits, telephone calls, and mail.

(h) To make and receive confidential telephone calls, send and receive confidential mail, and have confidential visits with attorneys and their authorized representatives, ombudspersons and other advocates, holders of public office, state and federal court personnel, and legal service organizations.

(i) To have fair and equal access to all available services, placement, care, treatment, and benefits, and to not be subjected to discrimination or harassment on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status.

(j) To have regular opportunity for age-appropriate physical exercise and recreation, including time spent outdoors.

(k) To contact attorneys, ombudspersons and other advocates, and representatives of state or local agencies, regarding conditions of confinement or violations of rights, and to be free from retaliation for making these contacts or complaints.

(l) To participate in religious services and activities of their choice.

(m) To not be deprived of any of the following as a disciplinary measure: food, contact with parents, guardians, or attorneys, sleep, exercise, education, bedding, access to religious services, a daily shower, a drinking fountain, a toilet, medical services, reading material, or the right to send and receive mail.

(n) To receive a quality education that complies with state law, to attend age-appropriate school classes and vocational training, and to continue to receive educational services while on disciplinary or medical status.

(o) To attend all court hearings pertaining to them.

(p) To have counsel and a prompt probable cause hearing when detained on probation or parole violations.

(q) To make at least two free telephone calls within an hour after initially being placed in a facility of the Division of Juvenile Facilities following an arrest.

Third, SB 518 requires all DJJ facilities to inform youth of their rights during orientation and provide youth with a copy of these rights.[22] In addition, each facility must post a listing of the rights codified under SB 518 in a conspicuous location.[23] The Office of the Ombudspersons of the Division of Juvenile Justice shall design age-appropriate posters, which include their toll-free telephone number and provide them to each DJJ facility for this purpose.[24]

Finally, SB 518 requires the DJJ ombudsperson to investigate complaints, and to maintain a toll-free helpline that youth can call to report rights violations and unlawful conditions in facilities.[25] The ombudsperson also has to document the number, source, nature, and resolution of all complaints received, compile this information, and make it available to the legislature and the public.[26]

On its own, this new law will not solve all of the problems at California's Department of Juvenile Justice – no single approach will be able to address the multitude of harms that young people are experiencing in these facilities. But SB 518 is an important piece of the overall picture. By ensuring that all youth, including LGBT youth, are better equipped to identify and report violations of their rights, SB 518 will help prevent young people like Antoine from suffering in silence.

CAL. WELF. & INST. CODE § 224.71.

[22] *See* CAL. WELF. & INST. CODE § 224.72(a).

[23] *See* CAL. WELF. & INST. CODE § 224.72(b).

[24] *See id.*

[25] *See* CAL. WELF. & INST. CODE §§ 224.74(a)(2), 224.74(a)(6).

[26] *See* CAL. WELF. & INST. CODE §§ 224.74(a)(5), 224.74(a)(7).

ADDRESSING DELINQUENT BEHAVIOR IN CALIFORNIA'S JUVENILE JUSTICE SYSTEM

By Judge Linda McFadden[*]

California law provides several alternatives to address delinquent behavior by minors. This article will explore the options available to parties in the juvenile justice system in California.

Purpose of Delinquency Law in California

The philosophy of delinquency law in California, as outlined in Welfare and Institutions Code Section 202(a), is to provide for the protection and safety of the public and each minor.

> Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objectives.[27]

Minors are to be removed from their parents' custody only when necessary for their welfare or public safety. If the

[*] Judge Linda McFadden is the Presiding Judge of the Stanislaus County Superior Court Juvenile Division in Modesto, California. Before becoming a judge, she worked as a Senior Deputy District Attorney at the Stanislaus County District Attorney's Office. Her current associations include the Stanislaus County Children's Council, Stanislaus County Juvenile Justice Delinquency Prevention Committee as well as the Stanislaus County Family and Domestic Violence Coordinating Council. Judge McFadden graduated from University of the Pacific McGeorge School of Law in 1987.

[27] CAL. WELF. & INST. CODE §202(b)

minor has been removed from the custody of his or her parents, family preservation and family reunification are appropriate goals for the juvenile court to consider when determining what orders to make for the minor.[28]

Alternatives to Filing a Petition

When a minor commits and offense, other than those involving personal use of a firearm or those listed in Welfare and Institutions Code, Section 707(b), the arresting officer has discretion on how to handle the offense. In some cases, the officer may just lecture the minor and release the minor back to his or her parents. In other cases, the officer may refer the minor to a local diversion program for the minor to receive counseling on making appropriate choices and improving behavior.

If the officer decides to cite or detain the minor for an offense, Welfare and Institutions Code, Section 654 allows the probation department, with consent of the minor and his or her parent, to delineate specific programs of supervision for a minor. These programs, not to exceed six months, attempt to adjust the situation at issue. The counseling programs may include courses relating to anger management, drug and alcohol abuse, making positive choices, and family guidance. The parents or guardians are required to participate with the minor in counseling as part of this informal probation program. Often the counseling programs will help the parent learn proper parenting skills to address the delinquent behavior of the minor. If the minor does not participate in the specific informal probation programs within 60 days, then the probation officer must file a petition or request the prosecuting attorney file a petition. This can occur any time within the 6 months or 90 days thereafter.

It is important to note that while informal probation is an option to some, Welfare and Institutions Code Section 654.3 restricts which minors are eligible for the informal probation. For example, minors who have previously

[28] *Id.*

participated in the informal probation or those 14 years and older who are alleged to have committed a felony offense are not eligible for the informal probation programs through probation. Therefore, the court will have to find another way to address the delinquent behavior of those not eligible for this type of consequence.

Post-Petition Alternatives

If a petition has been filed by the prosecuting attorney to declare a minor a ward of the court under Welfare and Institutions Code Section 602, the court may, without adjudicating the minor a ward of the court and with the consent of the minors parents or guardians, continue any hearing on a petition for 6 months and order the minor to participate in a program of supervision as set forth in Section 654.[29] The court can grant informal probation pursuant to Section 654.2 even if the prosecuting attorney objects. If the minor successfully completes the program, the court shall order the petition be dismissed. The court also has the option of continuing the supervision for an additional 6 months to allow the minor to complete this informal program. When ordering informal supervision under Section 654.2, the juvenile court cannot make a true finding on the allegations in the petition.[30] The court proceeds with a jurisdictional hearing only if the minor fails to satisfactorily complete his or her program of supervision. Note, however, if a minor falls within the provisions of Welfare and Institutions Code Section 654.3, as mentioned above, the minor is not eligible for this informal probation. Yet, the court has the discretion to make a finding on the record that the situation presents an unusual case where the interests of justice would best be served by granting the informal probation.

