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ESSAY: ARE WE FAILING OUR CHILDREN AND THEIR FAMILIES? CHILDREN’S MENTAL HEALTH AND THE MISUSE OF THE CHIPS PROCESS

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“Every Child Is A Story.”

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1. The views expressed in this article are those of the authors and do not necessarily reflect those of the State of Minnesota, the Governor, or the Legislature.
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I. INTRODUCTION

Children are one of our nation’s most precious resources. They provide us with a vast assortment of treasures and challenges, which simultaneously enrich our lives and push us to further limits of self-improvement. They are our nation’s future. Setting aside, for the moment, the emotional gifts they bring to our daily lives, as a nation, we are dependent upon our youth in countless ways. They will supply our nation’s future workforce and thus ensure the future fiscal viability of the economy and the social security system. In addition to the financial support they will provide to our aging population, they will be our future caregivers. Our youth will also be instrumental in providing future answers to currently unsolved national and global issues.

Our appreciation and recognition of the tremendous intrinsic value of children is reflected in our nation’s laws governing minors. These laws reflect a fundamental understanding that our children are extremely special and valuable and therefore warrant our most intense protection. Furthermore, our children deserve the best services our nation can provide. We have written numerous laws at the state and federal level to educate children, support them, provide them with nutritional and recreational programs, protect them from maltreatment, and to provide children in need with valuable social services.

The most prominent of Minnesota’s laws focusing on the special needs of children are the child protection provisions of the Juvenile Court Act (CHIPS). The intent of the provisions of the CHIPS law is to provide protection and services to children in need. Throughout Minnesota, however, there has been an increase in instances where counties have misused the CHIPS process, violating the rights of families. The county either fails to provide protection or services when clearly needed, or it

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3. **MINN. STAT. ch. 260C (2004)**. The child protection provisions of the Juvenile Court Act will hereinafter be cited as **MINN. STAT. § 260C** or “CHIPS,” which refers to “child in need of protection or services.” This term is a catchall phrase used to describe a child involved in the CHIPS process. The phrase does not simply describe children in need of protection from abuse or neglect, but also includes children in need of services to meet their special health, developmental, and mental health needs that are beyond the ability of the parents to personally provide.

4. **Id. § 260C.001, subd. 2.**
unnecessarily intrudes on the family by filing a CHIPS petition when it is unwarranted. The children and their parents may simply be in need of mental health treatment or other special services, but instead they find that they are being needlessly pulled into the juvenile court system through the CHIPS process.

The purpose of this essay is to illustrate the increasing number of calls to the Office of the Ombudsman by families who have become victims of the CHIPS process and will explore why this is happening. The families, whose children have special mental health needs, turn to their counties for assistance and find that they get trapped in a system where they lose custody of their children as a condition of, or as a result of, asking the counties for assistance.

The practice of parents being forced to relinquish custody of their child to access services is a widespread problem, and has been discussed and studied in a number of venues. Recently, there was a report in the Canadian Province of Ontario issued by the Provincial Ombudsman entitled, “Between a Rock and a Hard Place,” which describes Canada’s struggle with this issue. Currently, there is a bill pending before the United States Congress referred to as the “Keeping Families Together Act,” co-sponsored by Minnesota’s Senator Norm Coleman and sponsored by Minnesota’s Representative Jim Ramstad. The purpose of the Act is to create a state family support grant program to end the practice of parents relinquishing legal custody of their seriously emotionally disturbed children to state agencies to obtain mental health services for those children. It is troubling that this problem still exits in Minnesota, despite the fact that Minnesota is one of the few states in the nation with a statutory prohibition against such action.

One of the goals behind the Minnesota Comprehensive Children’s Mental Health Act is to provide children and their families with mental health services without the need to involve families in the CHIPS process. If parents suspect that their

5. See, e.g., Radke v. County of Freeborn, 694 N.W.2d 788 (Minn. 2005) (demonstrating an example of a county failing to protect a child); see infra Parts III, IV (discussing two examples of counties unnecessary filing CHIPS petitions).
9. Id. §§ 245.487–245.4887 or “Minnesota Comprehensive Children’s Mental
children are in need of mental health services, they can contact their county’s Children’s Mental Health Division for help and resources. The county receives financial grants from the state and federal governments in order to serve as a “safety net” for children with serious emotional disturbances or serious mental health needs.\(^\text{10}\)

The following is a scenario that may ensue as a result of the Children’s Mental Health Act: the concerned parents seek medical advice from their general practitioner who, in turn, refers the child to a pediatric psychiatrist. The psychiatrist prescribes medication and the parents are able to manage their child’s mental health needs within the family home. In another scenario, the parents may have to contact county social services and request that a personal care attendant come into the family home and provide care for the child while the parents are at work. Yet again, the child may need the assistance of a personal care attendant while attending school to assist with educational needs and to keep the child on track. The county may also be asked to provide mental health funding that would allow a skills worker to visit the home to assist the child with developing appropriate behavioral skills. The parents may also ask the county to provide the parents with short-term respite care so that they can receive temporary relief from the stress associated with caring for a challenged child. Finally, when necessary, the parents may ask the county to assist in locating and paying for treatment or foster care in an appropriate out-of-home placement. This temporary out-of-home placement would address the special needs of children until their symptoms are under control and they can return to the family home.

In each of the scenarios listed above, the parents receive mental health services for their child, as envisioned under the Children’s Mental Health Act, without the involvement of the CHIPS process. What is increasingly happening in Minnesota counties, however, is that county social workers mistakenly inform parents that the only way for the family to access mental health services for their child is through the filing of a CHIPS petition and for the court to award the county physical and, or in alternative,
legal custody of their child.\(^{11}\) This is in direct contradiction to the intent of both the Children’s Mental Health Act\(^{12}\) and the Juvenile Court Act,\(^{13}\) resulting in the collateral consequence that the child is unnecessarily removed from the family home and placed in foster care.\(^{14}\)

According to the most current Adoption and Foster Care Analysis and Reporting System Report, as of August 2004, there were approximately 532,000 children in the United States in foster care.\(^{15}\) In Minnesota, 8495 children entered foster care in fiscal year 2003 and there were 7338 children still in foster care at the end of the federal fiscal year.\(^{16}\) There are a host of reasons why there is such a large portion of our nation’s youth entering and remaining in foster care. One of the likely reasons for the increase in out-of-home placements is the reaction and aftermath by counties when there is a tragic death of a child that the county’s child protection service should have protected. Such cases inevitably catch the attention of our nation’s newspaper headlines and the public’s outcry and condemnation is understandable.

Such were the facts surrounding the murder of a nineteen-month-old child in Minnesota. The case resulted in a holding by the Minnesota Supreme Court that a cause of action can be maintained for negligence against counties and social workers as a result of the investigation and intervention of child abuse and neglect reports.\(^{17}\)

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11. There has been an increase in calls to the Office of Ombudsman by parents detailing this trend. See infra Parts III, IV (discussing two examples).
13. Id. ch. 260C.
14. Some county social workers mistakenly believe that it is necessary for the county to gain custody of the child in order for the county to access federal Title IV-E funds that help pay for the cost of out-of-home placement for children. This is not the case, however. A court order is required to ensure that a judge has reviewed and agrees that the child is in need of an out-of-home placement, but the court’s review of the matter does not have to involve the issue of custody. See id. § 260C.201, subd. 10(a).
17. Radke v. County of Freeborn, 694 N.W.2d 788 (Minn. 2005).
The child was beaten to death on April 21, 2001, by a roommate of the child’s mother. 18 “During the months preceding [the child’s] tragic death, he was the subject of a child abuse and neglect investigation by the Freeborn County Department of Human Services.” 19 During the time leading up to the child’s murder, physicians examined the child on two separate occasions because of the father’s suspicion that someone had abused his son. 20 In both instances, the physicians reported suspected child abuse and neglect to the county. 21 The child’s guardian ad litem also suspected abuse and alerted authorities. 22

The county investigated the suspected abuse, but each time the social workers believed the explanations of the mother. 23 In one instance, the mother explained that the injuries were from “hand-foot-and-mouth disease” and in another instance the mother claimed that the bruising occurred the night before while the boy was in the bathtub. 24 The county failed to take any protective measures and the child later was murdered by the man that had caused the earlier abuse. 25

This tiny child’s brutal murder is tragic and horrific and a community’s outrage over the failure of the social service system to protect this child is justifiable. Cases such as this, however, all too often have a negative consequence in that individuals within the “system” respond in an automatic manner that results in the system harming rather than helping some families. Because a county failed to provide protection or services in instances when it was clearly needed, there are times when the county and the court become overly cautious and controlling. As a result, counties unnecessarily file CHIPS petitions and seek custody of children even though there is no evidence or history of abuse or maltreatment. 26

This over-reaction by counties results in a “three stage” response by stake-holders. 27 This is not unique to Minnesota. 28 The

18. Id. at 791.
19. Id.
20. Id.
21. Id.
22. Id. at 792.
23. Id. at 791-92.
24. Id.
25. Id. at 792.
26. See infra Parts III, IV.
27. Emerich Thoma, If You Lived Here, You’d Be Home By Now: The Business of Foster Care, in INSTITUTE FOR PSYCHOLOGICAL THERAPIES (vol. 10 1998), available at
result is “foster care panic,” and it is described in the article, If You
Lived Here, You’d Be Home By Now: The Business of Foster Care, by
Emerich Thoma.29

This pattern is all too familiar to journalist Richard
Wexler (1990), who notes that politicians will first swoop
down on such a case “like vultures,” seeking out
scapegoats. They will pledge to “crack down on child
abuse” by urging more people to report the slightest
suspicion of maltreatment to authorities. They will then
suggest legislation to make it even easier than it already is
to remove children from their parents. [What] follows
then [is] a second stage, a “foster care panic” in which
caseworkers apprehensive about making mistakes set
about the task of removing a greater number of children
from their homes. The third stage finds bureaucrats
“ducking for cover,” finding some way to blame the death
on efforts to keep families together. They will say “the
law” requires them to keep children in, or return them to,
dangerous situations.

In New York City, there was a high-profile case in which a child
receiving social services died from abuse or neglect.31 An audit of
the New York City social service department was conducted and the
mayor and the new Commissioner of the Administration for
Children’s Services implemented recommendations of the audit.32

The response was an example of the “foster care panic.”

“I would like the caseworkers to err on the side of
protecting the children,” announced [the new
Commissioner] . . . . Shortly after [the child’s] death
made the headlines, [the Commissioner] sounded this
call and defense social work took hold in New York city as
it never had before. What is defense social work? As a
Brooklyn judge, speaking on condition of anonymity,
explained to the New York Times: “It’s classic cover-your-
rear-end behavior by people who are either genuinely
frightened or cynical. I don’t know if they are servicing
people better but all of a sudden, I have tons of cases,
cases that they would not have normally filed."\textsuperscript{33}

A senior official with the New York City Social Services Employees Union Local 371 stated, “People are working not to make mistakes, and that may not necessarily be in the best interests of the children. How so? Unnecessary removals.”\textsuperscript{34}

Fewer than 10% of New York City’s child welfare cases involve an allegation of physical abuse or severe emotional abuse, according to the Center for an Urban Future. For what reasons, then, are so many children being removed from their homes? . . . [C]lose to 85% of the cases agencies labeled as neglect are actually poverty cases, and removing children from their homes is often the safest course of action for a caseworker to take.\textsuperscript{35}

Judge Thomas Farber of Criminal Court in Brooklyn reportedly sees scores of parents who have spent time in jail and lost children to foster care for such things as fighting in front of their children, spanking their younger ones, or leaving their older ones home alone. “A huge number of these cases could be resolved without court, maybe 75% of them,” said Farber. “But more and more arrests are being made where the police might have accepted a more appropriate explanation.”\textsuperscript{36}

Minnesota has a number of laws and rules that govern how counties and the courts are supposed to approach both the CHIPS law and the Children’s Mental Health Act.\textsuperscript{37} Why then, do we find so many cases where there are actions taken that are contrary to the spirit, intent, and letter of these laws? Why do so many parents feel overwhelmed, helpless, intimidated, and disenfranchised simply because they accessed the system to help their child? While the social service system is designed to protect and provide services to those in need, in practice there are instances when the counties’ use of the CHIPS process violates parents’ rights and harms children.

\textsuperscript{33} Id.
\textsuperscript{34} Id. (citing Joe Sexton, As Child Abuse Cases Rise, N.Y. TIMES, May 12, 1996, at 1).
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} See MINN. STAT. §§ 245.487–.4887 (2004); see also id. ch. 260C.
II. THE JUVENILE COURT ACT AND THE CHILDREN’S MENTAL HEALTH ACT

Children’s mental health services in Minnesota are governed by two statutes, the Children’s Mental Health Act and the child protection provisions of the Juvenile Court Act. “The juvenile court has original and exclusive jurisdiction in proceedings concerning any child who is alleged to be in need of protection or services, or neglected and in foster care.” Minnesota Statutes section 260C.001 states, “[t]he paramount consideration in all proceedings concerning a child alleged or found to be in need of protection or services is the health, safety, and best interests of the child.” The statute goes on to state that

[t]he purpose of the laws relating to juvenile courts is to secure for each child alleged or adjudicated in need of protection or services and under the jurisdiction of the court, the care and guidance, preferably in the child’s own home, as will best serve the spiritual, emotional, mental, and physical welfare of the child; to provide judicial procedures which protect the welfare of the child; to preserve and strengthen the child’s family ties whenever possible and in the child’s best interests, removing the child from the custody of parents only when the child’s welfare or safety cannot be adequately safeguarded without removal; and, when removal from the child’s own family is necessary and in the child’s best interests, to secure for the child custody, care and discipline as nearly as possible equivalent to that which should have been given by the parents.

With regard to the Children’s Mental Health Act, the Minnesota Legislature found that “there is a need for further development of existing clinical services for emotionally disturbed children and their families and the creation of new services for this population.” The legislative mission behind the Children’s Mental Health Act is to have the Commissioner of the Department of Human Services “create and ensure a unified, accountable, comprehensive children’s mental health service system that is

38. Id. §§ 245.487–.4887.
39. Id. §§ 260C.001–.501.
40. Id. § 260C.101, subd. 1.
41. Id. § 260C.001, subd. 2.
42. Id.
43. Id. § 245.487, subd. 2.
consistent with the provisions of public social services for children."\textsuperscript{44}

Because the premise underlying the law is that decisions are to be made with the child’s best interests in mind, there is a fundamental assumption that individuals within the legal and social service system are also acting under the best of motives. But this is not necessarily the case. The CHIPS provisions do not work to protect children in the way the law was envisioned because often the rights of children and their families are decimated within the system. The child and the parents theoretically have legal rights, but the law, with the interweaving of the juvenile justice system and the social service system, is so convoluted that it often makes matters worse for the child and the family, rather than better.

