

WANTED: FOREVER HOME

ACHIEVING PERMANENT OUTCOMES FOR NEVADA'S FOSTER CHILDREN

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“That is three birthdays, three Christmases, and that is going through the first, second, and third grades, without having a mom and a dad.”

—Statement of Senator Chuck Grassley¹

I. INTRODUCTION

The Clark County Department of Family Services received initial reports on the maltreatment of nine-year-old Olivia in 2005.² A year later, the County placed Olivia with a series of relatives where she suffered abuse, including beatings with a belt.³ Finally, from 2009 on, Olivia lived with a permanent family.⁴

Olivia is one of the plaintiffs in *Henry A. v. Willden*,⁵ a widely publicized⁶ reminder of the realities for some children in foster care in Nevada.⁷ The case

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¹ 143 CONG. REC. S12,672 (daily ed. Nov. 13, 1997) (statement of Sen. Grassley). Senator Grassley was a chief advocate for reducing the time a child may spend in foster care before termination of parental rights, and expressed his concern about the three-year average of a child in foster care. *Id.*

² Amended Complaint at 12, *Henry A. v. Willden*, No. 2:10-cv-00528, 2010 WL 4362809 (D. Nev. Oct. 26, 2010) [hereinafter *Henry A. Complaint*].

³ *Id.*

⁴ *Id.*

⁵ *Henry A. v. Willden (Henry Appeal)*, 678 F.3d 991, 991 (9th Cir. 2012).

⁶ See Joe Schoenmann, *Court Ruling May Open Door to Monetary Damages to Nevada Foster Children Who Sue State Over Their Care*, LAS VEGAS SUN (May 4, 2012, 4:41 PM), <http://www.lasvegassun.com/news/2012/may/04/court-ruling-may-open-door-monetary-damages-nevada/>; Steve Kanigher, *Federal Class Action Suit Filed Against County Child Welfare System*, LAS VEGAS SUN (Apr. 14, 2010, 12:03 PM), <http://www.lasvegassun.com/news/2010/apr/14/federal-class-action-suit-filed-against-county-chi/>; David Kihara, *Lawsuit Eyed in Child Services*, LAS VEGAS SUN (Apr. 8, 2005, 10:59 AM), <http://www.lasvegassun.com/news/2005/apr/08/lawsuit-eyed-in-child-services/>.

⁷ Child welfare efforts and statistics on foster care may differ depending on the county. This note attempts to distinguish child welfare data by each of Nevada's counties whenever county-specific data is available. However, a general distinction by county goes beyond the scope of this note. As a point of reference, Clark County contains about two-thirds of Nevada's child protection caseload. Leroy H. Pelton, *An Examination of the Reasons for Child Removal in Clark County, Nevada*, 30 CHILD. & YOUTH SERVICES REV. 787, 788

is only one example of recent class action litigation aimed at reforming states' child welfare systems⁸ to ensure and improve basic services to abused and neglected children in dependency proceedings.⁹ When a child like Olivia is injured in foster care, the common media response is to call for harsher background checks and licensing for foster parents.¹⁰ However, in Nevada, a deeper look reveals that the state removes children from their families at an above-median rate.¹¹ Compared to all other states, Nevada had the largest increase of children entering foster care between 2000 and 2009,¹² and evidence suggests that these children face a higher likelihood of abuse or neglect in foster care than children in the general population.¹³

Another negative side effect of Nevada's high removal rate is that once children are taken from their home and enter foster care, they languish in foster homes and are deprived of permanency,¹⁴ a problem widely known as "foster

(2008). See also NEV. DEP'T OF HEALTH & HUMAN SERVS. DIV. OF CHILD & FAM. SERVS., NEVADA ANNUAL PROGRESS AND SERVICE REPORT 29 (2012), available at http://www.dchfs.state.nv.us/Reports/FINAL_APSR.pdf [hereinafter NEVADA 2012 WELFARE REPORT] (reporting that in April 2012 Clark County had 3,763 children in care, Washoe County had 728 children in care, and rural counties cared for 478 children).

⁸ See, e.g., Carson P. *ex rel.* Foreman v. Heineman, 240 F.R.D. 456, 464–65 (D. Neb. 2007) (alleging Nebraska's implementation of a child welfare system violated foster children's civil rights); Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1355 (N.D. Ga. 2005) (alleging foster child services in two Georgia counties were inadequate); R.C. *ex rel.* Ala. Disabilities Advocacy Program v. Nachman, 969 F. Supp. 682, 685 (M.D. Ala. 1997) (alleging maltreatment in Alabama's child welfare system).

⁹ This note addresses children in child protection proceedings. These proceedings refer to the set of hearings that occur in family court pursuant to a report alleging child abuse or neglect. See Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1, 1 n.2 (2000).

¹⁰ See Steve Green, *Woman Sues Foster Mother, Clark County over Death of 3-Year-Old Boy*, LAS VEGAS SUN (May 12, 2011, 12:21 PM), <http://www.lasvegassun.com/news/2011/may/12/woman-sues-foster-mother-clark-county-over-death-3>.

¹¹ The median rate at which children entered foster care across fifty-one states was 3.6 children per thousand children in the population. U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILDREN'S BUREAU, CHILD WELFARE OUTCOMES 2007–2010 12 (2012), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cwo07-10/cwo07-10.pdf> [hereinafter U.S. CHILD WELFARE OUTCOMES REPORT]. To compare, in Nevada, children enter foster care at a rate of 4.2 children per thousand children in the population. *Id.* at 213.

¹² *Foster Care Data Snapshot*, CHILD TRENDS 2 (May 31, 2011), http://www.childtrends.org/wpcontent/uploads/2011/05/Child_Trends_2011_05_31_DS_FosterCare1.pdf.

¹³ See Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 7 (1995) (attributing the failure of the foster care system to three factors: an upsurge in the number of children in need of care, an overburdened system and agencies, and an inadequate number of foster parents); Wendy Koch, *Study: Troubled Homes Better than Foster Care*, USA TODAY (July 3, 2007, 6:55 AM), http://usatoday30.usatoday.com/news/nation/2007-07-02-foster-study_N.htm?csp=4#Close.

¹⁴ A review of Nevada's child welfare system shows that the state only met three out of twelve of permanency indicators. NEVADA 2012 WELFARE REPORT, *supra* note 7, at 32. The report evaluated the state with the following permanency indicators: the number of foster care re-entries; stability of foster care placement; establishing permanency goals for the child; reunification, guardianship, or permanent placement with relatives; adoption; other planned living arrangements; proximity of foster care placement to parents; foster care placement with siblings; visiting with parents and siblings in foster care; preserving the child's

care drift.”¹⁵ Accordingly, foster care drift may currently affect a total of almost five thousand children in Nevada who have been in the State’s care for varying amounts of time.¹⁶ Researchers agree that children do best when raised in stable family settings and that preventing and shortening placements in foster care increases safety and well-being of Nevada’s most vulnerable children.¹⁷ Although evidence exists that Nevada’s child welfare system has recently made some improvements,¹⁸ Nevada should consider several measures that other states have already successfully implemented to improve services to foster children. These measures may affect a child’s experience in the Nevada foster care system and increase the permanent and positive outcomes these children need and deserve.¹⁹

By focusing on Nevada’s specific child welfare considerations, this note aims to provide guidance when discussing and adopting new laws benefiting Nevada’s abused and neglected children. Part II utilizes the recent Ninth Circuit decision in *Henry A. v. Willden* to point out weaknesses in Nevada’s child welfare system. Part III examines the framework of federal law that governs foster care in Nevada. Part IV critiques some of Nevada’s current child welfare efforts and suggests improvements to overcome these shortcomings. Finally, Part V proposes suggestions for new child welfare legislation to increase the likelihood of permanent outcomes for Nevada’s foster children. This note concludes by revisiting Olivia’s story and by showing how an abused child like Olivia would benefit from the proposed changes.

connections; relative placement; and the relationship of child in care with the child’s parents. *Id.* at 32–42.

¹⁵ Michael T. Dolce, *A Better Day for Children: A Study of Florida’s Dependency System with Legislative Recommendations*, 25 *NOVA L. REV.* 547, 551 (2001) (“These problems are so endemic to the system that the child welfare community recognizes them with widely used terms, like ‘foster care drift’ . . .”); Clare Huntington, *Rights Myopia in Child Welfare*, 53 *UCLA L. REV.* 637, 649 (2006) (describing foster care drift as the term used when children stay in foster care for years). Foster care drift also “occurs when children in placement lose contact with their natural parents and fail to form any significant relationship” with foster parents. Marsha Garrison, *Why Terminate Parental Rights?*, 35 *STAN. L. REV.* 423, 426 (1983).

¹⁶ NEVADA 2012 WELFARE REPORT, *supra* note 7, at 29.

¹⁷ See Timothy Arcaro, *FLORIDA’S FOSTER CARE SYSTEM FAILS ITS CHILDREN*, 25 *NOVA L. REV.* 641, 647 (2001) (arguing foster care is no less dangerous and detrimental to children than remaining with their abusive parents); *Supporting Reunification and Preventing Reentry Into Out-of-Home Care*, CHILD WELFARE INFO. GATEWAY 2 (Feb. 2012), https://www.childwelfare.gov/pubs/issue_briefs/srpr.pdf.

¹⁸ See *State Summary, Nevada*, NAT’L CHILD WELFARE RES. CTR. ON LEGAL AND JUD. ISSUES, <http://apps.americanbar.org/abanet/child/statesum/state.cfm?state=NV> (last visited Oct. 14, 2013). For instance, a Clark County legal aid society represented about one hundred children in initial protective custody hearings, one judicial district implemented a dependency mediation program, and the Nevada Division of Child and Family Services participates in a data driven decision-making project. *Id.*

¹⁹ See *infra* Parts IV–V.