In most cases, the prosecuting attorney will not want to be in a position of trying a case some 6 months to a year after the filing of the petition, since they may have more difficulty locating their witnesses or the memories of their witnesses

[29] CAL. WELF. & INST. CODE §654.2
[30] Rick J. v. Sup. Ct., 128 Cal. App.4th 783 (2005).

may fade over time. As such, the prosecuting attorney will want to obtain a finding by the court that the charges in the petition are true as soon as possible after filing of the petition. Thus, the prosecuting attorney often is not willing to reduce the filed charges or engage in plea bargaining unless an admission is entered. As a result, in cases where the minor is charged with certain serious offenses such as violent felonies, sale or possession for sale of a controlled substance, or committing an offense for the benefit of a criminal street gang, the prosecuting attorney is generally unwilling to reduce the charges unless the minor is willing to enter an admission to a lesser charge. Therefore, with this manner of addressing delinquent behavior, a minor would risk not having their charges reduced or dismissed if they fail to complete the informal probation.

Deferred Entry of Judgment

A solution to the problem of informal probation, which provides the prosecutor with an early admission of the offense and true finding, is for the court to take an admission of the offense and defer the entry of the judgment pursuant to Welfare and Institutions Code Section 790. In order to be eligible for the deferred entry of judgment program, the minor must meet the following requirements:

> (1) The minor must be charged with a felony offense;
> (2) The charged offense must not be a Welfare and Institutions Code Section 707(b);[31]
> (3) The minor must never have been committed to the custody of the Youth Authority;

[31] Offenses such as murder, attempted murder, voluntary manslaughter, arson, robbery, forcible sex offense, kidnapping, assault with a firearm, assault likely to produce great bodily injury, carjacking, manufacturing or selling one half ounce or more of certain controlled substances, felony witness intimidation, escape by force or violence, torture, any violent felony committed for the benefit of a criminal street gang, or any felony offense in which the minor personally used a weapon, or firearm.

(4) The minor must never have had probation revoked, without being completed;
(5) The minor must be eligible for probation;
(6) The minor must not previously have been made a ward of the juvenile court because of the commission of a felony;
(7) The minor must be at least age 14 at the time of the hearing.

Upon a finding that the minor is suitable for deferred entry of judgment and that the minor would benefit from education, treatment and rehabilitation efforts, the court may defer the entry of judgment for a minimum of 12 months and a maximum of 36 months. Upon completion of the deferred entry of judgment program, the court dismisses the charges and orders the minor's records to be sealed. The sealing of the minor's records is of great benefit to a minor who is 14 years old at the time the judgment is deferred and completes the program when he or she is 15 years of age. Absent this program, the minor would have to wait until he or she was 18 years old to petition to have his or her records sealed. Even if the case is dismissed without a true finding having been made, the minor would not be eligible to have his or her arrest records sealed until the minor reaches the age of 18 years or until 5 years or more has elapsed from the time the minor is cited by law enforcement.

This deferred judgment program, however, is not available to a minor charged with a misdemeanor offense or a minor who is under 14 years old. So a minor who commits only a misdemeanor is unable to take advantage of the opportunity to complete the program and have his or her records sealed.

If a minor is granted Deferred Entry of Judgment, the court will give the minor certain rules to follow such as reporting to probation, attending counseling, and having a curfew time. For the most part, these rules are the same as the rules the court orders for minors placed on formal wardship probation. If the minor fails to successfully complete the

Deferred Judgment program, the court can then proceed to judgment and place the minor on formal wardship probation.

Non-Wardship Probation

If the court finds the minor is a person described by Section 602 by reason of the commission of an offense other than any of the offenses set forth in Section 654.3,[32] it may, without adjudging the minor a ward of the court, place the minor on probation, under the supervision of the probation officer, for a period not to exceed six months. If the minor fails to comply with the conditions, the court may order and adjudge the minor to be a ward of the court.[33]

This non wardship probation is granted after the minor enters an admission to an offense or the court has found at least one of the offenses alleged in the petition to be true following a jurisdictional hearing. As stated above, the prosecuting attorney is generally more inclined to plea bargain if an admission is entered as they will not have to wait 6 months to see if they will have to prove their case at a jurisdictional hearing. This type of probation provides an alternative to the informal probation under Section 654.2, since the court is not declaring the minor to be a ward of the court. Therefore, the court is not limiting the control to be exercised over the minor by the parent or guardian. Also, the court is not ordering physical confinement of the minor. The amount of probation supervision and the length of the supervision period is usually less for nonwardship probation than for wardship probation. Although not specifically provided by statute, the parties may stipulate to allowing the minor to withdraw his or her admission upon the completion of 6 months of non-wardship probation. This would have a similar effect of allowing the minor to participate in an informal probation under Section 654.2 as it restores the minor back to the position of not having entered an admission

[32] For example, sales of a controlled substance, participation in a criminal street gang or any offense listed in Welfare and Institutions Code Section 707(b).

[33] CAL. WELF. & INST. CODE §725(a)

provided the minor successfully completes the non-wardship probation.

Wardship Probation

If the court finds the minor is a person subject to the jurisdiction of the court, it may order and adjudge the minor to be a ward of the court.[34] In all cases in which a minor is adjudged a ward, the court may limit the control to be exercised over the ward by any parent or guardian. Since the purpose of juvenile probation is to rehabilitate the minor, the juvenile court has broader discretion than in setting conditions of adult probation. A juvenile probation condition is generally valid unless it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.[35]

Once a minor is declared a ward of the court, the court may order the minor detained at a local detention facility, camp, or the Department of Corrections Juvenile Justice Division for a period not in excess of the maximum term of imprisonment which could be imposed upon an adult for the same offense. The court may also remove the minor from the custody of his or her parents and place the minor with relatives, foster care, group care or residential treatment. Under the newly amended Welfare and Institutions Code Section 1731.5, the court may only commit minors to the Division of Juvenile Facilities with Section 707(b) offenses or certain sex registrant offenses. Thus, the new law provides limited options for the courts in counties where the only locked detention facility is the juvenile hall and the minor continues to violate the law and run from non secured placement facilities.

[34] CAL. WELF. & INST. CODE §725(b).
[35] In re Daniel R., 144 Cal. App.4th 1 (2006).

Conclusion

As discussed, California law presents several alternatives for the legal system to deal with juvenile delinquent behavior. In determining the program to select, Welfare and Institutions Code Section 202(b) states in part, "The guidance the minor receives in the juvenile system should enable the minor to be a law abiding and productive member of his or her family and the community."

