

Reforming Juvenile Justice Through Impact Litigation: Can recent success in California be duplicated in Nebraska?

By Mark Porto

As an attorney who performs a rather high percentage of my practice in the juvenile court arena, I have heard many foster parents, support workers, and even the occasional caseworker complain about the rather minimal amount of financial assistance provided to foster parents. It took my recent trip to the National Juvenile Law Conference in New York City, however, to truly understand just how poorly we, as Nebraskans, treat these often thankless heroes in the lives of children who wind-up in the foster care system. Specifically, the presentation I attended was conducted by attorneys from the Children’s Advocacy Institute in California¹ who had recently participated in groundbreaking federal litigation regarding the sufficiency—or insufficiency—of reimbursement payments issued to foster care providers. This was truly an eye-opening presentation which I believe could very well be duplicated in Nebraska.

The Problem

Simply put, the State of Nebraska provides the lowest per-month reimbursement rate to foster parents in the entire United States² and the second lowest when adjusted for cost-of-living considerations³. This is a problem not only for the financial well-being of those families who choose to perform foster care services, but also for the many children who are at risk of being deprived of a traditional foster care home—often the best-case

¹ The Children’s Advocacy Institute’s website is located at: <http://www.caichildlaw.org/index.htm>

² “Hitting the M.A.R.C. Establishing Foster Care Minimum Adequate Rates for Children.” Technical Report. October, 2007. Children’s Rights, National Foster Parent Association and the University of Maryland, School of Social Work, 1.

³ *Id.* at 4-6.

scenario during what is obviously a difficult situation—because traditional foster care providers are not being provided with the financial assistance necessary to cover the monetary burdens associated with caring for a foster child.

Nebraska’s foster care reimbursement problem is not merely an unfortunate systematic inadequacy, it may very well be a violation of federal law. That is, under the federal Child Welfare Act⁴ (“CWA”), a state’s eligibility to receive federal funding is dependent on its agreement to, among other things, issue “foster care maintenance payments” to persons providing licensed foster care services⁵. The CWA goes on to state that:

[t]he term ‘foster care maintenance payments’ means payments to *cover* the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, and reasonable travel to the child’s home for visitation.⁶

In 2007, a study was released by the University of Maryland School of Social Work which shed light on the inadequacy of foster care reimbursement payments on a state-by-state basis.⁷ The study examined the actual costs necessary to provide foster children with those items required to be provided—or “covered”—by the states in the form of financial reimbursement to foster parents under the CWA. This amount was referred to as the “Foster Care Minimum Adequate Rates for Children” (or “Foster Care

⁴ 42 U.S.C. §§670-679b.

⁵ 42 U.S.C. §671 (a)(1)

⁶ 42 U.S.C. §675(4)(A) (Emphasis added).

⁷ “Hitting the MARC: Establishing Foster Care Minimum Adequate Rates for Children.” Technical Report. October, 2007. Children’s Rights, National Foster Parent Association and the University of Maryland, School of Social Work.

MARC”)⁸. The study then compared these costs with the amount of reimbursement each state actually provided to foster parents.

The results of the study were striking. Most notably, all but two jurisdictions—Arizona and the District of Columbia⁹—needed to increase payments to foster care providers of at least one age group.¹⁰ In fact, more than half of the states needed to increase payments by at least 50% in one or more age group in order to adequately “cover” these costs.¹¹ With respect to Nebraska, the results were even more alarming. That is, in order to become in compliance with the University of Maryland’s “MARC,” the study found that reimbursement compensation to Nebraska foster parents needed to increase 103% for children age 9;¹² 123% for children age 16;¹³ and an appalling 181% for children age 2.¹⁴ Only the State of Ohio was found to be lacking at a level exceeding that of Nebraska.^{15 16}

Changes Through Impact Litigation

In October, 2007, armed with the results of the University of Maryland Study, a group of California foster parents filed a class-action lawsuit against the California Department of Social Services seeking declaratory judgment and injunctive relief on account of the Department’s failure to abide by the Child Welfare Act’s requirement that

⁸ *Id.* at 2.

⁹ For the purposes of simplicity, the District of Columbia will be referred to as a “state.”

