

**CONSTITUTIONAL RIGHTS
OF CHILDREN**

Presented by

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**ASSERTING CONSTITUTIONAL RIGHTS OF
CHILDREN IN CHILD WELFARE
PROCEEDINGS**

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I. INTRODUCTION

The United States Supreme Court has long recognized that the United States Constitution protects children. “Whatever may be their precise impact, neither the Fourteenth Amendment, nor the Bill of Rights, is for adults alone.” *In re Gault*, 387 U.S. 1, 13 (1967). Furthermore, “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.” *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976).

This paper focuses on the rights of children under the U.S. Constitution that can most readily impact obtaining needed relief and services for them in child protection cases. The rights discussed, of course, must be considered in the context of the state’s compelling interest in protecting children. Although children have constitutional rights in several other contexts, such as juvenile delinquency cases, free speech, and the right of privacy, including the right to an abortion, those areas are beyond the scope of this paper, as is the child’s right to counsel in a child welfare proceeding. This paper also does not address issues regarding litigation of violations of constitutional rights, such as proper parties, qualified immunity, or the standard of liability.

By addressing the nature of the rights and case law supporting the assertion of children’s constitutional rights, the authors seek not only to heighten awareness of the importance of safeguarding these rights, but also to promote their use in individual day-to-day child welfare proceedings. The cases cited also can be used in legislative advocacy to ensure that all aspects of the child protection system in each state are funded sufficiently to fully protect the rights of the children in state care. By this paper we do not seek to promote law

suits against state child welfare agencies, but rather to encourage judges and attorneys to give the utmost consideration to protecting children's constitutional rights throughout all stages of a child's involvement in the child welfare system, including post-disposition of the initial child abuse case for those children who remain in the custody of the state.

II. RIGHTS OF FOSTER CHILDREN TO PROTECTION AND PROPER CARE

Overview

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty or property, without due process of law." The Due Process Clause has a procedural and a substantive component. The procedural component relates to ensuring that fair process is employed when the state seeks to deprive a person of life, liberty, or property. The substantive component "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U. S. 702, 720 (1997).

Based upon the substantive component of the Due Process Clause, every federal circuit court has determined that children involved in state child welfare systems have a constitutionally protected right to be protected and properly cared for when the state has exercised the requisite degree of control over them to impact their liberty interests. As will be discussed, although the U.S. Supreme Court has intimated that such a right exists for children, it has not addressed this question directly to date. The circuit courts have expressed the basis for this constitutional right in various ways. Broadly put, however, they have found that children "in the system" have a right to protection and proper care that reaches a constitutional imperative. Child advocates can draw upon this right to articulate more precise definitions of what protection and care is constitutionally mandated, such as the right to be protected from abuse, neglect, or other maltreatment in foster and other placements, the right not to deteriorate while in state custody,

the right to adequate food, clothing, and shelter, and the right to adequate medical services. This portion of the paper discusses case law that supports an advocate's position that a constitutional right to proper protection and care for children in the child welfare system exists and how that authority can be utilized to support more specific relief that the advocate's child client needs.

Discussion of Case Law

The U.S. Supreme Court has not yet addressed the issue of whether a state has an affirmative duty to protect a foster child in its custody. In *DeShaney v. Winnebago Cty. Dept. of Social Servs.*, 489 U.S. 189 (1989), the Supreme Court held that the substantive component of the Fourteenth Amendment's Due Process Clause does not require a state to protect the life, liberty, or property of a child (or any citizen) against invasion by *private actors*. 489 U.S. at 194-95. Nonetheless, *DeShaney* stands as a basis for many lower court holdings that the Due Process Clause creates a duty to protect children in the state's care.

In *DeShaney*, the child, Joshua DeShaney, was severely beaten by his father after numerous complaints to the child welfare agency (DSS) that he was being physically abused. *Id.* at 192-93. At one point, DSS had even temporarily removed Joshua from his father's custody but later returned him. *Id.* Despite the agency's notice and awareness of the potential abuse, the Supreme Court concluded that the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means." *Id.* at 195.

Thus, the Court concluded that since Joshua was beaten while in the custody of his father, the state did not have an affirmative duty to protect him. Nonetheless, the Court acknowledged:

[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the “deprivation of liberty” triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. at 199-200.

The Court left open the question of what the state's duty would have been if Joshua had been in its custody:

Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. Indeed, several Courts of Appeals have held . . . that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents. [citations omitted]. We express no view on the validity of this analogy, however, as it is not before us in the present case.”

Id. at 201 n. 9.