One of the clearest examples of how families’ rights are being abused under the CHIPS process is when the county unnecessarily assumes legal custody of the child. Under the CHIPS law, legal custody means “the right to the care, custody, and control of a child who has been taken from a parent by the court in accordance with the provisions of [Minnesota Statutes] section 260C.201 or 260C.317.”\textsuperscript{45} As discussed below, the filing of a CHIPS petition is unnecessary in order for a child to be placed in a long-term treatment facility.\textsuperscript{46} Even in instances where a CHIPS petition is filed, Minnesota Statutes section 260C.201, subdivision 1(a)(3) specifically states that the county shall not be awarded custody solely because the parents are unable to provide special services for their child.

If the child has been adjudicated as a child in need of protection or services because the child is in need of special services or care to treat or ameliorate a physical or mental disability, the court may order the child’s parent, guardian, or custodian to provide it. Absent specific written findings by the court that the child’s disability is the result of abuse or neglect by the child’s parents or guardian, the court \textit{shall not} transfer legal custody of the child for the purpose of obtaining special treatment or care solely because the parent is unable to provide the treatment or care.\textsuperscript{47}

\textsuperscript{44} Id. § 245.487, subd. 3.
\textsuperscript{45} Id. § 260C.007, subd. 22; see also id. § 260C.317 (referring to proceedings that terminate parental rights).
\textsuperscript{46} See id. § 260C.212, subd. 9(a)–(b).
\textsuperscript{47} Id. § 260C.201, subd. 1(a)(3) (emphasis added).
Under the Children’s Mental Health Act, parents should be able to access mental health services for their children, regardless of the length of period of treatment or the nature of an out-of-home placement, without the county initiating the CHIPS process. For the purpose of analysis, assume a couple has five children, one of whom is a thirteen-year-old boy who is often defiant and hostile toward his parents and other adults. The parents contact their social service agency and a psychological assessment is conducted, from which it is determined that the teenager suffers from Oppositional Defiant Disorder (ODD). It is common for family dynamics to be affected as a result of parents raising a behaviorally disabled child. Here, the boy’s behavior escalates to the point where the familial integrity begins to deteriorate because the parents are spending a disproportionate amount of time and energy on the needs of their child with ODD. The parents realize that they are unable to provide at home the intense services their son needs and request that the county place their son in residential treatment.

After five months in residential treatment, the parents and the county agree that the teenager is in need of continued residential treatment for his ODD. The county, however, informs the parents that a CHIPS proceeding in juvenile court must be initiated, and the county will need to assume legal custody of their son in order to continue residential treatment beyond six months. This example illustrates how Minnesota counties sometimes are making a fundamental mistake that results in unnecessary harm to families and violates the rights of the parents.

It is clear that, under the Juvenile Court Act, a court review

48. The essential feature of ODD is a recurrent pattern of negativistic, defiant, disobedient, and hostile behavior toward authority figures that persists for at least six months and is characterized by the frequent occurrence of at least four of the following behaviors: losing temper, arguing with adults, actively defying, or refusing to comply with the requests or rules of adults, deliberately doing things to annoy other people, blaming others for his or her own mistakes or misbehavior, being touchy or easily annoyed by others, being angry and resentful, or being spiteful or vindictive. Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders (4th ed. text rev. 2004) [hereinafter DSM-IV-TR].

49. It is important to note that the son is placed in residential treatment, not because of parental abuse or neglect, but because he is in need of special treatment to care for or ameliorate his mental disability. For the definition of a residential treatment center, see Substance Abuse and Mental Health Services Administration, Glossary of Terms: Child and Adolescent Mental Health, available at http://www.mentalhealth.samhsa.gov/publications/allpubs/CA-0005/default.asp (last visited Oct. 7, 2005).
must be conducted if a child is to remain in an out-of-home placement.

If a . . . child diagnosed as emotionally disturbed has been placed in a residential facility pursuant to a voluntary release by the child’s parent or parents because of the child’s . . . need for long-term residential treatment or supervision, the social services agency responsible for the placement shall report to the court and bring a petition of the child’s foster care status as required in section 260C.141, subdivision 2, paragraph (b). 50

It is not necessary to file a CHIPS petition, however, in order for the juvenile court to review a long-term, out-of-home residential placement. Rather, the juvenile court has jurisdiction to conduct a “review of foster care status of a child who has been placed in a residential facility . . . pursuant to a voluntary release by the child’s parent or parents.” 51 In the above example, the parents have voluntarily placed their son in a residential treatment facility solely for the purpose of providing special treatment for his ODD. Therefore, the juvenile court need only review the case to determine whether the boy’s continued out-of-home placement for ODD treatment is in his best interest. 52 The filing of a CHIPS petition is unwarranted and the county does not need to seek custody of the child. 53

Minnesota Statutes section 260C.007, subdivision 6(4) defines a child in need of protection or services as one that is “without the special care made necessary by a physical, mental, or emotional condition because the child’s parent . . . is unable or unwilling to provide that care, including a child in voluntary placement due solely to the child’s developmental disability or emotional disturbance.” 54 There are a number of ways parents may fall under this definition. The parents may be unable to provide for their children’s special needs when, for example, they have several children to care for and the child with the disability has needs that

50. MINN. STAT. § 260C.212, subd. 9(a).
51. Id. § 260C.101, subd. 2(e).
52. See id. § 260C.141, subd. 2(b). At the permanency review hearing, the court may permit an indefinite out-of-home placement of the child if there are compelling reasons for such a placement. This may be ordered without the need to permanently place the child away from the parents or award custody to the county.
53. See id. § 260C.212, subd. 9(b).
54. Id.
exceed what an ordinary parent can provide. Or perhaps the parents themselves suffer from a physical or mental disorder that prevents them from providing or seeking help for their child. Additionally, the definition refers to parents that are unwilling to provide for the care of their children because, for example, the parents deny either that their children suffer from a mental or emotional condition or they are afraid of the stigma attached to having a child with a mental illness.

In instances where the parents request mandated services from the county, the parents are able and willing to provide special care for their emotionally disturbed child and the involvement of the juvenile court is inappropriate. The fact that they ask for help shows that they are “able” to care for their child by virtue of the fact they know how to access community resources. The parents are also “willing” to care for their child by virtue of them asking for help.

Finally, there is a CHIPS provision that specifically grants the court authority to review long-term, out-of-home placements without the requirement that a CHIPS petition be filed. Under this provision, the county must file a petition for review (as opposed to a CHIPS petition) of the child’s foster care status in situations where parents have voluntarily placed their child in an out-of-home placement for the sole purpose of long-term residential treatment or supervision. The provision further states, “[i]f the child is in placement due solely to the child’s . . . emotional disturbance, and the court finds compelling reasons not to proceed under [the provision for a permanent placement determination], custody of the child is not transferred to the responsible social service agency . . . and no petition [for a permanency hearing] is required.”

The CHIPS law has distinct provisions in it that allow for services to be delivered to families without the need of the county to file a CHIPS petition. Counties, however, sometimes fail to inform families of this fact and needlessly file CHIPS petitions when the families were simply attempting to access mental health

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55. Id. § 260C.212, subd. 9(a).
56. Id.
57. Id. subd. 9(b) (emphasis added).
58. MINN. R. JUV. PROT. P. 44.02, subd. 1(a)(1) (2005).
59. See MINN. STAT. §§ 260C.007, 260C.212.
services for their children. Sections III and IV of this essay set forth two case studies reviewed by the Office of the Ombudsman for Mental Health and Developmental Disabilities (the “Office”) which illustrate ways in which the rights of two Minnesota families have been abused by the system and further illustrate the reasons that reform is needed in the area of children’s mental health.

III. LISA’S STORY

A. Lisa, the County, and the Misuse of CHIPS

Lisa’s future looked bright. She worked hard in school, was able to achieve a college education and secured a well-paying job that she found challenging and fulfilling. Even though she was a single mother of three children, she was still able to maintain a career and purchase and maintain her own home. But Lisa’s family’s future was soon to turn from one of optimism to one of despair.

When Lisa first learned that her neighbor’s teenage son had sexually abused her eight-year-old son and her six-year-old daughter, she was devastated. Lisa was concerned for her children’s continued safety, confused about what to do and frightened that the events would have a long-lasting and negative impact on her children’s mental health. She watched in frustration as her children’s behavior and moods began to change. The children became withdrawn, unusually apprehensive, and fearful of going to their school, where the teenager that abused them also attended.

Her children began missing school. To make matters even more difficult, Lisa was battling her own mental illnesses, which were later diagnosed as Bipolar Disorder and Attention-

60. Sections III and IV, Lisa and Bobby’s stories, are two case studies reviewed by the Office of the Ombudsman. The names used herein have been changed for privacy purposes. Specific documents are not cited to avoid disclosing facts that are not part of the public record for each case and to protect the families’ privacy. Documentation regarding these cases is on file with the Office of the Ombudsman.

61. DSM-IV-TR, supra note 48, at 382-97. Bipolar Disorder is characterized by one or more Manic Episodes (a distinct period during which there is an abnormally and persistently elevated, expansive, or irritable mood). Id. at 357. Often individuals have also had one or more Major Depressive Episodes (a period of at least two weeks during which there is either depressed mood or the loss of interest or pleasure in nearly all activities). Id. at 349.
Deficit/Hyperactivity Disorder (ADHD).\textsuperscript{62} Between her worries for her children, confusion as to what to do, and dealing with an illness that seemed to be increasingly oppressive, it is a wonder Lisa was able to cope with what was happening around her.\textsuperscript{63} Lisa needed help, but she was uncertain of where to turn.

The children’s school, concerned that her children were becoming increasingly truant from class, contacted the county’s social services department. The county opened a file on the children and contacted Lisa to set up an appointment to discuss the children’s truancy. Lisa thought that she had now found the help that her family so desperately needed.\textsuperscript{64}

During the appointment, Lisa informed a county social worker of her children’s sexual abuse and her belief that the trauma associated with that abuse was the main reason for their sudden absences from school. Despite the fact that the county was provided a copy of the police report documenting the sexual abuse, the county informed Lisa that, in its opinion, the children were not in need of any type of mental health services.\textsuperscript{65}

Lisa knew better. Despite the county’s dismissal of her concerns, Lisa found a family therapist to provide treatment for her children. The children, however, continued to miss school. During the summer of the following year, in July 2003, the county filed a petition in juvenile court stating that the children were in need of protection or services.\textsuperscript{66} The county filed the petition, not because of the children’s sexual abuse trauma, but because they were in need of protection due to Lisa’s alleged “educational

\textsuperscript{62} Id. at 85-91. The essential feature of ADHD is a persistent pattern of inattention and, or separate from, hyperactivity-impulsivity that is more frequently displayed and more severe than is typically observed in individuals at a comparable level of development. Id. at 85.

\textsuperscript{63} During this time, Lisa was fearful of her neighbor’s son, who was still living next to her even though he was a suspect in the sexual abuse of her children. This situation caused her mental illness to deepen to the point that she began experiencing severe episodes of mania.

\textsuperscript{64} Lisa was unaware that when she reached out to the county for support, she would spend more than a year going head-to-head with the county in an effort to regain custody of not only her children, but also her sense of self-worth and dignity.

\textsuperscript{65} The county initially refused to provide mental health services to the children. After the juvenile offender admitted to the sex offenses and was adjudicated a delinquent, the county acknowledged that the children were in need of mental health services.

\textsuperscript{66} See MINN. STAT. § 260C.007, subd. 6 (2004).
neglect” resulting in their “habitual truancy.”

At the initial CHIPS hearing, Lisa denied the county’s allegations that she was neglecting her children’s education. The judge ordered Lisa to cooperate with home visits by social services, and the matter was eventually set for trial in December 2003. After the neighbor was adjudicated for the sex offenses against Lisa’s children, the county moved to amend the original petition to include acknowledgement that Lisa’s children were in need of services as a result of the abuse. During a pre-trial hearing, the court appointed a guardian ad litem for the children and ordered that the children receive therapy.

Lisa was unaware that her children had the right to mental health services without the requirement of the filing of a CHIPS petition. Lisa mistakenly agreed to the petition because she knew her children were in need of services as a result of the abuse—precisely what she had been trying to convince the county of ever since her first meeting with the social worker over a year prior to the trial.

At the disposition hearing, the court ordered that Lisa’s children were in need of protection and services and ordered that all previous orders remain in effect. The children were to remain in therapy, custody was granted to Lisa, and the children were placed under the protective supervision of the county.

Even after the court ruled that the children were in need of mental health services, the county still persisted in its position that

67. Id. § 260C.007, subd. 6 (14). Under the CHIPS provisions, a habitual truant means “a child under the age of 16 years who is absent from attendance at school without lawful excuse for seven school days if the child is in elementary school.” Id. § 260C.007, subd. 19.

68. Id. § 260C.163, subd. 5. A guardian ad litem is a person appointed by a court to represent the best interests of a child or children in court proceedings when they are at risk of being overlooked. MINN. OFFICE OF THE LEGISLATIVE AUDITOR, GUARDIANS AD LITEM (1995), available at http://www.auditor.leg.state.mn.us/ped/1995/GUARDSUM.HTM; see also BLACK’S LAW DICTIONARY 725 (8th ed. 2004) (defining a guardian ad litem as “a guardian . . . appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party”).

69. Lisa had already placed the children in therapy upon her own initiative, but this is the first time the county was ordered to become involved with providing mental health services.

70. Lisa hired, at her own expense, an attorney that she spotted at a subsequent hearing who was working in the courthouse hallway. The attorney specialized in criminal law, and he may not have had the expertise in the nuances of the CHIPS law to have known that a court is not permitted to grant a CHIPS decree if the sole reason is to provide the children with mental health services.
the children did not suffer from an emotional disturbance. When the Office became involved in the case, the county questioned its involvement. The participation of the Office was justified because the children suffered from an emotional disturbance. The county disagreed. The Office informed the county that the children’s therapist had informed them that they suffered from post traumatic stress syndrome as a result of the sexual abuse. 71

During this stressful time, Lisa found out that her cousin, his wife, and their children were homeless and in need of a place to live, so she invited them into her home until they could get back on their feet.

