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## **SECTION 11 SPECIAL ISSUES**

### **SERVICES FOR FOREIGN BORN CHILDREN**

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If a child in foster care was born outside the U.S., several legal issues may need to be addressed. While the majority of foster children are U.S. citizens, failure to identify those who are not can seriously undermine permanency efforts. The best approach is to always find out where a child was born. If a child was born outside the U.S., be alert to the possibility that additional legal work may be necessary.

#### **What issues may arise if a child was born outside the U.S.?**

- Notice to the foreign consul may be required under the Vienna Convention on Consular Relations.
- An undocumented child may be eligible for Special Immigrant Juvenile Status, which provides a basis for obtaining Permanent Resident status.
- A child or youth with Permanent Resident status may be eligible for U.S. citizenship.
- A child born overseas to a U.S. citizen or adopted by a U.S. citizen may be entitled to U.S citizenship.
- Repatriation or placement with a parent or relative in the child's home country may be an option.

#### **What resources does DFPS have for meeting the needs of foreign born children and youth?**

Child Protective Services has three Citizenship & Immigration Specialists and each has responsibility for one third of the state. One DFPS attorney in each region is also designated to handle citizenship and immigration issues and these attorneys consult with private immigration specialists as needed. In some areas of the state, judges also appoint private immigration attorneys to represent children in foster care.

Useful forms and reference materials available in the Practice Guide, SECTION 13, TOOLS, Citizenship & Immigration, include:

DFPS Contacts for Citizenship & Immigration  
FAQ's for Foreign Born Children  
Notice to Foreign Consul  
Mexican Consulates in Texas

## **Why is it important to identify a child's immigration status or citizenship as quickly as possible?**

Access to government benefits, the ability to work legally and to remain permanently in the U.S. all hinge on a child's citizenship and immigration status. Consequently, the sooner any citizenship and immigration issues are resolved, the easier a child or youth will be able to navigate the normal steps to permanency.

## **How is a child or youth's citizenship or immigration status determined?**

DFPS uses a step-by-step "sifting" process to cull out the children with easily identified U.S. citizenship, permanent resident or other qualified alien status. All remaining children fall into a default category: Undetermined Status, designed to spotlight those cases most needing attention. Many of the children with Undetermined Status are undocumented, but not all. Some children have unusual documents that require additional research, others are U.S. citizens but have no documents beyond a foreign birth certificate.

### **Step One: U.S. citizen**

A child with a U.S. birth certificate, naturalization or citizenship certificate, or a U.S. passport is a U.S. citizen. The list of possible documents to prove citizenship is long, but these four options cover the vast majority of U.S. citizens.

### **Step Two: Lawful permanent resident**

A child with a permanent resident card (I-551 or "green card") is a permanent resident. A lawful permanent resident (LPR) can work legally, qualify for some government benefits and in general, barring commission of a serious criminal offense, cannot be removed (deported) from the U.S. At age 18, if a youth has been a permanent resident for five years and is otherwise eligible, a youth who desires to become a U.S. citizen can apply for naturalization.

### **Step Three: Other Qualified Alien**

“Qualified alien” is a welfare reform term that refers to foreign born persons admitted to the U.S. who are eligible for certain government benefits.<sup>1</sup> Lawful permanent residents are one type of qualified alien, but the "Other Qualified Alien" category used by DFPS consists of those qualified aliens *without* permanent resident status. The most common children in this (very small) category are refugees, but persons granted asylum or withholding of deportation, and

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<sup>1</sup> 8 U.S.C. §1611;1641.

Cuban or Haitian entrants (among others) are also included.<sup>2</sup> The important feature of this category is that these children do not have permanent resident status. The primary task for a child in this category is to make sure an application for permanent resident status is filed if a child or youth is eligible.

#### **Step Four: Undetermined Status**

All children who are not positively identified in the first three steps fall into this category. Most of these children will turn out to be undocumented, but some will be U.S. citizens or possibly permanent residents without documentation. The point is that every case in this category is flagged for immediate attention and ongoing monitoring.

#### **When is notice to the foreign consul necessary?**

When a child who is not a U.S. citizen comes into DFPS custody, the Vienna Convention on Consular Relations requires that notice be given to the foreign consul. Article 37 of the Vienna Convention on Consular Relations requires:

*If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty..... (b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments.*<sup>3</sup>

This duty applies regardless of the child's immigration status in the U.S., unless the child is a U.S. citizen. There is a form letter to use for consular notification, which can be sent by fax or certified mail.<sup>4</sup> The fax confirmation or mail receipt should be retained and submitted to the court to establish compliance with consular notification.

Giving notice to the consul does not confer substantive rights on the consul. In addition to fulfilling the legal obligation, however, giving notice often enables DFPS to tap into valuable resources in a child's home country. A consular office may be able to assist in obtaining birth records, locate family members or arrange for a home study in the home country.

#### **What is Special Immigrant Juvenile Status?**

The bulk of immigration work for foster children involves obtaining lawful permanent resident status by means of Special Immigrant Juvenile Status ("SIJS"). Every prospective immigrant

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<sup>2</sup> 8 U.S.C. §1641(b).

<sup>3</sup> Entered into force for the United States December 24, 1969; Art. 37, 21 U.S.T.77.

<sup>4</sup> For contact information for the consulates of Mexico in Texas as well as a link to the U.S. State Department website with contact information for other foreign consulates See Practice Guide, SECTION 13 TOOLS, Citizenship & Immigration, Consulates of Mexico in Texas.

must first qualify for a visa. The SIJS law permits eligible foster children to “self-petition” for a visa if a juvenile or family court makes the necessary findings (described below). One huge benefit afforded to SIJS petitioners is the ability to “adjust status,” or obtain permanent resident status without returning to the home country for an interview at the U.S. consulate. In addition, a number of the grounds of inadmissibility do not apply to SIJS petitioners and a discretionary waiver is available for other grounds.<sup>5</sup> The net effect is that SIJS offers an extraordinary opportunity for eligible children and youth.

## **What does the family court have to do with SIJS?**

Before a child can apply to the U.S. Citizenship & Immigration Services (“USCIS”) for SIJS, a Texas family court (or other court with jurisdiction over the custody and care of juveniles) must make three findings.<sup>6</sup>

### **Dependent/Custody**

The court must find that “the child has been declared a dependent of the court or has been placed by the court under the custody of a state agency or an individual or entity appointed by the court.” Every child in CPS foster care has been placed by the family court in the custody of the agency, so that this finding is typically not in question.

### **Reunification**

The court must also find that “reunification of the child with one or both parents is not viable as a result of abuse, neglect or abandonment (or a similar basis found under state law).” Without fail, a court has found every child in CPS foster care has also been abused, neglected or abandoned. The challenging question is whether reunification with one or both parents is not viable as a result of abuse, neglect or abandonment.

When the SIJS law was originally enacted in 1991, the law required that a court find a child was “eligible for long term foster care,” which was interpreted to mean that family reunification was not viable. Changes to the SIJS law made as part of the Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”) expanded the statute to permit SIJS where reunification with *one or both parents* is not viable.<sup>7</sup> With this change, SIJS is potentially available much earlier in a child protective services case, because if reunification with one parent is not viable, that is sufficient.

One common misunderstanding is that parental rights must be terminated or a final order granting permanent managing conservatorship entered in order for a court to make a finding that reunification is not viable. While either of those circumstances would support this finding, with sufficient evidence a family court can find family reunification is not viable as to a parent at any

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<sup>5</sup> 8 U.S.C. §1255(h).

<sup>6</sup> 8 U.S.C. §1101(a)(27)(J); See Practice Guide, SECTION 13, TOOLS, Citizenship & Immigration, SIJS Motion and Order.

<sup>7</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, , 110 P.L. 457, 122 Stat. 5044.

juncture in a Suit Affecting the Parent Child Relationship. If there are facts to suggest there is not a reasonable likelihood of reunification with at least one parent, SIJS should at least be considered for an undocumented child.

### **Best Interest**

The last of the findings the court must make is that it is not in the child's best interest to be returned to the parent or child's country of origin or last habitual residence.<sup>8</sup> If repatriation and placement with relatives in the home country is possible, that should be determined early in a case. Evidence of a lack of potential placement in the home country, a child's inability to speak the language, acculturation and ties in the U.S. , or special needs that cannot be met in the home country, can all support a best interest finding.

There is rarely controversy about a family court SIJS order, but it is sometimes important to lay the necessary groundwork if the court is not familiar with the SIJS process. A U.S. Citizenship & Immigration Service informational flyer designed for judges is useful for this purpose.<sup>9</sup> Perhaps the most significant point is that by signing a SIJS order, the family court order does not confer any immigration status. The family court order is a prerequisite to SIJS relief, but immigration authorities determine if SIJS or permanent resident status is granted. Everyone (including youths old enough to participate in the discussion) should also be aware that, unlike most immigrants, SIJS immigrants are barred from filing a visa petition for a parent in the future.<sup>10</sup> This is not usually a serious drawback for a child without other immigration options, but is something to be aware of.

### **Consent**

Eligibility for SIJS also requires one of two forms of statutory consent depending on whether a child or youth was in federal custody before entering foster care.<sup>11</sup>

#### **Prior federal custody**

If a child is already in actual or constructive federal custody, a fairly rare circumstance with the CPS population, the statute requires that the U.S. Secretary of Health and Human Services (HHS) consent to state court jurisdiction if a court seeks to alter the child's custody or placement.<sup>12</sup>

#### **Bona fide SIJS case**

In all other cases, consent is construed to be "an acknowledgement that the request for SIJ classification is bona fide," and is not requested primarily for the purpose of immigration relief,

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<sup>8</sup> 8 U.S.C. §1101(a)(27)(J).

<sup>9</sup> See Practice Guide, SECTION 11, TOOLS, Citizenship & Immigration, SIJS Information for Juvenile Courts.