However, both pre- and post- *DeShaney*, numerous federal circuit courts have held that once a state takes a child into its custody, the state has an affirmative duty to guard the child's constitutional right to protection and proper care. The earliest circuit court case on this issue is *Doe v. New York City Dept. of Social Servs.*, 649 F.2d 134 (2d Cir. 1981), after remand, 709 F.2d 782, *cert. denied sub nom., Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983). In *Doe*, the Second Circuit decided that a child in state custody has a constitutional right not to be abused in a foster care setting. *Id.* at 141. The child, Anna Doe, testified in the lower court

that she had been regularly and frequently beaten and sexually abused by her foster father. She claimed that the New York City Department of Social Services and the child-placing agency overseeing her foster home were responsible for her injuries because they had failed to investigate her circumstances even after repeated incidents should have alerted them to the abuse. The lower court entered judgment based on the jury's finding of no liability, but the Second Circuit reversed based on erroneous jury instructions and evidentiary rulings and remanded the case. The Second Circuit stated, "Government officials may be held liable...for a failure to do what is required as well as for overt activity which is unlawful and harmful." *Id.* The court ruled that "[d]efendants may be held liable...if they...exhibited deliberate indifference to a known injury, a known risk, or a specific duty, and their failure to perform the duty or act to ameliorate the risk or injury was a proximate cause of plaintiff's deprivation of rights under the Constitution." *Id.* at 145.

Similarly, the Eleventh Circuit has held "that a child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution" that the foster child is entitled to protection under the Fourteenth Amendment. *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc). *cert. denied*, 489 U.S. 1065 (1989). In *Taylor*, a two-year-old child had been placed in a foster home where she was so severely physically abused by her foster mother that she remained in a comatose state. The Eleventh Circuit explained that "[t]he liberty interests in this case are the right to be free from the infliction of unnecessary pain, as that interest is protected by the *fifth* and *fourteenth amendments*, and the fundamental right to physical safety as protected by the *fourteenth amendment*." *Id.* at 794. The court further expounded:

[I]f foster parents with whom the state places a child injure the child, and that injury results from state action or inaction, a balancing of interests may show a deprivation of

liberty.... In this case, the child's physical safety was a primary objective in placing the child in the foster home. The state's action in assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the state to insure the continuing safety in that environment. The state's failure to meet that obligation, as evidenced by the child's injuries, in the absence of overriding societal interests, constituted a deprivation of liberty under the *fourteenth amendment*.

Id. at 795.

The court distinguished harm in a foster home from corporal punishment in the public schools by explaining:

In the foster home setting, recent events lead us to believe that the risk of harm to children is high. We believe the risk of harm is great enough to bring foster children under the umbrella of protection afforded by the *fourteenth amendment*. Children in foster homes, unlike children in public schools, are isolated; no persons outside the home setting are present to witness and report mistreatment. The children are helpless. Without the investigation, supervision, and constant contact required by statute, a child placed in a foster home is at the mercy of the foster parents.... With contemporary society's outrage at the exposure of defenseless children to gross mistreatment and abuse, it is time that the law gives to these defenseless children at least the same protection afforded adults who are imprisoned as a result of their own misdeeds.

Id. at 797.

Likewise, the Seventh Circuit in *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990), found that a foster child has a constitutional "right not to be placed with a foster parent who the state's caseworkers and supervisors know or suspect is likely to abuse or neglect the foster child." *Id.* at 853. In this case, the state had placed the plaintiff in a series of foster homes and had failed "to take steps to prevent the child from deteriorating physically or psychologically as a result of either mistreatment by one or more sets of foster parents or the frequency with which the child is moved about within the foster-home system or, as in this case, both." *Id.* at 851. The court further stated that it should have been obvious that a state could not avoid its responsibilities "merely by delegating custodial responsibility to irresponsible private persons...." *Id.*

Additionally, in *Yvonne L. v. New Mexico Dept. of Human Servs.*, 959 F.2d 883 (10th Cir. 1992), the Tenth Circuit held that foster children have “a clearly established right to protection while in foster care.” *Id.* at 892-93. In this case, children in the legal custody of the state were placed in a private foster care facility that was not properly monitored, so they suffered repeated physical and sexual abuse while living there. The court found that the children had a constitutional right to be reasonably safe from harm while in the custody of the state.

The Eighth Circuit has also concluded that children who are placed in a foster home by the state have the right to state-provided medical care, protection, and supervision. In *Norfleet v. Arkansas Dept. of Human Servs.*, 989 F.2d 289 (8th Cir. 1993), a child suffered an asthma attack while in the care of his babysitter, who took the child to a hospital, where the babysitter was arrested for an undisclosed reason. The child was released into the custody of the child welfare agency, which placed the child in a foster home. The child suffered breathing problems and was told by the foster parent to return to bed. The child was later taken to a hospital and pronounced dead. The Eighth Circuit found a special custodial relationship between the state and the child because the state had taken him from his caregiver and placed him in foster care. The court held that due to the nature of this relationship, the state had an obligation to provide the child with adequate medical care, protection, and supervision. *Id.* at 293.