A few weeks later, Lisa realized that she needed to turn to her mother for support. Lisa had discovered that her cousin was dealing drugs and, so as not to risk the safety of her children, she demanded that her cousin and his family leave her home.

In retaliation for this decision, the cousin threatened Lisa that he would burn her house down in the middle of the night while she and her children slept. Fearing the safety of her family, she fled the family’s home and sought the comfort and protection of her parents. Because of Lisa’s behavior, spurred on by her fear and in the midst of a manic episode, the mother mistakenly thought Lisa’s behavior was caused by Lisa being under the influence of drugs. The truth, however, was that her behavior was a manifestation of her mental illness.

Lisa’s mother contacted social services to express her concerns. Along with Lisa’s ex-husband and the father of two of her three children, Lisa’s mother met with a county social worker to inform them that she believed Lisa was taking drugs.

Upon learning of unsubstantiated allegations that Lisa was taking drugs, the county swiftly took action. The same agency that refused to assist Lisa in helping her children recover from the trauma of sexual abuse blindly accepted her mother’s allegations of

71. The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate. DSM-IV-TR, supra note 48, at 463. The person’s response to the event must involve intense fear, helplessness, or horror (or in children, the response must involve disorganized or agitated behavior). Id.
drug use and sought immediate custody of her children.

The county filed a written request to modify the court’s December 2003 dispositional order and requested that the court transfer legal custody of Lisa’s children to the county. The court granted the county’s request and placed Lisa’s children in the temporary care of Lisa’s mother. At the hearing, the court also imposed a number of conditions on Lisa: she was ordered to undergo an immediate chemical dependency assessment, she was ordered to submit to random urinalysis, and she was required to undergo both a psychological and parenting assessment. Finally, the court ordered that all visitations between Lisa and her children be supervised.

Because the county took at face value the mother’s mistaken opinion about Lisa’s behavior, the Office requested to review the county’s investigation summary. When asked by the Office for the summary, the county’s reply was, “[w]e didn’t do an investigation.” When challenged as to how the county can remove Lisa’s children without investigating her case, the county responded, “[w]e believed Lisa’s mother and Lisa’s ex-husband when they told us they think she is taking drugs.”

The county’s blind faith in Lisa’s ex-husband was unfounded and inappropriate. While Lisa had never been charged or convicted of any drug-related offense, her ex-husband was convicted twice for dealing cocaine and heroin and did not have any contact with Lisa or their children in at least a year prior to this case because he was serving time in prison.

The county took custody of Lisa’s children and placed them, for a short period, in the home of Lisa’s sister. The county soon removed them from the sister’s home and placed them in a different foster care home, even though the county’s decision contradicted the preference outlined in the CHIPS law. The

72. This conversation occurred between the county’s supervisor for social services and the Office’s regional ombudsman.

73. In the interest of full disclosure, Lisa had a prior history of Vicodin dependence, a pain killer prescribed by her doctor to treat chronic pain she sustained as a result of an automobile accident. Lisa was so dedicated to her children that she took the initiative and voluntarily entered treatment for her dependence on the pain-killer. Her recovery, without relapse, began two and one half years prior to the county’s commencement of taking custody of her children.

74. See MINN. STAT. § 260C.212, subd. 2(a)(1) (2004). The CHIPS law states, in part:

The policy of the state of Minnesota is to ensure that the child’s best interests are met by requiring an individualized determination of the
county made this decision because it was concerned that Lisa would readily have access to her children and it would be too difficult to monitor such unsupervised contact in the aunt’s home.

A chemical evaluation was conducted and a report was sent to the county informing it that Lisa was neither abusing drugs nor dependent on any controlled substance. The county, however, was not satisfied with the assessment, and instead, forced Lisa to undergo a second evaluation. The evaluation was completed and a report was sent to the county informing it that, while it was possible that Lisa could be chemically dependent (because of her dependence on Vicodin almost three years prior), the report did not recommend that Lisa undergo chemical dependency treatment.

Despite the fact that two independent assessments failed to recommend that Lisa undergo chemical dependency treatment, the county still was not satisfied with the outcome. The county requested that the court order Lisa to attend outpatient chemical dependency treatment and the court granted the county’s request.

The county also forced Lisa to submit to random urinalyses. For over a full year, Lisa was required to call a telephone number every single day to “check in.” When she called, she was informed of whether that particular day was a “red day,” in which case she didn’t have to submit to a urine test, or whether it was a “green day,” which meant she had to immediately come in to the clinic for testing.

During the entire time she was being monitored, between January 2004 and February 2005, there were only two instances when Lisa’s urinalyses came back with an irregularity. With the first instance, there was a slight trace of methamphetamine found in her sample. There are two factors which may explain why her test came back positive. First, there may have been cross-contamination needs of the child and of how the selected placement will serve the needs of the child being placed. The [county] shall place a child . . . in a family foster home selected by considering placement with relatives and important friends in the following order: (1) with an individual who is related to the child by blood, marriage, or adoption . . . .

Id. (emphasis added).

75. The content of this report was corroborated by Lisa’s therapist.

76. It is unclear whether the county informed the court of the two previous assessments that did not recommend Lisa undergo treatment.
by the staff handling the urine samples, as Lisa witnessed the staff’s failure to change into new gloves after handling a urine sample from the previous patient. Second, on the day of the test, Lisa was suffering from a bad cold and had taken Sudafed medicine, which contains an ingredient used to make methamphetamine. The results of a second test revealed a trace amount of methamphetamine, although the amount found in that urinalysis was so minuscule that it was not enough to cover the head of a sewing needle.

Lisa took it upon herself to conduct research into the company that conducted the urinalysis and learned of the company’s methodology. She discovered that the urinalysis has a margin for error that takes into account irregularities in the test. The urinalysis may show a small trace of a certain substance, but such an amount should be discounted because it falls within the margin of error.

Even though Lisa informed the county of this information, it refused to believe Lisa was clean. The county chose to discount the testing company’s own position on the interpretation of test results, and instead, developed a “zero tolerance” policy. The county’s position was that any trace of substance found was interpreted as conclusive evidence that Lisa had been using illicit drugs.

During the entire time that Lisa was being randomly tested, she was being treated by two therapists. Lisa was undergoing individual family therapy to help her cope with the trauma associated with losing custody of her children, and she was also receiving therapy to address her mental illness. Both of her therapists, after learning of the county’s position that she had failed two urine tests, contacted the county and informed it that it would be impossible for someone to progress in treatment in the manner that Lisa had successfully done, if that person was taking a controlled substance. Again, the county refused to accept any

77. Many over-the-counter cold medications contain “pseudoephedrine which is a key ingredient for methamphetamine, which can be made in makeshift labs.” Target Stores Restrict Sales of Cold Medicine, THE TIMES (Shreveport, L.A.), Apr. 19, 2005, at A4. It is also telling to note that Lisa never had a history of methamphetamine use. While she admittedly was dependent on Vicodin a number of years prior to this, the trace of methamphetamine found in her sample is inconsistent with her previous history of drug use.

78. This was explained to the Office by a pharmacist working at a Regional Treatment Center, which routinely conducts urinalysis.

79. It is unclear whether this was an official, internal agency policy enforced against all clients, or whether Lisa had been singled out.
position other than that Lisa was using drugs.

During the time the children were in foster care, the county severely limited Lisa’s contact with her children to one to two hours per week. Lisa’s ex-husband, however, was given a more liberal visitation schedule, which included unsupervised, overnight visitation every weekend plus additional time as the father requested.

Lisa’s trials and tribulations with the county did not end there. In addition to a chemical dependency assessment, the county requested, and the judge ordered, that Lisa undergo a parenting assessment to determine whether Lisa was fit to raise her children. Lisa met with a family therapist and underwent an evaluation of her parenting skills. The therapist concluded that Lisa was clearly able to parent her children, although she might need periodic support from county social services if she experienced stress associated with her mental illness.

Once again, the county required her to attend a second parenting assessment. This time the county decided to find its own therapist to conduct Lisa’s evaluation, and this time the county was not disappointed. The report came back that Lisa was unable to parent her child because of possible chemical dependency issues. The report was silent as to Lisa’s mental illness and whether, with proper support from the county, Lisa could successfully raise her children.

Despite the actions of the county, Lisa eventually was able to be reunited with her children after they were forced to spend eight months in foster care. Lisa’s story, unfortunately, does not end here with a happy ending. Lisa’s mental health was so adversely affected during this period that she lost her job. Unable to work, Lisa could not afford her mortgage payments and her house went into foreclosure. Lisa now found herself unemployed, homeless, and living with her mother.

Just a few weeks into the children’s placement in their grandmother’s home, Lisa and her mother began to clash over how to raise the children. This was all the county needed to remove them from their mother’s custody and place them, for a second time, in foster care.

80. The county permitted Lisa to select her own therapist for the assessment.

81. At no time did the county heed the recommendation of the family therapist and provide Lisa with support from social services. The therapist specifically informed the county that Lisa would require those services whenever
On January 12, 2005, the county filed a petition to begin proceedings to terminate Lisa’s parental rights. The county contacted the father of the children and, even though he had little contact with his children and was still on parole for two drug-related felony convictions, the county offered to turn custody over to him. Once the father had been released from prison, he began paying child support. The county, allegedly as a financial incentive, informed the father that were he to accept custody of his two children, he would no longer be responsible for child support payments. The father agreed to accept custody.

The county prepared to move forward with its recommendation to terminate Lisa’s parental rights and to award her ex-husband custody of two of the three children. The county’s decision was made even more shocking in light of comments made in the father’s psychological assessment. The assessment found that the father exhibited difficulty controlling his anger, difficulty with authority, and had a history of cocaine and heroin addiction. The county did not require the father to undergo a parenting assessment.

After the Office became involved in Lisa’s case and began to question the county on its violations of Lisa’s rights and its abuse of the CHIPS process, the county admitted that it did not “like” Lisa’s family and that it was determined to terminate her parental rights. The supervisor for the social worker on this case stated to the Office that, “[t]his is the most difficult case we have had to deal with and we don’t like this family or their behavior. They are the most difficult people to deal with and we just want this case to go away.”

she suffered bouts with her mental illness.

82. One of the harmful consequences of the county’s decision to relinquish custody to the father would have been to split up the family unit, since he was the biological father of only two of the three children. Were the county to have had its way, the third child would have had to remain in permanent foster care. This move by the county would have frustrated the preference in the CHIPS law to, if possible, keep the family unit intact. See Minn. Stat. § 260C.212, subd. 2(d) (2004).

83. This information was told to Lisa’s mother by the father and, in turn, passed on to the Office.

84. The father’s psychological assessment was part of the children’s social service file.

85. In reference to “this family,” the county was indicating that it also had personal animosity toward Lisa’s mother because they believed that her mother, in many respects, was more difficult to work with than Lisa.
As further evidence of the county’s personal animosity toward Lisa, the county chose not to request that the court order the father to undergo a chemical dependency assessment or random drug testing. The county did this with full knowledge that the father had previously served time in prison for trafficking drugs and most recently served a second prison term of eighteen months for possession of cocaine and heroin.

Upon completion of the review of this case, the Office’s regional ombudsman contacted the court with a list of concerns about how Lisa’s case was being handled. Based on the issues raised by the Office, the court set up a review hearing prior to the hearing to terminate Lisa’s parental rights. At the review hearing, the court ordered that Lisa’s ex-husband undergo therapy and an assessment for chemical dependence.

After the review hearing, the county approached Lisa and her ex-husband and offered to drop the CHIPS case and the termination of Lisa’s parental rights case if the two of them would enter into an agreement to equally share custody. The county refused to drop either case if she did not agree to share custody with her ex-husband. Lisa was not willing to jeopardize her children’s safety, knowing her ex-husband’s drug history, and decided to have the court make a determination as to her parental fitness.

At the hearing to terminate Lisa’s parental rights, the county and its attorney were in disagreement as to how to proceed. The county attorney recommended to the court that it deny the county’s petition to terminate Lisa’s parental rights and order that the children be returned to Lisa. The county social service supervisor, on the other hand, requested that the CHIPS order remain in effect and that the children remain in foster care.

The court ruled that there was absolutely no evidence to indicate that Lisa could not parent her children and, while Lisa may need support to assist her, the children were to be returned to Lisa immediately. The court also ordered that the county could not remove the children from Lisa’s custody again without first coming before the judge.

B. How the County Abused the Process and Violated Lisa’s Rights

Throughout Lisa’s struggle with the county, her rights and the best interests of her children were continually violated and ignored by the county, and the intent and spirit of the Children’s Mental
Health Act and the Juvenile Court Act were thwarted. Listed below are some of the key areas where the county and the system failed Lisa and her family.

1. **Failure to Provide Mental Health Services Under the Children’s Mental Health Act.** Lisa’s entire ordeal with the county and her struggle to keep her family intact would not have occurred had the county simply complied with the Children’s Mental Health Act. As stated, during the initial meeting between the county and Lisa, she informed the county that her children’s absence from school was a result of the trauma they suffered from being sexually abused.\(^8\) Had the county initially conducted a proper psychological assessment of Lisa’s children, the horror Lisa endured would not have taken place.

2. **The County Unnecessarily Filed a CHIPS Petition.** The county immediately filed a CHIPS petition under Minnesota Statutes section 260C.141, subdivision 1, when it was unnecessary. Mental health services can be accessed without the need to file a CHIPS petition.\(^7\) Had the county provided Lisa’s children with mental health services, as requested by Lisa, the needs of the children could have been met under the Children’s Mental Health Act rather than invoking the jurisdiction of the court under the Juvenile Court Act. It was inappropriate for the county to file a CHIPS petition in order to access mental health services. The children’s eligibility for and the right to access mental health services is determined by the Children’s Mental Health Act.\(^8\) If the county disagreed with Lisa over whether the county had a duty to provide Lisa’s children with mental health services, the county’s disagreement should have been resolved through the appeal process within the Department of Human Services.\(^9\) While the juvenile court has the exclusive jurisdiction over any CHIPS matter,\(^9\) the county should not have invoked the jurisdiction of the court. Once the county did file a CHIPS petition, the court compounded the problem by failing to refrain from asserting jurisdiction over the matter when an administrative remedy was available.