<sup>10</sup> 8 U.S.C. §1101(a)(27)(J)(iii)(II).

<sup>11</sup> See 8 U.S.C. §1101(a)(27)(J)(iii).

<sup>12</sup> 8 U.S.C. §1101(a)(27)(J)(iii)(I).

rather than to obtain relief from abuse or neglect or abandonment.<sup>13</sup> This highlights a controversy as to the role of immigration authorities adjudicating SIJS cases. USCIS guidance makes clear that adjudicators should not question a child about the underlying abuse, neglect or abandonment, as those issues are the province of the juvenile (in Texas, family) court.<sup>14</sup> If the consent requirement is construed to permit an assessment of whether a genuine case of abuse, neglect or abandonment is involved, however, inquiry into the evidence is difficult to avoid. A report from the Citizenship and Immigration Ombudsman speaks directly to this point, recommending that USCIS: "[c]ease requesting the evidence underlying juvenile court determinations of foreign child dependency."<sup>15</sup> For now, the best practice is to be prepared to address the consent issue, but to cite the authority of the juvenile or family court and protect the confidentiality of the underlying child protection case to the greatest extent possible.

## What's the hurry?

One significant benefit of the TVPRA amendments is the addition of an "age-out" provision.<sup>16</sup> A child cannot be denied SIJS based on age, if the applicant is a child ("unmarried and under age 21") on the date the petition is filed.<sup>17</sup> Combined with amendments to the Texas Family Code which permit a family court to extend jurisdiction over a foster child until the young adult's 21<sup>st</sup> birthday (or the date the young adult withdraws consent),<sup>18</sup> this provision affords greater protection to youths seeking SIJS.

The best practice is still to act quickly on these cases, to eliminate barriers to permanency. The sooner a child obtains permanent resident status, the sooner the five year bar on receipt of "federal means-tested public benefits" will expire.<sup>19</sup> A child's undocumented status can deter potential adoptive parents and, equally important, if a child obtains permanent resident status *before* being adopted, the child may qualify for automatic citizenship if the adoption is consummated before the child is 16 years old.<sup>20</sup>

Obtaining permanent resident status is particularly crucial for children with severe disabilities who may need Supplemental Security Income (SSI). Very few permanent residents can qualify for SSI and as a result, most youth must become U.S. citizens to qualify.<sup>21</sup> Although a youth cannot generally apply to become a naturalized citizen until age 18, eligibility also requires at least five years as a permanent resident.<sup>22</sup> By obtaining permanent resident status as early as possible, the waiting period to obtain SSI can be minimized.

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<sup>13</sup> Memorandum from Donald Neufeld, Acting Assoc. Director, USCIS, "*Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions*" ("*TVRPA memo*") (Mar. 24, 2009).

<sup>14</sup> *TVPRA memo* at 3.

<sup>15</sup> January Contreras, Ombudsman, "*Special Immigrant Juvenile Adjudications: An Opportunity for Adoption of Best Practices*," April 15, 2011, at 2.

<sup>16</sup> 8 U.S.C. 1232(d)(6).

<sup>17</sup> *TVPRA memo*, at 3.

<sup>18</sup> TEX. FAM. CODE § 263.602.

<sup>19</sup> See 8 U.S.C. §1613(a).

<sup>20</sup> Child Citizenship Act of 2000, Pub. L. 106–395, §1, Oct. 30, 2000, 114 Stat. 1631; See 8 U.S.C. §1431..

<sup>21</sup> SSI is only available to permanent residents who have worked for 40 qualifying quarters, have status as a refugee or veteran, or resided in the U.S. lawfully as of August 22, 1996. 8 U.S.C. §1612 (a).

<sup>22</sup> 8 USC §1427.

## Who should *not* apply for SIJS?

For the youngest foster children, there are rarely inadmissibility issues. All SIJS petitioners are exempt from certain inadmissibility grounds (including public charge and illegal entry) and can apply for a discretionary waiver for all but the most serious grounds of inadmissibility.<sup>23</sup> If a youth has substance abuse problems, arrests, juvenile adjudications or convictions, a mental disorder that presents a danger to self or others, or prior deportations, caution is warranted. None of these issues will necessarily disqualify an applicant, but these are red flags that require further research. Juvenile adjudications are not treated as criminal convictions for purposes of immigration but all arrests and dispositions must be disclosed.<sup>24</sup> If a deportation order was previously entered against a child *in absentia*, it may be possible to file a joint motion to set the order aside with the government attorney. When in doubt about any inadmissibility issue, the best course of action is consultation with the DFPS regional attorney responsible for immigration issues or an experienced immigration attorney.

It is also good practice to advise an undocumented youth that the impact of any arrests, substance abuse or similar misconduct is magnified, because of the potential impact on eligibility for permanent resident status.

## What is the SIJS application process?

Once the family court signs the SIJS order, the next step is completing the forms and compiling the required supporting documents for both the SIJS petition and application for adjustment of status. This requires a medical exam from a USCIS approved civil surgeon, photographs, and certified copy of the child's birth record with an extract or summary translation. While there is no filing fee for the SIJS petition, the filing fees for adjustment of status are in the range of \$1000 per applicant. Fortunately, CPS routinely obtains fee waivers in these cases.

After the complete packet is submitted, USCIS will send an appointment notice for the biometric fingerprints for any child age 14 or above. Once the fingerprints are taken and the criminal background check completed, the last step in the process is an interview at the district USCIS office. The interview can be waived for petitioners under age 14 or when the adjudicating officer deems it necessary.<sup>25</sup> If an interview is held, a letter approving permanent resident status is often generated at the interview and the actual permanent resident card ("green card") is mailed later. If the USCIS requires additional documents, a Request for Evidence (RFE) can be issued. If a decision is not made at the interview, a decision is usually mailed within the next week or two. Although it is rare, if SIJS is denied, an appeal can be filed with the Board of Immigration Appeals.

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<sup>23</sup> 8 U.S.C. §1255 (h)(2).

<sup>24</sup> *Matter of Devison-Charles*, 22 I & N Dec. 1362 (BIA 2000).

<sup>25</sup> 8 C.F.R. §245.6.



## Obtaining U.S. Citizenship

U.S. citizenship can be a significant benefit for an eligible child or youth. While citizenship laws are complex, the most common avenues for foster children to obtain U.S. citizenship are:

- Naturalization;
- The Child Citizenship Act ("CCA"); and
- Acquisition of citizenship

### Naturalization

DFPS can help eligible youth who want to pursue naturalization and, for those who leave care before they become eligible at age 18, can provide referrals to community resources. To apply to become a U.S. citizen by naturalization generally an applicant must:

- Be at least 18 years old;
- Have at least 5 years continuous residence in the U.S. as a lawful permanent resident;<sup>26</sup>
- Demonstrate good moral character;<sup>27</sup> and
- Be able to pass a test of U.S. history and government, as well as speaking, writing and reading English.<sup>28</sup>

An eligible permanent resident can file for naturalization three months before meeting the five year continuous residence period.<sup>29</sup> There are excellent materials available online to aid youth in understanding the naturalization process and preparing for the exam.<sup>30</sup> The English proficiency and history and government requirements can be waived for applicants with physical or developmental disabilities or mental impairments.<sup>31</sup> Technically there is no waiver for a person unable to take the naturalization oath, but USCIS representatives have interpreted this requirement generously when an applicant is severely disabled. Youth who leave care before becoming eligible for citizenship can be referred to community resources that assist with the process.

### The Child Citizenship Act

The Child Citizenship Act of 2000 ("CCA") provides for "automatic citizenship" if a foreign born child:

- Has at least one U.S. citizen parent (by birth or naturalization);
- Is unmarried and under age 18;

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<sup>26</sup> Exceptions to the 5 year requirement apply to permanent residents with a citizen parent or spouse or those who have served in the U.S. military.

<sup>27</sup> 8 USCS § 1427.

<sup>28</sup> 8 U.S.C. §1423.

<sup>29</sup> 8 U.S.C. §1445(a) ; 8 C.F.R. §334.2(b).

<sup>30</sup> See [www.uscis.gov](http://www.uscis.gov).

<sup>31</sup> 8 U.S.C. § 1423(b)(1)

- Is residing in the U.S. in the legal and physical custody of the citizen parent; and
- Has been admitted for lawful permanent residence.<sup>32</sup>

The legal right is conferred automatically when the last statutory requirement is met. To get proof of citizenship, however, requires filing an application for either a certificate of citizenship (N-600) or for a U.S. passport. A U.S. passport application is less expensive, but the advantage of a certificate is that unlike a passport, a citizenship certificate does not expire.

There are two common circumstances where the CCA may have an impact on children in DFPS care:

#### Children adopted from DFPS

As long as the child is adopted while under the age of 16, and at least one of the adoptive parents is a U.S. citizen, the child will automatically obtain citizenship when the adoption is consummated, *if the child is a permanent resident* at the time of the adoption.<sup>33</sup> It's important that prospective adoptive parents are aware of this valuable right, so that they know to file the necessary paperwork after the adoption is consummated. The primary documents needed for either an application for certificate of citizenship (N-600) or a U.S. passport include proof of :

- One or both parent's citizenship;
- The parents' marriage;
- The adoption that creates the parent child relationship; and
- The child's lawful permanent residence.

Forms and detailed instructions are available online and DFPS staff can assist.<sup>34</sup>

#### Internationally adopted children

If a child adopted from another country enters foster care, determining the child's citizenship often requires research. Virtually all children adopted internationally enter the U.S. with permanent resident status, but the key issue for purposes of citizenship is whether U.S. immigration authorities have recognized the adoption as a "full, final and complete adoption."<sup>35</sup>

If a child enters on an IR-3 visa, this signifies that the USCIS has approved the adoption as full and final. If a child enters on an IR-4 visa, the child is admitted for the purpose of being adopted by pre-approved adoptive parents. A child who enters on an IR-4 visa is not eligible for citizenship under the CCA until the adoption is finalized in the U.S. In that circumstance, it is important to obtain documentation of the U.S. adoption (or at least find out the date and place the adoption occurred), if the child does not have a certificate of citizenship.