¹⁰ *Id.* at 7-9.

¹¹ *Id.* at 7-9.

¹² *Id.* at 9.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* In order to bring foster care reimbursement rates in accordance with the report’s MARC, the State of Ohio would need to increase reimbursement payments by 131% for children age 2; 164% for children age 9; and 190% for children age 16.

¹⁶ The Nebraska DHHS payment schedule for foster care services is set forth in the “Out-of-Home Placement Guidebook.” 390 NAC 7-004.05. According to pages 36-39 of the “Out-of-Home Placement Guidebook” produced on the DHHS website, the rates went into effect February 1, 1998 and there is no indication that the rates have been altered since.

the Department provide maintenance payments to foster care providers which “cover” the cost of foster care services.¹⁷ The result of the litigation was a relatively quick and decisive victory in favor of the foster parents. Specifically, in granting summary judgment in favor of the plaintiff-foster parents, the United States District Court for the Northern District of California stated that, because the California DSS based the amount of its foster care payments solely on general budgetary considerations, and without regard to the Child Welfare Act’s specific requirements as to what must be “covered,” the Department was not in compliance with federal law.¹⁸

Is a Similar Action Ripe for Nebraska?

The results of the California litigation, coupled with the Maryland Study’s conclusion that Nebraska’s foster care reimbursement rates fall far short of the CWA’s requirements, seemingly provide reason to believe that similar litigation could be successful in the Nebraska federal court system. Specifically, the successful litigation in *California State Foster Parent Assn.* revolved around rates which—even when adjusted for cost of living—were much closer to the Foster Care MARC than those provided to Nebraska foster care providers.¹⁹ Moreover, like the California DSS, it does not appear as though the base reimbursement rates set forth by the Nebraska DHHS were developed based upon criteria which objectively considered the amount it actually takes to “cover”

¹⁷ *California State Foster Parent Ass’n. v. Wagner, et. al.*, 2008 WL 4679857 (N.D. Cal. 2008).

¹⁸ *Id.* at 6-7. The Plaintiffs also argued that, notwithstanding the Defendants’ failure to adopt a payment system that considered the actual costs to “cover” foster care services, summary judgment should be awarded solely on account of the fact that California’s foster care payments needed to be increased between 44% and 61% in order to “cover” the costs of foster care services as per the University of Maryland study. The court noted that, while there was certainly a point at which foster care payments become sufficiently inadequate as to constitute a violation of the CWA, that was an issue of fact and therefore inappropriate for summary judgment consideration. *Id.* at 7.

¹⁹ Hitting the MARC, pgs. 7-9.

the costs that the state is required to “cover” by virtue of the CWA and the state’s acceptance of federal funding.

390 NAC 7-004.05 is the Nebraska regulation governing foster care payments.

According to the regulation:

[t]he payment rate is determined by the use of the Foster Care Payment Determination Checklist plus child care, respite care, transportation, and other needs based on the guidelines as found in the Out-of-Home Placement Guidebook.

According to the “Out-of-Home Placement Guidebook,” the maintenance payment provided to a foster care provider is based on 1) the age of the child; and 2) the child’s needs.²⁰ The base amount—or the amount issued in the absence of any “special needs” of the child—includes “board and room;” “personal needs;” “school needs;” “transportation to meet child’s needs;” “clothing;” and “allowance”²¹ and amounts to \$222 per month for children ages 0-5; \$292 for children ages 6-11; and \$352 for children 12 and over—well short of the University of Maryland’s foster care “MARC” for children in foster care in Nebraska.²² Additionally, conspicuously absent from the “Out-of-Home Placement Handbook” is an explanation as to how the base figures were determined, nor is there any evidence justifying these figures with respect to the state’s obligation to “cover” foster care payments under the CWA.

It certainly seems as though Nebraska current foster care reimbursement rates need to be reevaluated in light of the University of Maryland study. Clearly, there is

²⁰ Nebraska DHHS “Out-of-Home Placement Guidebook,” p. 38.

²¹ 390 NAC 7-004.05.