In *Henry A. v. Willden*, the child-plaintiffs adequately stated a claim for relief based on their “right to be free from harm while involuntarily in government custody and their right to medical care, treatment, and services.” *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2012). The Ninth Circuit decided that the plaintiffs had stated enough to allege a violation of their constitutional rights when several plaintiffs had medical complications after mistakes or delay

by the county. *Id.* at 997. For example, one child had ten treatment providers while in care and, as a result, his medical records were not transferred properly, which resulted in being hospitalized after receiving the wrong medications and then being hospitalized for the same problem shortly after release. *Id.* Another example in the complaint was that the county delayed in approving necessary surgery to cure a child's impacted colon. *Id.* The child suffered several months of pain before the doctor could declare it an emergency surgery and proceed without the county's consent. *Id.* The last medical treatment allegation was that a foster family did not receive the proper documentation from the county to be authorized to fill prescriptions for the foster child just released from a psychiatric facility, which forced the child to go through withdrawal symptoms. *Id.* Because of these allegations, the court found that the plaintiffs had sufficiently alleged a violation of the children's constitutional substantive due process rights. In doing so, the court stated, "[T]here is no question that a foster child's right to the basic needs identified in *DeShaney* – food, clothing, shelter, medical care, and reasonable safety – was clearly established 'at the time of the challenged conduct.'" *Id.* at 1000-01 (internal citation omitted).

In *Braam v. State*, 81 P.3d 851 (Wash. 2003), the Washington Supreme Court cited over twenty years of precedent affirming that foster children possess substantive due process rights under the U.S. Constitution. The court held that "foster children have a constitutional substantive due process right to be free from unreasonable risks of harm and a right to reasonable safety. To be reasonably safe, the State, as custodian and caretaker of foster children, must provide conditions free of unreasonable risk of danger, harm, or pain, and must include adequate services to meet the basic needs of the child." *Id.* at 856-57.

The Fifth Circuit has acknowledged that a state creates a “special relationship” when it removes children “from their natural homes and place[s] them under state supervision. At that time, [the state] assume[s] the responsibility to provide constitutionally adequate care for these children.” *Griffith v. Johnston*, 899 F.2d 1427, 1437 (5th Cir. 1990). Although the court did not find a potential violation of the children’s constitutional rights under the claims in this case, the court did acknowledge the existence of those rights.

In a subsequent case, the Fifth Circuit recognized a foster child’s substantive due process right to “personal security and reasonably safe living conditions.” *Hernandez ex rel. Hernandez v. Texas Dept. of Protective & Regulatory Services*, 380 F.3d 872, 880 (5th Cir. 2004). The question raised in this case was whether the implicated Child Protective Services workers were entitled to qualified immunity after placing a child in a foster home that had multiple prior allegations of abuse and reports of poor living conditions. *See id.* at 876-78. Even though the court ultimately found that qualified immunity applied because the conduct did not amount to “deliberate indifference,” the court pointed out that the right was established from the “special relationship” between the foster child and the state. *Id.* at 878, 880, 886.

Finally, it is important to note that the circuit courts have articulated a perspective on *DeShaney* and how it impacts a foster child’s constitutional right to proper care that does not necessarily turn on the state’s exercising a restraint on the child’s liberty by taking the child into custody. Instead, all the circuit courts have also recognized an “exception to *DeShaney* for ‘state-created dangers.’” *Jasinski v. Tyler*, 729 F.3d 531, 538 (6th Cir. 2013). In doing so, they point to the *DeShaney* Court’s comment: “While the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creation, nor did it do anything to*

render him any more vulnerable to them.” Id. at 201. Extrapolating from this statement, the Sixth Circuit articulated this exception as follows:

[A] plaintiff may bring a substantive due process claim by establishing (1) an affirmative act by the State that either created or increased the risk that the plaintiff would be exposed to private acts of violence; (2) a special danger to the plaintiff created by state action, as distinguished from a risk that affects the public at large; and (3) the requisite state culpability to establish a substantive due process violation.

Id. at 538-39. Accordingly, where a state can be shown to have created the danger – even apart from taking the child into its custody -- the child’s substantive due process right to proper protection and care may also arise. *See also Butera v. District of Columbia*, 235 F.3d 637, 648-49 (D.C. Cir. 2001) (“All circuit courts of appeals . . . have by now relied on this passage in *DeShaney* to acknowledge that there may be possible constitutional liability . . . where the state creates a dangerous situation or renders citizens more vulnerable to danger.”)(internal quotation marks omitted).