If a child entered on an IR-4 visa and the family did not consummate the adoption in the U.S., the child will not qualify as a U.S. citizen but will retain permanent resident status. Unless a child in this situation is adopted again, however, the child must generally wait until at least age eighteen to apply for U.S. citizenship. Fortunately, once a child qualifies for automatic citizenship under the CCA, subsequent events do not alter citizenship status. Consequently,

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<sup>32</sup> 8 U.S.C. §1431(a).

<sup>33</sup> 8 U.S.C. §1101(b)(1).

<sup>34</sup> See [www.uscis.gov](http://www.uscis.gov); Practice Guide, SECTION 13, TOOLS, Citizenship & Immigration, DFPS Contacts.

<sup>35</sup> 8 C.F.R. § 320.1.

removal of the child from the parents' custody or termination of parental rights will not divest a child of U.S. citizenship.

### **Acquisition of Citizenship**

All children born to one or both U.S. citizen parents in a foreign country are not U.S. citizens, but if a child has a U.S. citizen parent, this is important information. Applicable laws have changed many times, but currently the same rules apply to all persons born after November 14, 1986. If both a child's parents are U.S. citizens, and one parent has resided in the U.S. prior to the child's birth, a child born overseas after November 14, 1986 is a U.S. citizen at birth.<sup>36</sup> If only one parent is a U.S. citizen, the citizen parent must have lived in the U.S. for five years, including at least two years after the age of fourteen, in order for the child to acquire citizenship at birth.<sup>37</sup> If a child of a U.S. citizen was born "out of wedlock," additional research is necessary, as different requirements apply depending on whether the mother or father is a U.S. citizen.<sup>38</sup>

If a foster child qualifies as a citizen based on a parent's citizenship, obtaining proof also requires filing either an application for a certificate of citizenship (N-600) or for a U.S. passport. With a child's birth record, proof of the parents' marriage and of one parent's citizenship (birth record or naturalization certificate, most commonly), the primary challenge is usually proving up the necessary five year period of residence of the citizen parent before the child was born (including two years after age 14). Even if a parent is deceased or uncooperative, residency can usually be proven with school, employment, housing, public benefit, prison or other records.

Citizenship laws are complex but if a child has at least one citizen parent, the value of potential citizenship for a child merits the research and consultation with an expert if necessary to determine whether the child is entitled to U.S. citizenship.

### **What is required to repatriate or place a child in another country?**

Whether DFPS explores potential placement in a child's home country generally depends on many factors, including the viability of reunification with a parent in the U.S., the child's ties to the home country, language abilities, location of siblings and other extended family. In weighing the options, the following legal issues should be considered:

- If a child is a Permanent Resident in the U.S. (and not a U.S. citizen), taking up residence in another country may cause the child to lose Permanent Resident status in the U.S.;
- Leaving the U.S. voluntarily is not the same as removal or deportation; and
- The jurisdiction of a Texas court ends when a child is placed in another country; consequently, DFPS, the court and all parties must be prepared to dismiss the legal case and rely on the other country's child protection authorities to address any continuing needs the child or family may have.

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<sup>36</sup> 8 U.S.C. §1401(c).

<sup>37</sup> 8 U.S.C. §1401(g).

<sup>38</sup> See *Naturalization and U.S. Citizenship: The Essential Legal Guide* (10<sup>th</sup> ed. 2008) San Francisco, CA: Immigrant Legal Resource Center.

Before recommending placement in a foreign country, CPS must obtain a favorable home study, inform the court and all parties and request court approval. A court must also render an order approving any international travel before a foster child can leave the U.S.<sup>39</sup>

The CPS Border Liaison staff work closely with the Desarrollo Integral de la Familia ("DIF"), the Mexican social services agency responsible for child protection. DIF can perform home studies and provide information about potential placements in Mexico. For other countries, DFPS typically relies on either the foreign government social services staff or the International Social Services ("ISS").<sup>40</sup>

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<sup>39</sup> TEX. FAM. CODE §264.122.

<sup>40</sup>See [www.iss-usa.org/](http://www.iss-usa.org/).

## HEALTH CARE

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Heightened awareness of the health care needs of children and youth in foster care has resulted in a comprehensive statutory scheme, the use of medical passports, restrictions on medical consent, scrutiny of psychotropic medications, focus on the special needs of youth leaving foster care and those with disabilities, and added duties for courts, caseworkers, caretakers and attorneys. Special procedures apply to drug research programs, abortion, end of life decisions, s and organ donation.

Resources for DFPS staff confronting these issues include:

CPS Policy HB 11100

<http://www.dfps.state.tx.us/handbooks/CPS/Menu/MenuCPSa11000.asp>

**Nurse Consultants**- regional subject matter experts;

**Developmental Disability Specialists**- regional subject matter experts;

**Well-being Specialists**- staff liaisons with Superior Health, the STAR health services provider;

Extensive online materials, including *Psychotropic Medications - A Guide to Medical Services at CPS*, is available online at:

[http://www.dfps.state.tx.us/Child\\_Protection/Medical\\_Services/guide-star.asp](http://www.dfps.state.tx.us/Child_Protection/Medical_Services/guide-star.asp)

### Who Makes Medical Decisions for a Foster Child?

When a child is in foster care, with few exceptions, decisions about the child's medical care must be made by a "medical consenter" authorized by the court.<sup>41</sup> At the initial hearing where temporary orders are requested, DFPS requests that the court designate a medical consenter, most often the agency. The court may choose to appoint:

- DFPS; or
- an individual, such as a relative, foster parent or parent whose parental rights have not been terminated, if the court determines that doing so is in the best interest of the child.<sup>42</sup>

In the interim between removal by DFPS and the first court hearing, the caseworker, or a person designated by the caseworker, may give medical consent for necessary medical care in most cases. Either a professional staff member at an emergency shelter or the live-in caretaker the child is placed with may be designated by the caseworker for this purpose.<sup>43</sup> DFPS cannot give consent during this interim period, however, if the original reason for CPS intervention is a

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<sup>41</sup> TEX. FAM. CODE §266.004(a).

<sup>42</sup> TEX. FAM. CODE §266.004(b).

<sup>43</sup> CPS HB Section 11100.

family's objection to the medical care at issue. Whether a parent's objection is based on religious beliefs or adherence to non-traditional medicine, or some other basis, if DFPS seeks court intervention to obtain a blood transfusion, chemotherapy or other medical treatment, no treatment can be authorized without court approval.

Regardless of who is authorized by the court to make medical decisions for the child, DFPS, the medical consentor, a parent whose rights have not been terminated, a guardian or attorney ad litem, or a foster care provider may petition the court at any time for an order related to the child's medical care.<sup>44</sup> This option may be used when there is disagreement or uncertainty about the appropriate medical decision for a child's care. A treating physician is also specifically authorized to file a letter with the court regarding any concerns about a child's medical care.<sup>45</sup> In addition, at any hearing under Chapter 263 a child is entitled to express her views of the medical care being provided and in reviewing the medical care provided, the court must ensure the child has been given the opportunity to express an opinion of the care provided in a developmentally appropriate manner.<sup>46</sup>

## Scope of Law and Exceptions

In the context of medical consent for a foster child, medical care is defined to mean all health care services ordered or prescribed by a health care provider, regardless of whether the services are covered by Medicaid.<sup>47</sup> This includes physical, dental, behavioral and allied health care (such as physical therapy, occupational therapy, speech therapy and dietetic services). CPS provides caseworkers with policy guidance on issues related to medical consent, including dealing with court-ordered medical services.<sup>48</sup>

The authority of a medical consentor does *not* include:

- Abortion;
- Voluntary admission for mental health or substance abuse treatment without the child's consent<sup>49</sup>
- Withholding or withdrawing life support; or
- Diagnostic tests and services for children with possible disabilities provided by the Early Childhood Intervention program or as part of special education in a school, if the medical consentor is not the child's caregiver. (See **Special Services for Children with Disabilities** below).

### Emergency care

In the event a foster child needs emergency medical care and the medical consentor is unavailable, care may be authorized by a physician.<sup>50</sup> This exception covers medical care

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<sup>44</sup> TEX. FAM. CODE §266.004(e).

<sup>45</sup> TEX. FAM. CODE §266.004(f).

<sup>46</sup> TEX. FAM. CODE §§263.306(a)(12) ; 266.007(c).

<sup>47</sup> TEX. FAM. CODE §266.001(5); §266.004(k) ; HUM. RES. CODE §32.003(4).

<sup>48</sup> CPS Handbook 11100.

<sup>49</sup> TEX. HEALTH AND SAFETY CODE §572.001(c).

necessary to prevent the “imminent probability of death or substantial bodily harm to the child or others,” but does not apply to administration of psychotropic medication to a foster child at least age 16 who has been committed by a court to an in-patient mental health facility. Emergency medical consent in that situation is addressed in other law.<sup>51</sup>

## **DFPS Responsibilities if Designated as Medical Consenter**

If DFPS is authorized by the court to serve as medical consenter, the agency must:

### **Designate a Medical Consenter and a Backup Medical Consenter**

Within 5 business days after DFPS is authorized by the court, the agency must notify the court, all parties and their attorneys of the identity of the person designated to provide consent.<sup>52</sup> Selection of a medical consenter and a backup person follows detailed policy.<sup>53</sup> The medical consenter shall participate in each medical appointment.<sup>54</sup> The level of participation required depends on the nature of the care and requirements of the service provider.<sup>55</sup>

### **Train Medical Consenter**

All medical consenters except parents must complete the DFPS approved medical consent training before serving as medical consenter. This training must incorporate informed consent for psychotropic medications and appropriate use of psychosocial therapies, behavior strategies and other non-pharmacological interventions that should be considered before or concurrently when psychotropic medications are prescribed. A parent may be ordered by the court to complete medical consent training, if the court deems it appropriate.<sup>56</sup>

### **Consent for Psychotropic Medication**

Concerns about psychotropic drugs administered to children in the general population have prompted additional controls regarding use of these drugs for foster children, to mitigate the unique hazards caused by frequently changing placements, doctors and caseworkers.