II. FOSTER CARE IN NEVADA: CAN LITIGATION IMPROVE A BROKEN SYSTEM?

The U.S. Department of Health and Human Services conducts periodic reviews to assess whether a state's foster care program complies with federal mandates to continue to be eligible for federal funds.²⁰ In 2004 and 2009, these reviews found that Nevada failed to be in substantial compliance with the federal child welfare outcomes designed to ensure children's safety, permanency, and well-being.²¹ More than ten studies and reports documented the state officials' failure to protect the health, safety, and well-being of children in foster care.²²

A children's rights organization, the National Center for Youth Law,²³ first filed a lawsuit on behalf of Nevada's abused and neglected children in August 2006 in an attempt to improve Clark County's child welfare system.²⁴ The court failed to certify the class because all plaintiffs had either aged out of the system or were adopted; however, the organization filed a new lawsuit in 2010.²⁵

On April 13, 2010, thirteen children who were or had been in the legal custody of the State of Nevada filed individual and class action claims in the United States District Court for the District of Nevada.²⁶ The children based their claims on 42 U.S.C. § 1983 and other federal statutes, and named several state and Clark County officials as defendants ("defendants").²⁷ Specifically, the children alleged that the policies and customary practices in foster care failed to comply with State and federal law, departed from professional judgment and standards, and reflected a deliberate indifference to their health and safety, which the State is obligated to protect.²⁸ The children requested individual damages and injunctive relief, as well as injunctive relief on behalf of the class.²⁹

According to the complaint, the defendants violated the children's constitutional "right to be free from harm while involuntarily in government cus-

²⁰ Henry A. v. Willden (*Henry A. I.*), No. 2:10-cv-00528, 2010 WL 4362809, at *2 (D. Nev. Oct. 26, 2010). See also Henry A. Complaint, *supra* note 2, at 2. For more information on the federal funding structure of child welfare, see *infra* Part III.

²¹ *Henry A. I.*, 2010 WL 4362809, at *2. For more information on the federal Child and Family Services Reviews in Nevada, see *infra* Part IV.

²² *Henry A. I.*, 2010 WL 4362809, at *2.

²³ The National Center for Youth Law attempts to improve the lives of low-income children. *About NCYL*, NAT'L CTR. FOR YOUTH L., http://www.youthlaw.org/about_ncyl/ (last visited Oct. 27, 2013).

²⁴ The first lawsuit was *Clark K. v. Willden*, 616 F. Supp. 2d 1038, 1039 (D. Nev. 2007). See also *Clark K. v. Willden*, NAT'L CTR. FOR YOUTH L., http://www.youthlaw.org/litigation/ncyl_cases/child_welfare/6/ (last visited Oct. 27, 2013) (providing background information on the case).

²⁵ See Henry A. Complaint, *supra* note 2, at 1.

²⁶ *Henry A. I.*, 2010 WL 4362809, at *1. The children alleged violations of their substantive due process rights under the Fourteenth Amendment and violations of federal statutory rights. *Henry Appeal*, 678 F.3d 991, 996 (9th Cir. 2012).

²⁷ *Henry A. I.*, 2010 WL 4362809, at *3.

²⁸ *Id.* at *1.

²⁹ *Henry Appeal*, 678 F.3d at 996.

today,” and disregarded their rights to medical care, treatment, and other services.³⁰ For instance, fourteen-year-old plaintiff Henry spent ten years in over forty foster families in the custody of the state, and the defendants’ failure to adequately monitor and re-assess his mental health problems caused him to suffer severe drug poisoning.³¹ Further, the defendants removed the children from their homes and placed them into out-of-home care that posed “an imminent risk of harm to [the children’s] safety.”³² For instance, for one-year-old plaintiff Charlotte this meant that her foster mother’s teenaged son locked her in a closet without water or food for extended periods of time.³³

Moreover, the children’s statutory claims³⁴ alleged the right of each child to have health and educational records maintained and supplied to foster care providers, to be placed with relative foster parents only if these foster parents satisfied foster parent licensing standards, and to receive caseworker visits at least every six months if the child is in an out of state foster care placement.³⁵ For instance, twelve-year-old plaintiff Mason was transferred to the National Deaf Academy in Florida, and during his nineteen-month placement at the academy, the defendants never visited him to monitor his health or educational needs.³⁶

Additionally, the children claimed a federal statutory right to representation by a guardian ad litem in all proceedings before the juvenile court,³⁷ abuse and neglect prevention and treatment programs, and early intervention services.³⁸ “As a result of [d]efendants’ failures, [the children] state[d] that they have suffered numerous injuries including: severe physical abuse, lack of necessary medical treatment, and multiple placement disruptions.”³⁹

The United States District Court for the District of Nevada granted the defendants’ motion to dismiss, stating that the defendants were entitled to qualified immunity on the claims against them.⁴⁰ The court found that the children did not show that the defendants had a duty to protect them because a right to health screenings and to medical services is not a clearly established constitu-

³⁰ *Henry A. I*, 2010 WL 4362809, at *6. The children alleged that the state violated their rights by failing to provide adequate medical, dental, and mental health services; to inform caregivers of essential information; to conduct legally required visits with foster children; to adequately respond to reports of abuse; to ensure adequacy of relative caregiver placements; and to adequately inspect out of state facilities. *Id.*

³¹ *Henry A. Complaint*, *supra* note 2, at 7; *Henry A. v. Willden (Henry A. II)*, No. 2:10-cv-00528, 2013 WL 759479, at *1 (D. Nev. Feb. 27, 2013).

³² *Henry A. I*, 2010 WL 4362809, at *7.

³³ *Henry A. Complaint*, *supra* note 2, at 7–8.

³⁴ The children alleged a violation of their federal statutory rights under the Adoption Assistance and Child Welfare Act of 1980, as amended by the Adoption and Safe Families Act of 1997, and under the Child Abuse Prevention and Treatment Act. *Henry A. I*, 2010 WL 4362809, at *8, *12. For more information on these federal Acts, see *infra* Part III.

³⁵ *Henry A. I*, 2010 WL 4362809, at *8.

³⁶ *Henry A. Complaint*, *supra* note 2, at 12–13.

³⁷ *Henry A. I*, 2010 WL 4362809, at *12.

³⁸ *Id.* at *19.

³⁹ *Id.* at *1.

⁴⁰ *Id.* at *20. “Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.” *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2080 (2011).

tional right.⁴¹ The court dismissed the claim that the defendants acted with deliberate indifference because the defendants did not increase any danger to the children and did not do “anything more than place foster children into an already broken system.”⁴²

In regards to the children’s federal statutory claims, the court found that the children did not show that the rights to a case plan, to be placed with a relative foster parent only if licensing standards are satisfied, to receive caseworker visits at least every six months if in an out of state placement, and to be appointed a guardian are clearly established constitutional rights for purposes of qualified immunity.⁴³ Finally, the court dismissed the children’s claims for abuse and neglect prevention and treatment programs and for early intervention services.⁴⁴

The Ninth Circuit Court of Appeals reversed the dismissal of most claims, and stated that qualified immunity was not available to the defendants because the children sought injunctive relief.⁴⁵ The court found that the children had a clearly established constitutional right because, when the State takes a foster

⁴¹ *Henry A. I*, 2010 WL 4362809, at *6. The court found that there was a “clearly established right under the duty to protect for the state to provide individuals in state custody with their basic human needs,” but it was “not clearly established that [foster children] have a constitutional right to (1) ‘standardized periodic health screenings and treatments,’ (2) ‘medical services for maximum reduction of physical or mental disability,’ and (3) ‘monitory of, administration, and use of psychotropic drugs.’” *Id.* at *7. Further, the court found it to be not “clearly established” that the “failure to inform caregivers of essential information, . . . to conduct legally required visits with foster children, . . . to adequately respond to reports of abuse, . . . to ensure adequacy of relative caregiver placements; and . . . to adequately inspect out of state facilities constitutes a violation of a constitutional right.” *Id.*

⁴² *Id.* at *8. Because the defendants did not increase the danger to the children, the defendants could not have violated the children’s “‘clearly established’ constitutional rights under the state-created danger doctrine.” *Id.*

⁴³ *Id.* at *8–14. The court used the Blessing test to determine whether the children asserted the violation of a federal right, and not merely a violation of federal law. *Id.* at *8. “Under U.S. Supreme Court precedent, to permit a private right of action to enforce a federal spending clause statute,” such as the federal statutes the children based their complaint upon, “courts must consider three factors when determining whether a particular statutory provision gives rise to a federal right.” Gerard F. Glynn, *The Child’s Representation under CAPTA: It Is Time for Enforcement*, 6 NEV. L.J. 1250, 1258–59 (2006). “First, Congress must have intended that the provision in question benefit the plaintiff.” *Blessing v. Free-stone*, 520 U.S. 329, 340 (1997). Second, “the plaintiff must demonstrate that the right assertedly protected by the statute is not so ‘vague and amorphous’ that its enforcement would strain judicial competence.” *Id.* at 340–41. “Third, the statute must unambiguously impose a binding obligation on the States.” *Id.* at 341.

⁴⁴ *Henry A. I*, 2010 WL 4362809, at *19–20. The court found that there is no private right of action to enforce the state’s plan on how to spend federal grants. *Id.* at *19. The children’s early intervention services claim was dismissed because it failed to state a claim for relief. *Id.* Finally, the court declined to rule on the children’s negligence claims because it found these claims raised strict issues of state law. *Id.* at *20.

⁴⁵ *Henry Appeal*, 678 F.3d 991, 996, 999 (9th Cir. 2012). Regarding the children’s damages claim against county officials and the children’s claim for injunctive relief, the court found the district court’s conclusion, stating the specific examples of medical care and services were not clearly established constitutional rights, was “plainly wrong.” *Id.* at 999. “Qualified immunity is not available as a defense in § 1983 cases ‘. . . against individuals where injunctive relief is sought instead of or in addition to damages.’” *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 242 (2009)). The court also found that although the children’s claims fall short

child into custody and holds the child against the child's will, the Constitution imposes a duty to assume responsibility for the child's safety and general well-being.⁴⁶ Indeed, according to the court, a reasonable state official would have understood that the failure to respond to medical and safety needs was deliberate indifference to foster children's rights.⁴⁷ Consequently, because the defendants knew of the danger of abuse and neglect to children in certain foster homes and subsequently acted with deliberate indifference by exposing the children to that danger anyway, the plaintiffs stated a cognizable claim.⁴⁸

The court found that case plan provisions under federal child welfare law are enforceable because the provisions unambiguously require the state to provide for the development of a case plan for each foster child.⁴⁹ The provisions contain mandatory terms and detailed, concrete requirements that the case plan include health and educational records, an educational plan, and a description of the child's permanency plan.⁵⁰

However, the court found that federal law mandating the appointment of a guardian ad litem for every child did not create an individually enforceable right.⁵¹ The court reasoned that no court had previously addressed whether the guardian ad litem provision is enforceable through 42 U.S.C. § 1983 or privately enforceable,⁵² and that the provision does not contain the type of unambiguous, rights-creating language that the case plan provisions did.⁵³ According to the court, the guardian ad litem provision required "only that a [s]tate either enact a law or create a program that includes procedures designed to accomplish broad goals, such as representation for every child. . . ."⁵⁴ Finally, the court found that early intervention services were not privately enforceable

in some areas to tie the claims to the individual state defendants, the children could likely cure this deficiency by amending their complaint. *Id.* at 1005.