RECENT COURT DECISIONS AND LEGISLATION IMPACTING JUVENILES

DELINQUENCY

🕮 *Doe v. Michigan Dep't of State Police*
490 F.3d 491 (6th Cir. 2007)

The plaintiffs in this case were charged with criminal sexual offenses under the Holmes Youthful Trainee Act (HYTA). Doe v. Michigan, 490 F.3d 491, 494 (6th Cir. 2007). The HYTA is a juvenile diversion program for criminal defendants under the age of 21. *Id.* The plaintiffs were assigned the youthful trainee status, a status that does not constitute a criminal conviction. *Id.* If the defendant successfully completes his or her status as a youthful trainee, the court "shall discharge the individual and dismiss the proceedings." MICH. COMP. LAWS § 762.14(1); *Doe,* 490 F.3d at 494. Once the individual is released, he or she "shall not suffer a civil disability or loss of right or privilege" because of the assignment. MICH. COMP. LAWS § 762.14(2); *Doe,* 490 F.3d at 494.

When Michigan adopted the Sex Offender Registration Act (SORA) in 1994, it amended the HYTA to register individuals assigned to youthful trainee status as sex offenders. *Doe,* 490 F.3d at 495. Initially, SORA was for law enforcement agencies, and the registration records were kept confidential. *Id.* In 1999, the Michigan legislature amended SORA to create the Public Sex Offender Registry (PSOR). *Id.* The PSOR is freely accessible on the Internet. *Id.* It also includes information about individuals classified as youthful trainee status under HYTA who have satisfied their obligations and who were never convicted of their offense. *Id.*

In the district court, plaintiffs alleged violations of their right to privacy, substantive due process rights and equal protection rights. *Id.* at 497. In light of prior decisions from the Supreme Court and this court that have upheld similar sex-offender registration laws, the district court granted the State's motion. *Id.* In this appeal, the plaintiffs asserted the right to be free from being labeled a convicted sex offender when, under the HYTA, they were never convicted of this offense. *Id.* at 500.

The appeals court concluded that the right asserted was "not a fundamental right deeply rooted in our Nation's history." *Id.* The court emphasized that "[n]ot all rights of privacy or interests in nondisclosure of private information are of constitutional dimension, so as to require balancing government action against individual privacy." Kallstrom v. City of Columbia, 136 F.3d 1055, 1062 (6th Cir. 1998). Moreover, a statute will be considered constitutional under rational-basis review if there is "any reasonably conceivable state of facts that could provide a rational basis for it." FCC v. Beach Commc'ns, 508 U.S. 307, 313 (1993). Michigan's stated purpose for the SORA, "to prevent...and protect…against the commission of future criminal sexual acts by convicted sex offenders" clearly meets this test. *Doe,* 490 F.3d at 503. Because "it is only invidious discrimination which offends the Constitution," the Court ruled that the new registration requirements under PSOR were constitutional. *Id.* at 505. The court affirmed the judgment of the district court. *Id.* at 506.

🕮 *State v. Eggers*
160 P.3d 1230 (2007)

Sixteen-year-old Zachary Eggers was tried and convicted as an adult in the Superior Court of Cochise County of Arizona for the first-degree murders of his parents. *State v. Eggers,* 160 P.3d 1230, 1235. The court sentenced him to two consecutive life terms of imprisonment. *Id.* In Arizona, an

automatic filing statute required a juvenile fifteen, sixteen, or seventeen years of age to be criminally prosecuted as an adult for certain violent crimes, including first-degree murder. ARIZ. REV. STAT. ANN. §13-501(A) (2007*)*. Eggers appealed the judgment, contending that the automatic filing statute violated both his state and federal rights of due process. 160 P.3d at 1236. He also argued that the lower court erred in allowing a confession obtained after detectives gave him his *Miranda* because the confession came after an interrogation during which he confessed to the murders for the first time. *Id.* at 1235. Finally, Eggers contended that natural life sentences for juveniles were cruel and unusual punishment because the severity of the sentence was disproportionate to the culpability a juvenile was capable of having. *Id.*

The Court of Appeals affirmed that the automatic filing statute does not violate ARIZ. CONST., art. IV, pt. 2, § 22 because it was enacted under a constitutional amendment granting the legislature the power to enact laws affecting the proceedings of juvenile offenders. *Id.* at 1236. The court also found that the statute does not violate U.S. CONST. amends. V and XIV., because due process only protects life, liberty, or property. *Id.* at 1237. Under these amendments, there is no right to a hearing before a trying a juvenile as an adult. *Id.* at 1238.

Further, the court held that the trial court erred in not suppressing the confession that the detectives obtained after informing Zachary of his *Miranda* rights, but that was subsequent to an interrogation that resulted in a confession before they gave him his *Miranda* warning. *Id.* at 1245. However, the court found that this was a harmless error due to the amount of circumstantial evidence that indicated guilt. *Id.* at 1246-1247.

Finally, the court held that a natural life sentence for a juvenile is not cruel and unusual punishment because the punishment is not "grossly disproportionate" to the crime committed, murder. *Id.* at 1248. Part of the justification for this decision rested upon the legislative intent, which clearly allows more severe punishment for juveniles who committed

certain violent crimes by prosecuting them as adults. *Id.* They also drew a distinction between a natural life sentence and capital punishment, where the former is allowable depending on the severity of the crime, while the latter is not allowed as juveniles lack the culpability required. *Id.*

🕮 *State ex rel. Juvenile Dep't of Multnomah County v. J.D.* 164 P.3d 1182 (2007)

In a mall in downtown Portland, an officer stopped and questioned Defendant because the minor appeared to be in violation of the Truancy Statute, Portland, Or., City Code § 14.A.80.020. *State ex rel. Juvenile Dep't of Multonmah County v. J.D.*, 164 P.3d 1182, 1183 (2007). At this time, the officer also noticed that the defendant had a carton of cigarillos (small cigars) in his pocket. *Id.* After defendant admitted he was fifteen, the officer handcuffed defendant and read him his *Miranda* rights. *Id.* The officer proceeded to search him, discovering two bindles of marijuana. *Id.* Upon subsequent questioning, the defendant admitted to selling marijuana. *Id*. Defendant appealed the trial court's denial of his motion to suppress evidence obtained in violation of his state and federal rights. *Id.*