Consent for psychotropic medication must be given voluntarily and without undue influence, and the consenting person must first receive information verbally or in writing that describes:

- ✓ The condition to be treated;
- ✓ Beneficial effects expected;
- ✓ Probable health and mental health effects of not consenting;

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<sup>50</sup> TEX. FAM. CODE §266.009(a).

<sup>51</sup> TEX. HEALTH AND SAFETY CODE §574.101.

<sup>52</sup> TEX. FAM. CODE §266.004 (c); CPS Form 2096 Notification Regarding Consent for Medical Care.

<sup>53</sup> See chart at CPS HB 11110.

<sup>54</sup> TEX. FAM. CODE §266.004(i).

<sup>55</sup> CPS HB 11132 and FORM 2085-B.

<sup>56</sup> TEX. FAM. CODE §266.004(h), (h-1).

- ✓ Probable clinical significant side effects and risks; and
- ✓ The generally accepted alternative medications and non-pharmacological interventions, if any, and the reason for the proposed course of treatment.<sup>57</sup>

A consent form for psychotropic medication is available in the CPS medical forms listing.<sup>58</sup> The medical consentor is also responsible for monitoring the treatment of any child prescribed psychotropic medication, to ensure the child is seen by the prescribing physician (or physician assistant or advanced practice nurse) at least every 90 days for the purpose of monitoring side effects of the medication and determining whether the medication is helping to achieve treatment goals and continued used is appropriate.<sup>59</sup>

### **Notify Parent of Certain Medical Conditions**

DFPS must make a reasonable effort to notify a parent who is not a medical consentor and whose parental rights have not been terminated about certain medical conditions or events. Within 24 hours of a "significant change in medical condition," enrollment or participation of a child in a drug research program, or an initial prescription of a psychotropic medication, a parent must be notified, unless an exception below applies.<sup>60</sup> "Significant change in medical condition" is defined as an injury or the onset of an illness that is life-threatening or has potentially long-term health consequences, including hospitalization for surgery or other procedures except for minor emergency care.<sup>61</sup>

DFPS is not required to give notice if the parent cannot be located; the court has restricted the parent's access to the information; the child is in the permanent conservatorship of DFPS and the parent has not participated in the child's care for at least six months despite the departments' efforts to involve the parent; the parent's rights have been terminated; DFPS has documented in the child's file that it is not in the best interest of the child to involve the parent in case planning; or the parent has failed to provide contact information to DFPS.<sup>62</sup>

### **Provide Medical Summary to Court**

At each hearing under Tex. Family Code Chapter 263 or more frequently if ordered by the court, the court reviews a summary of the medical care provided to the child since the last hearing. The caseworker is responsible for gathering information specified in the Medical Summary, including detailed information about any psychotropic drug prescribed, filing the summary with the court and sending a copy to all parties at least ten (10) days before a scheduled hearing or at the hearing.<sup>63</sup> NOTE: While this statute allows the medical information to be submitted at the time

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<sup>57</sup> TEX. FAM. CODE §266.0042.

<sup>58</sup> Psychotropic Medical Consent CPS Form 4526.

<sup>59</sup> TEX. FAM. CODE §266.011.

<sup>60</sup> TEX. FAM. CODE §264.018(d), as amended by SB 206 (84<sup>th</sup> Reg. Session, effective Sept. 1, 2015).

<sup>61</sup> TEX. FAM. CODE §264.018(a)(4), as amended by SB 206 (84<sup>th</sup> Reg. Session, effective Sept 1, 2015).

<sup>62</sup> TEX. FAM. CODE §264.018(h),(j).

<sup>63</sup> TEX. FAM. CODE §266.007; CPS HB 11151.



of the hearing, many courts expect this information to be provided in the court report. It is recommended that only very new medical information be provided at the time of the hearing.

### **Medical Consenter's Identity May Be Kept Confidential**

If the department's designee for medical consent is a foster parent or a prospective adoptive parent and it is determined to be inappropriate to reveal that person's identity (other than to a medical provider), the CPS attorney may request that the court keep the consenter's identity confidential.<sup>64</sup>

### **Change the Medical Consenter**

When a child changes placement or a medical consenter does not perform adequately, the consenter may be changed. If DFPS is the court authorized medical consenter, the department may change the designee and provide notice to the court and all of the parties no later than the fifth business day after the change.<sup>65</sup> If the court appointed an individual as medical consenter, a petition must be filed for a court order to change the medical consenter.

### **When the Court Does Not Designate DFPS as Medical Consenter**

The court may choose to designate someone other than DFPS as medical consenter for a foster child. In this situation, DFPS must inform the consenter about using Medicaid services and the duty to keep CPS informed about the child's medical care, and must monitor the designee's actions to ensure that information about the child's medical status is communicated, as appropriate. DFPS retains the responsibility for notifying parents of certain medical conditions<sup>66</sup> and for obtaining updated medical status information for court reports to the extent it is feasible.<sup>67</sup>

If DFPS determines that the designated consenter fails to complete medical consenter training (if required), has not performed adequately as a medical consenter or is not acting in the child's best interest, DFPS may file a petition with the court to change the medical consenter or to request that the court enter an order concerning medical care of the child.<sup>68</sup>

### **Consent for Special Services for Children with Disabilities**

An attorney representing DFPS should be aware of federal law governing services for children with disabilities as it impacts the authority of the medical consenter appointed under state law. The Individuals with Disabilities Education Act (IDEA) governs the provision of informed consent for Early Childhood Intervention (ECI) services operated under the Department of Assistive and Rehabilitative Services (DARS), or special education services provided by a school district. Services such as physical or occupational therapy that would be considered

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<sup>64</sup> TEX. FAM. CODE §266.004(j); CPS HB 11118.

<sup>65</sup> TEX. FAM. CODE §264.004(c); CPS HB 11117.

<sup>66</sup> TEX. FAM. CODE §264.018(d).

<sup>67</sup> TEX. FAM. CODE §266.007.

<sup>68</sup> TEX. FAM. CODE §266.004.

medical in most situations are classified as early intervention, educational, or related services when they are provided by an ECI program or by the school district for an eligible child as part of a child's ECI or special education plan. Although DFPS staff may make referrals to both of these programs if they think the child should be evaluated, consent to these assessments or services can only be provided by a parent, foster parent, relative with whom the child lives, or surrogate parent. IDEA prohibits an employee of DFPS or any other government agency providing services to a child from being the consentor for ECI or special education services.<sup>69</sup> Therefore, DFPS medical consent protocols do not apply to diagnostic testing or services provided by an ECI program or a school district, even if those services would be considered medical if provided elsewhere.

#### Children birth to three years of age

Federal law requires states to have a process for referring any child under the age of three who was involved in a substantiated case of child abuse or neglect, or is identified as affected by illegal substance abuse or prenatal drug exposure, to the state's ECI program.<sup>70</sup> DFPS and DARS have entered into an agreement regarding referrals for children in conservatorship which provides that the child's physician will do the initial screening and determine whether a referral to ECI for a full evaluation is necessary. In this circumstance, the foster parent (or the surrogate parent appointed by the court or the ECI program) consents to the ECI evaluation and any subsequent services. If ECI is unsure who to look to as a "parent" or who to appoint as a surrogate parent, federal regulations require consultation with the public agency assigned to care for the child, which is DFPS for a foster child.

When CPS substantiates abuse or neglect of a child under three years of age but closes the case or provides family-based services to the family without taking conservatorship of the child, the family's name and information is sent to ECI. ECI then contacts the family to offer an evaluation, which the family can accept or refuse.

#### Children over three years of age

Federal law requires states to ensure that all children with disabilities over the age of three have access to a free appropriate public education that includes special education and related services designed to meet their individual needs and prepare them for further education, employment, and independent living.<sup>71</sup> If a parent is unavailable to make decisions regarding special education services for a foster child, the independent school district (ISD) must appoint a "surrogate parent" for this purpose. Again, federal law prohibits the ISD from selecting either a DFPS employee or an employee of an institution where a foster child resides as a surrogate parent. However, a foster parent may be appointed as the surrogate parent. The surrogate parent for educational purposes may be the same person as the medical consentor but that will not always be the case. If a surrogate parent is appointed by the ISD, DFPS provides this information to the court along with the name of the person appointed to be the education decision-maker. Under federal law, a court can also appoint a surrogate parent and in that case, there is no need for DFPS to inform the court, but DFPS is still required to notify the school of the surrogate appointment.

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<sup>69</sup> 20 U.S.C.A. §1401(23).

<sup>70</sup> 20 U.S.C.A. §1437(a)(6); 42 U.S.C. §5106a(b)(2)(A)(xxi).

<sup>71</sup> 20 U.S.C.A. §1400.

## Youth with Capacity to Consent

DFPS must ensure that before age 16, every youth in foster care is educated about informed medical consent, medical care and the option to request court approval to authorize the youth to give consent for his or her medical care.<sup>72</sup> If a youth elects to exercise this option, DFPS notifies the youth's attorney ad litem or requests that the court appoint an attorney ad litem. The court determines whether the youth has capacity to consent to some or all medical care issues at a review hearing, on the court's own motion or on motion by the youth's attorney ad litem.

If a youth authorized to give consent refuses medical treatment, DFPS can petition the court for an order for appropriate medical care. The court can override the youth's decision if there is clear and convincing evidence that the medical treatment is in the youth's best interest, and either (1) the youth lacks capacity, (2) the failure to provide medical care will result in observable and material impairment to the growth, development or functioning of the child, or (3) the child is at risk of substantial bodily harm or of inflicting substantial bodily harm to others. A youth authorized under this section to consent to medical care is *not* authorized to consent to abortion.