⁴⁶ *Id.* at 998 (citing *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 198–202 (1989)). Further, for over twenty years, Ninth Circuit precedent recognized that foster children's rights include supervision by social workers and protection from harm by foster parents. *Id.* at 1000.

⁴⁷ *Id.* at 1001.

⁴⁸ *Id.* at 1002. The Ninth Circuit previously recognized that the state-created danger doctrine applies to placing a foster child in a home where there is a known danger of abuse, and the fact that the dangerous foster homes already existed is irrelevant. *Id.*

⁴⁹ *Id.* at 1006–08.

⁵⁰ *Id.* at 1008–09. The court cited to Ninth Circuit precedent, where the court found that the records provision's "focus on individual foster children," and the language "designating foster parents" to receive a benefit on their foster child's behalf, "together unambiguously reflect Congress's intent" that the records provisions benefit individual foster children and parents." *Id.* (citing *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 981 (9th Cir. 2010)).

⁵¹ *Id.* at 1011.

⁵² *Id.* at 1010.

⁵³ *Id.*

⁵⁴ *Id.* at 1010. Before the Ninth Circuit's decision in *Henry A.*, child welfare advocates hypothesized that if any provision within Child Abuse Prevention and Treatment Act "creates a specific, privately enforceable right, it is the representation provision." Glynn, *supra* note 43, at 1260. In contrast to the Ninth Circuit's view, advocates such as Gerard Glynn opined that although many of this Act's provisions relate to broad policy, the representation provision creates specific obligations based on the language that an attorney "shall be appointed to represent the child in such proceedings." *Id.* (citing 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000)).

because Congress did not unambiguously confer an individual federal right to these services.⁵⁵ The court remanded for further proceedings.⁵⁶

On remand, the district court addressed the defendants' second round of motions to dismiss.⁵⁷ The children filed an amended complaint that tied the children's harms to the individual state defendants'⁵⁸ obligations as the administrators of the foster care system.⁵⁹ However, the court found no supervisory liability because the amended complaint did not show a connection between the individual defendants and a particular plaintiff or "acquiescence or indifference to failures in any particular case or even generally."⁶⁰ Further, the court accepted the defendants' argument that the federal case plan provision was limited to requiring an initial case plan within sixty days of entering foster care.⁶¹ Finally, the court dismissed the children's negligence claims under federal law, and upheld the negligence claims of three children under Nevada law.⁶²

Henry A. v. Willden will move forward to discovery and a jury trial "most likely in March 2014," with few of the children's initial claims remaining.⁶³

Ultimately, even if a trial grants some relief to Nevada's foster children on the remaining claims, attempting to improve a state's child welfare system

⁵⁵ *Henry Appeal*, 678 F.3d 991, 1011 (9th Cir. 2012). Foster children are entitled to some early intervention services under the Individuals with Disabilities Education Act (IDEA), and the court found the IDEA has a comprehensive enforcement mechanism that precludes enforcement under 42 U.S.C. § 1983. *Id.*

⁵⁶ *Id.* at 1012. For remand, the court further instructed the district court to grant the children the right to amend their substantive due process claim and add claims under the IDEA. *Id.* at 1012–13.

⁵⁷ *Henry A. II*, No. 2:10-cv-00528, 2013 WL 759479, at *1 (D. Nev. Feb. 27, 2013).

⁵⁸ *See supra* note 45.

⁵⁹ *Henry A. II*, 2013 WL 759479, at *8.

⁶⁰ *Id.* at *8. The court also granted the state defendants' motion to dismiss on the official and individual capacity claims for monetary damages. *Id.* at *9–10.

⁶¹ *Id.* at *11. The court hence rejected a foster child's right to a case plan once an "initial" case plan was provided. *See id.* Further, the court granted the defendants' motion regarding timely initial case plans. *Id.* The court explained that class representatives for these plans "do not have standing to assert their own claims or the claims of others, because they do not allege having not received a case plan within sixty (60) days of removal from their homes," and the class had been defined as foster children who did not receive a case plan within sixty days. *Id.*

⁶² *Id.* at *16–18. "Discretionary immunity" under state law barred the negligence claim of the remaining children. *Id.* at *17. Discretionary immunity protects state officials from lawsuits based on discretionary acts in the course of employment. *Id.* at *12. However, under a negligence per se claim, adhering to specific statutory commands is nonnegotiable. *Id.* at *15. The children alleged a violation of federal child welfare laws that mandate actions such as the case plan and records provisions, and such actions are non-discretionary, ministerial tasks, and officials are not immune to claims when performing ministerial tasks. *Id.* The court noted that although Nevada accepted federal funds conditioned to complying with these federal laws and that the federal government could cease funding for non-compliance, Nevada has not adopted the statute, and hence the negligence per se claim for violation of federal laws was not available to the children. *Id.* at *16. However, the court upheld the children's state law negligence per se claim because of the defendants' failure to investigate reports of abuse, to counsel foster parents regarding any available medical and behavioral history, and to inspect out of state placement facilities before placing a child. *Id.* at *17.

⁶³ *Plaintiffs in Henry A. Move Towards Trial*, NAT'L CTR. FOR YOUTH L., http://www.youthlaw.org/publications/yln/2013/jan_mar_2013/plaintiffs_in_henry_a_move_towards_trial/ (last visited Oct. 27, 2013).

through litigation can present challenges.⁶⁴ Although litigation-driven reform can elicit “political will, additional resources, wider community and external support, an attention to data and performance and often new leaders committed to positive change,”⁶⁵ at the time *Henry A. v. Willden* goes to trial, Nevada officials will have spent seven years litigating the case.⁶⁶ Other child welfare advocates criticized the children’s rights organization that filed the *Henry A.* lawsuit.⁶⁷ Indeed, the complaint in *Henry A.* did not include cases of wrongful removal among the named children plaintiffs, nor did it even address wrongful or unnecessary removals of Nevada’s children from their parents.⁶⁸

Injunctive relief mandating the implementation of federal requirements such as a case plan, permanency plan, and maintenance of health and education records would improve some aspects of foster care for Nevada’s abused and neglected children; however, given Nevada’s documented shortcomings over almost ten years,⁶⁹ these improvements will be too narrow to truly make a difference. To better understand how federal child welfare laws affect Nevada’s children, the next section provides an overview of the federal framework that currently governs Nevada’s child welfare efforts.

III. THE FEDERAL LEGAL FRAMEWORK FOR CHILD WELFARE IN NEVADA

In Nevada, the state administers child welfare services in counties with a population of less than one hundred thousand, and counties administer child welfare services in counties with a population of over one hundred thousand.⁷⁰ The Nevada Division of Child and Family Services oversees child welfare and

⁶⁴ Bruce A. Boyer & Amy E. Halbrook, *Advocating for Children in Care in a Climate of Economic Recession: The Relationship Between Poverty and Child Maltreatment*, 6 Nw. J. L. & Soc. POL’Y 300, 315 (2011) (arguing the legal climate in many ways became increasingly intolerant toward “reform-oriented class-action lawsuits”); see CTR. FOR THE STUDY OF SOC. POLICY, FOR THE WELFARE OF CHILDREN: LESSONS LEARNED FROM CLASS ACTION LITIGATION vii (2012), available at http://www.cssp.org/publications/child-welfare/class-action-reform/For-the-Welfare-of-Children_Lessons-Learned-from-Class-Action-Litigation_January-2012.pdf.

⁶⁵ CTR. FOR THE STUDY OF SOC. POLICY, *supra* note 64, at vii.

⁶⁶ *Clark K. v. Willden*, *supra* note 24.

⁶⁷ See *Foster Care Lawsuit in Nevada: How the National Center for Youth Law Planted the Seeds of Its Own Defeat*, NAT’L COAL. FOR CHILD PROT. REFORM CHILD WELFARE BLOG (Nov. 1, 2010, 7:53 AM), <http://www.nccprblog.org/2010/11/foster-care-lawsuit-in-nevada-how.html>.

⁶⁸ See *id.*; see also Richard Wexler, Exec. Dir., Nat’l Coal. for Child Prot. Reform, Presentation for the Greenspun College of Urban Affairs at University of Nevada, Las Vegas: First Steps Down the Road Less Traveled 24 (Feb. 23, 2011) (transcript available at <http://www.nccpr.org/reports/nevada.pdf>) (“At the heart of the problem with the lawsuit is the fact that it ignores the elephant in the room. There is not a word about Clark County’s high rate of removal and not a word about curbing that high rate of removal. But wrongful removal drives everything else.”).

⁶⁹ See *supra* text accompanying note 21 (describing Nevada’s failed child welfare efforts).

⁷⁰ NEV. REV. STAT. § 432B.325 (2011). In 2010, only two counties were above 100,000 in population. *State & County QuickFacts*, U.S. CENSUS BUREAU, available at <http://quickfacts.census.gov/qfd/states/32000.html> (last visited Oct. 27, 2013) (select “Clark County” under “Nevada Counties”).

directs child welfare efforts in Nevada.⁷¹ Nevertheless, familiarity with the federal guidelines is the key to understanding the State's system.

States relinquish their authority to develop their own child welfare policies to the federal government in exchange for funding some state child welfare programs with federal grants.⁷² Federal law ties these grant funds to mandates on controversial issues such as when to terminate parental rights and what efforts should be made to reunify families.⁷³ Congress passed a series of acts to reform states' child welfare systems out of concern about the inadequacies of states' child protection and foster care efforts.⁷⁴

The Child Abuse Prevention and Treatment Act (CAPTA), initially passed in 1974, was the first major federal legislation to address child abuse. Its proponents held hearings in Children's Hospitals and visited victims of child abuse to gain support for the Act.⁷⁵ CAPTA established the structure within the Social Security Act to provide federal funds to states and nonprofit organizations for child abuse and neglect services in exchange for states' implementation of federal requirements.⁷⁶ Specifically, to obtain federal dollars, states have to agree to reforms such as establishing child abuse and neglect reporting systems, expending sufficient resources to investigate and deal with allegations of abuse and neglect, and mandating cooperation of law enforcement, courts, and human service agencies.⁷⁷

Reports of children being unnecessarily torn from their families and of children spending years in foster care led Congress to pass the Adoption Assistance and Child Welfare Act of 1980 (CWA), and to establish Title IV-E of the Social Security Act, which covered foster care and adoption assistance programs.⁷⁸ Title IV-E continued to reimburse states for foster care maintenance payments to foster parents, while offering additional funding for child protection, family intervention, and adoption services for children with special

⁷¹ See NEVADA 2012 WELFARE REPORT, *supra* note 7, at 11.