3. **Failure to Place Children with Relatives.** The county

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8. *See supra* Part III.A.
9. *See supra* Part II.
89. *Id.* § 245.4887.
90. *Id.* § 260C.101, subd. 1.
initially placed the children in the home of Lisa’s sister, but quickly removed them to foster care in order to be in a better position to discourage unsupervised visitation between Lisa and her children. As stated earlier, this contradicts the express preference contained in the CHIPS law.\footnote{Id. \textsection 260C.212, subd. 2(a) (1).} It also contradicts the following philosophy of the Department of Human Services.

Children thrive best in their families. Family preservation efforts are provided to prevent out-of-home placement whenever possible. Most often foster care is temporary and children are reunited with their parents within a short time. In Minnesota, when children must enter foster care, relatives and kin are sought to care for their children. Preserving relationships with family members is crucial to a child’s sense of safety and well being. When relatives and kin are \textit{not available}, county social service and private foster care agencies recruit community members to become foster families.\footnote{MINN. DEP’T OF HUMAN SERVICES, FOSTER CARE AND OTHER OUT-OF-HOME PLACEMENT, \textit{at} http://www.dhs.state.mn.us/main/groups/children/documents/pub/dhs_id_000164.hcsp (emphasis added).}

4. The County’s Decision to Split Up the Children. The county recommended that Lisa’s ex-husband be granted custody of two of the children, knowing that he was not the father of the third child. This would have caused the children to be split up, with the third child remaining in permanent foster care. Again, this contradicts the express intent of the CHIPS law, which states that, “[s]iblings should be placed together for foster care and adoption at the earliest possible time unless it is determined not to be in the best interests of a sibling or unless it is not possible after appropriate efforts by the responsible social services agency.”\footnote{MINN. STAT. \textsection 260C.212, subd. 2(d).}

5. Decision to Terminate Parental Rights. The county moved to terminate Lisa’s parental rights even though the children were not being maltreated. The county “did not like this family,” and wanted Lisa’s case to “just go away.” Had the county been successful in terminating Lisa’s parental rights, it would have gotten its wish. There were no allegations that Lisa jeopardized the safety of her children or that they were maltreated in any way. The county attempted to terminate Lisa’s rights, in part based on its
belief that she was chemically dependent. As discussed above, these allegations turned out to be false. Even were it true, many parents struggle with, and receive treatment for, their chemical dependence without the threat of losing custody of their children. The county’s action speaks volumes as to its animosity toward Lisa, especially when compared to the county’s attempt to place custody of the two children with the father that had two drug-related felony convictions.

IV. BOBBY’S STORY

A. Bobby’s History

Bobby and his twin brother were born into a family with three additional siblings. Tragically, Bobby and his twin were born prematurely and suffered from oxygen deprivation at birth. The oxygen deprivation resulted in a number of attention and learning deficits. Bobby was extremely hyperactive and he did not learn to speak until the age of four. Despite the delay in his verbal development, he and his twin brother developed their own language that allowed them to communicate with each other. As they grew older, the boys’ verbal deficits were addressed while attending a school specializing in early childhood services.

Growing up, Bobby and his family lived with the horror of an abusive father. Instead of enjoying fatherly love and protection, Bobby and his siblings experienced their father’s physical and sexual abuse. Bobby’s mother, Sharon, also suffered at the hands of the abusive husband. Sharon took her children and fled to a women’s shelter to seek help and safety. After observing the behavior of Bobby and his twin brother, staff at the shelter reported suspected sexual abuse to the county. According to Sharon, however, the county did not substantiate the father’s suspected abuse.

Bobby’s parents filed for divorce. Both prior and subsequent to the dissolution of their marriage, Bobby’s mother attempted to keep her children from having visits with their father. While the

twins were often extremely hyperactive, they also began to act out in other ways during this difficult period. The boys exhibited sexual behavior that was beyond anything a five-year old would know. Their sexual knowledge likely stemmed from acts that they had experienced from their father’s abuse. As a single mother with five small children, and in the midst of going through a divorce, Sharon became overwhelmed and knew she and her family needed help. In desperation, she contacted the county’s social service for assistance.

Despite being raised in a professional family and attending college, Sharon’s self-esteem was very low during this period. As a single, working mother of five young children, she was mentally and physically exhausted and did not know what to do. Believing that the county social workers were the “professionals,” Sharon trusted that they would make decisions that would be in the best interests of her family. In fact, she admired the first few social workers assigned to her case so much, it became her dream to be like them some day.

Sharon suddenly developed pain in her back. The twins’ behavior became out of control to the point that she realized that she could no longer handle their extreme needs and also continue to care for her three other children. The social worker assigned to the family offered to place Bobby and his twin brother in respite care.\footnote{Respite care is a service paid for by the county that provides the primary care-giver some short-term relief. Minn. Stat. § 245A.02, subd. 15. The child or person with a disability is placed in a licensed program in order to receive care, thus providing the primary care-giver some rest. Id.} The worker indicated that it would be for thirty days and this would allow Sharon to spend some time recuperating from her back pain and to focus on the needs of the rest of her children. She agreed to the placement believing that her family’s well-being was the goal of the social worker.

The thirty days of respite care, however, turned into three years of out-of-home placements in either respite care or foster care homes. After the boys had been in out-of-home placements for eleven months, the county filed a CHIPS petition and the county was awarded custody of Bobby and his brother. Sharon was assured by the county that the transfer of custody was needed, not because she had abused or neglected the two boys, nor because she was unwilling to parent her children, but because she was \textit{unable} to care...
for the boys’ special needs. 97

When the boys were placed in foster care, they were placed in separate homes for two reasons. The county believed that their behavior played off each other, and it also believed that it would be too difficult for a single home to care for both children. 98 Bobby’s first placement was in a regular foster home, as compared to a treatment foster home. 99 While in that home, Bobby was forced to sleep in the basement while the rest of the family slept upstairs. When Bobby began wetting his bed, his foster parents forced him to sleep on the floor. Bobby talks about the effect on him caused by the heavy drinking of the foster father and how, in a fit of anger, the foster parent tried to stomp on Bobby’s head. Bobby remained in this dysfunctional placement for nineteen months.

Even though Bobby was removed from that foster care home, the county placed him into a similar foster home rather than a therapeutic one. While in this home, Bobby was forced to sleep in the attic and he continued to wet his bed. As punishment for this, the foster parents would awaken him at six o’clock in the morning and throw him in a cold shower while hanging his wet sheets outside. Later, the parents would make him hand wash his sheets. Bobby was only seven years old. 100

As further evidence of the dysfunctional nature of Bobby’s second foster home placement, he often felt uncomfortable because his foster parents forced him to bathe every night while they watched him. When he objected to their intrusion, they would give him a wash cloth to cover himself. Moreover, neither foster home had what would be considered a regular child’s bedroom.

In one home, Bobby was taken on a family vacation, but his foster parents threatened to send him home if he wet the bed.

97. See id. § 260C.007, subd. 6(4).

98. The decision to separate the boys illustrates how difficult it was to control their behavior. The records in this case, however, clearly show a prejudice against the mother because she is portrayed as being “unable” to control her children.

99. “‘Foster care’ means 24 hour substitute care for children placed away from their parents . . . and for whom a responsible social services agency has placement and care responsibility.” Minn. Stat. § 260C.007, subd. 18. A treatment foster care home, however, is one in which the parents are specially trained in handling special behavioral needs. Minn. R. 2960.3010, subpt. 43 (2003); see also Dennis E. Cichon, Encouraging a Culture of Caring for Children with Disabilities, 25 J. Legal Med. 39, 56 n.145 (2004) (discussing therapeutic foster care homes).

100. This was contained in notes in Bobby’s file written by the foster parent confirming that “he washed his sheets by himself.”
True to their threat, Bobby was sent home from the vacation after one day. While living in the second home, all of the other children were taken on vacation trips, except for Bobby, who was the only child left behind. Although there may be other reasons behind these actions, those are the memories that stand out in Bobby’s mind and are part of his developmental experiences. He believes that no one really cared about him. Through all of these terrible experiences, however, the one constant for Bobby was that he knew his mother loved him and he considered her the only person he could count on.  

Bobby also spent time in various respite care homes. Despite being placed in a host of different homes, there was only one home where he felt that his providers truly cared for him. He says he liked living there because, unlike his foster parents that made him wash his sheets by hand whenever he wet the bed, the respite care provider would simply put the wet sheets in the washing machine. Yet, even at this respite home, the father once got so angry at Bobby that he deliberately cut Bobby’s hand with a knife. When Bobby was brought to his mother’s home, she took him to get medical attention and his injuries required stitches.

Prior to Bobby’s placement in foster care, his parents battled over the issue of custody and visitation during their divorce. Given the father’s previous abuse of his children, the resulting sexual behavior of the boys and the restraining orders that she filed against her husband, Sharon resisted forcing her children to visit their father. There was plenty of evidence that their father had “failed” at supervised visits. During the divorce, the juvenile court combined the CHIPS case and the Family Court custody and visitation case. This action only involved the twin boys because Sharon’s other three children were still living at home. Sharon was granted temporary custody of the three children, pending the dissolution of the marriage, while the county was granted custody of Bobby and his brother for purposes of obtaining services.

Both Sharon and the children’s father were assigned reunification workers relative to the CHIPS case. The two workers

101. Taken from interviews and meetings with Bobby over a year-long period.
103. “Failed” is a term used by Sharon. However, the records do support that the father would spank his son in front of the supervision staff even though he was repeatedly counseled to replace corporal punishment with “time out” sessions. The record also reflects that the children reported that he would hit them very hard and it hurt.
disagreed as to whether the father should continue to enjoy visitation with his children. The father’s case worker supported his continued visitation, whereas Sharon’s case worker believed that visitation should be discontinued. Even though there were allegations of sexual abuse by the father, as well as an acknowledgement that the father acted inappropriately during his supervised visits, the court nevertheless granted the father unsupervised visits. The father’s case worker stated he could find “no reason” to discontinue visits despite mounting information from Sharon, the foster parents, and others concerning Bobby’s worsening behavior. Bobby’s troubling conduct escalated during his weekend, overnight visits with his father. During this period, Bobby started to burn his underwear and act out in other extreme ways. His foster parents, however, believed that Bobby deliberately chose to wet his bed. A professional therapist, appointed by the county to treat Bobby, counseled his foster parents on ways to deal with Bobby’s bed-wetting behavior, and also suggested consequences they could impose if Bobby were to continue to do so.

The county requested, and the court ordered, that both biological parents undergo parenting assessments. Sharon was ordered to be assessed even though her parenting ability relative to her other three children was not in question and despite the fact that she was the one who initially recognized and sought help for her sons’ disabilities. The record notes repeated delays in getting the assessments done. The county’s process seemed endless and Sharon’s concern for her son’s well-being increased.

Bobby’s behavior was getting worse and he was becoming increasingly unhappy at his foster home and wanted to return to his family. At the same time, Sharon was becoming more and more frustrated and voiced her concerns to the county about its failure to provide for her child’s needs. She also expressed concerns regarding additional instances of sexual abuse by his father as well as the way his foster parents were treating him. Additionally, Bobby’s guardian ad litem wrote several letters to the court also expressing frustration over the county’s decisions and its inaction.

104. This information is based on record reviews.
105. This information is based on record reviews and interviews with the mother.
106. This information is based on record reviews and interviews with the
The allegations of sexual abuse by the father were finally substantiated and all of his rights to visitation were terminated. The record, however, fails to indicate whether the county ever proceeded to permanently terminate the father’s parental rights.107 In addition, there is no evidence that the county ever prosecuted the father for the substantiated sexual abuse.108 Based on the finding of sexual abuse by the boy’s father, the court canceled the request for parenting assessments, ordered that Bobby be returned to Sharon, and that the county provide whatever services the family needed to care for Bobby’s needs. The court ordered this over the county’s objection and despite the fact that the county requested that it retain custody of Bobby and that he remain in foster care.

To further complicate matters, the county was actually attempting to permanently terminate Sharon’s parental rights during this period.109 The more Sharon raised protests with the county about what was happening to her sons, the more the county treated Sharon as if she were the problem.110 Sharon recounts how, upon leaving the court room, one of the county workers who was angered over the judge’s decision turned to her and said, “I don’t care what the judge ordered, if we don’t have it, you won’t get it!”111 A second worker also approached Sharon and hostilely stated, “[f]rom now on when I meet with you it won’t be friendly!”112

Sharon believes that her son’s disabilities were actually made worse while he was under the county’s care and custody. Despite all of the time and money the county provided on Bobby’s case, it failed as his surrogate parent in its most fundamental responsibility—to protect Bobby from continued sexual abuse by his father. What is also telling about the county’s attitude toward Sharon is that she was able to successfully protect her other three children from further abuse by their father, even though the

107. This information is based on record reviews.
108. This is based on record reviews and interviews with the mother and the guardian ad litem.
109. This information is based on record reviews.
110. In conversations with other parents in similar situations, the Office has repeatedly heard that parents have a greater likelihood of being labeled “problem parents” if they disagree with the county, raise questions about the actions of county workers or advocate for different or better services than what the county is willing to provide.
111. This information was obtained through interviews with Sharon.
112. Id.
county was of the position that she was an “unfit” mother. 113

By the time Bobby moved back home, Sharon had remarried, and Bobby had two new step-brothers. Sharon also gave birth to a baby girl. The new couple and their eight children blended well together. However, there were still challenges in the household as Bobby’s behavior remained out of control. He continued to set fires to his underwear and other objects, as he had done while in foster care. He also continued to be defiant and aggressive. Sharon believed that the county had returned to her a terribly damaged son. To make matters worse, even though the judge directed the county to provide whatever services the family needed, the county actually eliminated some services.

Bobby’s twin brother’s foster parent was provided a personal care assistant (“PCA”) 114 to help with the brother’s care due to his disabilities. The service also allowed the foster parent to work outside of the home. Sharon was assured by the county that she would also be provided PCA services when her boys were returned to her. Sharon vainly waited for a PCA to arrive and eventually contacted social services who informed her that she needed to re-apply for a PCA. Unlike the foster mother, who was well versed in the social service system, Sharon did not know how to fill out the paper work, and the county did not assist her in doing so. As a result, she was informed that, based on her answers to questions on the assessment, she was not eligible for PCA services even though she now had eight children at home, including the two challenging boys. The county was willing to provide PCA services to the foster parents, yet it was unwilling to provide the same service to Sharon as she tried to reintegrate her sons into their family home.