## Health Passport

To ensure that specific medical information regarding foster children is maintained in a central repository, the state procured a web-based system known as the "Health Passport".<sup>73</sup> The Health Passport is not a comprehensive medical record or "electronic health record" as that term is commonly understood in the medical community. It is a limited compilation, composed primarily of Medicaid claims data, on children in DFPS conservatorship.

For children who were in the Medicaid system prior to entry into DFPS conservatorship, the claims data includes up to two years of claims preceding the child's entry into foster care. However, providers have up to ninety days to submit claims and consequently the data is not available in real time. The data includes immunizations, prescriptions, lab results, and other data that may be uploaded manually.

The system is accessible to DFPS caseworkers and certain other DFPS staff, medical consenters (including youth designated to consent to their own medical care), and health care providers. Not all portions of a child's record are accessible by all users. For example, non-DFPS medical consenters are not authorized to view the quarterly progress notes on a child's behavioral health. Guardians or attorneys ad litem, CASA volunteers, judges and other interested parties have no direct access to the system, with some limited exceptions under a pilot program. Paper copies of relevant sections of the Passport should be provided by the CPS worker to other parties as necessary for representing or serving the child. Finally, DFPS is obligated to provide a copy of the Passport to a youth who is aging out of care, and to the child's parent or guardian when the child is discharged from foster care.<sup>74</sup>

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<sup>72</sup> TEX. FAM. CODE §266.010.

<sup>73</sup> TEX. FAM. CODE §266.006.

<sup>74</sup> TEX. FAM. CODE §266.006(f).

## **Participation in Drug Research Programs**

In extremely rare situations, with court approval, it may be appropriate for a foster child to enroll in a drug research program. Except for a parent appointed by the court to give medical consent, a medical consentor may not consent to enrollment or participation in a drug research program without a specific court order. Before issuing such an order, the court must appoint an independent medical advocate and adhere to a detailed statutory protocol to determine whether participation is in the child's best interest.<sup>75</sup> In an emergency, the court may issue an order before appointing an independent medical advocate. This restriction does not apply to drug research studies based only on medical records, claims data or outcome data. Extensive CPS policy details the procedures to be followed to assess whether a foster child can participate in a drug research program<sup>76</sup>

## **Abortion and End-of-Life Decisions regarding children and youth in DFPS Conservatorship**

DFPS-authorized medical consentors do not have authority to consent to abortion or end-of-life medical decisions for children and youth in DFPS conservatorship. DFPS policy is currently undergoing extensive review in these two issue areas, and the practice guide will be updated once the new policy is adopted by the agency.

## **Organ Donation**

If a child in CPS conservatorship dies, the hospital may request that the child's organs be donated.

If parental rights have not been terminated, the decision on whether to donate organs belongs to the child's parents.<sup>77</sup> CPS provides assistance in locating the parents and setting up meetings with the hospital staff so that parents may make an informed decision.

If parental rights have been terminated or parents are deceased, CPS as managing conservator may consider whether to approve organ donation based on considerations set forth in handbook policy.<sup>78</sup>

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<sup>75</sup> TEX. FAM. CODE §266.0041.

<sup>76</sup> CPS HB 11710.

<sup>77</sup> TEX. HEALTH & SAFETY CODE §692A.004.

<sup>78</sup> CPS HB 11730.

# **BABY MOSES**

March 2016

The statutes referred to as the Baby Moses law were enacted in 1999 to encourage parents to leave infants in a safe environment rather than abandoning them in an unsafe location.<sup>79</sup> The nickname comes from the ancient tale of baby Moses, who was placed in a wicker basket in the Nile River by his mother to save him from certain death. This statutory scheme serves as an exception to the law that requires CPS intervention in response to child abandonment.

## **Authority**

TEXAS FAMILY CODE §161.001

TEXAS FAMILY CODE, CHAPTER 262, Subchapter D

TEXAS FAMILY CODE §263.407

PENAL CODE §22.041

CPS Handbook Sections 2351

## **When Does the Baby Moses Law Apply?**

The general prohibition against child abandonment that requires a full investigation and an attempt to identify the parents<sup>80</sup> does not apply if the terms of the Baby Moses statute are met. An abandoned infant meets the criteria for a Baby Moses case if the infant:

- Is 60 days old or younger;
- Was delivered to a designated emergency infant care (DEIC) provider by the child's parent (including a case where a child is abandoned immediately after being born in a medical facility) who did not express an intent to return for the child; and
- Does not appear to have been abused, neglected, or neglected.<sup>81</sup>

A DEIC provider is:

- An emergency medical services provider;
- A hospital;
- A freestanding emergency medical care facility licensed under Chapter 254 of the Health and Safety Code (defined as a "facility, structurally separate and distinct from a hospital, that receives an individual and provides emergency care"<sup>82</sup>); or
- A child-placing agency licensed by DPFS that:
  - Agrees to act as a DEIC provider, and
  - Has on staff a licensed registered nurse or licensed emergency services provider who will examine and provide emergency medical services to the child taken in.<sup>83</sup>

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<sup>79</sup> TEX. FAM. CODE Chapter 262, Subchapter D.

<sup>80</sup> TEX. PENAL CODE §22.041(h).

<sup>81</sup> TEX. FAM. CODE §262.302.

<sup>82</sup> TEXAS HEALTH AND SAFETY CODE §254.001(5)

<sup>83</sup> TEX. FAM. CODE §262.301

The law does not specifically require that an infant be delivered to a *person* at a DEIC. However, if an infant is abandoned at a DEIC provider in a manner that causes harm to the infant or exposes the infant to serious risk of harm, that may impact whether the case is treated as a Baby Moses case. This is consistent with the goal of the legislation, which is to promote safe delivery of a child that might otherwise be abandoned in an unsafe manner.

### ***EXAMPLE***

If a newborn were found swaddled in a blanket in a basket left just steps away from a DEIC's main door, the case would be handled as a Baby Moses case, assuming all other criteria were met. If that same newborn were instead left on a bench more than 50 feet from and not visible from the DEIC entrance with only a diaper on at 2 a.m. on a night when temperatures dipped to 40 degrees, the case would probably be investigated as a standard child abuse case.

If the criteria for a Baby Moses case are not met, DFPS handles the case as it would any other abandonment case by reporting the matter to law enforcement and doing a thorough investigation, including diligent search efforts to locate parents and relatives of the child.<sup>84</sup>

## **Removal**

When a child is delivered to a DEIC provider, the provider has no legal duty to detain or pursue the parent and may not do so unless the child appears to be abused or neglected.<sup>85</sup> The DEIC provider has no legal duty to ascertain the parent's identity and the parent may remain anonymous; however, the parent may be given a form for voluntary disclosure of the child's medical history.<sup>86</sup>

After a DEIC provider has possession of the child, the provider must notify DFPS no later than the close of the first business day after taking possession of a child under this provision.<sup>87</sup> DFPS then takes custody of the child.<sup>88</sup> Once DFPS assumes custody of the child, DFPS must take action as required by §262.105, and file a petition for an emergency removal.<sup>89</sup>

## **Rebuttable Presumptions**

Several rebuttable presumptions apply if DFPS takes custody of a child under the Baby Moses law, including:

- a person who delivers a child to a DEIC provider pursuant to Subchapter D, Chapter 262, is the child's biological parent;
- the parent intends to relinquish parental rights and consents to the termination of parental rights with regard to the child; and

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<sup>84</sup> TEX. FAM. CODE §262.302(b).

<sup>85</sup> *Id.*

<sup>86</sup> TEX. FAM. CODE §262.303(a).

<sup>87</sup> TEX. FAM. CODE §262.303(a).

<sup>88</sup> TEX. FAM. CODE §262.303(b).

<sup>89</sup> TEX. FAM. CODE §262.304.

- the parent intends to waive the right to notice of the suit terminating the parent-child relationship.<sup>90</sup>

A party can seek to rebut any of the above presumptions at any time prior to the parent-child relationship being terminated.<sup>91</sup> If a person claims to be the parent of the child before a final order terminating parental rights, the court shall order genetic testing unless parentage has previously been established.<sup>92</sup>

DFPS is not required to conduct a search for the relatives of a child in a Baby Moses case,<sup>93</sup> but the agency must take certain steps regarding the National Crime Information Center and the state's paternity registry before a final termination order can be issued, as discussed below.

## Confidentiality

Several confidentiality laws apply specifically to Baby Moses cases:

- all identifying information, documentation or other records regarding a person who voluntarily delivers a child to a DEIC provider is confidential and not subject to release to any individual or entity with the one exception listed next;
- any pleadings or other documents filed with a court are not public information for purposes of the Public Information Act and may not be released to a person other than to a party in a suit regarding the child, the party's attorney, or an attorney ad litem or guardian ad litem appointed in the suit; and
- the court shall close the hearing to the public unless the court finds that the interests of the child or the public would be better served by opening the hearing to the public.<sup>94</sup>

## Termination

If a person appears and claims to be a parent and the court orders genetic testing for parentage, the court shall hold the petition for termination in abeyance for a period not to exceed 60 days pending the results of the genetic testing.<sup>95</sup>

Two requirements must be met prior to the court rendering a termination order in a Baby Moses case. DFPS must show the court that the agency has:

- verified with the National Crime Information Center and state and local law enforcement agencies that the child is not a missing child; and
- obtained a certificate of the search of the paternity registry not earlier than the date DFPS estimates to be the 30<sup>th</sup> day after the child's birth.<sup>96</sup>

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<sup>12</sup> TEX. FAM. CODE §263.407(a).

<sup>13</sup> TEX. FAM. CODE §263.407(a-1).

<sup>14</sup> TEX. FAM. CODE §263.407(b).

<sup>15</sup> TEX. FAM. CODE §262.309.