Defendant argued, and the state conceded, that neither Defendant's truancy nor his possession of tobacco were sufficient crimes that permitted the officer to conduct a warrantless search. *Id.* at 1184. Nevertheless, the state contended that the officer was authorized to conduct a warrantless search upon taking the youth into protective custody. *Id.* Defendant argued that under Portland, Or., City Code § 14.A.80.020 and OR. REV. STAT. § 419B.150 (2005), truancy was not sufficient to authorize the officer to place defendant in protective custody. *Id.* Portland, Or., City Code § 14.A.80.020 allows a child to be taken into protective custody pursuant to the circumstances listed under OR. REV. STAT. § 419B.150 (2005): the surroundings reasonably appear to jeopardize the child's welfare, the child has been ordered to

be taken into custody by the juvenile court, or it reasonably appears that the child has run away. *Id*. The court held that truancy itself was insufficient to authorize the officer to place the defendant under protective custody. *Id.* at 1185. The court distinguished the current case from *State ex rel. Juvenile Dep't. v. Stevens*, 749 P.2d 613 (1988), on the basis that Stevens had a specific statute granting the officer power to take the child into protective custody for a curfew violation. *Id.* In the current case, there is no analogous statute that allows an officer to take a child into protective custody for a truancy violation. *Id*. The court also held that the officer's concern of the child being in danger due to the high drug traffic area was not enough to authorize him to take the child into protective custody. *Id.* at 1185-1186. This standard was too ambiguous and indefinite to show potential jeopardy to the child's welfare. *Id*. at 1186.

🕮 *Deandre Smith v. State of Maryland*
399 Md. 565 (2007)

Deandre Smith, a juvenile, had several criminal charges. *Deandre Smith v. State of Maryland,* 399 Md. 565, 568 (2007). One of them was a handgun charge that prevented the juvenile court from exercising exclusive jurisdiction. *Id.* The prosecution reached a plea with the juvenile in criminal court and Smith pled guilty to one count of motor vehicle theft and one count of fleeing and eluding an officer in a vehicle. *Id.* The plea bargain allowed the juvenile court to handle the disposition of the charges as the handgun charge would be nolle prossed. *Id.* at 569. The court committed Smith to the Department of Juvenile Services and they placed him in Bowling Brook Preparatory School from which he escaped before committing more crimes. *Id.* Upon appearing in juvenile court for the subsequent charges, the court held Smith to be unamenable to treatment in the juvenile system and the juvenile court remanded the case to criminal court for sentencing. *Id.*

Smith argued that once the criminal court had transferred jurisdiction of the case to the juvenile court, the juvenile court could not remand the case back to the criminal court. *Id*. at 570. The court agreed with Smith and held that MD CODE ANN., CRIM. PROC. § 4-202.2 (2002) expressly limited the power of the statutorily created juvenile courts to waive jurisdiction to the criminal courts. *Id.* at 579. Therefore, the juvenile court had no power to modify or reverse a criminal court's decision to reverse waiver of jurisdiction. *Id*. at 577. Furthermore, the objective of the juvenile system is to permit treatment and rehabilitation of the juvenile offenders. *Id*. at 579. To return the case to criminal court would be to declare Smith unable to receive treatment and would contradict legislative intent and policy goals of the juvenile system. *Id.* at 580. The court also stated that rehabilitation is an on-going process. *Id*. at 579. In conclusion, the juvenile court cannot remand a case back to criminal court once the criminal court has transferred jurisdiction to the juvenile court. *Id.* at 584-585.

🕮 *Timothy J. v. Superior Court of Sacramento County*
150 Cal.App.4th 847 (2007)

Two minors, Dante H., aged 11, and Timothy J., aged 12, filed this suit after the Superior Court of Sacramento County rejected their claims of incompetency to stand trial. Dante and two other minors broke windows at their elementary school and took food from the school gymnasium. Timothy entered his elementary school after being suspended and stole personal property from the school, and several months later, a petition alleged that he possessed a knife with a 3-inch blade on school grounds.

Court appointed psychologists determined that Dante did not have the mental capacity to work effectively with his attorney because of his age and developmental stage. Timothy, who had diagnosed obedience and attention deficit disorders, was in special education classes and had an individualized

educational program (IEP). His attorney also recognized that he lacked competency to understand and prepare for trial.

The court denied requests by both youths that they were incompetent to stand trial on the grounds that they did not have a mental disorder or developmental disability. Both petitioned for writs of mandate and requests for stay of proceedings in the juvenile court. In Dante's case, the court denied the petition and on appeal, the Supreme Court granted the petition and transferred the case back to the Court of Appeal. In Timothy's case, the Court of Appeal granted the stay and issued an alternative writ.

Both Dante and Timothy argued that under California Rules of Court 1498(d) a minor may be found incompetent on the basis of developmental immaturity alone, and that it was not necessary to find a mental disorder or developmental disability to be found incompetent. The court agreed, finding that under *Dusky v. United States*, 362 U.S. 402, 402 (1962) ("Dusky"), a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . ." (*Id.*) After *Dusky*, the Supreme Court extended the right of due process to juveniles (*In re Gault* 387 U.S. 1, (1967)). The California court in *James Paul H. v. Superior Court*, 77 Cal.App.3d 169 (1978) ("James Paul H."), held that a minor has the right to a competency hearing in a delinquency proceeding.

California Rules of Court 1498(d) conforms to the rules established in both *Dusky* and *James Paul H* and neither case held that incompetency requires the existence of a mental disorder or developmental disability. California Rules of Court 1498(d)(2) refers to California Welfare and Institutions Code section 6550, which uses the terms "mental health or the mental condition" of the person, and not mental disorder. The court held that developmental maturity may be cause to stay proceedings based on the rules established in *Dusky*, *James Paul H* and California Rules of Court 1498(d).

🕮 H.R. 1806, 110th Cong. (2007)
Youth Crime Deterrence Act of 2007
Introduced March 29, 2007
Status: Referred to the Subcommittee on Healthy Families and Communities on 7/9/2007

In 2007 Representative Eddie Johnson introduced a bill in the House to amend the Juvenile Justice and Delinquency Prevention Act of 1974. The goal of HR 1806 is to strengthen the quality of prevention and accountability programs relating to juvenile delinquency and juvenile justice. Specifically, HR 1806 would add new requirements for state plans under the juvenile justice and delinquency prevention program relating to juvenile truancy from detention or placement settings and housing, reentry and aftercare services for juveniles released from incarceration.

HR 1806 would authorize the Administrator of the Office of Juvenile Justice and Delinquency program to make grants to or contracts with both public and nonprofit agencies in three areas: 1) family and community programs to prevent and reduce the participation of youth in gangs; 2) treatment programs for youth who are juvenile offenders and victims of child abuse or neglect and their families; and 3) mentoring programs for at-risk juveniles.

It would also authorize the Administrator to make grants to states for different challenge activities under the programs. A challenge activity is a state program maintained for five different purposes. Those purposes are: (1) to provide juveniles in the juvenile justice system with basic health, mental health and education services; (2) to increase community-based alternatives to incarceration of juveniles; (3) provide secure settings for placement of violent juvenile offenders; (4) establish and operate a state ombudsmen office for monitoring out-of-home care for juveniles; or (5) adopt policies for alternatives to suspension and expulsion from school and for prohibiting discrimination against juveniles in program placement or treatment based on perceived or actual sexual orientation of gender identity.