⁷² Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281, 290 (2007). In 2006, 54 percent of Nevada's child welfare funding was from federal funds. CHILD WELFARE LEAGUE OF AM., NEVADA'S CHILDREN 2012 3 (2012), available at <http://www.cwla.org/advocacy/statefactsheets/2012/nevada.pdf> [hereinafter NEVADA'S CHILDREN 2012].

⁷³ Sankaran, *supra* note 72, at 290.

⁷⁴ *Id.* at 288–89.

⁷⁵ See Susan Vivian Mangold & Catherine Cerulli, *Follow the Money: Federal, State, and Local Funding Strategies for Child Welfare Services and the Impact of Local Levies on Adoptions in Ohio*, 38 CAP. U. L. REV. 349, 360–61 (2009).

⁷⁶ See 42 U.S.C. § 5101(a)–(b) (2012); Glynn, *supra* note 43, at 1251. Before Congress passed CAPTA, all fifty states had some form of a reporting law in place, requiring certain professionals and other citizens to report suspected child abuse; however, there was no uniformity among these laws. Mangold & Cerulli, *supra* note 75, at 360.

⁷⁷ See Gerard F. Glynn, THE CHILD ABUSE PREVENTION AND TREATMENT ACT—PROMOTING THE UNAUTHORIZED PRACTICE OF LAW, 9 J.L. & FAM. STUD. 53, 54–55 (2007).

⁷⁸ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C. (2012)); see Mangold & Cerulli, *supra* note 75, at 362.

needs.⁷⁹ Funding under Title IV-E is permanently authorized and open-ended, and provides the largest amount of federal funding for child welfare.⁸⁰

However, Title IV-E imposed more responsibility on the states with respect to the provision of services than previous federal acts and increased federal supervision over the states' responsibilities.⁸¹ The federal government will not contribute funds unless a state has a plan in place that meets the requirements of federal statutes⁸² that is jointly developed by the relevant state agency and the Secretary of the Department of Health and Human Services.⁸³ A state plan must assure that every child the state claims for federal foster care reimbursements receives appropriate care and services,⁸⁴ and failure to comply with any one of these mandates could jeopardize a state's receipt of federal funding.⁸⁵

The passage of the CWA represented the first time federal law required that family preservation be considered prior to the placement of a child into foster care by requiring "reasonable efforts" to prevent a child's placement in foster care and preserve families.⁸⁶ However, the CWA failed to provide legislative guidance on specific "reasonable efforts" an agency must provide,⁸⁷ or as to what might constitute sufficient emergency services and funding to needy families.⁸⁸ In addition, child welfare agencies spent "too much time trying to reunify children with families who would never be able to provide a safe, stable, and loving home, and [did not take] steps to expedite adoptions when reunification with the biological family was inappropriate."⁸⁹

Federal laws also support states' family preservation efforts with funds from Title IV-B of the Social Security Act.⁹⁰ These funds are geared toward

⁷⁹ Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 270 (2003).

⁸⁰ Deborah Paruch, *The Orphaning of Underprivileged Children: America's Failed Child Welfare Law & Policy*, 8 J. L. & FAM. STUD. 119, 139 (2006).

⁸¹ Crossley, *supra* note 79, at 270. According to the drafters of the CWA, the federal funding structure to states for child welfare prior to the CWA yielded converse incentives. *Id.* at 269–70. Although the goal was to reduce states' financial obligations for caring for foster children, the financial reimbursement "encouraged states to place children in foster care and leave them there." *Id.* at 270.

⁸² 42 U.S.C. § 671(a) (2012); *See* Sara J. Klein, Note, *Protecting the Rights of Foster Children: Suing Under § 1983 to Enforce Federal Child Welfare Law*, 26 CARDOZO L. REV. 2611, 2620 (2005).

⁸³ 42 U.S.C. § 622(a) (2012).

⁸⁴ 42 U.S.C. § 671(a)(16) (2012); *see also* 42 U.S.C. § 675(1), (5) (2012) (mandating the specific provisions of a foster child's case plan and a case review to assure the child is placed in an appropriate setting).

⁸⁵ 42 U.S.C. § 674(d) (2012).

⁸⁶ Paruch, *supra* note 80, at 135; Steven M. Cytryn, Note, *What Went Wrong? Why Family Preservation Programs Failed to Achieve Their Potential*, 17 CARDOZO J.L. & GENDER 81, 96 (2010).

⁸⁷ Paruch, *supra* note 80, at 135.

⁸⁸ Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 456 (1997); Cytryn, *supra* note 86, at 96.

⁸⁹ Klein, *supra* note 82, at 2621–22.

⁹⁰ *See* 42 U.S.C. § 629 (2012). Although the CWA provided some additional funds for child welfare services, states still lacked funding for family support and preservation services. Crossley, *supra* note 79, at 268. Congress passed the Omnibus Budget Reconciliation Act of 1993 specifically to provide additional funds for these services. *Id.*

family preservation, family reunification, and community-based family support services.⁹¹ The recipients of Title IV-B funds are families “at risk,” where some form of child maltreatment has already occurred but the child can safely remain in the home.⁹² The federal government caps Title IV-B dollars⁹³ and subjects these dollars to an “annual appropriations process.”⁹⁴ Although Title IV-B funds are not based on the eligibility requirements of Title IV-E,⁹⁵ only a fraction of Title IV-E funds are available in Title IV-B funds, and preventive services are only reimbursed up to a certain predetermined level.⁹⁶ Therefore, “for every dollar the federal government spends in subsidies for the out-of-home placement of children, it spends just \$0.14 on prevention and protective services.”⁹⁷

Federal family preservation efforts continued with the Adoption and Safe Families Act of 1997 (ASFA).⁹⁸ It amended provisions of Title IV-E, but left in place the federal-state funding structure and eligibility requirements.⁹⁹ The ASFA mandated permanency “in a safe and stable home . . . [as] the goal for all of the children who enter foster care”¹⁰⁰ and created a timetable and incentives for moving children out of state care and making them available for adoption.¹⁰¹ This act required permanency hearings within twelve months of the initial removal of the child from the home into foster care and made the child’s health and safety a paramount concern.¹⁰² The ASFA limited the “reasonable efforts” requirement to preserve families because, now, a state must file a petition for termination of parental rights once a child has been in foster care for fifteen of the most recent twenty-two months.¹⁰³ This length of time require-

⁹¹ Paruch, *supra* note 80, at 139.

⁹² See 42 U.S.C. § 629. The act describes family preservation services programs to help children return to their family, pre-placement preventive services to help children at risk for removal, parenting skills training, follow-up services for families after children have returned from foster care, in-home parent aides, and respite care. 42 U.S.C. § 629a (2012).

⁹³ 42 U.S.C. § 623 (2012).

⁹⁴ Paruch, *supra* note 80, at 139.

⁹⁵ Mangold & Cerulli, *supra* note 75, at 370.

⁹⁶ Paruch, *supra* note 80, at 139.

⁹⁷ Janet L. Wallace & Lisa R. Pruitt, *Judging Parents, Judging Place: Poverty, Rurality, and Termination of Parental Rights*, 77 MO. L. REV. 95, 143 (2012).

⁹⁸ See Adoption and Safe Families Act of 1997, Pub. L. 105-89, 111 Stat. 2115 (1997) (amending 42 U.S.C. § 671(a)(15) and codified in scattered sections of 42 U.S.C. (2012)).

⁹⁹ See *id.* at 2115–36; Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 664 (1999).

¹⁰⁰ Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, “Bad” Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL’Y & L. 176, 178 (2004).

¹⁰¹ See Mariely Downey, *Losing More than Time: Incarcerated Mothers and the Adoption and Safe Families Act of 1997*, 9 BUFF. WOMEN’S L.J. 41, 44 (2001).

¹⁰² 42 U.S.C. § 675(5)(C) (2012). The ASFA sought to clarify the “reasonable efforts” requirement in part because of highly publicized cases such as *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189 (1989). Kelli M. Mulder-Westrate, Note, *Waiting for the Justice League: Motivating Child Welfare Agencies to Save Children*, 88 NOTRE DAME L. REV. 523, 534 (2012) (citing the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2116 (1997) (amending 42 U.S.C. § 671(a)(15))).

¹⁰³ 42 U.S.C. § 675(5)(E) (2012); Gordon, *supra* note 99, at 651.

ment became the most commonly used ground for termination of parental rights.¹⁰⁴

The ASFA maintained a limited “reasonable efforts” requirement and the states still define what these “reasonable efforts” mean.¹⁰⁵ Coupled with the lack of available funding for preventive services, poor families face insurmountable roadblocks to reunite with their children. The unavailability of jobs and lack of affordable housing often cause the termination of parental rights.¹⁰⁶ Although child advocates view termination of parental rights as the first step toward achieving permanency for children,¹⁰⁷ it “does not necessarily result in new permanent families for the children [because t]he increase in parental rights terminations has not led to a corresponding increase in the hoped for adoptions” and forever homes for foster children.¹⁰⁸

Most recently, the Child and Family Services Improvement and Innovation Act amended Title IV-B to authorize funding support to states for projects “that have demonstrated innovative and creative child welfare programs.”¹⁰⁹ States must implement at least two of the demonstration projects listed in the statute, such as establishing a bill of rights for children in foster care, within three years of applying for the project.¹¹⁰ This legislation includes Title IV-E waiver agreements that allow states to use Title IV-E funds for areas other than

¹⁰⁴ See Jennifer Ayres Hand, Note, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251, 1261 n.66 (1996).

¹⁰⁵ Paruch, *supra* note 80, at 137–38. However, the ASFA does not require “reasonable efforts” if a parent subjected a child to an “aggravated circumstance” such as abandonment, torture, chronic abuse, or sexual abuse. Dolce, *supra* note 15, at 557.