<sup>16</sup> TEX. FAM. CODE §262.308.

<sup>17</sup> TEX. FAM. CODE §263.407(b).

<sup>18</sup> TEX. FAM. CODE §263.407(c).

Usually it is the mother who delivers an infant to a DEIC provider. For the parent who delivers a child to the DEIC provider, there is a specific ground to terminate found in TEX. FAM. CODE §161.001(S) that states the court may terminate if the court finds that the parent voluntarily delivered the child to a DEIC provider under TEX. FAM. CODE §262.302 without expressing an intent to return for the child.

For the father of the child, the termination ground is frequently §161.002, Termination of the Rights of an Alleged Biological Father. If the father's identity and location are unknown, his rights can be terminated based on failure to register with the paternity registry.



## INTERSTATE PLACEMENTS (ICPC)

March 2016

The Interstate Compact on the Placement of Children (ICPC) is a statutorily binding agreement enacted into state law by each state to regulate child placements across state lines.<sup>97</sup> The ICPC requires the agency in the state that is placing the child (sending agency) to notify and receive approval from the state where the proposed placement is located (receiving state) prior to placement of the child.<sup>98</sup> The Compact also makes the sending state responsible for any placement expenses not otherwise covered and mandates that the sending agency accept the child back into care if the placement breaks down.<sup>99</sup> The Association of Administrators of the Interstate Compact on the Placement of Children promulgates implementing regulations pursuant to the Compact.<sup>100</sup>

Federal law requires that states complete home assessments requested under the ICPC within 60 days of receipt of a request as a condition of federal funding.<sup>101</sup> One important caveat is that this time frame does not apply to any education or training component of a home study.

### Placement With A Relative

However, when the proposed placement is a relative, an expedited (Regulation 7) request for placement should be considered. Regulation 7 requires that an ICPC home assessment be approved or denied by the receiving state within 20 days if the proposed placement is with a parent, stepparent, grandparent, adult uncle or aunt, adult brother or sister, or the child's guardian, *and* one of the following criteria apply:

- the child was unexpectedly placed in the child welfare system because the parent or guardian was recently incarcerated; is unable to care for the child due to a medical, mental, or physical condition; or is recently deceased;
- the child is four years of age or younger;
- the court finds that the child has a substantial relationship with the proposed placement (i.e. the relative has a familial or mentoring role with the child, has spent more than cursory time with the child, and has established more than a minimal bond with the child); or
- the child is currently in an emergency placement.

Note that several states require the relative's home to be licensed or certified for foster care prior to placement. In these situations, the receiving state will not process the home study as an expedited request.<sup>102</sup>

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<sup>97</sup> TEX. FAM. CODE CH. 162, SUBCHAPTER B.

<sup>98</sup> TEX. FAM. CODE §162.102, Art. III.

<sup>99</sup> TEX. FAM CODE §162.102, Art. V; TEX. FAM CODE §162.103.

<sup>100</sup> See Practice Guide, SECTION 11 TOOLS, ICPC.

<sup>101</sup> 42 U.S.C. §671(a)(25), (26).

<sup>102</sup> See Practice Guide, SECTION 11 TOOLS, ICPC.

Once the child is placed in the receiving state, the court must not terminate jurisdiction unless the child turns 18 or is emancipated; the child is adopted; or the receiving state agrees to termination, including when the sending state court grants permanent managing conservatorship to the caretaker. Otherwise the placement is considered an illegal ICPC placement.<sup>103</sup>

### **Placement With a Non-Offending, Non-Custodial Parent**

Pursuant to DFPS policy, the ICPC does not apply to out-of-state parents who have not been found to be unfit by any court with jurisdiction over child custody cases.<sup>104</sup> Thus, when the proposed placement is with a non-offending, non-custodial parent living in another state, DFPS policy states that an ICPC home study should not automatically be initiated on the parent unless ordered to do so by the court. In these cases, the DFPS caseworker is required to conduct a non-ICPC preliminary check on the out-of-state parent without utilizing or contacting the child welfare office in the receiving state. Depending on the results of the non-ICPC preliminary check, the caseworker will either be required to request that the court place the child with the parent and dismiss the case *or* ask the attorney representing DFPS to set the matter for an evidentiary hearing in order for the court to make a determination regarding the parent's fitness and ability to care for the child.

The caseworker must request that the court place the child with the parent and dismiss the case when:

- the caseworker does not have documented evidence that a court with jurisdiction over child custody matters has previously made a finding of unfitness against the parent;
- AND*
- the caseworker does not have any concerns with the parent's ability to care for the child based on the non-ICPC preliminary check.

The caseworker must request that the attorney representing DFPS set the matter for an evidentiary hearing when:

- the caseworker has documented evidence that a court with jurisdiction over the child custody matters has previously made a finding of unfitness against the parent;
- OR*
- the caseworker has concerns with the parent's ability to care for the child based on the non-ICPC preliminary check.

When an evidentiary hearing is set, all parties, including DFPS and the out-of-state parent, have the opportunity to present evidence regarding the parent's ability to adequately and safely care for the child and the child's best interest. After hearing the evidence, if the court finds the evidence is insufficient to show that the parent is unfit, the attorney representing DFPS must request that the court place the child with the parent and dismiss the matter.

If the court finds that the evidence shows the parent is unfit, the attorney representing DFPS must request the court to make a finding that reasonable efforts have been made to place the

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<sup>103</sup> TEX. FAM CODE §162.102, Art. V; see also Practice Guide, SECTION 13 TOOLS, ICPC.

<sup>104</sup> CPS Handbook 9312

child in the home of that parent and that placement with that parent would be contrary to the child's welfare as a result of the parent's unfitness. The attorney should further request that the court order DFPS to remain managing conservator with responsibility for placement and care of the child. If the court makes a finding of unfitness, DFPS may still initiate a request for placement with that parent under the ICPC.

***TIP:***

Efforts are underway to have all the states enact a new Interstate Compact for the Placement of Children or to federalize the ICPC. Texas has not yet enacted the new ICPC, nor have most states as of 2016. For updated information about the status of the new ICPC or efforts to federalize the compact, consult the website of the Association of Administrators of the Interstate Compact on the Placement of Children at [www.icpc.aphsa.org](http://www.icpc.aphsa.org).

## **CIVIL RIGHTS & PLACEMENT DECISIONS (MEPA-IEP)**

March 2016

During the 84<sup>th</sup> session, Texas Legislature replaced state laws restricting the role of race and ethnicity in the foster or adoptive placement process with laws that require DFPS or a licensed child-placing agency to comply with corresponding federal laws.<sup>105</sup> This eliminates the confusion posed by two similar but distinct legal standards, while underscoring the significance of federal laws that prohibit discrimination in the context of child placement.

The Federal Multiethnic Placement Act, as amended by the Interethnic Adoption Provisions (“MEPA-IEP”), prohibits a state from using race, color or national origin to deny a prospective foster or adoptive parent the opportunity to foster or adopt a child *or* from delaying or denying a child’s opportunity for a foster or adoptive placement based on the same criteria.<sup>106</sup> A violation of MEPA-IEP is deemed to be a violation of Title VI of the Civil Rights Act.<sup>107</sup>

Federal policy interpreting MEPA-IEP makes clear that consideration of race, color or national origin in the placement process must be extremely limited, based on well-documented, narrowly tailored circumstances specific to a child.<sup>108</sup> Cases subject to the Indian Child Welfare Act are specifically exempt from MEPA-IEP.

Federal policy implementing MEPA-IEP is complex and nuanced. Training prepared by the Children's Bureau, Administration for Children and Families Office for Civil Rights is available online and offers detailed guidance.<sup>109</sup>

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<sup>105</sup> TEX. FAM. CODE §264.1085, added by S.B. 206, § 86 (27), (84<sup>th</sup> Sess., effective Sept. 1, 2015).

<sup>106</sup> 42 U.S.C. §1996b.

<sup>107</sup> P.L. 104-188, Sec. 1808(c)(2)

<sup>108</sup> Child Welfare Policy Manual, §4,3, 3-4, Administration of Children and Families (2016).

<sup>109</sup> <http://www.acf.hhs.gov/programs/cb/resource/mepa-video>.

# **MEDIATION**

March 2016

The challenges of modern child welfare litigation require innovative solutions. While mediation is far from a new concept, child protection professionals have not always embraced this tool for resolving child abuse and neglect cases. Evidence of successful CPS mediations in communities across Texas, however, underscores the value of mediation as an efficient and effective strategy for improving outcomes for children.

## **Can CPS cases be mediated?**

Absolutely. The law encourages mediation, particularly for cases which involve the parent-child relationship and conservatorship, and any time a CPS case can be moved forward outside the adversary process it is a benefit to the child, the parents and the agency.<sup>110</sup> Mediation is a solid fixture in CPS cases in many jurisdictions in Texas, and can be used to informally resolve discrete issues or entire cases while enabling courts to preserve resources for cases that must be litigated.

## **What's the difference between mediation, arbitration and family group conferencing?**

Unlike an arbitrator, a mediator cannot make a unilateral decision that is binding on the parties. The mediator is a neutral party appointed to facilitate dispute resolution, and cannot compel or coerce the parties to enter into a settlement agreement.<sup>111</sup> Any mediated agreement represents the voluntary decision-making of the parties. Although Family Group Decision Making (FGDM) and mediation both involve voluntary decision-making and can be used to address the same issues, mediation is typically more closely linked to the litigation process and the need for a final order. FGDM, in turn, is more focused on the family's ability to create a cohesive plan to meet the child's needs. Depending on availability of FGDM and mediation in a given locale, these tools can be used for different kinds of cases or to complement each other at different stages of a case.

## **What rules apply to mediation?**

The TEXAS CIVIL PRACTICE & REMEDIES CODE, CHAPTER 154 and TEXAS FAMILY CODE §153.0071(c)-(f) govern alternative dispute resolution, including mediation. Local rules may address mediation procedures, and individual mediators generally have a set of rules which the parties must agree to abide by as a condition of participation.