🕮 *The State v. Pittman*
373 S.C. 527 (Supreme Ct of S. Carolina 2007)

Christopher Pittman, a twelve year old, was arrested and charged with double homicide in connection with the deaths of his grandparents, whom he had been living with. On the day of the murder, Pittman's grandparents had been called in response to an incident, which occurred on the previous day. During this incident, Pittman allegedly choked a second grader on the bus. That night, Pittman's grandparents locked him in his room and paddled him.

Later that night, after his grandparents had gone to bed, he entered their bedroom and shot them with a .410 shotgun. He lit candles to burn down the house, collected money, weapons, and his dog, and drove away in his grandparents' car. Two hunters found him wandering around in the woods the next morning. Pittman told them that a black man had killed his grandparents and kidnapped him, but that he got away. A search ensued for this alleged kidnapper.

After detectives suspected that Pittman was a possible suspect, they questioned him and he confessed. The jury convicted him on both counts of murder. The trial judge sentenced him to the shortest sentence possible under the mandatory minimum sentencing guidelines, two concurrent terms of thirty years imprisonment. Pittman appealed.

Pittman claimed he did not have the requisite capacity to be held responsible for the double homicide. Witnesses and expert testimony state that Pittman's demeanor on the day of the crime was calm and showed no remorse. The State offered the testimony of Dr. Pamela Crawford, a court appointed examiner. Dr. Crawford testified that, Pittman "was competent and capable of understanding the difference between right and wrong… [he] admitted that what he did was wrong, but maintained that his grandparents deserved it."

Pittman also claims that the sentence violates the 8th Amendment. He argues that he should have received a shorter sentence than if he were an adult because of the underdeveloped cognitive capacity of a twelve year old. However, the court rejected this claim because of the nature of the crimes that Pittman committed. Pittman managed to plan and execute a double murder and escape plan. He also was capable of creating a false story that had law enforcement tricked. The court also stated that the 8th amendment analysis focuses on "proportionality" and the crime committed was so heinous as to justify the sentence, even for a younger person such as Pittman.

🕮 California AB 1381
Gangs: Office of Gang and Youth Violence Policy
Introduced February 23, 2007
Status: Chaptered

This bill, approved on October 11, 2007 in Sacramento, establishes the Office of Gang and Youth Violence Policy. The Office, through its Director and Chief Deputy Director, will work to monitor, coordinate and assist existing programs, strategies, funding, and other entities in working towards understanding and preventing gang involvement and youth violence. This will include creating a website that will aid interested parties in applying for grants administered by the Office of Emergency Services related to gang prevention. The ultimate goal is to promote the best practices for addressing gang and youth violence through suppression, intervention and prevention. Collaboration with state and local stakeholders is key to achieving this goal. The Office and its stakeholders will together determine the role of the Office in: collecting and analyzing data on gang membership and effectiveness of strategies; developing reliable data sources; developing a clearinghouse for research in this area; providing or promoting public education and training and developing sustained coordination mechanisms

and greater integration between existing gang prevention entities. The Office shall submit to the Legislature a report on or before March 1, 2009, detailing its recommendations.

🕮 *In re Sheena K.*
40 Cal.4th 875 (Cal. 2007)

Sheena K., a minor, was convicted of misdemeanor battery (CAL. PENAL CODE § 242) following an altercation in a children's shelter. The juvenile court adjudged her to be a ward of the court and placed her on probation in the Camp Community Placement Program, subject to 15 terms and conditions. One condition stated that Sheena may not "associate with anyone disapproved of by [her probation officer]." *In re Sheena K, supra* at 878.

Sheena appealed, arguing that such a condition was unconstitutionally vague and overbroad. The Court of Appeals agreed. It modified the condition to prohibit Sheena's association with people *she knew to be* disapproved of by her probation officer. The California Supreme Court granted the Attorney General's petition for review.

The Court first determined that Sheena did not waive her objection when she failed to protest at sentencing; a facial challenge to probation conditions presents a pure question of law for the appellate court.

The Court proceeded to hold that, despite a trial court's wide discretion to select probation conditions, the original condition here was vague and overbroad. In order for this probation condition to be constitutional, a defendant must know whom it applies to—of whom the probation officer disapproves. Otherwise, the condition would not give the defendant fair notice of the restrictions placed on her. Additionally, because the probation condition implicated Sheena's constitutional rights, the court had to narrowly tailor the condition to achieve its goal. In this case, the vagueness and overbreadth of the probation condition show that the trial

court did not narrowly tailor the condition. The Supreme Court concluded that by inserting a knowledge requirement, the Court of Appeals remedied both of the condition's constitutional deficiencies.

🕮 *In Re James R.*
153 Cal. App. 4th 413 (Cal. Ct. App. 2007)

Following his parents' divorce, James R., a minor, committed and admitted to numerous acts of sexual molestation against four children in his family. He pleaded no contest to violating CALIFORNIA PENAL CODE Sections 288.5 and 288(a) (continuous child sexual abuse and nonforcible lewd act). James was adjudged a ward of the court and was placed at a residential sexual offender treatment program under the supervision of the probation department. The juvenile court gave the program wide latitude to determine James' conditions of confinement. At James' six-month review hearing, and subsequently at his permanency planning hearing, the court refused to mandate minimum visits with James's father, stating that parental visits were a "privilege" and expressing its desire not to interfere with the program's plan. James appealed from both orders.

The Court found that James' right to visitation with his father was constitutionally mandated and critical to the reunification process. Nevertheless, the Court held that James had not raised a viable due process claim based upon the number of visits (about once per month) he was allowed with his father because he had not demonstrated any detriment the limitation had caused. They also reasoned that since the trial court grounded its decision in the context of James' specific circumstances at the time, James' progress in the program and his specific continuing needs, it did not err in its decision at the six-month review hearing.

However, the Court held that the juvenile court unlawfully delegated its authority at the permanency planning hearing. There, the trial court completely deferred to the

program's judgment as to how many visits to allow. Despite the trial court's stated desire to increase the number of visits, the court expressly refused to interfere with the program's system. Since the program is private in nature, and not an arm of the juvenile court, this constituted an unlawful abdication of the court's authority. The Court of Appeals ordered a new hearing in the trial court to set visitation guidelines for James' father.

