Reducing Reliance on Non-Family Placements

A Judicial Toolkit

An Advocacy Guide for Attorneys

Children do better when they live in families. This common-sense experience is confirmed by research and embedded in our laws. Services for children, youth, and families are best provided in the home and in their home community. If a child is removed from the home, our laws require children be placed in the least restrictive, most family-like setting to meet their needs.

Yet, statistics reveal practice is not consistent with this policy. Forty percent of children removed from their homes are placed in a congregate care setting without a demonstrated clinical or behavioral need for placement outside of a family.[1] Attorneys can and do play a critical role in changing this practice and improving outcomes for children and families.

Children and families need advocates to assert a child's right to live in a family. This guide was created to support attorney's advocacy efforts to keep children in families and family settings and provides a framework to identify issues for case investigation and legal arguments, as well as supporting resources for presenting these arguments in court. It is based on multi-disciplinary research, as well as other resources and guidelines, and draws on best practices for professionals within the child welfare field.[2] As a user of this tool, we encourage you to familiarize yourself with the cited references to further strengthen your legal advocacy for children.

We start with the premise that every child should be placed in a family unless there is a well-documented, professionally recommended clinical and/or behavioral need that is beyond the ability of a family to meet, with or without community services. The cornerstone question is whether congregate care[3] is necessary and appropriate to meet the child's needs.

Part I: Framework for Advocacy

As attorneys, we should use the applicable laws, along with the social science research and equity issues, to frame our arguments. After a thorough, independent investigation of the facts in our case, combined with legal and other research, we have the tools we need to assert arguments to the court.

Analysis:

(1) Have reasonable efforts been made to allow the child to remain safely in the home?
(2) If removal is necessary despite making reasonable efforts, is the child placed with relatives? If not, why not?
(3) If the child is not with relatives despite every effort being made to place with relatives, is the placement in a foster family setting? If not, why not?
(4) If the child is not with a foster family, is the congregate care placement the least restrictive placement available to meet the child's needs?

[1] U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau (2015). *A National Look at the Use of Congregate Care in Child Welfare.*

[2] Annie E Casey Foundation, EVERY KID NEEDS A FAMILY: GIVING CHILDREN IN THE CHILD WELFARE SYSTEM THE BEST CHANCE FOR SUCCESS, Kids Count Policy Report (2015); Building Bridges Initiative, BEST PRACTICES FOR RESIDENTIAL INTERVENTIONS FOR YOUTH AND THEIR FAMILIES: A RESOURCE GUIDE FOR JUDGES AND LEGAL PARTNERS WITH INVOLVEMENT IN THE CHILDREN'S DEPENDENCY COURT SYSTEM (February 2017); National Center for State Courts, EVERY KID DESERVES A FAMILY: A JUDICIAL GUIDE TO BETTER PLACEMENTS (July 2017)

[3] For purposes of this toolkit "congregate care" includes group homes, institutions, emergency shelters or residential treatment facilities

I. Federal/State Law Arguments

a. Adoption Assistance and Child Welfare Act of 1980 (AACWA)[4]

i. AACWA requires the Department to make "reasonable efforts" to prevent removal of a child. If, despite making reasonable efforts to prevent removal, a removal is nevertheless necessary the Department must make reasonable efforts toward reunification of the child with the family.[5]

ii. Under AACWA each child should have a case plan that describes where and in what setting the child is to be placed and a discussion of the safety and appropriateness of the placement.

iii. Additionally, AACWA states that each child should have a case plan, "designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available…"[6]

b. Adoption and Safe Families Act (ASFA)

i. In order to be eligible for federal funds, ASFA requires the State to consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards.[7]

Questions to ask in Court

1. Reasonable Efforts to Prevent Removal

- ◊ *Did the Department make reasonable efforts to prevent the removal of the child from the home?*
- ◊ *Were there supports that could/should have been explored to allow the child to remain safely in the home and eliminate the need for placement?*