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<sup>110</sup> TEX. CIV. PRAC. & REM. CODE §154.002.

<sup>111</sup> TEX. CIV. PRAC. & REM. CODE §154.053(a).

## **Why mediate?**

Mediation can't solve every issue or offer a final resolution in every case, but it can offer:

- A less formal and intimidating environment that promotes cooperation, consensus and free exchange of information without the acrimony that the adversarial process can generate;
- An opportunity for the parents to get a firm understanding of the case, the perspectives of all of the parties, and exactly what must occur before the children can be safely returned to the home; and
- Time and money savings by reaching a case resolution without a trial, or by streamlining the issues to be litigated.

## **How is a CPS case referred for mediation?**

Mediation is generally triggered either by the request of the parties or the decision of the court to make a referral.<sup>112</sup> If a party files a written objection within ten days of the referral, the court cannot refer a matter to mediation if it finds a reasonable basis for the objection.<sup>113</sup>

## **What is the best time for mediation?**

Opinions vary as to what the prime time is for mediation and, to some extent, the best time depends on the goal of the mediation. The availability of mediators, as well as the philosophy of the local judiciary regarding mediation will impact how mediation is used in CPS cases.

Some consider the time between the 60 day hearing and the first permanency hearing to be the best time to mediate, while others prefer to conduct mediation closer to the trial date, when the parties can grapple with the facts that will likely determine the outcome if a trial is conducted. Faced with the evidence accrued up to that point, the options for a child's safety and permanency and an impending trial, the parties are often motivated to attempt to craft a mutually satisfactory solution that will better reflect the needs of the children and parties than a judgment imposed by a judge or jury.

Other mediation proponents prefer to use mediation as an ongoing problem solving mechanism, suitable for disputes ranging from the contents of a service plan to the final disposition of the legal case. Proponents of early mediation cite the advantage of getting the parents to focus on the reality of the circumstances that prompted CPS intervention at the outset of the case as a primary benefit.

## **What preparation is required for mediation?**

Preparing for a mediation should closely parallel trial preparation. Without detailed information about the legal case, the child's placement, the parent's performance on the service plan, visitation, reports from therapists, physicians and other providers, the participants in a mediation

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<sup>112</sup> TEX. CIV. PRAC. & REM. CODE §154.021.

<sup>113</sup> TEX. CIV. PRAC. & REM. CODE §154.022.

will be at a great disadvantage. If parties and attorneys arrive with a firm grasp of the legal options, the evidence, the recommendations of knowledgeable professionals and the child's current needs, the likelihood of success is greatly enhanced.

### **Who should attend mediation?**

Usually, mediators seek to have the parties, their attorneys and the guardians ad litem in attendance. If a parent is incarcerated, the judge can sign a bench warrant directing the sheriff of the county in which the case is pending to transport the incarcerated parent from a state or county jail to the mediation. This requires advance planning, as the bench warrant must be signed in enough time to allow the sheriff's office notice and opportunity to transport the parent. Federal prison officials may not honor a state bench warrant, but sometimes with sufficient notice some accommodation can be made to ensure an inmate's participation either telephonically or in person.

The court order referring a case to mediation may require that a CPS representative with authority to agree to a mediation agreement attend the mediation. Even if this is not court-ordered, at the very least a successful mediation requires that a decision-maker be available by phone. The title of the CPS decision-maker will vary by county. In some counties, supervisors are authorized to agree to increase visitation or agree to appointment of a managing conservator while in other counties the decisions are made by the program director. The important thing is to confer in advance to be certain that the necessary individual will be present or at the very least available.

The downside of not having the decision-maker in attendance is that a carefully orchestrated agreement that reflects a full and complete discussion of the issues may be rejected, simply because the decision maker did not have the benefit of the discussion that preceded the proposal. While in rural areas it may be particularly difficult, whenever possible the best practice is to have the CPS person with authority to resolve the case in the room throughout mediation.

Because mediation is intended "to encourage the peaceable resolution of disputes", the parties must carefully consider whether the presence of additional persons will impede resolution.<sup>114</sup> Whether additional persons attend a mediation may also depend on the preference of the mediator. Sometimes it is helpful to have the input from a caretaker, therapist or counselor, but the best strategy may be to obtain a report or letter in lieu of adding more attendees. At times a child will attend all or part of a mediation, if the circumstances make this appropriate and proper accommodations are made.

The issue of who should attend should always be part of the planning process for a mediation.

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<sup>114</sup> TEX. CIV. PRAC. & REM. CODE §154.002.

## **How is confidentiality protected in a mediation?**

All communications made by a participant relating to the subject matter of the case are confidential and may not be used as evidence in court.<sup>115</sup> The mediator may not disclose to either party information that is given in confidence by another party and may not disclose the conduct of the parties or their counsel during the settlement process, even to the referring court, unless all parties agree otherwise.<sup>116</sup> Any record made at the mediation is also confidential and neither the participants nor the mediator can be compelled to testify regarding what happened at mediation unless the record is independently admissible.<sup>117</sup> One exception to the strict requirement of confidentiality is the duty to report abuse or neglect.<sup>118</sup>

## **Who pays for mediation?**

Although some mediators accept pro bono cases, most are paid either by the county or DFPS. Questions regarding the availability of funding for mediation should be discussed either with local court administration personnel, regional CPS, or the Office of General Counsel.

## **Who can mediate a CPS case?**

Mediators are not licensed in Texas, but to conduct a mediation in a CPS case, a person must have at least 40 classroom hours of approved training in dispute resolution and an additional 24 hours of training in family dynamics, child development and family law.<sup>119</sup> A court has discretion to appoint a mediator without these qualifications if the individual has legal or other professional training or experience in dispute resolution processes.<sup>120</sup> Ideally, mediators for CPS cases will be well versed in the laws and policies that govern agency practice.

## **What is a caucus style mediation?**

In a caucus format, the parties and their attorneys are located in separate rooms and the mediator speaks with each privately. This approach is often used by mediators at different stages of a mediation, depending on the mediator's style and the needs of the case. Communications between the mediator and each party in a caucus are confidential, unless the parties agree otherwise.

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<sup>115</sup> TEX. CIV. PRAC. & REM. CODE §154.073(a) (communications are confidential, not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding).

<sup>116</sup> TEX. CIV. PRAC. & REM. CODE §154.053(b), (c).

<sup>117</sup> TEX. CIV. PRAC. & REM. CODE §154.073(b),(c).

<sup>118</sup> TEX. CIV. PRAC. & REM. CODE §§154.053(d); 154.073(f).

<sup>119</sup> TEX. CIV. PRAC. & REM. CODE § 154.052(a), (b).

<sup>120</sup> TEX. CIV. PRAC. & REM. CODE §154.052(c).



**TIP:**

If there is a history of violence between the parties, or one party refuses to be in the same room with another party, consider allowing the parties to arrive at separate times and/or via separate entrances to the building. Many mediation facilities are designed to accommodate this arrangement. The mediator can go back and forth to the separate rooms and facilitate a resolution without the parties meeting face to face.

## **Is a mediated settlement agreement binding?**

A mediated settlement agreement memorializes the agreement reached by the parties and can be incorporated into a final decree.<sup>121</sup> Generally, a mediated settlement agreement is binding on the parties if the agreement:

- (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
- (2) is signed by each party to the agreement; and
- (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.<sup>122</sup>

If a mediated settlement agreement meets the requirements of TEX. FAMILY CODE §153.0071(d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.<sup>123</sup>

## **When can the court refuse to enforce a mediated settlement agreement?**

A court may decline to enter a judgment on a mediated settlement agreement if the court finds that:

- a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and
- the agreement is not in the child's best interest.<sup>124</sup>

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<sup>121</sup> TEX. CIV. PRAC. & REM. CODE §154.071.

<sup>122</sup> TEX. FAM. CODE §§153.0071(d); 154.071; *In re A.G. C.*, 279 S.W. 3d 441(Tex. App.— Houston [14<sup>th</sup> Dist.] 2009, no pet.) (termination of parental rights based on relinquishment incorporated into mediated settlement agreement affirmed, case remanded for arbiter's resolution of terms of settlement agreement); *Wall v. Texas Dep't Family & Protective Servs.*, 2006 Tex. App. LEXIS 4744 (Tex. App. — Austin 2006, no pet.) (where pregnant mother is represented by counsel, the inherent pressures of mediation on the eve of trial where termination of parental rights could impact her unborn child does not make relinquishment involuntary); *Glover v. Brazoria County Children's Protective Servs. Unit*, 916 S.W. 2d. 19 (Tex. App. — Houston [1<sup>st</sup> Dist.] 1995, no pet.)(termination based on settlement agreement reversed where there was no stipulation regarding the best interest of the children).

<sup>123</sup> TEX. FAM. CODE §153.0071(e).

<sup>124</sup> TEX. FAM. CODE §153.0071(e-1).

# **EXTENDED FOSTER CARE**

March 2016

Few foster children are fully prepared to assume the freedoms and responsibilities of adulthood on the day they turn 18. Transitioning to adulthood is a challenging period in the life of any young adult, but all the more so for youth who have grown up in the foster care system and have no permanent family to support them during this time. Texas has long offered youth in the conservatorship of the Department of Family and Protective Services ("DFPS") on the day before their 18<sup>th</sup> birthdays the option to remain in foster care after turning 18; however, until recently this benefit was limited to youth completing secondary education or post-secondary technical/vocational training. Effective October 1, 2010, eligibility criteria for "extended foster care" - the terminology used by the department to describe foster care after a youth's 18<sup>th</sup> birthday - has been significantly expanded. This paper provides a summary of the statutes, rules and policies governing extended foster care, including a new concept known as "trial independence" which will facilitate an even wider safety net for youth who reach adulthood in foster care.