¹⁰⁶ Paruch, *supra* note 80, at 140.

¹⁰⁷ See Gordon, *supra* note 99, at 658.

¹⁰⁸ Deseriee A. Kennedy, *Children, Parents & the State: The Construction of A New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 106 (2011). After passing the AFSA in 1997, Congress again amended Title IV-B and E on several occasions. Acts concerned with major federal child protection, welfare, and adoption legislation include, among others, the Foster Care Independence Act (FCIA), Pub. L. No. 106-169, 113 Stat. 1822 (1999), and the Fostering Connections to Success and Increasing Adoptions Act of 2008 (FCSIAA), Pub. L. No. 110-351, 122 Stat. 3949 (2008). For more information on these Acts, see Emily Buss, *Juvenile Court for Young Adults? How Ongoing Court Involvement Can Enhance Foster Youths’ Chances for Success*, 48 FAM. CT. REV. 262, 263–64 (2010) (FCSIAA); Mangold & Cerulli, *supra* note 75, at 364 (FCIA); May Shin, Note, *A Saving Grace? The Impact of the Fostering Connections to Success and Increasing Adoptions Act on America’s Older Foster Youth*, 9 HASTINGS RACE & POVERTY L.J. 133, 143–45 (2012) (FCSIAA); Jill K. Jensen, Note, *Fostering Interdependence: A Family-Centered Approach to Help Youth Aging Out of Foster Care*, 3 WHITTIER J. CHILD & FAM. ADVOC. 329, 332 (2004) (FCIA). For a chronological timetable of Federal Child Welfare Acts, see *Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption*, CHILD WELFARE INFO. GATEWAY (2012), <https://www.childwelfare.gov/pubs/otherpubs/majorfedlegis.cfm>.

¹⁰⁹ Jill Reyes, *Child Welfare Bills of Rights for Foster Children*, 31 CHILD. L. PRAC. 156, 156 (2012); *Child and Family Services Improvement and Innovation Act P.L. 112-34*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/systemwide/laws_policies/federal/index.cfm?event=federalLegislation.viewLegis&id=122 (last visited Oct. 28, 2013).

¹¹⁰ See *Child Welfare Waiver Demonstration Projects*, CHILD. BUREAU EXPRESS (June 2012), <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=136§ionid=1&articleid=3530>.

foster care maintenance payments.¹¹¹ Child welfare advocates opined that this flexibility creates “an opportunity to rigorously evaluate new reform strategies” of the child welfare system and the system’s financing.¹¹²

The grant and funding provisions of the Social Security Act are complicated because of various matching rates for the different categories of services for families.¹¹³ Critics have voiced the unintended consequences of these strict federal mandates. For instance, states often make decisions and approve services to foster children in consideration of federal reimbursement rates instead of the well-being of the children and their families.¹¹⁴ Further, state court judges must focus on “using designated words and phrases drawn from federal statutes” in order to ensure compliance with the federal funding mandates, instead of focusing on the needs of a child.¹¹⁵ Nevertheless, the Nevada legislature “must provide for compliance with federal requirements to support its [child dependency system’s] heavy reliance on federal funding.”¹¹⁶ Unfortunately, the myriad federal laws have not eliminated the challenges facing Nevada’s children in foster care.

IV. PROVIDING FOR THE UNMET NEEDS OF FOSTER CHILDREN: STRENGTHENING AND EXPANDING NEVADA’S CHILD WELFARE EFFORTS

In 2011, 4,947 children in Nevada lived apart from their families in out-of-home care.¹¹⁷ Considering the total state population of children under eighteen, this translates into more than seven children per one thousand Nevada children living away from their families.¹¹⁸ To compare, the national average of children living away from their families is around five children per one thousand.¹¹⁹ Foster children in Nevada comprise all age groups, but the greatest number of children are between zero and four years old.¹²⁰ The race and ethnicity distribution of children in care is disproportionate because approxi-

¹¹¹ Reyes, *supra* note 109, at 156; see CASEY FAMILY PROGRAMS, ENSURING SAFE, NURTURING AND PERMANENT FAMILIES FOR CHILDREN: THE NEED TO REAUTHORIZE AND EXPAND TITLE IV-E WAIVERS 1 (2010), available at <http://casey.org/resources/publications/pdf/NeedForWaivers.pdf>.

¹¹² CASEY FAMILY PROGRAMS, *supra* note 111, at 1.

¹¹³ See Mangold & Cerulli, *supra* note 75, at 364.

¹¹⁴ See Sankaran, *supra* note 72, at 293.

¹¹⁵ *Id.* at 293–94.

¹¹⁶ Dolce, *supra* note 15, at 557 (reasoning that Florida and other states must comply with federal mandates to continue to be eligible for federal funding). Nevada’s Title IV-E eligibility review reports are available at *Title IV-E State Reports*, ADMIN. FOR CHILD. AND FAMILIES ARCHIVES, <http://archive.acf.hhs.gov/programs/cb/cwmonitoring/final/index.htm> (last visited Oct. 28, 2013).

¹¹⁷ NEVADA 2012 WELFARE REPORT, *supra* note 7, at 29.

¹¹⁸ NEVADA’S CHILDREN 2012, *supra* note 72, at 1.

¹¹⁹ CHILD WELFARE LEAGUE OF AM., THE NATION’S CHILDREN 2013 1 (2013), available at http://www.cwla.org/advocacy/statefactsheets/NationalFactSheet_2013.pdf.

¹²⁰ NEVADA 2012 WELFARE REPORT, *supra* note 7, at 13. The largest number of children in foster care, 44.59 percent, was between zero and four years old, 25.18 percent of children were between five and nine years old, 19.31 percent of children were between ten and fourteen years old, and the smallest aggregate cohort, 10.92 percent, were between fifteen and nineteen years old. *Id.*

mately eight percent of the children should be of African American heritage given the percentage of African Americans in Nevada's total population, however twenty-eight percent of children in care are of this ethnicity.¹²¹ Currently, a foster child in Nevada has to wait an average of thirty-seven months after being removed from home until finding a forever home through adoption.¹²²

As outlined in the children's complaint in *Henry A. v. Willden*, the Children's Bureau¹²³ periodically conducts Child and Family Services Reviews (CFSR) among the states to ensure compliance with federal mandates.¹²⁴ These reviews include factors such as whether a state succeeds in protecting children from abuse and neglect, maintains children safely in their homes, ensures permanency and stability in their living situation and continuity of family relationships, assists families in providing for the children's needs, and provides children with services that meet their mental, physical, and educational needs.¹²⁵ States that are not conforming to national standards must submit a program improvement plan.¹²⁶

In response to the first round of CFSR in 2004, the U.S. Department of Health and Human Services placed Nevada on a program improvement plan.¹²⁷ Nevada's child welfare practices were reviewed again in 2009,¹²⁸ and although no state conformed to the Children's Bureau's high standards,¹²⁹ Nevada ranked below the mean state performance in all but one of the seven factors.¹³⁰ Because Nevada participates in the federal foster care assistance program Title IV-E of the Social Security Act, failing to comply with federal laws not only

¹²¹ *Id.*

¹²² *Id.* at 36.

¹²³ The Children's Bureau is a part of the U.S. Department of Health and Human Services and is the first federal agency within the U.S. government to "focus exclusively on improving the lives of children and families." *What is the Children's Bureau?*, CHILD. BUREAU, <http://www.acf.hhs.gov/programs/cb/> (last visited Oct. 28, 2013).

¹²⁴ *Child and Family Services Reviews*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/management/reform/cfsr/> (last visited Oct. 28, 2013).

¹²⁵ Klein, *supra* note 82, at 2614–15; *see also* U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, FEDERAL CHILD AND FAMILY SERVICES REVIEWS AGGREGATE REPORT 12 (2011), *available at* http://www.acf.hhs.gov/sites/default/files/cb/fcfsr_report.pdf [hereinafter CFS AGGREGATE REPORT].

¹²⁶ *See* 45 C.F.R. § 1355.35 (2012) (mandating the development of program improvement plans for states that are not in substantial conformity with state plan requirements). Failure to improve and begin to perform in substantial conformity will lead to the withholding of federal funds. 42 U.S.C. § 674(d)(1) (2012); 45 C.F.R. § 1355.36 (2012) (setting forth the penalties associated with a State's failure to operate a program in substantial conformity).

¹²⁷ *See* NEV. DEP'T OF HUMAN RES., DIV. OF CHILD & FAMILY SERVS., PROGRAM IMPROVEMENT PLAN 1 (2005), *available at* http://www.dcf.state.nv.us/nevada_cfsr_program_improvement_plan.pdf. In fact, all states had to submit a program improvement plan that indicated how the state would correct the deficiencies that the CFSR uncovered. Sarah H. Ramsey, *Child Well-Being: A Beneficial Advocacy Framework for Improving the Child Welfare System?*, 41 U. MICH. J.L. REFORM 9, 14–15 (2007).

¹²⁸ NEV. DEP'T OF HEALTH & HUMAN SERVS., DIV. OF CHILD & FAMILY SERVS., EXECUTIVE SUMMARY FINAL REPORT: NEVADA CHILD AND FAMILY SERVICES REVIEW 1 (2010), *available at* http://www.dcf.state.nv.us/Reports/2009/NV2009_CFSR_Summary_FinalReport.pdf.

¹²⁹ CFS AGGREGATE REPORT, *supra* note 125, at 13.

¹³⁰ *Compare id.* at 13 (showing mean performance across all states in each of the seven categories), *with* NEVADA 2012 WELFARE REPORT, *supra* note 7, at 24–51 (showing Nevada's percentage conformity in each of the seven outcomes).

has a negative impact on Nevada's children, but can also, as the court noted in *Henry A. v. Willden*, "provide a basis for the [federal] Secretary of Health and Human Services to cease funding."¹³¹

Nevada's lawmakers play vital roles as leaders in achieving permanency for foster children, and therewith in safely reducing the number of children in foster care. The Nevada legislature enacted its first child abuse legislation in 1965¹³² and during subsequent years implemented various services to aid these children.¹³³ In 1984, after a subcommittee of the Legislature first recommended that Nevada add a comprehensive child protection act to its statutes, the Legislature added a new chapter that consolidated existing and new legislation on child welfare.¹³⁴ Currently, in addition to the provisions on foster homes in the Nevada Revised Statutes Chapter 424, Chapter 432B incorporates federal mandates on child welfare, defines child abuse and neglect, and authorizes investigation of alleged abuse and neglect.¹³⁵

Although Nevada's child welfare system has made progress¹³⁶ and the State has implemented family preservation and support services throughout many counties,¹³⁷ Nevada still takes children from their parents at a higher rate than other states.¹³⁸ Nevada has a high number of younger foster children,¹³⁹ and making these children eligible to participate in an alternative to a traditional child maltreatment investigation could reduce the number of these young children in foster care. It should be noted that once these young children enter foster care, they have a special need for a timely permanent outcome.