🕮 *United States of America v. C.M. (A Juvenile)*
485 F.3d 492 (9th Cir. 2007)

The Juvenile Delinquency Act (18 U.S.C. § 5033) ("JDA") requires, based on text and judicial decisions, that when a juvenile in taken into federal custody the arresting officer must (1) immediately advise the minor of his or her rights, (2) immediately notify the minor's parents, guardians or consulate and (3) honor his or her requests to speak to parents or consulate. The Act also states that a magistrate judge must arraign the minor forthwith. A divided panel of the Ninth Circuit Court of Appeals held that the government's failure to fulfill all of these requirements was prejudicial to the minor and warranted dismissal.

C.M. was arrested at the US-Mexico border and charged with three counts of transporting illegal immigrants and three counts of doing so for profit (8 U.S.C. §§ 1324(a)(1)(A)(ii) and (a)(2)(B)(ii), respectively). The arresting officers quickly ascertained that C.M. was a minor. Nevertheless, the agents waited six hours to advise C.M. of his rights. They contacted C.M.'s parents after a similar wait and after beginning interrogation during which C.M. confessed. Further, the agents did not make reasonable efforts to notify the Mexican Consulate, as the Ninth Circuit has held the JDA requires. Nor did the agents comply with C.M.'s requests to speak with his consulate. Finally, they arraigned C.M. eleven hours after his arrest, with no reasonable explanation for the

delay. The trial court held that the agents did not violate C.M's due process rights and convicted C.M. on all counts.

The Court of Appeals held that these failures were not harmless. The circumstances of confinement were, at least, a cause of C.M.'s confession. While the Government did not use the confession at trial, the Government relied upon it to bring the case. The Court determined that this prejudiced C.M., that the Government undermined Congress' intent by disregarding the JDA and that dismissal serves to deter to such behavior.

The dissent argues that the Government had ample other evidence to support its initial charge. The correct remedy as the Supreme Court previously articulated is not dismissal, but exclusion of the confession. At most, the dissent states, that the Court should remand the case to the district court for their determination as to how to proceed.

DEPENDENCY

🕮 California AB 755
Corporal Punishment Amendment to California Penal Code Section 273(a)
Introduced February 22, 2007
Status: on hold in Assembly Appropriations Committee as of Nov. 7, 2007

California Assembly Bill 755 ("AB 755") recognizes that child abuse is a "major social problem" and aims to address the high fatality rate of children under the age of four due to child abuse. Currently, California Penal Code section 273(a) defines child abuse as infliction of "unjustifiable physical pain or mental suffering," but is silent as to what types of conduct constitute child abuse. If passed, AB 755 would remedy the vagueness of the current law by listing conduct that a fact finder may consider when determining if child abuse occurred. The proposed list includes using an implementation to physically punish a child; throwing, kicking, burning, or cutting a child; striking a child with a closed fist; striking a child under the age of three in the face or head; shaking a child under the age of three; interfering with the child's breathing; and brandishing a deadly weapon. The suggested alteration to the current statute includes a clause indicating that none of the listed conducts are alone sufficient to prove child abuse and the weight and significance of the conduct is to be determined by a fact finder.

Additionally, current law sentences people found guilty of child abuse to one year of a child abuser's treatment counseling program. CAL. PENAL CODE § 273a-c-3-A (West 2007). The proposed bill will allow the courts to substitute this requirement with a probation department approved nonviolent parental education class if appropriate.

Opponents consider the proposed change of law to include conduct that is not traditionally considered child abuse and argue that passage of the bill will be "an incremental step toward the outlawing of all spanking..." HOME SCHOOL LEGAL

DEFENSE ASSOCIATION, CALIFORNIA: AB 755 JOINT LEGISLATIVE ALERT (2007), http://www.hslda.org/elert/archive/2007/04/20070412142144.asp (last visited Nov. 15, 2007).

As of October 29, 2007 AB 755 remains active and is currently on hold under submission in the California Assembly Committee on Appropriations.

🕮 *In re S.G.*
922 A.2d 943 (Pa. Super. Ct. 2007)

After several years of family intervention by Blair County Children and Youth Services ("CSY") to address issues of neglect, abuse, and mental development, the court declared S.G. a dependent after his mother acknowledged hitting him. The court then removed S.G. from his mother's custody and gave S.G. a placement goal of returning home to his mother due to their emotional bond. The mother then failed to attend many of her therapy sessions and her domestic situation continued to deteriorate. After an incident in which the mother indicated she was concerned with her behavior towards the rest of her children, she signed an emergency voluntary placement agreement and CSY removed all of her children from her custody. At a hearing held soon after, S.G., along with sister V.G., received a new placement goal of "other planned living arrangement intended to be permanent." *In re* S.G., 922 A.2d 943, 946 (Pa. Super. Ct. 2007). Four months later, at CSY's request, the court changed the placement goal for both children to adoption. The court cited evidence that the children were making substantial progress both behaviorally and developmentally in foster care, and their mother had still been unsuccessful in establishing an appropriate environment for them. The mother appealed from the court's decision arguing that she had maintained compliance with permanency goals and that she should eventually be able to have custody of her children.

In evaluating the mother's argument, the court recognized that when developing a placement goal, the main consideration is the best interest of the child – not those of his or her parents. The court then discussed the children's substantial improvements in their behavioral and mental conditions subsequent to entering foster care. S.G., who was diagnosed with post-traumatic stress disorder and attention deficit hyperactivity disorder, was making substantial progress at his foster home and had demonstrated only periodic behavioral outbursts. Before being place in foster care, V.G. was diagnosed as "mildly retarded" but had made such significant improvement in her development that professionals questioned her diagnosis. *Id.* at 948. The court further found that while the mother had made some progress, her progress was not sufficient to prove she would one day be able to support the children again. The court held that these factors combined justified changing the children's placement goals, despite the mother's personal progress.

🕮 *In re Cody B.*
153 Cal.App.4th 1004 (2007)

Cody B. and his mother Deanna C. appealed from an order denying her request to be considered his "presumed mother" (*In re Cody B.*, 153 Cal.App.4th 1004, 1008 (2007)) after her parental rights had been terminated. After four years of foster placement, the court terminated Deanna's parental rights and Vincent, the biological father of Cody's half-sister, adopted him. Cody lived with Vincent and his mother sporadically from 2002 to 2006, at which time he returned to foster care because the health department deemed Vincent's home hazardous.

Cody and Deanna mutually wished to live together and argued that Deanna had maintained a parental relationship with the child, despite earlier termination of her parental rights. Therefore, they argued that she should be considered his presumed mother and granted placement of Cody.