Practical Application

Often times, when a child’s attorney is seeking treatments or evaluations that are not on the “laundry list” of the state’s child welfare agency services, she will be met with resistance. Policy, practice, and/or funding may be cited by even the best intentioned child welfare agency when the advocate pursues these “off menu” services. Indeed, well-meaning caseworkers (and their counsel) may have their hands tied by the policies and bureaucracy of their agency. On these occasions, the child’s constitutional right to adequate care once in the custody of the state can provide the child’s attorney with a powerful argument for why the court should order the services that are needed.

Likewise, the child’s constitutional right to adequate care can be raised when advocating that the child’s mental health services must be provided by an appropriately trained,

trauma-informed professional who uses trauma-informed treatment modalities. The lack of an adequate pool of trained professionals is frequently cited as the reason for failure to provide one, but raising the constitutional argument can put pressure on the system to develop the necessary pool of trained professionals and can give state legislatures an incentive to require that only appropriately trained mental health professionals treat traumatized children.

Similarly, a caseworker may be following policy and local practice when placing a child with a relative or other placement. If the child's attorney is convinced that the placement is not safe – even if it technically complies with the list of checks and balances that an agency utilizes to assess a placement – raising this constitutional argument can provide more force to the argument to obtain the relief the advocate wants for his client.

In the previously described cases and others following them, the courts have interpreted a child's constitutional right to protection and proper care to include:

- The right not to be abused in a foster care setting
- The right to be free from infliction of unnecessary pain
- The right to physical safety
- The right not to be placed with a foster parent likely to abuse or neglect the child
- The right to have the state take steps to prevent the child from deteriorating physically or psychologically as a result of maltreatment or the frequency of placement changes
- The right to be reasonably safe from harm
- The right to adequate food, clothing, shelter, medical care, treatment, services, protection, and supervision
- The right to reasonable security and reasonably safe living conditions.

- The right to be free from state action that creates or increases the risk of exposure to private acts of violence
- The right to be free from state action that creates a special danger

If the advocate's child client's care is being compromised in any of the foregoing ways, asserting this constitutional right when asking the court for needed protections, evaluations, treatment, and services for the child can be very persuasive. Making the court aware that a child's needs have constitutional ramifications can increase the likelihood that the child's needs will be met.

III. THE RIGHT TO MAINTAIN FAMILY RELATIONSHIPS

Overview

Federal law, state law, and the policies and practices of child welfare agencies generally recognize that family relationships should be maintained, as doing so is more often than not in the best interests of the child. But the right for a child to maintain family relationships when the child welfare system has intervened in his or her life can also be argued to have constitutional dimensions based on the Fourteenth Amendment's Due Process Clause and the First Amendment's Freedom of Association Clause.

Discussion of Case Law

A long line of U.S. Supreme Court authority recognizes the fundamental liberty interest of parents in the care, custody, companionship, and control of their children and that the relationship between parent and child is constitutionally protected. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). However, the U.S. Supreme Court has not specifically addressed a *child's* constitutional right to maintain family relationships. Indeed, in *Michael H. v. Gerald D.*, 491

U.S. 110 (1989), the high Court stated, “We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship.” 491 U.S. at 130.

Justice Stevens, however, commented on a child’s constitutional right to maintain family relationships in his dissenting opinion in *Troxel v. Granville*, 530 U.S. 57 (2000), a case in which grandparents who, relying on a Washington state statute that permitted any person to seek child visitation, sought visitation with their grandchildren born out of wedlock. In the course of his dissent, Justice Stevens observed and opined:

While this Court has not yet had occasion to elucidate the nature of a child’s liberty interests in preserving established familial or family-like bonds, [citation omitted] it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this court reject any suggestion that when it comes to parental rights, children are so much chattel.

530 U.S. at 71.

In *Smith v. Org. of Foster Families for Equality and Reform, et al.*, 431 U.S. 816 (1977), the appellees, individual foster parents and a foster parent organization, argued that once a foster child has lived in a foster home for a year or more, a psychological bond is formed between the child and foster parents which makes the foster family the true “psychological family” of the child. The appellees further argued that this “psychological family” has a liberty interest, under the Fourteenth Amendment, in its survival as a family. Although the Court found it unnecessary to decide whether foster parents have a constitutionally protected right to familial privacy in the integrity of their family unit, it noted, “There can be, of course, no doubt of appellees’ standing to assert this interest, which, to whatever extent it exists, belongs to the foster parents *as much as to the foster children.*” 431 U.S. at 842 (emphasis added).