A. *Keeping Children at Home: Family Preservation*

Scholarship praises family preservation programs for decreasing the placement of children into foster care and providing a range of services that target families at risk of having their children removed.¹⁴⁰ Family preservation is pre-

¹³¹ *Henry A. II*, No. 2:10-cv-00528, 2013 WL 759479, at *16; see also *supra* notes 81–85.

¹³² LEGISLATIVE COMM'N OF THE LEGISLATIVE COUNSEL BUREAU STATE OF NEV., BULLETIN NO. 85-13, REVIEW AND EVALUATION OF THE COMPREHENSIVE STATEWIDE PLAN FOR SERVICES TO AID ABUSED AND NEGLECTED CHILDREN 8 (Aug. 1984), <http://leg.state.nv.us/Division/Research/Publications/InterimReports/1985/Bulletin85-13.pdf> [hereinafter NEVADA LEGISLATURE 1984].

¹³³ *Id.* at 10–13.

¹³⁴ *Id.* at 19.

¹³⁵ NEV. REV. STAT. § 432B.020 (2011) (defining abuse and neglect).

¹³⁶ See *supra* note 18; see also Wexler, *supra* note 68, at 2 (reporting that some aspects of child welfare in Nevada changed, although a lot remains the same). In Clark County, the family court is investigating the backlog in termination of parental rights proceedings that result in delayed adoptions. Caroline Bleakley & Kyle Zuekle, *I-Team: Changes in Family Court Follow I-Team Investigation*, KLAS-TV (May 13, 2013 5:01 P.M.), <http://www.8newsnow.com/story/22239069/i-team-sweeping-changes-in-family-court-follow-i-team-investigation>.

¹³⁷ See NEVADA 2012 WELFARE REPORT, *supra* note 7, at 74–75.

¹³⁸ See *supra* note 11.

¹³⁹ NEVADA 2012 WELFARE REPORT, *supra* note 7, at 13.

¹⁴⁰ See Cytryn, *supra* note 86, at 85. However, not all forms of family preservation equally serve children's interests. For a critique of family preservation systems, see Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60 BUFF. L. REV. 1323, 1357–70 (2012).

mised on the notion that many children are removed from their homes in situations where children and their families would be better served by receiving targeted and intensive support services such as emergency shelters, financial assistance, caretakers, and various counseling services.¹⁴¹ Nevada offers services to aid needy families in order to prevent removal, but the benefit of these services has not greatly affected Nevada's removal rate.¹⁴² Although the State's removal rate has been much higher in prior years,¹⁴³ between 2011 and 2012 the number of removals again increased 11.7% statewide.¹⁴⁴ Further, for many Nevada children, removal from the home is only the beginning of an odyssey through the system because statistics show that children often linger in the system awaiting the termination of parental rights and adoption before finding a forever home.¹⁴⁵

Critics of the interrelation between state and federal child welfare efforts may provide answers on why Nevada's family preservation efforts encounter challenges and why its benefits do not trickle down to the removal rate. First, federal funding assistance and reimbursement for family preservation efforts is inadequate.¹⁴⁶ The matching funds from the federal government for state foster care are "inflexible," and states must use these funds for foster care services instead of providing other services that may better meet the needs of children and families.¹⁴⁷ Thus, Nevada may receive matching federal funds if Nevada places a child in foster care, but no funding if it determines the child could remain at home as part of a family preservation program.¹⁴⁸

Second, the lack of clarity in the federal "reasonable efforts" provision designed to keep families together, may impede the successful implementation of family preservation because states determine their own standards with little federal guidance.¹⁴⁹ For instance, according to the federal mandate, Nevada

¹⁴¹ Bartholet, *supra* note 140, at 1358–70; *Family Preservation Services*, CHILD WELFARE INFO. GATEWAY, <http://www.childwelfare.gov/supporting/preservation/> (last visited Oct. 28, 2013); *What is "Family Preservation"?*, NAT'L COAL. FOR CHILD PROTECTION REFORM, <http://www.nccpr.org/reports/10Whatis.pdf> (last updated Jan. 1, 2008).

¹⁴² See U.S. CHILD WELFARE OUTCOMES REPORT, *supra* note 11, at 213.

¹⁴³ See *id.*

¹⁴⁴ See NEVADA 2012 WELFARE REPORT, *supra* note 7, at 21.

¹⁴⁵ See *supra* note 122.

¹⁴⁶ See Paruch, *supra* note 80, at 139–40.

¹⁴⁷ MADELYN FREUNDLICH, TIME FOR REFORM: INVESTING IN PREVENTION: KEEPING CHILDREN SAFE AT HOME 1, 23 (2007), available at http://www.pewtrusts.org/uploadedFiles/www.pewtrusts.org/Reports/Foster_care_reform/time_for_reform.pdf.

¹⁴⁸ A third reason why family preservation based on the "reasonable efforts" provision fail may be because the Supreme Court held that the "reasonable efforts" requirement of the CWA, preventing removal of children from their homes and facilitating reunification of families where removal has occurred, does not provide a basis for a private right of action. *Suter v. Artist M.*, 503 U.S. 347, 353–54, 364 (1992). After *Suter*, "Congress signaled its disapproval [of the Court's decision] by amending the Social Security Act." Crossley, *supra* note 79, at 290. Although Congress overturned the Court's method for determining private enforceability, it left untouched the specific holding of *Suter* that the reasonable efforts provision is not enforceable by a private action. *Id.*

¹⁴⁹ 42 U.S.C. § 671(a)(15)(B) (2012) ("[R]easonable efforts shall be made to preserve and reunify families . . . prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and . . . to make it possible for a child to safely return to the child's home . . ."). See also Amelia S. Watson, *A New Focus on*

law indicates that a child welfare agency “shall make reasonable efforts to preserve and reunify the family of a child” before placing the child in foster care to avoid removing the child from the home.¹⁵⁰ However, the definition of “reasonable efforts” under Nevada law is relatively broad¹⁵¹ because Nevada lawmakers did not add further detail to explain the federal requirement. Therefore, the statute lacks clarity about what kind of effort and quality of services “reasonable efforts” dictate.

The Children’s Bureau’s Child Welfare Policy Manual provides some explanations on “reasonable efforts.” It suggests that the decision on whether the agency made reasonable efforts could be based on whether (1) the child’s health or safety would have been compromised had the agency attempted to maintain the child at home, (2) the service plan was customized to the individual needs of the family, (3) the agency provided services to ameliorate factors present in the child or parent that would inhibit a parent’s ability to maintain the child safely at home, (4) limitations existed with respect to service availability, (5) the agency undertook efforts to overcome these obstacles, and (6) whether the agency’s activities associated with finalizing an alternate permanent placement were consistent with the permanency goal.¹⁵² The Children’s Bureau’s Manual reminds states that every child deserves “reasonable efforts,” to be determined on an individual basis.¹⁵³ However, amending Nevada’s statute with this Manual’s suggestions would provide better guidance to agencies regarding specific “reasonable efforts” and actions to preserve Nevada’s families.¹⁵⁴ Preserving Nevada’s families is also the focus of the next section, which calls for expanding an alternative maltreatment response system to reduce Nevada’s removal rate.

Reasonable Efforts to Reunify, 31 CHILD. L. PRAC. 113, 118 (2012) (finding that the federal government did not define “reasonable efforts”). A judicial finding in a child’s case that the agency made “reasonable efforts” to prevent removal is necessary for a state to be eligible to receive Title IV-E foster care maintenance payments for that child. *Id.*

¹⁵⁰ NEV. REV. STAT. § 432B.393 (2011) (providing that an agency shall make “reasonable efforts” considering the safety of a child).

¹⁵¹ Compare *id.*, with IOWA CODE § 232.102(10) (2013) (defining “reasonable efforts” extensively, including, but not limited to, specific family preservation efforts; the type, duration, and intensity of services offered to a child; and the relative risk to the child of remaining in the child’s home versus removal).

¹⁵² *Child Welfare Policy Manual: Section 8.3C.4 Title IV-E, Foster Care Maintenance Payments Program, State Plan/Procedural Requirements, Reasonable Efforts*, CHILD. BUREAU, http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=59 (last visited Oct. 28, 2013).

¹⁵³ *Id.*

¹⁵⁴ The federal statute requires that a court of competent jurisdiction make a judicial determination in regards to documentation of “reasonable efforts.” See 42 U.S.C. § 671 (2012). The Nevada statute, on the other hand, is silent on documentation requiring the court to make case-specific determinations regarding “reasonable efforts.” See NEV. REV. STAT. § 432B.393.

B. An Alternative to the Traditional Investigation of Child Maltreatment: Differential Response

Nevada implemented an alternative to the traditional investigation of alleged child maltreatment, called differential response,¹⁵⁵ and its statutes already provide for this effort.¹⁵⁶ However, if Nevada expands this differential response system to include children of all age groups, the multi-tiered response system could safely reduce the number of children entering Nevada's foster care system, and State and local agencies would realize significant cost savings.¹⁵⁷

Incorporating the differential response approach in Nevada would increase cooperation with and provide greater support to families, but this approach is currently not available to almost half of the children who end up in foster care.¹⁵⁸ Under a differential response system, once a suspicion of child abuse or neglect is reported to the Child Protective Services agency, instead of conducting a typical investigation,¹⁵⁹ the differential response "aims to be a collaborative and non-adversarial way to assist families in crisis."¹⁶⁰ For children aged five or younger, Nevada law prohibits anything but a traditional investigation regardless of the severity of the allegation.¹⁶¹ However, CAPTA's 2010 reauthorization encourages states to adopt an alternative response system and recognizes this system as effective reform.¹⁶² In order for a significant portion of Nevada foster children to qualify for this program and to comply with feder-

¹⁵⁵ See NEVADA 2012 WELFARE REPORT, *supra* note 7, at 73.