California Welfare and Institutions Code section 366.26, subdivision (i)(1), states that an order of the court terminating parental rights is permanent and binding and that the court has no power to modify or restore rights. The court previously interpreted this statute in *In re Jerred H,* 121 Cal.App.4th 793, (2004) ("Jerred H."). In *Jerred H*, the court denied granting a step-father, whose parental rights were previously terminated, presumed parent rights because the statute very clearly states that orders terminating parental rights are final. *Id.* at 796-799.

Deanna and Cody also argued that their motions were not collateral attacks on the 2001 termination judgment because Deanna was a "legal stranger" (*In re Cody B.,* 153 Cal.App.4th 1004, 1012 (2007)) who has maintained a maternal relationship with Cody that the court should recognize. The court determined that these motions were in fact collateral attacks on the termination judgment and as in *Jerred H.,* any exceptions to California Welfare and Institutions Code section 366.26, subdivision (i)(1) must be determined by the legislature, not the court. The court held that Deanna does not have the legal right to be Cody's presumed mother based on the binding nature of termination of parental rights.

The Court of Appeal remanded the case to the juvenile court to determine if Cody is an Indian child as required in compliance with the Indian Child Welfare Act. If he is not, the case is reversed and the jurisdictional and dispositional order will stand.

EDUCATION

🕮 California AB 1236
Compulsory School Attendance: Kindergarten Readiness Program
California A.B. 1236, 2007-2008 Regular Session
Introduced February 23, 2007
Status: On hold in Assembly Appropriations Committee as of Nov. 7, 2007

If passed, AB 1236 will establish three new policies in the California Education Code. First, the bill will change the date used to determine when a child should start school. Existing law allows a child to start kindergarten if they will have their 5th birthday before December 2nd. The bill will change the date from December 2nd to September 1st, thereby establishing an older group of students in each class. Proponents of this policy point cite studies that show that slightly older students are better socially and developmentally prepared for kindergarten. California Performance Review, *Change Enrollment Entry Date for Kindergartners to Enhance Their Success,* CPR REPORTS, at 567-570, http://cpr.ca.gov/report/cprrpt/issrec/etv/pdf/chapter3.pdf (last visited Nov. 15, 2007). The bill proposes that changes take effect on July 1, 2011.

Second, the bill will eliminate California's current kindergarten readiness pilot program and replace it with a permanent kindergarten readiness program. The Commission on Teacher Credentialing, the Superintendent, and California public colleges and universities will develop a new early learning credential. The program also requires teachers in kindergarten readiness classes to take additional educational and credential classes. Schools implementing kindergarten readiness programs will be eligible for state funding and the State Department of Education will then evaluate the program to ensure it effectively prepares students for subsequent studies. The kindergarten readiness pilot program will

converge into the kindergarten readiness program during the 2011-12 fiscal year.

Lastly, the bill will alter current law to extend the requirement of compulsory full-time education to students 5 years of age, effectively making kindergarten attendance mandatory and full-time. Currently, most public kindergarten programs in California are voluntary and taught on a part-time basis. The bill proposes to change all voluntary, part-time kindergarten programs to compulsory, full-time programs beginning July 1, 2010.

Opponents to the bill cite California's rejection of universal preschool on the 2006 ballot with Proposition 82. They argue that the government should focus their efforts on strengthening the state's current K-12 educational programs instead of adding to an already poor performing system. *See* Legislative Alert! California Assembly Bill 1236, http://www.universalpreschool.com/alerts/20070416.asp ("[I]t is ridiculous to spend money on broadening Kindergarten programs when the state can't properly fund our failing, existing K-12 schools.").

AB 1236 is currently active and is on hold by the author, Assembly Member Mullin, in the California Assembly Appropriations Committee.

🕮 *Deborah Morse, et al., petitioners v. Joseph Frederick* 127 S. Ct. 2618 (S. Ct. 2007)

The torchbearers of the Olympic Torch passed through Juneau, Alaska on January 24, 2002. Petitioner Deborah Morse, principal of Juneau-Douglas High School (JDHS), decided to permit her students to participate in the Torch Relay as an approved social event for the school. As the torchbearers and camera crews passed by, Joseph Frederick and his friends unfurled a 14-foot banner bearing the phrase: "BONG HiTS 4 JESUS." Morse demanded the removal of the

banner and Frederick refused. She then confiscated the banner and suspended him for 10 days.

Frederick filed suit under 42 U.S.C. Section 1983 alleging that the school board and Morse had violated his First Amendment rights. The District Court granted the petitioners summary judgment, but the Ninth Circuit reversed.

The Court agrees with Morse that the banner promoted illegal drug use, in violation of school policy. The U.S. Congress has declared that part of a school's job is to educate students about the dangers of drug abuse, and such promotion of illegal activity during a school event is contrary to that duty. Congress has also specified that a principal may restrict student speech at a school event. The rights of a student at a school-sanctioned or school-supervised event are not equal to the rights of adults in other settings.

Frederick stated, "the words were just nonsense meant to attract television cameras," claiming no religious or political message. The Court states that this case is not just a "mere desire to avoid discomfort and unpleasantness that always accompanies an unpopular viewpoint" by the school. This decision is in contrast to the case of *Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731,* when students wore armbands in protest of the Vietnam war. Rather, the danger here was much more serious because of the school board's interest in preventing student drug abuse, as is embodied in school policy.

🕮 *Wisniewski v. Board of Education of the Weedsport Central School District and Richard Mabbett*
494 F.3d 34 (2nd Cir. 2007)

This appeal concerns a First Amendment challenge to an eighth-grade student's semester long suspension for sharing a small drawing suggesting that a teacher should be shot and killed with friends via Internet instant messaging. In April 2001, Wisniewski, from his parents' home computer, drew a

pistol firing a bullet at a person's head, and beneath the drawing the words, “Kill Mr. VanderMolen.” He created this drawing a couple of weeks after the school instructed his class that the school would not tolerate threats and it would treat all threats as acts of violence. The image was available for viewing for 3 weeks.

The school suspended Wisniewski for 5 days and allowed VanderMolen to stop teaching Wisniewski's class. At the superintendent's hearing, a hearing officer recommended a one semester suspension of Wisniewski. Wisniewski's parents filed a complaint alleging their son's icon was not a “true threat,” but was protected speech under First Amendment. They also claimed that the Board had failed to train the school staff in threat assessment and had violated N.Y. State Education Law.

The District Court dismissed the case and the parents appealed. The Court of Appeal decided that the District Court properly dismissed the federal claims because it was reasonably foreseeable that Wisniewski's communication would cause a disruption in the school environment and was a “true threat.”