2. Relative Placement

- ◊ *If removal was deemed necessary despite making reasonable efforts, is the child placed with an adult relative?*
- ◊ *If no relatives identified, has the Department conducted a diligent search, and if so, how recently?'*
- ◊ *Have the child and parents been asked about close relatives?*
- ◊ *Is there an absent father and have those relatives been identified and contacted?*
- ◊ *If there are identified relatives, but none are willing to serve as a placement, what are the barriers?*
- ◊ *Can those barriers be addressed and ameliorated by the Court and/or Department?*
- ◊ *Are there supports we can put in place to allow the child to be placed with a relative?*

3. Non-Relative Foster Family Placement

- ◊ *Is there a foster family available and willing to serve as a placement?*
- ◊ *Are there supports we can put in the foster family home to allow the child to live in a family setting?*
- ◊ *Does the child need a therapeutic foster home who can address special needs?*

[4] Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96–272; 42 USC §675 (2012)
[5] *Id.*
[6] I*d.* at §675
[7] 42 U.S.C. §671 (a)(19)

4. Congregate Care Placement

A. Basis of the Determination
   ◊ *Is the congregate care decision being made based on a professional's recommendation?*
      a. *Did the professional use a validated assessment tool?*
      b. *Did the professional utilize the level of care process in making the determination?*
      c. *What behaviors or needs did the professional identify that cannot be met within a family setting?*
   ◊ *What type of congregate care placement is proposed and why?*
      a. *If proposed placement is a group home or emergency shelter, how does this placement meet the federal standard for the least restrictive most family like setting and how is it appropriate to meet the child's needs?*
      b. *If an institution or other residential treatment facility is proposed, have community-based treatments been tried and excluded?*

B. Documentation Supporting Determination
   ◊ *Is the professional's recommendation based on a well-documented history that demonstrates a clinical need for congregate care?*
   ◊ *Was an evaluation with written recommendations and/or a validated assessment tool utilized?*
   ◊ *Were all parties provided with a copy of that evaluation and recommendations?*
   ◊ *Is there an opportunity to cross-exam the professional who conducted the evaluation on the record?*
   ◊ *Were all parties provided with documentation of that history?*
   ◊ *Do you need to file a motion for discovery to obtain the history that is being relied on to support placement in a congregate care setting?*

C. Is there a plan to transition the child from congregate care to his/her home or to another family setting?
   ◊ *What are the steps in that plan?*
   ◊ *How are the youth and parents involved in the transition plan?*
   ◊ *How are the parent's involved in the child's treatment (i.e. family therapy)?*

c. State Statute or Case Law Arguments

i. Many states have statutes that guide judicial decision-making about placement decisions. In other words, placement is not solely a Child Protective Agency decision, and should involve attorney input and judicial review.

ii. Furthermore, many states have case law[8] that addresses relative placements and the ability of relatives to serve as placements without first being "licensed" by the child protection agency.

iii. To be eligible for federal funds under ASFA, states must include in their State Plans a preference for placement with adult relatives over non-related persons.

Questions to ask in Court: (will depend on the state law at issue)

◊ *Is there a statute or is there any case law that addresses children's placement and if so, can you use the law to further your argument that a particular child should not be placed in congregate care?*

◊ *Does your State Plan include a statement that relative placements will be prioritized over non-relative placements and how is the Agency implementing that priority?*

[8] See NJ Dept. of Child Protection & Permanency v. K.N., 223 NJ 530 (2015) (placement is not solely within the purview of the Division. There is judicial oversight of placement decisions.)

II. Social Science

a. Social science research indicates that children who are placed in non-family settings are at higher risk for several negative (poor) outcomes including, DSM diagnosis, behavioral problems, educational issues, etc.[9]

b. There are clinically effective alternatives to congregate care that must be explored, such as Therapeutic Foster Care. [10]

Tips for Court

◊ Cite to the research that indicates children who are placed in non-family settings are put at risk for several negative outcomes. This may be compounded by the facts of the case if a particular child already has special needs that require specialized and more supportive attention.

◊ Cite to the research regarding effective alternatives to congregate care.