While Bobby was still under the care, custody, and control of the county, he underwent a psychiatric evaluation from a noted medical center. The evaluation confirmed that Bobby exhibited behaviors consistent with sexual abuse. The evaluation also noted that Bobby had other significant problems including suffering from attention deficit disorder and other learning disabilities. The assessment clearly stated that “no ordinary parent could raise this child.” 115

Just as Bobby is not an ordinary child, Sharon is no ordinary parent. Through her experiences with her son’s disabilities and in

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113. This information is based on county record reviews.
114. See MINN. STAT. § 256B.0627, subd. 1(i) (2004).
115. This information is based on county record reviews.
dealing with the county, she has significantly grown as a person. In the beginning, Sharon was very passive and accepting of what the professionals told her, and she acquiesced to the professional judgment of the social workers. However, as the county and others increasingly took control over the life of her twin boys and ignored her, Sharon became more assertive and voiced her opinion. Sharon began to read about her son’s disabilities, consulted with others, and sought the assistance of outside advocacy organizations, such as PACER, the leading statewide educational advocacy group for children with disabilities. The more Sharon learned, the more she was convinced that the services being provided were not only wrong for her children, but in some cases their educational and other rights were not being respected.

For example, while Bobby was in the custody of the county, the special education teacher at his school was putting Bobby in a “time out” room because of his disruptive behavior. At the time, Bobby was only six years old. While Sharon recognized the school had to address Bobby’s behavior, she was under the impression that the time out room was bright and comforting, like the teacher’s lounge. Such a room, she believed, would help Bobby calm down. Instead, Sharon discovered that the time out room was the size of a small closet and that staff would leave Bobby in this room all alone. When she inquired as to how long Bobby was left in the time out room at any given time, Sharon was assured that he would be in the room for maybe an hour to an hour and a half. Sharon discovered, however, that her son was kept in the time out room, on average, for a total of five hours out of a six hour school day.

Even though Sharon grew from a passive to an assertive participant, she discovered that this clearly did not translate into her sons receiving the services they needed.

The statement in Bobby’s psychiatric assessment that “no ordinary parent could raise this child” was telling as to the difficulty of raising Bobby, and it should have garnered support and sympathy from the county. Bobby, however, was consistently placed in multiple voluntary placements over the next eight years of his life.

116. See PACER, Who We Are, http://www.pacer.org/about.htm (last visited Oct. 19, 2005). State law clearly articulates that citizens have a right to an advocate in a number of different health care and educational settings. See MINN. STAT. § 144.651, subd. 9. Despite this right, clients routinely report retaliation and experiencing substandard care because they sought the assistance of an advocate. Often times the Office is able to validate those claims but they are difficult to prove because the retaliation is subtle.
life, while his family was treated as though they were the problem.

Sharon did not agree with all of the various placements or the specific treatments that the county provided. Consequently, she voiced her disagreement over inappropriate placements. The county, however, continued to expect Sharon to “trust the professionals” and exhibited an attitude that made Sharon feel like it knew better than she as to what was best for Bobby.\textsuperscript{117} The county labeled Sharon as a “difficult” parent to deal with because she was an assertive advocate for her child.\textsuperscript{118} The focus soon became Sharon’s involvement in her son’s case and Bobby got lost in the process. Despite the county’s resistance toward Sharon, she nevertheless developed a deep bond with all of her children and gained excellent insight into Bobby’s condition.

The county refused to listen to Sharon because she was not a mental health professional. Even though the county and other professionals expected Sharon to behave in a certain way, it soon became evident that she would continue to challenge decisions that did not meet Bobby’s needs.\textsuperscript{119} She was described as “histrionic,” and the Office was told by more than one person from the county that Sharon thinks “everything is always about her.”\textsuperscript{120} The struggle between Sharon and the county became a downward spiral, which eventually lead to the county refusing to listen to Sharon whenever she voiced her opinion as to Bobby’s needs. The harder Sharon attempted to get the county to listen, the more her concerns fell upon deaf ears. Sharon was viewed as interfering with her child’s placement and treatment.

Just when this family felt they had reached their limit of frustrations and despair, fate dealt them another tragic blow. Bobby’s stepbrother had just graduated from high school with a straight A grade point average. The stepbrother, however, was also known to use drugs, which eventually led to him being picked up

\begin{footnotes}
\item[117] This information was obtained through interviews with Sharon.
\item[118] Id. As noted earlier, parents are oftentimes described as “difficult” because of a disagreement between the county and the parents as to the scope and nature of the services the child is to receive. Often times the parents request services that are either more expensive than what the county is willing to cover or different than what is being proposed by the case manager. The more assertive the parents advocate for services that differ from what the county wants the more likely they are viewed as interfering with their child’s care. The county often does not seek custody of the child until there is a disagreement with the parents.
\item[119] A review of county records confirms that opinions were exchanged between professionals about how difficult it was to deal with the mother.
\item[120] Id.
\end{footnotes}
by the police. When he arrived home after the police interrogation, he began to throw his possessions in a bag, all the while saying he was a “dead boy.” He told his parents not to go near the windows. While walking in a park one day, members of a local gang slit his throat, killing him. The murder became a high profile murder case in their local community and it took fifteen long months before anyone was arrested for the murder.

The suspects were tried as adults and the trial was constantly in the news. It took almost a year for the trial to be completed and the defendants to be found guilty. Between the moment of the boy’s murder and his assailants’ convictions, Bobby’s family was stalked by gang members. In an attempt to intimidate the family, gang members would constantly drive by the house, park their cars on the front lawn, get out of their cars, and walk toward the house. In one instance, a gang member shot a gun through the bedroom window of Bobby’s sister. All of these events put extreme stress on Bobby and his family.

Despite Bobby’s behavior during these years, he remained in the family home. About the time the murder trial ended, Bobby began to enter his adolescent years. His fascination with fire continued. He also began stealing and would not respond to any redirection. As a result, Bobby was soon adjudicated as a delinquent and spent time in and out of the juvenile detention center. Over one nine-month period, Bobby was placed in the detention center four times, a local hospital, a state-run psychiatric hospital, and a respite home. He was eventually placed for six months in a residential treatment program licensed by the Department of Corrections.

After the trial for the murder of her step son, Sharon moved her family to another county. At the time of the move, Bobby was in the correctional residential program. The murder, trial, and stress on the family took its toll on Sharon’s marriage, and the couple separated. Bobby’s brother was receiving children’s mental health case management services from the new county, and Bobby’s case was transferred to the new county for case management services as well. Information about the family was exchanged between the two counties, in violation of state statute,

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121. While Bobby was at the state-run psychiatric hospital, he was diagnosed with bipolar disorder in addition to his other disabilities. See DSM-IV-TR, supra note 48, at 382-401 (describing Bipolar I Disorder, Bipolar II Disorder, Cyclothymia, and Bipolar Disorder Not Otherwise Specified).
including how difficult the family was to work with.\textsuperscript{122} 

Both boys were sent to a facility to be further assessed. From there, Bobby was placed in a children’s mental health residential treatment program licensed by the Department of Human Services. He spent the next eleven months in this facility. At this point, Bobby was no longer on probation, but he was still in need of mental health treatment and services. During his stay at the facility, professionals identified Bobby’s need for specific therapy and treatment related to sexual issues.

The facility was an eight hour drive from Sharon’s new home, where Bobby would be transported once a month to visit his family. During this time, Sharon was unable to visit him at the facility because she needed to care for her other children. When the county offered to pay for gas and a hotel so that she could visit Bobby, Sharon was forced to decline because she did not feel that she could leave her other children home alone. Despite Bobby’s monthly visits home and Sharon informing the county that she needed to remain home to care for her other children, her failure to visit Bobby at the facility was repeatedly used against her in court. While Bobby’s file documented that Sharon failed to visit him at the facility, it omitted the reasons why and neglected to state the stress she was under at the time. The record misleadingly portrayed Sharon as a mother who did not care about her child.

When it came time to discharge Bobby from the treatment facility, Sharon expressed concerns about his new placement, believing that it would not meet her son’s needs. Staff at the facility, consequently, contacted the county and recommended that the county seek legal custody of Bobby and prevent Sharon from taking Bobby home, in violation of the CHIPS law.\textsuperscript{123} After several voluntary placement agreements, the county once again filed for legal and physical custody of Bobby in order to keep control over Bobby’s placement decisions. Despite his mother’s concerns about

\textsuperscript{122} The case manager shall not disclose to anyone, other than the case manager’s immediate supervisor, information on the child, the child’s family or services provided to the child or child’s family without informed written consent. Minn. Stat. § 245.4876, subd. 5 (2004).

\textsuperscript{123} CHIPS law provides that

[a]bsent specific written findings by the court that the child’s disability is the result of abuse or neglect by the child’s parent or guardian, the court shall not transfer legal custody of the child for the purpose of obtaining special treatment or care solely because the parent is unable to provide the treatment or care. Id. § 260C.201, subd. 1(a) (3).
his placement, the county nevertheless placed Bobby in the facility. After six weeks, Bobby ran away from that facility. Bobby was later found and returned to the previous children’s mental health residential treatment facility.

Bobby stayed at the residential treatment center for four more months. His discharge recommendations specifically stated that Bobby should be placed in a structured, supervised setting, and receive ongoing therapy to address his sexual issues. Despite these recommendations, the county case manager supervising his case decided to place him in a regular foster home with other children. While living at the foster home, Bobby witnessed adolescent girls walking around the home wearing hardly any clothes. The family slept upstairs while Bobby and another foster child slept in the basement, with sheets being hung to serve as their door. On one occasion, the girls came down to the basement with only towels on.

The county scheduled only one therapy visit for Bobby and then discontinued the therapy sessions. The foster mother expressed to Sharon her frustration with the county because it expected her to “haul” Bobby all over “God’s green earth.” The foster mother told Sharon that if the county wanted him to go to therapy, the county could take him. When Sharon requested he receive the therapy that was recommended in his discharge summary, Bobby’s caseworker said there was no point in providing the service because Bobby told the worker he was doing fine and did not need to go. As a result, the therapy sessions were discontinued.

While at the foster home, Bobby was able to attend the local high school and it was his first real opportunity at socializing with peers. He played on the local football team, an experience he enjoyed. Just when things started looking up for Bobby, allegations surfaced that Bobby had sexually fondled a young boy who had visited the foster home. An investigation followed and Bobby pled guilty to fifth degree criminal sexual conduct. As a condition of his plea, Bobby was required to register as a sex offender and provide a DNA sample. Bobby was placed on probation, placed in a new foster home, and ordered to complete out-patient sex offender

124. The same facility that Sharon had reservations about later had licensing violations cited against it.
125. This is verified in the facility discharge summary.
treatment.  

Bobby began sex offender treatment and moved into a new foster home. While he continued to attend high school, a substitute teacher was assigned to teach Bobby’s shop class. Bobby asked if he could make a ceremonial sword, and the substitute teacher approved Bobby’s project. Bobby was complimented on the fine job he did on the project, and he was proud of his work. When he brought it home, however, the foster mother went to the principal, upset about the sword. Bobby was expelled from the high school because, while Bobby explained that he just liked collecting knives and swords, some believed that he might use them, given his violent history.

Bobby’s new foster parents indicated that they no longer wanted him at their home and Bobby was thereby transferred to a shelter until a new plan could be devised. At the same time, his out-patient sex offender therapist became concerned about Bobby’s increasingly deviant fantasies and recommended that Bobby be placed in an in-patient sex offender residential treatment center. Contact was made between the county where Bobby was receiving case management and his county of financial responsibility.

The county of financial responsibility happened to own and operate a facility that was licensed by the Department of Human Services as a children’s mental health residential treatment program. One unit of that program provided adolescent sex offender treatment. The mental health case managers involved in Bobby’s case decided to transfer Bobby’s case back to the county of financial responsibility. A CHIPS hearing was scheduled so that Bobby could be placed in the residential treatment program, which was a more restrictive setting. A request was also made to transfer Bobby’s probation to the county of financial responsibility even though the crime was not committed there. This was done as a courtesy to probation case management since Bobby would now be

126. It is important to note at this point that the authors of this essay acknowledge that Bobby has engaged in delinquent behavior. His behavior was such that society has the right to be concerned about public safety as well as expect that he be held accountable for his actions. Society also is justified in expecting that Bobby receive treatment to address his inappropriate behavior. While not attempting to minimize Bobby’s delinquent behavior, the telling of Bobby’s story is intended to show how the unfolding of events in his life, along with the action or inaction of others, has contributed to the reason Bobby acted the way he did and why he developed into who he is today.
back in his original county of financial responsibility.

The treatment program that Bobby was sent to had formerly been a correctional facility and was in the same building as the local juvenile detention center. The transition from a correctional program to a mental health program had been made a few years prior to his arrival. There were signs, however, that the culture of the staff had not fully made the transition to a mental health facility, despite the numerous requirements for treatment professionals.

In addition to their Department of Human Services’ license, they were also required to be certified by the Department of Corrections to provide sex offender treatment. Despite very specific requirements for experienced, licensed sex offender therapists, the facility was repeatedly granted waivers to the professional qualification requirements of some members of their staff. Even though Bobby was considered their most significant case, he was assigned to a therapist who was not qualified to treat him. The staff member serving as Bobby’s therapist was unlicensed and did not have the professional training and qualifications for the position. In instances such as this, the person is required to be supervised by a licensed therapist. Even the clinical supervisor of the program was unlicensed and did not meet the necessary minimum qualifications. Nevertheless, the facility was paid $250.00 per day for Bobby’s care.

The program was patterned after a level-based system where residents are required to progress through various levels before they can gain certain privileges. For example, until children have progressed beyond the initial level, they are not permitted to visit with family members other than their parents. Bobby had been at the program for nearly a year, and the facility had yet to allow him a visit with family members.

Both Bobby and Sharon recount situations involving staff that

127. The facility is licensed under Minnesota Rules 2960, Licensure and Certification of Certain Programs for Children, which is commonly referred to as the Umbrella Rule. The rule’s predecessor was commonly referred to as Rule 5 programs, Children’s Mental Health Treatment Programs. It should be noted, however, the Umbrella Rule went into effect July 1, 2005, but the components of the Umbrella Rule for Children’s Mental Health Treatment Programs are essentially the same as the old Rule 5 programs. Juvenile Sex Offender Treatment certification is required and governed under Minnesota Rules 2955.