📖 *Parents Involved in Community Schools v. Seattle School Dist No 1*
127 S. Ct. 2738

Recently the United States Supreme Court addressed the constitutionality of public school districts using racial balancing as a method to assign students to schools. In Washington’s Seattle School District Number 1, students ranked schools in order of preference, and if too many students requested a particular school, the district made their placement decisions on three criteria, the second being racial balance of the school in question. The school district considered the race of the student (classified as either white or nonwhite) against the current racial composition of the school. The district overall, which had no history of racial segregation,

was 41 percent white and 59 percent nonwhite. If the school's racial composition was not within 10 percentage points of this district-wide racial balance, then the school district only selected students whose race would contribute to making the school more racially balanced to attend.

Jefferson County Public Schools in Louisville, Kentucky, used a similar method of student assignment towards the goal of racial diversity in its schools. District-wide, the racial balance was 33 percent black and mostly white for the remaining 66 percent. Jefferson County Public Schools implemented a policy wherein each school was required to have a minimum 15 percent black enrollment and maximum 50 percent black enrollment. This school district had a history of racial segregation, but had taken steps to remedy this and in 2000 a Kentucky court declared the school district officially desegregated.

In Seattle, Parents Involved In Community Schools, a nonprofit organization comprised of parents whose children currently or in the future might be unable to attend their first choice school because of race, brought action against Seattle School District No. 1. They claimed that the racial tiebreaker policy violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and the Washington Civil Rights Act. The defendant school district argued that the racial imbalance of the schools constituted a de facto resegregation, and therefore its use of race as a factor in assigning students to schools to prevent this was justified. There were discrepancies in the lower and appellate court decisions, so the Supreme Court granted certiorari.

In Louisville, Crystal Meredith brought suit against Jefferson County Public Schools after the school district denied her son Joshua enrollment at Bloom Elementary School based on his race. The District Court and Sixth Circuit both found for the school district. Meredith appealed.

The Supreme Court reversed the judgments of the Courts of Appeal for the Sixth and Ninth Circuits and remanded the cases in a 5-4 vote. Chief Justice Roberts wrote the majority opinion in which he found that strict scrutiny is

required whenever a racial classification is used, meaning that school districts may only consider race as a factor in assigning students to attend certain schools if the method they use to do so is narrowly tailored to achieve a compelling government interest. The Constitution is not violated if these schools are racially imbalanced as a result of private choices rather than state action. Since the areas where students reside that correspond to these schools are often racially imbalanced, it follows that the schools would reflect this imbalance.

In these cases, the districts used crude measures to define and measure diversity of enrollment (in Seattle, white vs. nonwhite; in Jefferson County, black vs. other) and erroneously assumed that if the district wide diversity standards were used, actual diversity would then exist. For the "narrowly tailored" argument to succeed, there must be evidence of "serious, good faith consideration of workable race-neutral alternatives." Race cannot be a deciding factor by itself; it can only be one of several factors that, taken together, provide a basis for decision. The Court refers to *Brown v. Board of Education*, 347 U.S. 483 (1954), as relevant precedent, demonstrating that the government is prohibited from the use of race as a deciding factor in affording educational opportunities to its citizens, regardless of good intentions.

In Justice Thomas' concurring opinion he rebuts Justice Breyer's dissent and states that contrary to the dissent's belief, school districts will not become resegregated if they are unable to use this integration technique. Justice Kennedy also wrote a separate concurring opinion disagreeing with the plurality opinion with regard to its limited view of the reach of the Equal Protection Clause as well as Justice Breyer's interpretation of precedent.

In Justice Breyer's dissenting opinion, he draws a distinction from precedent between race-based criteria that are *permitted* under the Equal Protection Clause, as opposed to the use of such criteria as *compelled* by the Constitution. These school districts, while not constitutionally compelled to use race as a criteria, were permitted to do so. Breyer asserts that

there is a difference between using race conscious criteria to keep the races separated, versus using the criteria to bring the races together. He argues for contextual scrutiny, rather than a strict scrutiny rule that would rule out all race conscious criteria *de facto*.

Justice Stevens also wrote a dissenting opinion to address the majority's treatment of *Brown v. Board of Education*. He points out that the context of *Brown* is very different in that *Brown* concerned a school district that told only black students where they could or could not attend schools, not ALL students.

🕮 *Preschooler III v. Clark County School Board of Trustees* 479 F.3d 1175

Jane Roe, parent of a four year old autistic preschooler (Preschooler II), brought action against Clark County School Board of Trustees (hereinafter Clark County) on several causes of action including violation of 42 U.S.C. § 1983 based on the Fourth and Fourteenth Amendments. United States District Court for District of Nevada denied a motion to dismiss based on qualified immunity, and Clark County brought an interlocutory appeal to the United States Court of Appeals for the Ninth Circuit on the issue of qualified immunity for the §1983 claims.

Jane Roe's child was four years old during the 2002-2003 school year. Preschooler II suffered from tuberous sclerosis and nonverbal autism, and is eligible for special educational services under IDEA. Roe alleges that her child's teacher, Kathleen LiSanti, physically abused Preschooler II on multiple occasions from September 2002 to April 2003. This included LiSanti hitting Preschooler II on the head and face, "maliciously body slamm[ing]" him into a chair, forcing Preschooler II to walk across asphalt without shoes four separate times and causing other unexplained bruising. In addition, Preschooler II alleges that the school principal and

district personnel were notified of the abuse and unlawful acts, and failed to prevent further harm to him.

This Court addressed two issues to determine whether the defendants were entitled to qualified immunity against the §1983 claims. First, plaintiff must show that the defendants violated a federal right of the plaintiff. Secondly, the Court considers whether the defendants violated "clearly established statutory or constitutional rights of which a reasonable person would have known" *Preschooler II v. Clark Sch. Bd. of Trs*., 479 F.3d 1175, 1180 (9th Cir. Ct. 2007). If the defendants knowingly violated the law, they cannot be protected by qualified immunity. On the first two counts of physical abuse (the head beating and the body slamming), the Court finds that LiSanti used excessive force that did violate Preschooler II's constitutional rights under the Fourth Amendment, and was unreasonable in light of the child's age and disability and in this context. However, the latter two counts (walking on asphalt without shoes and unexplained bruising) do not rise to the level of a constitutional violation. LiSanti is not eligible for qualified immunity because she knowingly violated the law with regard to the first two counts.

The court also denied the other school district personnel qualified immunity. The court has held that a person violates the constitutional right of another "if he does an affirmative act, participates in another's affirmative act, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made." *Id*. at 1183. School personnel committed an act of omission in failing to remove Preschooler II from the harm posed by LiSanti's conduct. As such, the school personnel are liable for the violation of Preschooler II's constitutional rights. Therefore, this court affirmed in part (on the denied claim for qualified immunity for the first two abuse claims), and reversed and remanded in part (with regard to the latter two abuse claims).