In *Franz, et al., v. U.S.*, 707 F.2d 582 (D.C. Cir. 1983), a father brought suit individually and as next friend of his children, against the administrators of a witness protection program alleging, among other things, that the defendants abrogated their constitutionally protected rights to one another's companionship. The Circuit Court for the District of Columbia held that children, along with parents, have a reciprocal right to maintain the companionship of the parent-child relationship. The court stated that a parent and child's "stake in one another's companionship must be deemed a 'fundamental liberty interest,'" such that the state must have a "very good" reason for abrogating it. *Id.* at 603. Moreover, in this case where permanent termination of the bond was contemplated, the state needed a "compelling reason" to interfere with it. *Id.*

In *Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982), the Second Circuit also described a child's interest in preserving his/her relationship with *extended* family as a liberty interest entitled to protection under the Fourteenth Amendment. At issue in this case was whether an adult half-sibling, who was also the foster parent of her half-brother and half-sister, had procedural due process rights under the Fourteenth Amendment when the children were removed from her care. Plaintiff Rivera, who had cared for her half-siblings even prior to the state's involvement, became the foster parent of her half-siblings (the Ross children) when their mother was institutionalized due to a deteriorating mental condition. After Rivera had cared for the children for six years, the state decided to remove the children without explanation. Rivera was not permitted to communicate with her half-siblings, nor was she informed of the identity or location of the new foster parents. In discussing several U.S. Supreme Court cases, which had affirmed that "family life" is one of the liberty interests protected by the due process clause of the Fourteenth Amendment, the Second Circuit noted that although there had

been some disagreement over what constitutes a “family”, the parent-child relationship was at the “core of the constitutional notion of ‘family.’” *Id.* at 1022. The court further noted that when the Supreme Court had extended due process protection to persons not specifically fitting the parent-child mold, it had “focused principally on the biological relationship between the parties....” *Id.* Consequently, the court held that:

In these circumstances, we find that Mrs. Rivera possesses an important liberty interest in preserving the integrity and stability of her family. We believe that custodial relatives like Mrs. Rivera are entitled to due process protections when the state decides to remove a dependent relative from the family environment.

Id. at 1024-25. The court then went on to comment about the *children’s* constitutional rights, saying:

The liberty interests at stake in this action are rendered more compelling given the important interests that the Ross children maintain in preserving the integrity and stability of their extended family. The courts have long recognized that children possess certain liberty rights and are entitled to due process protection of these rights.... The Ross children surely possess a liberty interest in maintaining, free from arbitrary state interference, the family environment that they have known since birth.... If the liberty interest of children is to be firmly recognized in the law, we must ensure that due process is afforded in situations like that presented here where the state seeks to terminate a child’s long-standing familial relationship.

Id. at 1026.

Practical Application

A child’s interest in maintaining family relationships is often an issue in child protection cases. This constitutional right is implicated by visitations scheduled between the child and parents or other close family members. Although important for children of all ages, adequate visitation time to promote bonding is critically important for children who are 0-3 years old. The constitutional argument may provide more force to overcome claims of inadequate funding to facilitate lengthier visits or to challenge cookie-cutter length of visitation policies.

The right also might be argued to support a request for family therapy. Not only does such therapy have the potential to help the participants individually, it can be critical in maintaining a child's relationship with family.

This right is also implicated by the diligence used by the state agency in searching for family members to locate appropriate relative placements that will enable the child to maintain this important interest. The right may also be argued to extend to fictive kin – and the ability to continue relationships with the various important people in a child's life. Similarly, this right is closely related to the child's interest in sibling access, as discussed more specifically below.

IV. THE RIGHT TO SIBLING ACCESS

Overview

Psychologists and other child welfare professionals recognize the importance of a foster child's need to have regular access to the child's other siblings. This is ideally achieved by placing siblings together with a foster family or relative placement. Joint placement, however, is not always possible. In those instances, access through visits, telephone, Skype, and other such means are other alternatives. In addition to the substantive due process analysis discussed generally with respect to maintaining family relationships, the right to sibling access can also be viewed under the lens of the First Amendment, which guarantees citizens – even child citizens - the right to “freedom of association.”

Discussion of Case Law

As with the other issues discussed in this paper, the U.S. Supreme Court has not yet addressed whether minor siblings have a constitutional right to maintain contact with each other once they are placed in foster care by the state. At least one federal district court,

however, has concluded that children in foster care have a constitutional right to maintain their relationships with their siblings through reasonable contact under both the associational freedoms of the First Amendment and the substantive due process protections of the Fourteenth Amendment.

In *Aristotle P. v. Johnson*, 721 F.Supp. 1002 (N.D. Ill. 1989), seven foster children ranging in age from one to eighteen, who were under guardianship of the Illinois Department of Children and Family Services (DCFS), brought a class action suit against the Director of DCFS and the Guardianship Administrator, challenging the defendants' practices of placing siblings in separate foster homes or residential facilities and denying them the opportunity to visit their sisters and brothers who were placed elsewhere. In denying the defendants' motion to dismiss the foster children's constitutional claims, the court analyzed the rights at issue.