¹⁵⁶ NEV. REV. STAT. § 432B.260(3) (2011).

¹⁵⁷ *Supporting Reunification and Preventing Reentry into Out-of-Home Care*, *supra* note 17, at 2.

¹⁵⁸ See NEVADA 2012 WELFARE REPORT, *supra* note 7, at 13. In 2012, around forty-two percent of Nevada's foster children were four years old or younger. *Id.*

¹⁵⁹ In the typical investigation, cases that do not meet the state's minimum criteria for abuse or neglect are "screened out" and the case is closed. Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 639 (2012). In a traditional investigation, if the case meets established criteria for child abuse and neglect, the case is "screened in" and a caseworker is assigned to the case to investigate the allegations. *Id.* The investigation involves visiting the home, interviewing the child who is the subject of the report separately from the rest of the family, and interviewing members of the child's community such as parents, relatives, teachers, and neighbors. *Id.* "If a risk assessment of the child's home raises sufficient concerns about the child's safety or the family's ability to protect the child from harm, or to meet the child's medical and other basic needs, the caseworker may initiate court proceedings to secure out-of-home placement or may arrange to provide services to the family." *Id.* at 639-40.

¹⁶⁰ *Id.* at 642. Once a case is determined eligible for an alternative response, a caseworker from a partnering community service provider contacts the family to assess the family's individual strengths and needs and to encourage the family to accept voluntary services. GARY L. SIEGEL ET AL., INST. OF APPLIED RES., DIFFERENTIAL RESPONSE IN NEVADA: FINAL EVALUATION REPORT 15 (2010), available at <http://www.iarstl.org/papers/NevadaDRFinalReport.pdf>. The hallmarks of differential response are to determine the response to maltreatment by the presence of imminent danger, use an engaging approach, encourage families to identify their needs for services, and to provide a continuum of response tailored to each family. See McGrath, *supra* note 159, at 642-45.

¹⁶¹ NEV. REV. STAT. § 432B.260(2) (2011); SIEGEL ET AL., *supra* note 160, at iv.

¹⁶² See Howard Davidson, *The CAPTA Reauthorization Act of 2010: What Advocates Should Know*, ABA (Jan. 3, 2011), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/010311-capta-reauthorization.html>.

ally encouraged best practices, the Nevada Legislature would need to amend Nevada's differential response statute to allow children of all ages to be eligible.

The children of neglectful parents in Nevada would benefit from an expanded differential response system "in which neglect that does not result in serious harm or danger would trigger benefits in the form of services," rather than increasing the possibility of needlessly removing children from their familiar surroundings.¹⁶³ The need for this system will be especially great in Nevada because the decline in federal and state financial assistance and the economic crisis caused an increase in the number of families unable to secure housing, food, and medical care.¹⁶⁴ Agencies remove children from poor families at alarming rates because poverty is frequently confused with neglect and often leads to the placement of children into foster care.¹⁶⁵ Nevertheless, "[f]amilies assigned to a differential response pathway, while low to moderate in terms of risk, may [still] be families in crisis"¹⁶⁶ and Nevada law permits a child welfare agency to reclassify a case to a traditional investigation if a family refuses to accept services.¹⁶⁷

The Nevada Legislative Committee on Child Welfare and Juvenile Justice noted the increase in cost of an expanded differential response program to children of all ages.¹⁶⁸ However, according to reports from the State of Washington ("Washington"), the implementation of this program statewide could be achieved at no cost. Washington is implementing a differential response system through a Title IV-E waiver that was authorized by the Child and Family Services Improvement and Innovation Act.¹⁶⁹ Washington applied for this waiver

¹⁶³ Ross, *supra* note 100, at 192. Child protective services should apply the differential response approach only to cases of neglect. Amy Conley, *Differential Response: A Critical Examination of a Secondary Prevention Model*, 29 CHILD. & YOUTH SERVICES REV. 1454, 1456 (2007).

¹⁶⁴ See, e.g., Boyer & Halbrook, *supra* note 64, at 307 (reporting a correlation between poverty and foster care and that during recessions families face an increased threat to become exposed to the child protective system). In Nevada, the poverty rate among children under eighteen is twenty-two percent and the poverty rate among children under five is over twenty-six percent. NEVADA'S CHILDREN 2012, *supra* note 72, at 1. Researchers found that "[c]hildren from families with annual incomes below \$15,000 as compared to children from families with annual incomes above \$30,000 . . . were over 22 times more likely to experience some form of maltreatment . . ." Andrea J. Sedlak & Diane D. Broadhurst, *Executive Summary of the Third National Incidence Study of Child Abuse and Neglect*, CHILD WELFARE INFO. GATEWAY (1996), <https://www.childwelfare.gov/pubs/statsinfo/nis3.cfm>.

¹⁶⁵ See Paruch, *supra* note 80, at 120. In fact, parents encounter roadblocks such as lack of funds for bus passes to attend required therapy sessions. Boyer & Halbrook, *supra* note 64, at 311-12.

¹⁶⁶ McGrath, *supra* note 159, at 681. Although proponents note that a differential response approach aids in closing a high proportion of child maltreatment cases without providing of services, the families often need services because around "one-third of the children in these cases are rereported for maltreatment within about a year." Bartholet, *supra* note 140, at 1335-36.

¹⁶⁷ See NEV. REV. STAT. § 432B.260(7)-(8) (2011).

¹⁶⁸ Legis. Comm. on Child Welfare & Juvenile Justice, *Summary Minutes and Action Report*, NEV. LEGISLATURE 7, <http://leg.state.nv.us/Interim/76th2011/Minutes/ChildWelfare/IM-ChildWelfare-040412-10548.pdf> (last visited Oct. 28, 2013).

¹⁶⁹ See *supra* text accompanying notes 109-12.

in 2012, which “will allow flexibility in using Title IV-E funding for innovative services to safely prevent children from entering foster care; . . . to ensure . . . permanent reunification with their families; and to find timely, safe, permanent homes for those children who cannot be safely reunited with their families.”¹⁷⁰

The core of Washington’s efforts is a Family Assessment Response program, a differential response pathway to screen statewide allegations of abuse and neglect as an alternative to traditional investigations.¹⁷¹ The Washington Legislature passed several key initiatives related to Family Assessment Response, including performance-based contracting and the use of evidence-based practices.¹⁷² Based on financial projections, Washington believes that this project “will create savings by reducing out-of-home care costs” and that Washington’s waiver will be “cost-neutral to the federal government.”¹⁷³ Washington’s overall goal behind the waiver is to “reinvest Title IV-E funds into interventions that support major reform of the child welfare system.”¹⁷⁴

Washington used a creative approach to expand its differential response model statewide in a cost-effective fashion. A program such as Washington’s could not only help to safely reduce the number of younger children in foster care, but could also help to address the substantial correlation between poverty and child maltreatment in Nevada.¹⁷⁵ Younger children would benefit from participating in differential response to find options other than removal to help their families. However, once the state takes these young children from their families, they have a unique need for timely permanency.

C. Shorter Permanency Deadlines to Meet the Needs of Nevada’s Younger Foster Children

The damage to children that results from delayed permanency has contributed significantly to the philosophy of child welfare laws. For this basic reason,

¹⁷⁰ *Flexible Funding, Title IV-E Waiver*, WASH. STATE DEP’T OF SOCIAL & HEALTH SERVS., CHILD. ADMIN., <http://www.dshs.wa.gov/ca/about/flexfunding.asp> (last modified Mar. 07, 2013).

¹⁷¹ ROBIN ARNOLD-WILLIAMS, WASH. STATE DEP’T OF SOCIAL & HEALTH SERVS., CHILD WELFARE TITLE IV-E WAIVER DEMONSTRATION PROJECT PROPOSAL FOR FISCAL YEAR 2012 1 (2012), available at <http://www.dshs.wa.gov/pdf/ca/WAWaiverApplication.pdf>; *Federal Title IV-E Waiver to Help More Families Stay Together*, BUILDING CHANGES (Oct. 17, 2012), <http://www.buildingchanges.org/current-issues/building-changes-announcements/item/516-federal-title-iv-e-waiver-to-help-more-families-stay-together>.

¹⁷² ARNOLD-WILLIAMS, *supra* note 171, at 1. Performance-based contracting assists in aligning the child welfare system’s focus on outcomes with the services’ financing. *Improving Outcomes for Children through Performance-Based Contracting*, CHAPIN HALL (June 10, 2008), <http://www.chapinhall.org/events/governing-children-and-families/improving-outcomes-children-through-performance-based-contrac>. When a state uses performance-based contracting with child welfare service providers, it “shift[s] incentive[s] so that service providers find it easier to match the needs of children and families with the array of services offered.” *Id.* “Evidence-based practices are approaches to prevention or treatment that are validated by some form of documented scientific evidence.” *Strengthening Families and Communities: 2011 Resource Guide*, CHILD WELFARE INFO. GATEWAY 16, <https://www.childwelfare.gov/pubs/guide2011/guide.pdf> (last visited Oct. 28, 2013).

¹⁷³ ARNOLD-WILLIAMS, *supra* note 171, at 2.

¹⁷⁴ *Id.* at 1.

¹⁷⁵ See *supra* text accompanying notes 164–65.

time limits are placed on reunifying families, and if reunification fails, other permanency options must be pursued timely.¹⁷⁶ While recognizing that, especially for younger children, delays in modifying their legal status may be less important than the actual commitment of their caretakers, older children likely confer greater significance to a child's legal status.¹⁷⁷ Still, damage to children and their bond with parents is exacerbated with younger children¹⁷⁸ because "long delays in permanency cause children to 'lose hope . . .'"¹⁷⁹ Although around fifteen months¹⁸⁰ is not a terribly long period for an adult, it is for a child, and if too much time is spent in foster care during early formative years, a child can suffer lifelong psychological consequences.¹⁸¹ However, only a few other states address the particular need for permanency of younger children.¹⁸² Nevada joins most other states in making no adjustments to its dependency system procedures for these younger children, and mandates a permanency hearing regardless of age no later than twelve months after the initial removal.¹⁸³

Given the foregoing, Nevada should consider shortening permanency deadlines in cases involving younger foster children. Over forty percent of Nevada's foster children are age four and younger,¹⁸⁴ and "[f]rom birth to five years old, children develop the foundation for their future development."¹⁸⁵ Further, the older a child is, the lower the child's chance becomes to find a forever home through adoption.¹⁸⁶ Combining this large group of young foster children and the negative consequences of foster care and associated costs,

¹⁷⁶ See Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 377 (1996) (stating that "it is the child's need for an undisrupted parental relationship in a permanent home that provides the basis for proposals to sever the parent-child bond at the end of a time-limited period in foster care").