## **The Old Safety Net**

Section 264.101, Family Code, is the state statutory authority for the provision of paid foster care services to children and young adults. Until amendment in 2009, § 264.101 provided that youth in the conservatorship of the department on the day before their 18<sup>th</sup> birthday were eligible to remain in foster care until the earlier of the date they completed high school or another program leading towards a high school diploma, or until their 22<sup>nd</sup> birthday. Further, § 264.101 authorized the department to adopt rules establishing additional eligibility criteria for youth attending higher education or technical/vocational training. Under rules at 40 TX. ADMIN. CODE §700.316, the department previously permitted youth to remain in foster care for a maximum of three and a half months following completion of high school or a GED, if admitted to attend a post-secondary program (including a college or university), or until their 21<sup>st</sup> birthday while enrolled in a post-secondary technical or vocational training program. Federal funding under Title IV-E of the Social Security Act (Title IV-E) was available to partially reimburse the state for the costs of extended foster care only until a youth's 19<sup>th</sup> birthday. The remainder of extended foster care was funded entirely with state general revenue funds. All youth in extended foster care are eligible for continued Medicaid coverage.

## **The New Safety Net**

In 2008, Congress enacted landmark legislation entitled The Fostering Connections and Increasing Adoptions Act of 2008 (*Fostering Connections*) - offering states a variety of new federal funding options to improve their child welfare systems. Many of these new initiatives focus on older children and youth aging out of the foster care system, including expanded availability of Title IV-E funds for states opting to enact or expand extended foster care programs for youth ages 18, 19 and 20, effective October 1, 2010. The 81<sup>st</sup> Texas Legislature took full advantage of this new funding with enactment of House Bill 1151 and Senate Bill 2080. Both bills amended § 264.101, Family Code, to provide that all youth in the conservatorship of

DFPS on the day before their 18<sup>th</sup> birthday are eligible to remain in foster care until the later of their 21<sup>st</sup> birthday, or until they cease to meet at least one of the following eligibility criteria:

1. Regularly attending high school or enrolled in a program leading to a high school diploma or equivalence certificate, e.g. GED;
2. Regularly attending a higher education program or post-secondary technical or vocational program;
3. Actively participating in a program designed to promote employment or remove barriers to employment;
4. Employed at least 80 hours per month; or
5. Incapable of performing any of the above activities due to a documented medical condition.

The rules relating to the state law are at 40 Texas Administrative Code §700.346(a)(4)(A)-(E). Under the rule's subsection (b) there is a presumption that a youth is capable of performing one or more of the activities in bullets 1-4, above, which may be rebutted only if sufficient medical documentation is provided not only to verify a medical condition, but also that the medical condition renders the youth incapable of performing one of the required activities. Such documentation must verify the "activities of daily living" that the youth is rendered incapable of performing as a result of the documented medical condition.

Youth in extended foster care must provide their caseworkers with regular documentation of participation in one of the required activities. Participation in a post-secondary educational activity requires that youth register for a minimum of 6 hours per regular academic term. Youth remain eligible between regular academic terms. Youth engaged in other activities will have a maximum of 30 days between ceasing to participate in a required activity and resuming participation in the same, or a different activity. For example, a youth who had been working at least 80 hours per month who is laid off must, within 30 days of being laid off, obtain new employment or participate in one of the other required activities, such as participation in a program that promotes employment or removes barriers to employment (e.g. resume writing instruction or a job skills development program).<sup>125</sup>

In addition to participation in one or more of the required activities discussed above, or being unable to do so due to a documented medical condition, youth must complete a Voluntary Extended Foster Care Agreement (VEFCA) prior to their 18<sup>th</sup> birthdays that voluntarily confers on the department continued responsibility for the youth's placement and care. Further, youth must agree to abide by the terms and conditions imposed by their foster caregivers - which vary according to provider, but may cover matters such as curfew hours, agreement to refrain from the use of drugs or alcohol, and other "house rules". Finally, the ability of youth to remain in extended foster care is constrained to some extent by the availability of placements willing to serve young adults.

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<sup>125</sup> For additional information regarding extended foster care terms and conditions, please see Section 10400, et seq in the Child Protective Services Handbook available on-line at: [http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS\\_pg\\_x10400.jsp#CPS\\_10400](http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_x10400.jsp#CPS_10400)

## Federal Funding and Extended Court Jurisdiction

Legislation widening the extended foster care safety net for older youth was adopted by the 81<sup>st</sup> Legislature with the expectation that a significant portion of the costs would be reimbursed by the federal government as a result of *Fostering Connections*. However, in July 2010, the federal Administration for Children and Families, a division of the Department of Health and Human Services with responsibility for oversight of state child welfare systems, provided extensive clarification regarding the terms and conditions for receipt of Title IV-E funds authorized by *Fostering Connections*. Of relevance to extended foster care, the July 2010 guidance clarified that a youth is only eligible for federal reimbursement if that youth continues to be under the extended jurisdiction of a court that holds continued periodic hearings and issues findings, including permanency findings, similar to the placement review hearings and orders issued prior to turning 18. This clarification led to the enactment of legislation in the 82<sup>nd</sup> Legislature to amend Subchapter G, Chapter 263, Family Code, Extended Jurisdiction After Child's 18<sup>th</sup> Birthday.

The highlights of Chapter 263 include the following:

- Mandatory extension of jurisdiction by the court that has jurisdiction of the youth at age 18 while a youth remains in extended foster care.;<sup>126</sup>
- Requirement that the court continue to hold periodic hearings similar to placement review hearings every 6 months while a youth is in extended foster care and must make certain required findings, including a finding as to whether reasonable efforts have been made to finalize the youth's permanency plan (most commonly, a plan for independent living);<sup>127</sup>
- An automatic period of "trial independence" for the first six months after a youth leaves foster care on or after the youth's 18<sup>th</sup> birthday, which may be extended for up to a maximum of 12 months, if so ordered by the court;<sup>128</sup>
- Extended court jurisdiction by operation of law for the duration of a trial independence period; however, a court is not required to conduct hearings during a trial independence period and a youth who is no longer in extended foster care may not be compelled to attend any hearings conducted during such period;<sup>129</sup>
- No change to the process for extension of a court's jurisdiction for youth referred to the Department of Aging and Disability Services (DADS) for guardianship services<sup>130</sup> or to the process for voluntary extension of a court's jurisdiction for youth who exit foster care, but continue to receive transitional living services from the department;<sup>131</sup>
- The definition of foster care is amended to include not only foster parents and child-care facilities that are licensed or verified by the department, but also providers that are "approved" by the department, which will include a new foster care placement option for extended foster care recipients called "supervised independent living", as discussed below.

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<sup>126</sup> TEX. FAM. CODE §263.602(a).

<sup>127</sup> TEX. FAM. CODE §263.602(b).

<sup>128</sup> TEX. FAM. CODE §263.602(f).

<sup>129</sup> TEX. FAM. CODE §263.602(g).

<sup>130</sup> TEX. FAM. CODE §263.603.

<sup>131</sup> TEX. FAM. CODE §263.6021 (replaced TEX. FAM. CODE §263.609, which was repealed in 2011).

## **Return To Foster Care/Trial Independence**

Beginning in September 2007, the department initiated a "return to care" program for youth who were in the conservatorship of the department on the day preceding their 18<sup>th</sup> birthdays (including youth in the Department's conservatorship who were on runaway status at age 18), who leave and later desire to return to foster care. Up to 2010, this program was funded entirely with state funds, and was limited to youth who left care and desired to return to care to complete a high school diploma, GED, or post-secondary technical or vocational training, or who are between academic terms for higher education. In its July 2010 guidance, the federal government clarified that youth who leave and return to extended foster care prior to their 21<sup>st</sup> birthday will retain eligibility for Title IV-E funding, provided:

- The youth returns to extended foster care prior to the expiration of a "trial independence" period that may be presumed to exist for the first 6 months after a young adult leaves care, but may be extended to a maximum of 12 months by a court;
- The court resumes periodic hearings and makes the required findings for a youth who returns to extended foster care before trial independence ends;
- The youth confers "placement and care" responsibility on the department prior to turning 18 or prior to the expiration of the court's jurisdiction over the youth; and
- The youth engages in one or more of the same activities as would be required of youth who remain continuously in care after turning 18, unless unable to do so due to a documented medical condition.<sup>132</sup>

## **Supervised Independent Living**

In order to receive federal Title IV-E funding for a child in foster care prior to age 18, the child must be residing in a residential child-care facility or foster home that is licensed or verified by the state, and that meets certain additional criteria. However, the federal *Fostering Connections* legislation also allows states to create supervised independent living (SIL) settings and still receive IV-E payments for those placements if the young adult qualifies for Title IV-E funding and of course meets the criteria for the Extended Foster Care program.<sup>133</sup> SIL settings are unique as they are designed for individuals 18 and older and are less restrictive than a traditional foster care setting.

In Texas SIL settings are living arrangements offered through the Extended Foster Care program that allows young adults to reside in a less restrictive, nontraditional foster care setting while continuing to receive case management and support services to become independent and self-sufficient. However, the young adult must be able to demonstrate a reasonable level of maturity and ability to manage the expectations required in a SIL setting with minimal supervision and

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<sup>132</sup> Program Instruction 10-11 (July 10, 2010) issued by the Administration of Children and Families, available online at: [www.acf.hhs.gov/programs/cb/laws\\_policies/policy/pi/pi00index.htm#2010](http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/pi00index.htm#2010).

<sup>133</sup> 42 U.S.C. §672(c).

case management. Obtaining a SIL placement is not automatic, the young adult must go through a pre-screening process and must apply and be approved by DFPS and the SIL provider.<sup>134</sup>

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<sup>134</sup> For additional information regarding extended foster care terms and conditions, please see Section 10480, et seq in the Child Protective Services Handbook, available on-line at:  
[http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS\\_pg\\_x10440.jsp#CPS\\_10480](http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_x10440.jsp#CPS_10480)