As to the plaintiffs' claims under the First Amendment, the court agreed that the "practice of placing siblings in separate placements and then failing to provide visits among siblings on a reasonable basis violates their right to freedom of association under the *First Amendment*...." 721 F.Supp. at 1005. Quoting the U.S. Supreme Court's decision in *Robert v. U.S. Jaycees*, 468 U.S. 609 (1984), the court explained that under the First Amendment:

Freedom of association...protects "choices to enter into and maintain certain intimate human relationships...against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." The relationship between two family members is the paradigm of such intimate human relationships. "In this respect, freedom of association receives protections of a fundamental element of personal liberty."

Aristotle P., 721 F. Supp. at 1005 (internal citations omitted). Thus, the court held that "the children's relationships with their siblings are the sort of 'intimate human relationships' that are afforded 'a substantial measure of sanctuary from unjustified interference by the State.'" *Id.* The court found it particularly compelling that foster children's "relationships with their siblings

are even more important because their relationships with their biological parents are often tenuous or non-existent.” *Id.* at 1006.

The court also agreed that the foster children’s relationships with their siblings were a protected liberty interest under the substantive due process clause of the Fourteenth Amendment. Citing *Moore v. East Cleveland*, 431 U.S. 494 (1977), the court determined that “the *Fourteenth Amendment* embraces a right to associate with one’s relatives.” 721 F.Supp. at 1007. In *Moore*, the U.S. Supreme Court noted that “the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.” 431 U.S. at 503. In *Aristotle P.*, the court noted that the defendants’ policies resulted in the physical separation of the plaintiffs and their siblings for extended periods of time. In some instances, the foster children were unable to maintain any relationship at all with their siblings, and in others, the children never got to know their siblings who had been taken into the state’s custody as infants. The court concluded, “Thus, the defendants’ policies have seriously damaged, if not severed, the relationships between the plaintiffs and their siblings.... [T]he plaintiffs have sufficiently alleged the existence of a policy which deprives their liberty interests in their sibling relationships....” 721 F.Supp. at 1008.

The court further based its decision on the fact that the children were involuntarily taken into the state’s custody. The court reviewed the line of cases which have held that once having taken children into its custody, a state owes those children an affirmative duty to assume some responsibility for their safety and general well-being. The court found that “the plaintiffs have a substantive due process right under the *Fourteenth Amendment* to be free from unreasonable and unnecessary intrusions upon their physical and emotional well-being, while directly or indirectly in state custody, and to be provided by the state with adequate food, shelter, clothing and

medical care....” [citation omitted]. *Id.* at 1009. The court held that the plaintiffs had stated a claim for violation of their substantive due process rights by “alleging that the defendants, with deliberate indifference, pursued policies which caused them injuries by impairing their relationships with their siblings.” *Id.* at 1010. Significantly, the court noted, “The fact that the plaintiffs’ injuries are psychological rather than physical is of no moment.... ‘[T]he protections of the Due Process Clause against arbitrary intrusions on personal security include both physical and emotional well-being.’” *Id.*, citing *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979).

Practical Application

If a foster child’s attorney seeks visitation for the child with siblings, and the child protection agency is uncooperative, she should seek relief from the court. If the court denies the request or provides inadequate relief, the attorney should consider whether some form of appellate review or other legal action would be appropriate in order to establish that the child has a constitutional right to preserve the integrity and stability of his/her family. Additionally, confirming the existence of this constitutional right would give state legislatures a greater incentive to make sure that state child welfare agencies have the funding they need to be able to facilitate sibling visits and contact to ensure that foster children are able to maintain their very important relationships with their siblings.

V. THE RIGHT TO BODILY INTEGRITY

Overview

The right to bodily integrity is another constitutionally protected right emanating from the substantive due process clause of the Fourteenth Amendment. However, this is a right possessed by all children, not just those in the custody of the state, although, of course, some state action would be required to base a claim upon this right. One of the authors of this paper has asserted

this right in a number of contexts to obtain benefits or relief for her clients and some of those instances will be discussed below.

Discussion of Case Law

All children have a constitutional right to their bodily integrity. In *Doe v. Taylor I.S.D.*, 15 F.3d 443 (5th Cir. 1994) (en banc), cert. denied, *Lankford v. Doe*, 513 U.S. 816 (1994), plaintiff Jane Doe had been sexually abused by her high school teacher. The Fifth Circuit held, “[S]chool children do have a liberty interest in their bodily integrity that is protected by the *Due Process Clause of the Fourteenth Amendment* and... physical sexual abuse by a school employee violates that right.” 15 F.3d 443 at 445. The right to bodily integrity does not only refer to intrusions on such integrity due to sexual abuse. For instance, in *Jefferson v. Ysleta I.S.D.*, 817 F.2d 303 (5th Cir. 1987), a teacher had lashed a second grade student to a chair for the majority of two school days. The court found that this conduct violated the child’s substantive due process “right to be free of state-occasioned damage to [her] bodily integrity.” 817 F.2d at 305 [citation omitted].