III. Equity

a. Children who are disproportionately represented in the foster care system may also be disproportionately represented in congregate care.

b. Although not exhaustive, children who may be at greater risk for congregate care include: LGBTQ, transgender, Native American, racial or ethnic minorities, children with special medical, mental health, or behavioral needs, and dual system youth.

Questions to Ask in Court

◊ *Is this child being treated differently based on a demographic category or minority status?*

[9] American Association of Orthopsychiatry, *Consensus Statement on Group Care for Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association*, American Journal of Orthopsychiatry 2014, Vol. 84, No. 3, 219-225; Building Bridges Initiative, BEST PRACTICES FOR RESIDENTIAL INTERVENTIONS FOR YOUTH AND THEIR FAMILIES: A RESOURCE GUIDE FOR JUDGES AND LEGAL PARTNERS WITH INVOLVEMENT IN THE CHILDREN'S DEPENDENCY COURT SYSTEM (February 2017); National Center for State Courts, EVERY KID DESERVES A FAMILY: A JUDICIAL GUIDE TO BETTER PLACEMENTS (July 2017)

[10] Chadwick Center and Chapin Hall. (2016). *Using evidence to accelerate the safe and effective reduction of non-family placement for youth involved with child welfare.* San Diego, CA & Chicago, IL.

[11] Mallon, Aledort and Ferrera, (2002 study LGBTQ youth averages 6.35 placements)

[12] Glick, Douglas, Krishan, Fisher, Lieberman, and Sisson, *Redefining Residential: Ensuring Competent Residential Interventions for Youth with Diverse Gender and Sexual Identities and Expressions*, Association of Children's Residential Centers (Oct. 2014) found at: http://togetherthevoice.org/sites/default/files/paper_12.pdf

Part 2: Advocacy After a Child Is Ordered To Residential Care

Suppose that after your thorough and independent investigation you determine that congregate care is necessary, OR despite your arguments to the contrary, congregate care is ordered by the court. What now? It is crucial to determine and advocate for the best possible placement, given the child's needs, for the shortest period of time to meet those needs. To assess whether the congregate care placement is safe, effective and appropriate to meet the child's needs, and if not, argue for a different placement, you need to focus on **11 Critical Areas**.

Critical Areas of Focus	Questions To Ask In Court
1. Does the program have a **focus on permanency**? a. Initial assessment to determine the necessity of care b. Commitment to every child having a permanent family and will work to find one if the child does not already have identified family c. Utilizes intervention as a short-term solution and actively works to help the youth return to family of origin or a family setting d. Begins discharge planning upon intake or soon thereafter	◊ *Is there a discharge plan that identifies anticipated duration of intervention and the treatment targets?* ◊ *If reunification with parents has already been excluded, has the family to whom the youth will return been identified and if not, what steps have been taken to find and engage family members?* ◊ *Are the child's parents engaged in the treatment plan?*
2. Does the program **Involve families (including biological parents, non-custodial parents, adult relatives and other identified kin)?** a. Prioritizes connection to family from admission throughout the residential intervention b. Engages the family as partners in the intervention/treatment c. Creates a Child and Family Team (CFT) d. Empowers parental decision-making	◊ *Is an identified family currently engaged in the child's intervention?* ◊ *If not, what steps are being taken to identify and engage family or other positive adult connections?* ◊ *Has a child and family team (CFT) been created?* ◊ *Has the CFT created a comprehensive treatment plan? If not, when will that take place?*
3. Does the program **involve youth**? a. Supports and ensures that youth have a voice in their treatment plan/goals b. Provides youth with the opportunity to connect with peers c. Utilizes youth advocates d. Promotes youth involvement	◊ *Does the youth have an active role in establishing treatment plans and goals?* ◊ *Is the youth allowed to attend public school – or their home school?* ◊ *Does the youth have a youth advocate to engage, guide and support him/her/their?* ◊ *Is the youth encouraged to attend his/her/their court hearings?* ◊ *Does the program involve and inform the child's attorney in the child's treatment?*
4. Does the program provide **culturally and linguistically competent services**? a. Utilizes staff with similar cultural and linguistic capabilities b. Ensures diverse workforce c. Provides opportunities for youth to engage in cultural, religious, ethnic practices d. Creates living environments that reflect diversity	◊ *Does the youth have an opportunity to engage in religious and/or cultural traditions?* ◊ *Is the program able to meet the cultural and linguistic needs of the youth?*
5.Does the program provide **trauma-informed care**? a. Conducts trauma assessments for both youth, parents and families b. Assures medical care, preferably in the youth's community c. Creates trauma-informed environments d. Utilizes evidence-informed strategies e. Regularly trains staff on understanding trauma	◊ Are trauma assessments completed for the youth? ◊ Are trauma assessment completed by the parents and other family members involved in the youth's transition home? ◊ Does the facility provide medical care for the youth in their home community? ◊ Does the staff receive regular training on trauma and evidence informed strategies? ◊ Is there a protocol for using evidence informed strategies related to trauma?