128. Verification of these waivers was obtained from a review of records at Minnesota’s Department of Human Services and Department of Corrections.
revealed a program clearly based on an “in your face” approach and was punitive in nature. This information was obtained through interviews with Bobby and Sharon.

129. The treating psychiatrist said that she was afraid of Bobby and did not want to be alone with him. When he was placed in a juvenile detention setting for his behavior, the psychiatrist kept him there to “adjust his medications.” This information was obtained from case management notes.

130. The punishment approach is generally not effective with children who have mental health disorders and will likely result in more of the very behavior that the program is trying to prevent. Interview with Dr. Jonathan Jensen, M.D. Associate Professor, Director of Residency Training and Education in Child and Adolescent Psychiatry, University of Minnesota Medical School. This information was obtained from multiple telephonic and in-person interviews from February 2004 through October 2005. Bobby already had a sense of failure and had difficulty with peer relationships. Punishment often reinforces this sense of personal failure during a very critical stage of child development and when done in front of adolescent peers, it fosters a sense of social isolation and embarrassment. Id.

131. The polygraph is commonly called a “Lie Detector Test.” See Am. Polygraph Ass’n, Frequently Asked Questions About Polygraphs, http://www.polygraph.org/faq.htm (last visited Oct. 19, 2005). It is a machine that measures a person’s physiological response when he or she answers carefully crafted questions. Id. “The term ‘polygraph’ literally means ‘many writings.’” Id. “The name refers to the manner in which selected physiological activities are simultaneously recorded.” Id. Polygraph examiners use both “conventional instruments,” and “computerized polygraph instruments.” Id. Depending on those responses, a trained polygraph expert can interpret the likelihood of participant’s truthfulness. Id. Depending on the expertise of the examiner, the test may or may not be viewed as reliable. Id.; see generally Michael J. Ligons, Polygraph Evidence: Where Are We Now?, 65 MO. L. REV. 209 (2000).

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134. A mandated reporter is a professional who is engaged in the practice of the healing arts, social services, hospital administration, psychological or psychiatric treatment, child care, education, or law enforcement; or, in some instances, a member of the clergy. See
programs have moved away from having the client provide names of the victims.

Other programs have developed agreements with their county attorney that the child will not be charged for offenses revealed in treatment. However, with children coming to programs from other counties, the facility cannot assure what another county will do when they receive a report. In Bobby’s case, his therapist did tell him in the beginning that she was a mandated reporter, but assured Bobby that if he was honest and was working hard in treatment, he would not get in trouble for telling the truth. Besides, Bobby had no choice because he could not progress to the next level in treatment until he revealed all of his victims and passed the polygraph test. Bobby was required to sign a consent agreement to allow the polygraph to be administered and he was not provided an attorney to advise him of his rights. The treatment program also restricted Bobby from discussing his treatment with his mother. As such, Bobby did not have anyone to advise him of his rights, and his case manager, serving as his legal custodian, told him he had to sign the form.

The need for victim identification is an important part in getting help for the victims, and it has societal value. The first obligation of the treatment program, however, is to treat the needs of the patient. It is the county child protection division’s obligation to look after the victim. Requiring the treatment facility to secure the name of the victims blurs not only the role of the therapists, but also the objective behind the treatment. Ideally, both the victims and the abuser would be helped. But that is not always the case. By blending these roles, the question needs to be asked: Is this a treatment facility or an agent of law enforcement? Society needs each, but the roles need to be clearly separated.

Another example of the correctional staff’s attitude is when Bobby was transferred to the juvenile detention center as a result of

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135. Interview with Alan Listiak, Ph.D., Minnesota Department of Corrections Sex Offender Program Certification Specialist, Minnesota member of the Association for the Treatment of Sexual Abusers, (ATSA). This information was obtained from multiple telephonic and in-person interviews from February 2004 through October 2005. ATSA is the leading national association for sex offender treatment professionals.

136. Id.
an emotional outburst. The use of the juvenile detention center as a behavior consequence in a mental health treatment setting is highly questionable and is not allowed in most circumstances. Participants within the system, however, often find a way around that prohibition. When other infractions or problems occurred, children were placed on “desk time” where they were required to sit while the others were allowed to enjoy their activities. There are instances when children would be on desk time for days. The children were also forced to wear orange clothing and they would have their shoes taken away from them if they misbehaved. This activity was justified by saying the child was a “run risk.”

As noted earlier, the mental health residential treatment center is owned and operated by the county. It is located in the same building as the juvenile detention center, and for all practical purposes, the two centers are run as one facility under the same administration. Despite being a treatment center, the facility is listed on the county web site as being in the community corrections division. In addition, community corrections is in the same division of the county as the children’s mental health division. This means that the county, Bobby’s legal custodian, had complete control over every action and decision regarding Bobby. His case manager, his probation officer, his entire treatment team, and the detention staff all worked together in the same department. Even Bobby’s psychiatrist was under contract with the county. When either the county case manager or the facility brought a petition

137. See Minn. R. 2960.0710, subpts. 3, 6 (2003) (specifying that a facility that uses restrictive procedures must have a plan approved by the Commissioner of Department of Human Services and it specifies the rules governing seclusion). Seclusion is defined as confining a person to a locked room. See id. 2960.0020, subpt. 65.

138. Evidence exists in Bobby’s file indicating that staff at the treatment facility asked his county case manager if the program was allowed to use the detention center as a standing consequence for Bobby. While the case manager informed the facility that the program is not allowed to use the detention center in such a manner, he then proceeded to instruct staff on how to get around that prohibition.

139. The reader should not interpret the authors’ concerns over punishment to mean that children should not be held accountable for their actions nor should it be viewed that children with mental illnesses should not have consequences for unacceptable behavior. The point here is that how consequences are handled determines whether it has a positive learning effect on the child or whether a misguided approach garners anger and disenfranchisement that negatively effects the development of a child leading to a more dangerous person.

140. A copy of the organization chart is on file with the Office.
into court, it was the same county attorney representing all parties. The cards were stacked against Bobby and it was unclear who was representing his best interests.

In addition, despite two written requests to the judge from Bobby requesting that an attorney be appointed to represent him in his CHIPS case, the judge repeatedly denied his request. The judge indicated that Bobby’s guardian ad litem was adequate representation. Unfortunately for Bobby, the guardian ad litem appointed to represent him supported the facility’s position to restrict Bobby’s contact with his mother, despite having never met with Bobby regarding this issue. Bobby remembers meeting his guardian ad litem once, and for a very brief time. The guardian refused to explore Bobby’s wishes. During hearings regarding Bobby’s “best interests,” observers noted that the judge never addressed Bobby nor questioned him as to his wishes. Furthermore, the judge never even looked Bobby in the eye. Therefore, the only advocate for Bobby was through Sharon’s own attorney.

While Bobby was being held in the juvenile detention setting because of his behavior at the treatment facility, Sharon contacted the Office to express her concerns. Sharon’s primary complaint centered on the fact that, while her son was placed in a residential treatment facility to address his behavior, he was instead lingering away in a detention center and not receiving therapy. Why? Because Bobby had exhibited the type of behavior that necessitated his need for treatment in the first place. When his mother contacted the Office, Bobby had been in the detention center for a very long period of time.

Sharon wanted to know whether staff could remove Bobby from treatment simply because of an emotional outburst. She was also upset because staff at the treatment facility would not allow her to participate in decisions about her son, and Bobby’s psychiatrist refused to talk to her. The staff ignored Sharon’s concerns even though she retained all of her parental rights. In fact, Bobby’s mother was not given any information about the treatment program and was completely lost as to the nature of her son’s

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141. Minnesota’s child protection statute, however, states that the counsel for the child shall not also act as the child’s guardian ad litem. MINN. STAT. § 260C.163, subd. 3(d) (2004).
142. This information was obtained through interviews with Bobby and Sharon.
treatment. Sharon stated that, with the exception of a few hours a day for schooling and recreation, Bobby’s stay at the detention center consisted of isolation in his room. He was even required to eat his meals alone in his room.

The staff from the Office went to the detention center to visit Bobby and hear his side of the story. Staff members at the residential treatment program were also interviewed. Within one week of the Office intervening in Bobby’s case, Sharon was informed that she was no longer able to speak to her son or have regular visits unless his county case manager was present to monitor the visit. To complicate matters further, the case manager was unwilling to supervise Bobby’s visitation because visitation was limited to Sundays and the case manager did not work on Sundays.

The case manager wrote a letter to Bobby and his mother listing topics that the two were not allowed to discuss, including any information about Bobby’s treatment or his medications. Bobby was denied visitation with his mother for over three months. When Bobby was finally allowed to visit with Sharon, each conversation was monitored and, at times, staff would abruptly end the visitation. Because of the lack of privacy, Bobby had to resort to calling the Ombudsman since that was the only person he was allowed to speak with privately. He was told, however, that he could only call the Office if he had a question or complaint about his treatment.

The Ombudsman visited the facility a second time for one of Bobby’s team meetings. During the meeting, it became clear that the team was uncomfortable with questions being raised about Bobby’s care while Bobby was present. Staff objected to certain issues being raised, even though the laws and rules allow children to participate in their treatment and case planning as well as have a representative present to assist them. Facility staff went so far as to accuse Bobby openly, in front of everyone, of manipulating his mother and the Ombudsman. When the meeting became strained, the case manager began to cry and staff turned to Bobby and said, “see what you have done now!” even though Bobby had said very little during the meeting.

Bobby and Sharon had a visitation the Sunday following the team meeting. During the visitation, Bobby and his mother did

143. Copies of the case manager’s letters are on file with the Office.
145. An agreement had been reached whereby the facility staff would monitor
not discuss anything inappropriate or “off limits,” and the visitation went well. The facility nevertheless petitioned the court to limit Sharon’s contact with Bobby because, according to the facility, Sharon and the Ombudsman had “interrupted the flow” of the team meeting. As a result, Bobby told the Ombudsman that he was reluctant to talk to any outsider or advocate, no matter what was happening to him in the facility, because he feared retaliation leading to the loss of contact with his mother.

Minnesota’s resident and patient bill of rights grants individuals the right to have a “family member or other chosen representative” present during consultations with physicians. Even though Bobby was entitled to this right and an agreement was made in the team meeting that the Ombudsman could accompany Bobby to visit his psychiatrist, after one visit the psychiatrist would not permit it. As such, Bobby did not have anyone to assist him in informing the psychiatrist as to the side effects he was experiencing from his medications. The doctor, however, invited facility staff to be present to recount Bobby’s behavioral problems. Bobby’s psychiatrist continued to increase the dosage of his medication over Bobby’s objection.

In a subsequent meeting with the Ombudsman, the psychiatrist stated that every time the doctor met with Bobby all he wanted to do was talk about lowering the dosage of his medication because of side effects. She stated that, “there is no way that I am going to let that child participate in decisions on his dosage.” The psychiatrist dismissed Bobby’s complaints, despite the fact that each side effect he complained about was clearly listed as a possible side effect from that particular medication. She went on to say that someone was planting those ideas in his head and he could not possibly be experiencing side effects. Bobby was being prescribed a neuroleptic medication, which is primarily used in the treatment of schizophrenia and bipolar disorder. According to his

the visitation, rather than the case manager.

146. MINN. STAT. § 144.651, subd. 9.
147. A neuroleptic, or antipsychotic, is defined as “[a]ny major tranquilizer that acts on the nervous system and has therapeutic effects on psychoses and other types of psychiatric disorders.” IDA G. DOX, ET AL., ATTORNEY’S ILLUSTRATED MEDICAL DICTIONARY 32 (1997). Psychosis includes disorders such as paranoia, bipolar disorder, and schizophrenia. Id. at 88.
148. It is important to note that a doctor cannot administer this type of medication against the will of an adult patient without a court order. Because Bobby was a minor, the doctor was not required to seek court approval.
psychiatrist, although Bobby did not suffer from bipolar disorder, she prescribed the neuroleptic to treat his agitation.\footnote{149. This was an "off label" application of the medication. "Off label" is a common term used to indicate that the doctor is using the drug "for an indication not in the [FDA] approved labeling . . . ." Food & Drug Admin., "Off-Label and Investigational Use of Marketed Drugs, Biologics, and Medical Devices, http://www.fda.gov/oc/ohrt/irbs/offlabel.html (last visited Oct. 19, 2005). This practice is not uncommon in psychiatry. See, e.g., Kimberly J. Stone et al., Off-Label Applications for SSRIs, 68 AM. FAM. PHYSICIAN 498, 498-503 (2003) (specifying several off-label uses for selective serotonin reuptake inhibitors).}

Sharon contacted the District Guardian Ad Litem’s office to discuss her concerns about the representation of her son. A new guardian ad litem was assigned to Bobby. This guardian met with Bobby and his mother, spoke with the Ombudsman, and met with staff at the treatment facility. Again, in complete disregard for the patient bill of rights, the psychiatrist refused to permit the guardian ad litem to accompany Bobby during his medication review meeting. After reviewing the case, the new guardian ad litem concluded that the county-run treatment facility was not meeting Bobby’s needs and recommended that the court place Bobby in a state-run psychiatric hospital. The purpose of this placement was to provide Bobby with a comprehensive assessment of his medication, his diagnosis, and review appropriate placement options to address his complex needs. It was determined that Bobby should be assessed to determine whether placing him in a specialized individual home, referred to as a Multimodal Intensive Therapy Home\footnote{150. Multimodal Intensive Therapy Home is a program of the Department of Human Services, State Operated Services, Child and Adolescent Behavioral Health Services. See MINN. DEPT’T OF HUMAN SERVS., CHILD & ADOLESCENT BEHAVIORAL HEALTH SERVICES: COMMUNITY SERVICES (providing that such homes “use an intensive multimodal treatment model for a child or adolescent with severe emotional disturbance and serious acting out behaviors”) (pamphlet on file with the William Mitchell Law Review).} (MITH), would be appropriate.

While in the county-run treatment center, staff always described Bobby as being manipulative. Staff believed that Bobby’s behavior was deliberate and was caused by his conduct disorder. As a result of his agitation, he was often placed on desk time and instructed to work on his assignments. Despite his learning disabilities, the only accommodation given to Bobby was additional time to complete his assignments. The effect of this “accommodation” was simply to prolong his stay at the treatment facility. His progress reports consistently showed loss of points each
week. They seemed to follow a distinct pattern of a few weeks of poor performance followed by improvement. These weekly reports had a cyclical pattern, but the facility continued to insist that his performance was deliberate and was not reflective of bipolar cycling. The staff at the facility continued reciting how dangerous he was and Bobby was made to feel that, regardless of what he did right, staff only saw the bad in him.