²² According to the aforementioned University of Maryland study, the foster care MARC for Nebraska foster children is \$636 per month for children age 2; \$729 for children age 9; and \$799 for children age 16.

precedence for successful class-action litigation based primarily on the study—from a state which, according to the study, was actually much closer to the Foster Care MARC than Nebraska. That being said, the unsuccessful litigation in *Carson P. v. Heineman*, 240 F.R.D. 456 (D. Neb. 2007), does leave reason for skepticism regarding the chances that such litigation could be successfully prosecuted by a private class of Nebraska citizens. Specifically, in *Carson P.*, a group of children in the Nebraska foster care system brought a class-action lawsuit against the State of Nebraska alleging, among other things, that they were harmed by Nebraska’s failure to abide by the CWA’s requirement that it “cover” the cost of foster care.²³ In dismissing that portion of the lawsuit, the court held that the CWA did not provide the children with a private right of action for damages based on a state’s failure to comply with the mandates of the CWA.²⁴

The *Carson P.* court gave two justifications for this determination. First, the court indicated that, because the plaintiff-children were not the direct recipients of the foster care reimbursements, they were not the proper party to initiate an action contesting the inadequacy of the rates.²⁵ Instead, the proper party would have been the actual foster care providers.²⁶ Second, the court held that the right to adequate foster care maintenance payments was too “vague and amorphous” to constitute an enforceable federal right.²⁷

The first hurdle experienced by the Plaintiffs in *Carson P.* regarding a private right of action under the CWA would presumably be overcome by Nebraska litigation based on *California State Foster Parent Assn.* in that Nebraska foster parents are direct recipients of foster care payments whereas the children in *Carson P.* were not—a critical

²³ 240 F.R.D. at 539.

²⁴ *Id.* at 539-41.

²⁵ *Id.* at 540.

²⁶ *Id.*

²⁷ *Id.* at 540-41.

distinction according to *Carson P.*²⁸ While the second hurdle—that the CWA’s requirements regarding foster care payments are too “vague and amorphous” to provide individuals with a private right of action—may not be overcome at the Nebraska federal trial court level, there is reason to be optimistic that the Eighth Circuit may feel differently. That is, while the *Carson P.* court did not feel as though the CWA’s requirements regarding foster care maintenance payments were sufficiently definitive to provide foster parents with a private right of action, there is clearly authority supporting an opposite conclusion. For instance, the court in *California State Foster Parent Assn.* specifically stated that “the Child Welfare Act contains the rights-creating language necessary to confer upon plaintiffs a private right of action under Section 1983.”²⁹ Perhaps even more encouraging is the fact that, in *Missouri Child Care Assn. v. Martin*, 241 F.Supp.2d 1032 (W.D. Mo. 2003)—a case within the Eighth Circuit’s geographical area—the court held that the CWA did create a private right of action,³⁰ stating that “Congress provided sufficient guidance in the CWA to permit judicial enforcement.”³¹ Thus, while the *Carson P.* precedent would likely preclude Nebraska foster parents from initially reaching the merits of a challenge to the state’s current foster care reimbursement rates, there is certainly reason to believe that *Carson P.*’s prohibition regarding private challenges under the CWA could be overcome with the right group of Plaintiffs (foster parents as opposed to foster children) and a possible challenge to the Eighth Circuit Court of Appeals.

Conclusion

²⁸ *Id.* at 540.

²⁹ 2008 WL 4679857, p. 3.

³⁰ With respect to whether the CWA created a private right of action, the *Carson P.* noted the decision set forth in *Missouri Child Care Assn.*, and indicated its disagreement. 240 F.R.D. at 540.

³¹ *Id.* at 1041.

The results of the University of Maryland study, coupled with the recent litigation in *California Foster Parent Assn.* provides what I believe to be the groundwork for a major reconsideration of Nebraska's foster care reimbursement rates. Too many Nebraska foster care providers are currently forced provide their own financial resources to adequately care for children in their home. This is an unacceptable situation and one that may very well violate the Child Welfare Act. Perhaps the Nebraska DHHS will see the aforementioned California litigation as a "wake-up call" and reconsider its current policies regarding foster care reimbursement. If it does not, however, then perhaps the environment is ripe for similar litigation designed to improve the lives of Nebraska's foster children.