A majority of circuits, including the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth recognize a child’s constitutional right of bodily integrity. See *United States v. Giordano*, 442 F.3d 30 (2d Cir. 2006); *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607 (8th Cir. 1999); *Plumeau v. Sch. Dist. #40*, 130 F.3d 432 (9th Cir. 1997); *Doe v. Claiborne*, 103 F.3d 495 (6th Cir. 1996); *Abeyta v. Chama Valley I.S.D.*, 77 F.3d 1253 (10th Cir. 1996); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1988); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980). Two of the remaining circuits, the First and the Eleventh, have recognized a child’s liberty interest in his or her bodily integrity within their district courts. See, e.g., *Hackett v. Fulton County Sch. Dist.*, 238 F. Supp. 2d 1330 (N.D. Ga. 2002); *Hinkley v.*

Baker, 122 F. Supp. 2d 48 (U.S. Dist. Me. 2000). Arguably, bodily integrity includes the integrity of the mind and protects a child from psychological injury as well.

Practical Application

The right to bodily integrity gives children a right to physical safety in circumstances beyond the foster care setting. Accordingly, children's attorneys can assert this right to protect children from dangers beyond the foster home, provided there is a basis to assert that the conduct at issue constitutes an action of the state.

As noted, one of the authors has asserted the right to bodily integrity in several contexts. In *Bucher v. Richardson Hospital Authority*, 160 F.R.D. 88 (N.D. Tex. 1994), the author filed a motion to quash the deposition of a 15-year-old girl who had been sexually abused by a teacher in a hospital's adolescent psychiatric unit. The motion was premised on the argument that the teenager's constitutional right to her bodily integrity would be violated if she were subjected to the physical and psychological harm that was likely to result from a deposition, especially if certain procedural safeguards were not in place. The federal magistrate granted almost every safeguard requested, including that the deposition be time limited, that the opposing counsel could not ask any questions implying doubt regarding the veracity of the witness, and that the attorneys for the defendant would question the witness outside her presence via closed circuit television. Although the magistrate chose not to address the constitutional issue, the assertion of the teen's constitutional right heightened the magistrate's concern about the need to be sure that the teenager's psychological well-being was protected during the deposition process.

Additionally, in *Doe v. Eason, et al.*, 1999 U.S. Dist. LEXIS 22292 (N.D. Tex. Aug. 4, 1999), the author represented a plaintiff who had sued anonymously to protect the identity of

her daughter, who had been sexually abused. The defendants filed a motion to require the plaintiff to sue under her actual name. In responding, the plaintiff argued that the psychological injury to the child that would result from public disclosure of her identity would violate her constitutional right to bodily integrity. Although the court did not address the constitutional claim, the judge took the issue of potential harm to the child very seriously and concluded that the case fell “within the narrow category of exceptional cases where the need for confidentiality outweighs the strong constitutional interest of openness of judicial proceeding.” 1999 U.S. Dist. LEXIS 23392 at 9.

VI. RIGHT TO NOT BE DISCRIMINATED AGAINST BASED ON RACE, RELIGION, SEX, SEXUAL ORIENTATION, OR GENDER IDENTITY

Overview

Child advocates can make arguments based on the Constitution when their child client’s right to not be discriminated against based on race, religion, sex, sexual orientation, or gender identity has been violated. Just as with adults, a child’s right to non-discrimination is grounded in the Due Process Clause, particularly substantive due process liberty interests. In addition, the right not to be discriminated against may be grounded in the Equal Protection Clause. It is worth noting that beyond constitutional arguments, in connection with issues raising the specter of discrimination, child advocates can also argue for relief based on state and local law violations encompassed in nondiscrimination statutes and policies.

Discussion of Case Law

Many of the cases previously discussed can be relied upon to support arguments for the constitutional right of children in the child welfare system not to be discriminated against based on race, religion, sex, sexual orientation, or gender identity. If a child is discriminated against or harassed based on race, religion, sex, sexual orientation, or gender identity, arguably her right to

protection and proper care has been violated. This is especially true if the discrimination or harassment resulted in mental or physical injury or damage at the hands of state actors or contracted foster parents responsible for the child's protection and care. An advocate can also argue that the right is encompassed under the right to bodily integrity to the extent that right includes the integrity of the mind and protects a child from psychological injury. Psychological injury most certainly can result from discrimination based on race, religion, sex, sexual orientation, or gender identity.

In *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003), a male child with Gender Identity Disorder (GID) was prohibited from dressing like a female at his foster care facility and the court found that GID was a "disability" within the meaning of New York's Human Rights Law, which, like federal disability discrimination statutes, requires covered entities to provide "reasonable accommodations" to persons with disabilities. Enforcement by New York City Administration for Children's Services (ACS) of the foster care facility's dress policy barring residents of the all-male foster care facility from wearing skirts or dresses violated the New York Human Rights Law by failing to make reasonable accommodations to the resident minor who suffered from GID. The resident needed to be able to wear feminine clothing as part of his treatment and to avoid psychological distress, and purported safety concerns behind the policy did not provide a rational basis for rejecting accommodation. Although this case was based on state, not federal law, a similar argument could be linked to the federal constitution and federal non-discrimination laws.