Upon transfer to the state-run psychiatric hospital, however, staff described Bobby as being a pleasant, honest, and cooperative patient. Unlike his previous psychiatrist, Bobby had a new doctor who listened to him. The psychiatrist worked with him and his mother and lowered the dosage of his medication. Bobby improved significantly and the side effects bothering Bobby either subsided or were reduced to a tolerable level. The facility included Bobby’s mother in consultation about medications and also listened to her concerns.

Bobby did have minor incidents at the new facility. Most of these incidents were minor rule violations, such as him wanting to play his PlayStation longer than was permitted. He would also have an occasional run-in with staff or his peers. On a spectrum of behavior typically seen in the hospital, however, Bobby was doing very well. He was allowed to see his mother without staff monitoring and he was even allowed to visit his siblings, whom he had not seen for a year due to the restrictions at the previous facility. Bobby was allowed to leave the hospital and go with his family on afternoon passes. Despite Bobby’s improved behavior, a discharge plan was never developed. Even though the professionals at the hospital concluded that Bobby would do best in an individualized treatment center like the MITH, nothing was being done to bring this about.

Bobby was under the physical and legal custody of the county. As such, the county was obligated to act in Bobby’s best interest and in the same or better manner than his biological parents. Both the hospital and the MITH staff determined Bobby to be appropriate for the MITH setting. However, Bobby’s case manager failed to work on any of his discharge planning. Even though the case manager was charged with being, in essence, Bobby’s surrogate parent, she did not visit Bobby at the hospital except to attend the two team meetings called by the facility. In addition, the case manager never called Bobby merely to ask how he was doing.

During one of the team meetings, it was revealed that new
criminal charges were filed against Bobby as a result of self-disclosure during treatment. A study was underway to determine if Bobby should be tried as an adult. Even though Bobby had yet to be tried or convicted for these new offenses, the county suddenly acted as though he was guilty and deferred all decisions regarding Bobby’s future placements to the county that was prosecuting him. The county also deferred all decisions to Bobby’s probation officer, the very person conducting the study as to whether or not Bobby should be tried as an adult. The decision was ultimately made to transfer Bobby to a detention center.

To make matters worse, Bobby turned eighteen when all of this was taking place. Instead of celebrating becoming an adult, as most eighteen year olds do, Bobby languished day after day in a juvenile detention center waiting for someone to make a decision. Having been transferred from the adolescent psychiatric hospital when he turned eighteen, professionals had to decide whether Bobby should remain in detention until his trial or be transferred to an adult treatment facility in the interim. While waiting for the professionals to make up their minds, Bobby sat in a facility that exacerbated his mental health. Since his admission to the detention center, Bobby had been denied access to outside fresh air, and he sat in his cell without anything to read or do.

B. How Bobby’s Rights Were Disregarded

From the outset, Bobby clearly gave clues to everyone in the system that something was wrong. Indeed, children who have been labeled emotionally and behaviorally disturbed (EBD) are crying out for help in ways that get our attention. Oftentimes, in order to get our attention they behave in inappropriate ways. They do this

151. MINN. STAT. § 626.556 (Maltreatment of Minors Act).
152. “The case manager . . . is responsible for ongoing coordination with any other person responsible for planning, development, and delivery of social services, education, corrections, health or vocational services for the individual child.” Id. § 245.4873, subd. 4.
153. A “facility grounds must provide adequate outdoor space for recreational activities.” Minn. R. 2960.0120, subpt. 2(C) (2003). This facility was granted a variance to this requirement and was thereby able to deny detainees access to fresh air.
154. “Emotionally and Behaviorally Disturbed” is a catchall term used to describe children and their behavior absent any other specific DSM-IV diagnosis, or in lieu of labeling a child as having a “mental illness.” See, e.g., MINN. STAT. § 245.4871, subd. 15 (2004) (defining “emotional disturbance”).
not because they are innately malevolent, but because they do not understand or do not know how to tell us what is going on inside their heads. Too often society’s response is to punish the individual without treating the underlying issues that caused the negative behavior. In the end, we do an injustice not only to the child, but also a disservice to society as a whole. In times of fiscal scarcity, our government spends a great deal of money attempting to address the needs of children, yet all too often the system makes the child worse. Because the system is too quick to solve the immediate problem, the unique circumstances of a particular child are often overlooked as well as what caused the child’s behavior. For far too long, the system has forced the child to fit into the established service system rather than finding the right treatment or therapies to meet the unique needs of the child. As demonstrated here, Bobby’s life clearly represents the meaning of “systemic abuse.”

Minnesota has long had a public policy that attempts to keep children in their family homes. It is incumbent upon counties to provide a support system to accomplish this goal. This public policy predates Sharon’s initial request to have the county assist her when Bobby was a toddler. While various laws governing the obligations of counties regarding out-of-home placements have changed, counties have always been expected to make efforts to allow the children to remain at home.

It is difficult to understand why a county is willing to remove a disabled child from the home of a non-abusive parent, only to put him into a foster home with foster parents that are no more skilled in meeting the child’s needs than the biological parent. Even worse is when the county provides assistance and services to the foster parent, but is unwilling to provide that same assistance to the natural parent. The cost of the out-of-home placement, along with the services provided to the foster parent, could be better spent on in-home support services for the child’s natural family. In fact, this is exactly what the legislature envisioned when it enacted Minnesota’s Comprehensive Children’s Mental Health Act. 155

Examples of how Bobby’s rights were disregarded:

1. Failure to Protect. Bobby had a right to be free of abuse and neglect. 156 Everyone in society has an obligation to protect children

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155. Id. §§ 245.487–.4887.
156. Id. § 626.556 (“[T]he public policy of this state is to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or
Parents and professionals have an even higher obligation to protect children. When the county originally took custody of Bobby when he was five years old, the county not only had the responsibility to protect him, but it also implied that it could better provide for Bobby’s welfare than could Sharon. The county stated that Sharon was either unwilling or unable to protect and provide for Bobby’s needs. Bobby’s mother, however, was better able to protect her children who remained in her custody than the county was able to protect Bobby and his brother. While in the county’s custody, Bobby and his brother experienced egregious harm. In addition, the county failed to protect Bobby from further abuse by the foster family, who punished Bobby for bed-wetting when his behavior was a symptom of underlying problems that needed treatment.

2. Failure to Provide Appropriate Services. The family had a need for intensive wrap-around services. It was the obligation of the county social service department to assist the family in obtaining those services. The family also needed assistance in developing coping skills that would allow the children to remain at home. The county was willing to provide those services to the foster parent, but not to the natural family.

3. Failure to Include the Family in Planning. Despite Sharon’s parental right to participate fully in Bobby’s treatment planning, when she attempted to participate, she suffered retribution. When Sharon disagreed with the county’s placement decisions, the county attempted to gain custody of her son. They advised her that if she did not agree to the custody petition, Bobby would not receive services.

4. Failure to Provide Legal Counsel. Despite Minnesota’s Juvenile Court Act, which states the child has a right to effective counsel, the court refused to provide counsel to Bobby despite two written requests for counsel.

5. Failure to Protect Him from Retaliation. While receiving treatment in the county-run facility, the county case manager and the facility worked together to restrict Bobby’s relationship with his

\[157\] See Minn. R. 2960.0050, subpt. 1(c)
\[158\] See supra Part IV.1.
\[159\] MINN. STAT. §§ 245.487–.4887.
\[160\] Id. § 260C.163, subd. 3.
mother, in violation of Minnesota’s licensing laws and without a court order. The patient and resident bill of rights provided him with a right to access to association and visitation with his mother and that was inappropriately denied to him. In addition, the laws governing his right to access to the Ombudsman prohibits retaliation for contacting the Ombudsman, yet with each visit of the Ombudsman Bobby had restrictions placed on his access to his mother.

6. Failure to Inform of Medication Side Effects. While at the same facility, staff failed to provide Bobby with information about the side effects of medications and denied him his right to have his chosen representative participate in his psychiatric treatment.

V. ANALYSIS

What does “best interest of the child” mean, who defines it, and who has the ultimate decision in determining what services best provide for the needs of the child? In this country and state, there is a long standing philosophy that parents are in the best position to raise their family and to know what is in their children’s best interest. Philosophically, we go to great lengths to respect the rights of parents even when their decisions might seem odd or out of the main stream of society. Everyone has their own ideas, values, beliefs, and prejudices which influence how they would define the term “best interest of children.” Those beliefs are often based on individual up-bringing, cultural heritage, social circumstance, education, financial resources, religion, and many other factors that contribute to a person’s make-up. One of the hallmarks of our legal system is that parents have the right to make decisions concerning their family because of their unique appreciation for the family’s values and circumstances.

The value of maintaining the family integrity is so important that, when an out-of-home placement is necessary due to abuse or parental neglect, we put extensive resources into assuring that the placement is necessary and appropriate. Extensive laws and rules have been written on how those decisions are to be made and who must be involved in making those decisions. Additionally, the

161. “An agency, facility, or program shall not retaliate or take adverse action against a client or other person, who in good faith makes a complaint or assists in an investigation.” Id. § 245.94, subd. 3.
162. Id. § 145.651, subd. 9.
163. See id. ch. 260C.
laws require a judge to review the placement so that all of those laws and rules are followed. One of the roles of the court is to ensure that the decisions made are truly what the child needs as well as to prevent government from unnecessarily intruding upon the sanctity of the family. When a court does deem the placement necessary, it is also the function of the court to monitor the matter to ensure that the placement is for the shortest period of time possible. The reason the law places such an emphasis on reviewing out-of-home placements is because children are in a constant state of growth and any disruption in their lives risks leaving a permanent imprint on their overall development.

Most often we associate an out-of-home placement with child abuse and/or parental neglect. In Minnesota, however, the CHIPS law which governs child protection includes all out-of-home placements for children, including those for disabilities. Herein lays the negative consequences of combining all out-of-home placement issues within the CHIPS provision of the Juvenile Court Act. When the disability is a mental illness or emotional disturbance, long-standing stigma associated with these disorders lead many to mistakenly believe that there is something wrong with the parents. This assumption seems to permeate the system in subtle ways that leads to families becoming disenfranchised.

The stigma associated with parents seeking assistance for their emotionally disturbed child is further extended by the inclusion of mental health services in the CHIPS law. As stated in the introduction to this article, “children in need of protection and services” is a catchall phrase used to describe any child involved in the CHIPS process. As such, the phrase does not simply describe children in need of protection from abuse or neglect, but also includes children in need of services to meet their special health, developmental, and mental health needs that are beyond the ability of the parents to personally provide. When the law incorporates into one law both concepts of “protection” and “services,” it fosters a negative impression toward the family seeking services. Such

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164. Id. § 260C.201, subd. 10(a).
165. See, e.g., id. § 260C.001, subd. 2 (“The paramount consideration in all proceedings concerning a child alleged or found to be in need of protection or services is the health, safety, and best interests of the child.”); see also Minn. R. Juv. P. 1.02, Advisory Comm. Cmt. (1999).
167. Id. §§ 260C.101, subd. 2(e), 260C.141, subd. 2.
168. See supra note 3 and accompanying text.
stigma isolates a family from their community and, rather than promoting children’s best interests, it hinders them.

The stigma associated with mental health is readily apparent when one compares children receiving mental health services with children receiving medical attention. When parents need assistance with providing for the special needs of their children, they often seek the help of a professional who is considered trained in providing those needs. For example, parents typically seek the assistance of a physician to treat their children’s serious medical condition. If parents are unable to pay for such medical treatment, either because they do not have medical insurance or they lack the financial resources to do so, they would not be described as being unable to parent their children simply because they were in need of public assistance. Only when the parents seek public assistance for their children’s emotional disturbance does such a stigma attach.

A. Stakeholders’ Roles

The State of Minnesota enacts very extensive, and sometimes expensive, due process measures to protect citizens from an overly zealous government. Consequently, when a child is deemed in need of an out-of-home placement requiring court review, a number of professionals are involved in the process. In order for due process to function properly, it is critical that these various roles remain independent of the other so that a complete and accurate case is presented before the judge. It is also critical that stakeholders take their jobs very seriously, come to their own independent conclusions and follow the practice guidelines of their profession. Without the complete story from all points of view, the judge may issue wrong decisions that will negatively impact the child and the family. In such cases, the end result is that precious public resources are wasted and the child’s physical and emotional well-being is harmed rather than helped.

The CHIPS process has various stakeholders involved:

- The County or Community Human Services is traditionally the social service department of the county. It is usually comprised of not only the social services, child protection, and

These divisions employ social workers, probation officers, public health employees, financial workers, child protection workers, case managers, and treatment providers. Some smaller counties assign one worker to perform many of these functions. Unless a county is diligent in separating these various services, workers can confuse the mission of their functions and end up performing functions with competing priorities. In the juvenile justice system, there are the public policies of promoting children’s best interest and the preference to keep families together. In many cases, however, when a mental health case manager also serves as the child’s protection worker, there is a risk that the person may too easily associate the disability of the child with being the fault of the parent.

- The Children’s Mental Health Case Manager’s role is to ensure that a child with an emotional disturbance is provided with appropriate treatment and services for the disability in an effort to allow the child to succeed at home, in school and the community. The case manager is to secure an appropriate placement when the child is not able to remain in the home because of the type of treatment needed. In addition, the case manager is to monitor the quality of services provided and coordinate services with other systems including, among other things, education, corrections, and health


172. See MINN. STAT. § 260.12(a).

173. Minn. R. 9520.0904A(3) (2003); see also MINN. STAT. § 245.4881 (providing for case management for emotionally disturbed children).
When the county is awarded legal custody of the child, the case manager is under a legal obligation to provide for the care and support of the child. However, when the provisions of the Children’s Mental Health Act is viewed in conjunction with the CHIPS statute, it is clear that parents retain the right to participate in the planning of and approval for services provided.

While professional ethics dictate that their clients should be paramount in their approach to their duties, some case managers report that they are pressured by their supervisors and county managers to hold down costs. Rarely are decisions made without the cost of services being a driving factor. This is the case, regardless of the assessed needs of the child or what has been deemed to be best practice. When the county has legal and physical custody, they often act as though they are in complete control of the placement decision. In the end, however, when the child is placed in the wrong setting, it becomes more costly because the treatment duration is often times longer than it would have been were the child placed in an appropriate setting.