Critical Areas of Focus	Questions To Ask In Court
6. Does the program link itself with the **youth and families' home community**? a. Utilizes many practices that support reunification b. Ensures youth spend quality time at home c. If program is more than 2 hours from the youth's home, ensures a means for frequent contact d. Works with the family's local community and support network	◊ *If the location of the program is more than 2 hours from the youth's home, why was it chosen and is there a closer alternative?* ◊ *If location is more than 2 hours from youth's home, is the youth provided with meaningful opportunities to engage with family and others in their support network daily?* ◊ *Is there an aftercare program provided by or coordinated through the program?*
7. Does the program use **seclusion and restraint**? a. Has a policy regarding the use of seclusion and restraints which all parties have reviewed b. Requires staff to undergo regular training on S/R c. Collects/monitors/tracks data on S/R usage d. Uses debriefing techniques after S/R e. Creates an environment grounded in knowledge of trauma and applies it to S/R	◊ *Has the youth been subjected to seclusion or restraint and if so, why?* ◊ *What was tried to de-escalate the situation prior to the use of S/R?* ◊ *How long did the S/R last and was that the least amount of time necessary to safely reduce the threat?* ◊ *Was a de-briefing conducted with the youth (and staff?) after the S/R?*
8. Does the program work with **youth in transition to adulthood**? a. Supports youth and who they consider family b. Teaches youth skills to be successful in adulthood c. Utilizes peer mentors to teach and model skills d. Connects youth to resources e. Assures that youth have access to support networks and housing prior to leaving the program	◊ Does the youth have a transition plan? ◊ Has an adult connection or connection to a support network been established for the youth ◊ Does the youth have a place to live and a means of financial support in place upon discharge?
9. Does the program have an informed practice on the **use of psychotropic medication**? a. Has a medical doctor/psychiatrist on staff or as a regular part of the treatment team b. Ensures prescribing physicians weigh the risks and benefits of medications c. Conducts on-going re-assessments d. Obtains informed consent e. Ensures a smooth transition upon discharge to ensure the prescriptions are maintained appropriately	◊ Is the child currently on any psychotropic medication? ◊ Is the child's prescribed medication consistent with the child's diagnosis? ◊ How often does the child get medication assessments to ensure the continued appropriateness of the prescription?
10. Does the program use **best practices**? a. Implements standards and procedures to hold itself accountable b. Is licensed by its state authority and nationally accredited c. Provides regular and consistent training and supervision to staff d. Incorporates a core set of values and operating principles e. Employs trauma-informed care and utilizes evidence based or evidence informed practices	◊ Is this facility licensed by the state? ◊ How does the state or other licensing body monitor the facility? ◊ Does the facility have operating principles that are publicly available? ◊ How does the facility incorporate trauma-informed practices?
11. Does the program **focus on outcomes**? a. Ensures what outcome data is critical to collect and develops methods to collect the data b. Develops and implements a method for data collection and benchmarking its performance c. Ensures that practice and process indicators are measured d. Ensures that the functional domains of home, purpose, community and health are measured e. Collects functional outcome data and uses it to inform on-going performance f. Shares its data with external constituents	◊ Does this program have a process by which it tracks data in order to measure and improve outcomes? ◊ In addition to tracking systemic outcomes, how does this program measure and ensure outcomes for this individual child?

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