In *Connor B. ex rel. Vigurs v. Patrick*, six named plaintiffs representing all children who are now or will be in the foster care custody of Massachusetts Department of Children and Families (DCF) brought constitutional claims against the state. 771 F. Supp. 2d 142 (D. Mass. 2011). The complaint alleged a number of harms as a result of improper placements and treatment that violated the plaintiffs' substantive due process rights under the Fourteenth Amendment, their liberty interests, privacy interests, and associational rights under the First, Ninth, and Fourteenth Amendments, and their procedural due process rights under the Fourteenth Amendment. *Connor B.* complaint available at [http:// www.childrensrights.org/wp-content/uploads/2010/04/2010-04-15_ma_complaint_as_filed.pdf](http://www.childrensrights.org/wp-content/uploads/2010/04/2010-04-15_ma_complaint_as_filed.pdf).

The complaint alleged a variety of particular harms to the representative foster children. As part of those allegations, specific harm was alleged as a result of Massachusetts DCF placing a gay teen in a home intolerant of differences in sexual orientation. Although the court did not analyze this specific allegation, it did deny Massachusetts DCF's motion to dismiss as to the plaintiffs' substantive due process claim. *Connor B.*, 771 F. Supp. 2d at 150.

Practical Application

Legal advocates for children who are experiencing constitutionally prohibited discrimination in their placements should raise their constitutional rights to get the situation remedied. Even some forms of discrimination not yet prohibited by the constitution - such as LGBT status – could be addressed under substantive due process principles if the child's right to reasonable care and protection is implicated by the discriminatory treatment. Also, of course, state constitutions or human rights provisions may provide additional protections for youth. For example, based on such provisions, Massachusetts and New York courts have held that a youth has a right to dress in gender non-conforming clothes. *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Dist. Ct. Oct. 11, 2000) (allowing a transgender girl to wear girl's clothing in high school based on the plaintiff's likelihood of success on her claims under Mass. Gen. Laws Ch. 76, § 5 and Article I and XIV of the Massachusetts Declaration of Rights, reasoning that “since plaintiff identifies with the female gender, the right question is whether a female student would be disciplined for wearing items of clothes plaintiff chooses to wear.”) *aff'd sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000; *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003) (allowing gender non-conforming dress in foster care facilities because refusing to reasonably accommodate the plaintiff's Gender Identity Disorder was a violation of the New York State Human Rights Law).

VII. USING ONLINE RESOURCES AND COLLABORATION TO HELP PROTECT CHILDREN'S CONSTITUTIONAL RIGHTS

A single impassioned individual or a small group can begin a movement to share information, expertise, and resources on a statewide basis through the internet to assist judges, attorneys, and other advocates in their efforts to protect abused and neglected children from additional harm by safeguarding their constitutional rights. Online resources and collaboration can help fill gaps too often caused by lack of funding. A gold mine that already exists in every state is the expertise of seasoned practitioners who have acquired the knowledge and skills necessary to serve abused and neglected children in the court system very well. There is a way to capture that expertise and share it with others across the state. Five states are using an innovative online system that was created to do that and more.

Texas Lawyers for Children (TLC) created and operates a unique, interactive Online Legal Resource and Communication Center (Online Center), for judges and attorneys (and other advocates) handling children's court cases, and TLC has replicated the Online Center for California, Florida, Alabama, and Maryland. Each Online Center is a state-specific, one-stop source of critical and cutting-edge legal, medical, and psychosocial resource materials in an easily searchable database. The Online Center also contains innovative communication tools enabling judges, attorneys, and other professionals to discuss novel solutions, share expertise with their respective colleagues, and mentor those with less experience. Additionally, the Online Center provides opportunities for pro bono involvement, as well as access to video-recorded training programs. The Online Center fosters development of a collaborative community that paves the way for change and facilitates system reform by sharing best practice information and innovative ideas. This multifaceted approach builds a brain trust that equips the judges,

attorneys, and other advocates within a state to fully address the legal needs of children and ensure protection of their constitutional rights. See Appendix A for more details.

VIII. CONCLUSION

Much more than children's constitutional rights are at stake in child protection cases. Every aspect of a child's life and future is impacted by his/her attorney's advocacy and the judge's decisions. If judges and attorneys focus more attention on safeguarding children's constitutional rights, they have another means to help ensure that the best outcome for the child can be achieved in each case, and the child welfare system in this country can be improved one case at a time.