- The County Attorney represents the county in all legal proceedings regarding the Juvenile Court Act(s). In some counties, the county attorney simply advocates for whatever position the county requests. In other counties, the attorney views their role as representing the best interests of the citizens of the county and may choose to exercise his

174. Minn. Stat. § 245.881, subd. 3.
175. Id. § 260C.007, subd. 10.
176. Id. § 245.4876, subd. 5(b).
177. This information is derived from comments made by experienced case managers directly to the Ombudsman.
178. Minn. Stat. § 388.051, subd. 1(a); see also id. § 260C.163, subd. 4.
or her discretion as to whether to bring an action forward.

• The role of the Defense Attorney is to represent his or her client. In the Juvenile Court system, there are often several defense attorneys on the same case. In most instances, the parents are entitled to legal defense. In some instances, each parent is appointed a separate attorney. Depending on the age, children are entitled to their own attorney and the children’s interests may or may not be the same as that of the parent, guardian, or custodian. If the family lacks resources, they may be represented by a public defender. In many cases, the guardian ad litem also may be represented by an attorney. While these attorneys are usually familiar with the Juvenile Court Act, many of them are not familiar with the provisions of the Children’s Mental Health Act and how the two laws acting together may affect the rights of the child or the parents. When the county petitions to take custody of the child for purposes of mental health services, it is critical that the defense attorney is well versed in both laws.

• Guardians ad litem are lay people appointed by the court to assess the CHIPS case solely from the view of what is in the best interest of the child. The guardians ad litem report their findings to the court. They are given broad access to extensive private data on the child and the parents including information on the mental health treatment of all the parties involved. They conduct their own independent investigation. There

179. MINN. R. JUV. PROT. P. 25.02, subd. 1(a).
180. MINN. STAT. § 260C.163, subd. 3(b).
181. Id. § 260C.163, subd. 5(a).
182. Id. chs. 260, 260A, 260B, 260C.
183. Id. §§ 245.487–.4887.
184. MINN. GEN. R. PRAC. 901.01.
185. MINN. R. JUV. PROT. P. 26, subd. 1.
186. MINN. GEN. R. PRAC. 905(a).
are no requirements, however, that the guardian ad litem have any particular knowledge of mental health issues or treatment. While they have broad access to records, they may or may not be skilled in appropriate treatment options or how to interpret a child’s or a parent’s mental health needs. Just as with the defense attorneys, the guardians ad litem work predominantly with the CHIPS law more so than with the Children’s Mental Health Act. As such, they too often give more weight to the county professionals on the needs of the child than they do to the parental knowledge of the child. The guardians ad litem often change during the course of the child’s growth and development. Families often report to this agency that the guardian will support the county’s placement decision without consulting with the family or the child.

- The Juvenile Court Judge is the court official who decides what is in the best interest of the child, whether it is a child in need of protection, a child who needs services in out-of-home placement or a child who has been adjudicated as a delinquent. The judge is supposed to do this after listening to all interested parties and in accordance with the laws and rules. Just like the guardian ad litem, the judge may have little or no knowledge of the various services proposed, or appropriate mental health diagnoses or treatment. In the authors’ experience,

187. *Id.* at 902.
188. In cases worked on by the Office, parents report that they have very little contact with the guardian ad litem. Often times the parents do not receive the guardian ad litem’s report until the date of court. In instances where the report contains inaccuracies obtained from case manages, the parents or their attorney have little time to mount a rebuttal. Additionally, children report that they have little contact with the guardian ad litem appointed to represent their interests and the guardian often times does not take into account their wishes when making recommendations to the court. While this may not be true in all cases, it is reported to the Office in enough instances to support the authors’ contention.
however, many judges are not familiar with the Children’s Mental Health Act\textsuperscript{190} and the provisions regarding out-of-home placement.\textsuperscript{191} Even when judges rule on matters contained in the Juvenile Court Act, some judges ignore certain directives specifically addressed within the statute. For example, some judges transfer custody of children to the county when the sole reason for the out-of-home placement is to access mental health services.\textsuperscript{192}

\textbf{B. Why Would Counties Needlessly Seek Custody of Children?}

Minnesota’s Children’s Mental Health Act envisions that services will be provided to children in their own home and local community whenever possible.\textsuperscript{193} But children with severe emotional and behavioral disorders often require treatment in a hospital or residential treatment center. In other cases, the needs of the children are greater than what the parent can handle, especially if the family has other children at home. In some cases the child or the family are not safe while the child’s behavior is out of control. Sometimes the parents are under stress from raising a child with a disability and need respite services and other times parents need help in developing the skills needed to care for their disabled child. Parents of children with physical or developmental disabilities are not asked to relinquish custody. Why, then, are parents forced to give up custody of their children simply to access mental health services for their children?

There are a number of different reasons why this may be happening. Most of the reasons cited are based on misconceptions and are related to such issues as insurance limits or lack of private insurance. Other misconceptions include the belief that custody is

\begin{itemize}
  \item \textsuperscript{190} Minn. Stat. §§ 245.487–.4887.
  \item \textsuperscript{191} For example, Minnesota Statutes sections 260C.141, subdivision 2(b) and 260C.212, subdivision 9(a) and (b), address the court’s ability to review voluntary, long-term out-of-home placements. This review can be done without the need for the county to file a CHIPS petition. When the out-of-home placement continues to meet the needs of the child, the court should not permanently place the child away from the parents nor award custody to the county.
  \item \textsuperscript{192} Minn. Stat. § 260C.201, subd. 1(3).
  \item \textsuperscript{193} \textit{Id}. § 245.2885.
\end{itemize}
required to gain access to the federal child protection and out-of-home placement funds referred to as Title IV-E funds. Still other reasons deal with the permanency planning requirements in the CHIPS law. These policies and practices have their roots in the child protection system addressing children that have been abused and/or where there has been parental neglect. As pointed throughout this article, it is often mistakenly believed that the county must assume custody of a child and a permanency plan established whenever the child is in an out-of-home placement beyond one year. Again, the laws in Minnesota make it clear that the transfer of custody is not necessary when the sole purpose of the out-of-home placement is to treat the child’s disability.

Cases reviewed by the Office often involve a disagreement between the county and the parents on what type of services are appropriate or necessary for their child. Often the parents want services that are more expensive than what the county is willing to fund or the parents do not agree with the services the county is willing to provide. The harder the parents advocate for services that are different than those being imposed upon them by the county, the more the case manger develops a bias against the parents, labeling them “difficult to work with,” “interfering with their child’s care,” and “unwilling” to provide for their child. While the case manager might be a professional in children’s mental health, the parents have more extensive knowledge of their child. Because Minnesota allows for voluntary out-of-home placement agreements between the parent and the county, custody often times does not become an issue until there is a disagreement over services. While the Children’s Mental Health Act specifically requires parental consent for treatment even when the county has custody, counties sometimes take custody believing that they are entitled to make all the decisions on behalf of the child. Most case managers and other treatment providers mistakenly believe that legal and physical custody have the same legal consequence as a guardianship in Minnesota.

194. *Id.* § 260C.201, subd. 11.
195. *Id.* § 260C.201, subd. 1(3).
196. *See supra* Part IV.1.
198. *Id.* § 245.4876, subd. 5.
199. “Legal custody” is defined as “the right to care, custody, and control of a child who has been taken from a parent by the court in accordance with the provisions of section 260C.201 or 260C.317.” *Id.* § 260C.007, subd. 22.
Under Minnesota rules, when the court transfers legal custody of a child to the county, the local agency is still required to petition the court before it can provide special treatment and care in the event the parents fail to provide it.  This clearly implies that parents retain their decision-making rights and only the court can limit those rights. Despite this fact, in case after case, once the county is awarded custody for the purposes of providing mental health care, it often makes all the decisions for the child without the parents’ consent. These decisions often include approving health care procedures, making decisions about complicated medications, planning, and signing for special education plans.

C. Recent Changes in the Law

Despite the fact that for years Minnesota law has been clear that courts shall not transfer custody of children to the county when the sole reason is to access mental health services, the practice nevertheless continues. Each county has its own set of policies and procedures, often unwritten, which leads to the potential of each county doing something different. Sometimes there is not even consistency from one case manager to another within the same county. With Minnesota having a state-run, county delivered system, does it make sense for Minnesota to have eighty-seven different ways of doing business?

During the last legislative session, the Department of Human Services proposed legislation that would help reinforce and clarify the point that child custody should not be transferred to the county

“Guardianship,” however, is defined as a fiduciary relationship in which the guardian assumes the power to make decisions about the ward’s person or property. BLACK’S LAW DICTIONARY 726 (8th ed. 2004).

200. Minn. R. 9560.0525 E.

201. Parents are too often systematically pushed aside or not included in decisions about their child. Meetings are set at times convenient for the professionals without any consideration given to the parents’ schedule. The parents are simply told the date and time of the meeting. If the parents miss the meeting because of a conflict, they are viewed as not caring about their child. Even when they attend meetings, they are often overlooked or treated like they are not there. Professionals talk to each other without consideration of the parents’ or the child’s understanding of the process.

202. Minnesota has eighty-seven counties. See Minnesota QuickFacts from the U.S. Census Bureau, http://quickfacts.census.gov/qfd/maps/minnesota_map.html (last visited Oct. 19, 2005). Each county has a county board that is responsible for county services required under Minnesota law. MINN. STAT. §245.4883.
when the sole issue is accessing children’s mental health services.\textsuperscript{205} The proposed law also clarifies that the permanency plan required under the CHIPS law may simply be the continuation of the voluntary out-of-home placement without the need for a court hearing.\textsuperscript{204} The legislation passed and was signed by the Governor.\textsuperscript{205}

\textbf{D. When Government Does Not Follow The Law}

In Minnesota, state agencies like the Department of Human Services believe that their role is to work collaboratively with the counties who are responsible for delivering services. While in theory this service system should work well, it practice it fails in many ways. What happens when a county chooses to ignore the law or refuses to take the time to adequately train its employees? History has shown that counties are not held accountable when they fail to follow the law.\textsuperscript{206} There are few, if any, administrative, legal, or financial sanctions which can be applied by the state against the counties.

Parents who have been swept up in the child protection or children’s mental health systems often complain about the negative fallout associated with seeking assistance for their child. If the parents fail to follow their child’s plan or disagree with the county about the nature of services their child needs, they risk the most serious of all consequences—the loss of the custody of their child. Conversely, if a case manager fails to follow the edicts contained within the CHIPS law or fail to provide the appropriate services, they are not held accountable.\textsuperscript{207} Even when a parent may have a legal cause of action against the county, the burden of overcoming government’s limited liability is almost insurmountable and few attorneys are willing to take on the challenge.\textsuperscript{208}

\textsuperscript{203} H.F. 1816 Art. 2, 84th Leg. (Minn. 2005-2006).
\textsuperscript{204} \textit{Id.} § 1, subd. 2a(1)(iii).
\textsuperscript{206} \textit{See supra} Parts III, IV (Lisa and Bobby’s stories). In both case studies, the counties had violated the rights of families, yet sanctions were not imposed or any other punitive steps taken to hold the counties accountable.
\textsuperscript{207} \textit{MINN. STAT.} § 256B.0625, subd. 4; \textit{see also id.} § 245.4876.
\textsuperscript{208} This contention is based on the Office’s conversations with parents who wished to bring a cause of action against counties but learned, upon consultation with legal counsel, that it would be futile to try. This point has also been
The Ombudsman’s Office acknowledges that there are many conscientious workers at all levels of the social service system working hard every day to improve the lives of children. The stories of families and the cases reviewed by the Office, however, reveal that the destructive practices and harmful decisions made by counties contained within this essay are not simply isolated cases.

VI. CONCLUSIONS AND OPPORTUNITIES FOR CHANGE

Minnesota’s current delivery of children’s mental health services can lead to absurd outcomes. The social service system within Minnesota is entrusted with the responsibility of assisting families in need. The intent behind the CHIPS provision of the Juvenile Court Act is to identify children in need of protection or services and to ensure that the children’s needs are met. There are instances, however, when counties abuse the CHIPS process and needlessly remove children from their homes in the process of providing services.209 Additionally, parents are sometimes mistakenly informed by counties that the only way for them to access services for their child is to relinquish custody. Once the county assumes custody, the parents are often left to the sidelines and the county dictates the extent and nature of the services provided. The result is not only the needless break-up of the family unit, but also the child becoming further harmed as a result of poor decisions by counties regarding treatment options and out-of-home placement.

The current children’s mental health system focuses on providing services that are available rather than developing services that individual families actually need. In many cases, large expenditures of public funds are spent on services that not only fail to address the needs of the child, but actually make the child’s disability worse. Children are often moved from one inappropriate placement to another without any assessment as to their progress. Children with emotional disturbances are often placed in correctional settings to address their behavior rather than to treat the underlying cause of the behavior. When things go wrong in the

209. See supra Parts III, IV (Lisa and Bobby’s stories).
placement setting, the child is blamed for the failure to progress in the placement rather than focusing on the fact that the treatment provider failed to meet the needs of the child.

There is an urgent need for systemic reform in order to better protect the best interests of children, ensure appropriate outcomes for children, and protect the rights of the family. Minnesota needs to completely separate children’s mental health services from the child protection system. While it is appropriate to have oversight of an out-of-home placement to ensure that children are not needlessly removed from their family, that oversight should proceed outside of the system that deals with child protection.

Specifically, Minnesota needs to establish a statewide Foster Care and Out-of-Home Placement Review Panel. This statewide panel would be an administrative review panel that would conduct hearings upon request of the child, his or her parent, or other interested parties. The panel would review out-of-home placements and other county decisions to determine their appropriateness. If the panel determines that a county’s decision is inappropriate, the panel would have the authority to overturn that decision. In addition, Minnesota needs to establish a Juvenile Court System Training and Resource Center. The center should be run by an impartial entity not directly involved in the service delivery system and would provide information on the rights of the child and the family as well as provide training to all parties within the system.

Children with mental and behavior disorders are growing and changing every day. These children suffer daily and can not wait for the system to slowly evolve. In the end, the emphasis should be on meeting the needs of children, rather than the county, the workers, the service providers, the judges, the attorneys, the therapists, or anyone else who is entrusted to serve children.