¹⁷⁷ See *Id.* at 388–89.

¹⁷⁸ See JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 42 (1996).

¹⁷⁹ Dolce, *supra* note 15, at 608.

¹⁸⁰ U.S. CHILD WELFARE OUTCOMES REPORT, *supra* note 11, at 217–18.

¹⁸¹ Dolce, *supra* note 15, at 608.

¹⁸² See, e.g., COLO. REV. STAT. § 19-1-102(1.6) (2013) ("[T]he general assembly finds and declares that it is appropriate to provide for an expedited placement procedure to ensure that children under the age of six years who have been removed from their homes are placed in permanent homes as expeditiously as possible."); COLO. REV. STAT. § 19-3-702(1) (2013) (requiring a permanency hearing within three months of the dispositional hearing for children under six years); ARIZ. REV. STAT. ANN. § 8-862(A)(2) (2013) (requiring a permanency hearing within six months of removal for children under three years).

¹⁸³ NEV. REV. STAT. § 432B.590(1) (2011).

¹⁸⁴ NEVADA 2012 WELFARE REPORT, *supra* note 7, at 13.

¹⁸⁵ Candice L. Maze, *Advocating for Very Young Children in Dependency Proceedings: The Hallmarks of Effective, Ethical Representation*, 1 (2010), available at http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/ethicalrep_final_10_10.authcheckdam.pdf.

¹⁸⁶ Older children remain statistically far less likely to leave the foster care system through adoption than younger children. Emily W. McGill, Note, *Agency Knows Best? Restricting Judges' Ability to Place Children in Alternative Planned Permanent Living Arrangements*, 58 CASE W. RES. L. REV. 247, 256 (2007). "Once waiting children in foster care are nine or older, they are much less likely to be adopted." N. AM. COUNCIL ON ADOPTABLE CHILDREN, *IT'S TIME TO MAKE OLDER CHILD ADOPTION A REALITY* 1 (2009), available at <http://www.nacac.org/adoptalk/MakeOlderChildAdoptionReality.pdf>.

Nevada should provide for the unique need for permanency experienced by younger children to ensure these children are placed on a healthy development track.

However, currently, thousands of children in Nevada live away from their families and need to be reunified with their parents or placed in a permanent home.¹⁸⁷ The following section suggests representation models for foster children and their parents, which could not only reduce foster care drift, but may also have other benefits for the state as a whole.

V. ADDITIONS TO NEVADA'S CHILD WELFARE LAWS FOR MORE TIMELY FOREVER HOMES

Effective advocacy can speed the process toward reunification with parents or toward another permanency option in a safe and loving home. Providing an attorney for every foster child in Nevada may increase permanent outcomes because the attorney could affect the progress of the child's case throughout all stages of dependency court.¹⁸⁸ Further, as the early years in the life of a child are crucial to the development of the child,¹⁸⁹ timelier and more consistent caregiving that is achieved by competent representation especially benefits the over forty percent of Nevada's foster children who are age four and younger.¹⁹⁰ In addition, over sixty percent of Nevada's foster children are reunited with their natural parents (compared to a national average of around fifty percent).¹⁹¹ If parents were represented, this unification could be expedited and permanency could be established because parents would become more effective participants in dependency court proceedings.

A. *A Voice at the Table: Representation for Nevada's Foster Children*

In the past, the area around representation of abused and neglected children received significant research attention, specifically as to whether to mandate representation for children at all and which representation model is best for a child.¹⁹² After the landmark case *Kenny A. ex rel. Winn v. Perdue*,¹⁹³ the University of Nevada, Las Vegas ("UNLV"), hosted child law experts from

¹⁸⁷ NEVADA 2012 WELFARE REPORT, *supra* note 7, at 34.

¹⁸⁸ See Dolce, *supra* note 15, at 597; LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605, 615 (2009); Shireen Y. Husain, Note, *A Voice for the Voiceless: A Child's Right to Legal Representation in Dependency Proceedings*, 79 GEO. WASH. L. REV. 232, 254 (2010).

¹⁸⁹ COMM. ON EVALUATION OF CHILDREN'S HEALTH, BD. ON CHILDREN, YOUTH, & FAMILIES, DIV. OF BEHAVIORAL & SOC. SCIS. & EDUC., CHILDREN'S HEALTH, THE NATION'S WEALTH: ASSESSING AND IMPROVING CHILD HEALTH 24 (2004).

¹⁹⁰ NEVADA 2012 WELFARE REPORT, *supra* note 7, at 13.

¹⁹¹ U.S. CHILD WELFARE OUTCOMES REPORT, *supra* note 11, at 216; NEVADA'S CHILDREN 2012, *supra* note 72, at 1.

¹⁹² See CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 566–67 (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010); Michael J. Dale & Louis M. Reidenberg, *Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Updated*, 35 NOVA L. REV. 305, 310–11 (2011); Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 579–80 (2008).

around the country at the UNLV Conference on Representing Children in Families.¹⁹⁴ This conference addressed many recommendations on effective representation of children, which the Nevada Law Journal published in a special issue.¹⁹⁵ Unfortunately, most of Nevada's abused and neglected children did not benefit from these recommendations because the State never implemented them.

Several other states can provide a roadmap to guide Nevada on its way toward establishing a representation model for foster children. In 2011, the American Bar Association¹⁹⁶ voted to adopt the ABA Model Act Governing Representation of Children in Abuse, Neglect, and Dependency Proceedings ("Model Act").¹⁹⁷ This Model Act set a new standard of legal representation for maltreated children across America¹⁹⁸ and implemented many of the recommendations from the UNLV Conference.¹⁹⁹ Recently, there has been a shift throughout the states because more states now provide foster children with child-directed representation.²⁰⁰ Connecticut and Iowa are among the states child welfare advocates applauded for mandating effective legal representation for maltreated children.²⁰¹

¹⁹³ Kenny A. *ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005). Kenny A. was the first case to recognize a state and federal constitutional due process right to counsel for children in dependency cases. *Id.* at 1359–60.

¹⁹⁴ See *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten years After Fordham*, 6 NEV. L.J. 592 (2006) [hereinafter *UNLV Conference*].

¹⁹⁵ *Id.* at 594–600.

¹⁹⁶ *About the ABA*, ABA, http://www.americanbar.org/utility/about_the_aba.html (last visited Oct. 28, 2013).

¹⁹⁷ HILARIE BASS, ABA SECTION OF LITIG., REPORT TO THE HOUSE OF DELEGATES 1 (2011), available at http://www.caichildlaw.org/Misc/ABA_Resolution.pdf.

¹⁹⁸ *Id.*

¹⁹⁹ Compare ABA MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, & DEPENDENCY PROCEEDINGS § 3 (2011), available at <http://www.isc.idaho.gov/cp/docs/ABA%20Model%20Act%20rep%20of%20child%20in%20cp%20case.pdf>, with *UNLV Conference*, *supra* note 194, at 594–99.

²⁰⁰ Compare CHILDREN'S ADVOCACY INST. & FIRST STAR, A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN 10 (3d ed. 2012), available at <http://www.firststar.org/LinkClick.aspx?fileticket=y5NGNY0iBqk%3d&tabid=74> [hereinafter NATIONAL REPORT CARD, 3d] (reporting that fifteen states earned an A or A+ for their child representation laws in 2011), with WHYTNI KERNODLE FREDERICK & DEBORAH L. SAMS, FIRST STAR, A CHILD'S RIGHT TO COUNSEL: FIRST STAR'S NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR CHILDREN 10 (2007), available at <http://www.firststar.org/LinkClick.aspx?fileticket=Zh0LWwfpvRA%3d&tabid=74> (reporting that five states earned an A in 2006).

²⁰¹ See NATIONAL REPORT CARD, 3d, *supra* note 200, at 18, 39, 58. See also Carolyn Signorelli, *Connecticut's Road to "Real" Attorneys for Kids*, 36 NOVA L. REV. 391, 391 (2012) (reporting that "Connecticut took a tremendous step forward by giving children involved in child protection proceedings 'real' attorneys . . ."); Kasey L. Wassenaar, Note, *Defenseless Children: Achieving Competent Representation for Children in Abuse and Neglect Proceedings Through Statutory Reform in South Dakota*, 56 S.D. L. REV. 182, 196 (2011) (reporting that Iowa mandates an attorney and guardian ad litem for every abused and neglected child). This note compares Nevada to Iowa and Connecticut because these three states have a similar population and a similar percentage of the population is under eighteen and under five years old. Compare *State & County QuickFacts: Nevada*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/32000.html> (last visited Oct. 28, 2013)

In Connecticut and Iowa, statutes require courts to appoint an attorney and a guardian ad litem in all child abuse and protective proceedings.²⁰² These states recognized that mandatory child-directed representation for children serves a different purpose than a guardian ad litem because, in the former, the attorney assists the child as an advocate, while the guardian ad litem represents the child's best interests.²⁰³

Both Connecticut and Iowa laws address this distinction between child-directed and best-interest advocacy.²⁰⁴ Iowa law permits the attorney to serve the dual role of legal advocate and guardian ad litem.²⁰⁵ In contrast, Connecticut recently amended its child representation statute to mandate a separate guardian ad litem, in addition to child-directed representation, if the child cannot act in the child's own best interest.²⁰⁶ In the event the attorney has a conflict representing the child's legal interest and the child's best interests, Iowa courts may appoint another person as guardian ad litem.²⁰⁷ To resolve any ambiguities between both roles, Iowa enacted a comprehensive statute that outlines the duties of a guardian ad litem when working with a child.²⁰⁸ Further, in Connecticut and Iowa, case law provides guidance for attorneys when serving in the role of child-directed attorney or guardian ad litem.²⁰⁹

As the court in *Henry A. v. Willden* was no doubt aware, Nevada's abused and neglected foster children do not have their voices heard in decisions about things most important to them, such as where they go to school, with whom they will live, and whether they will be separated from their siblings.²¹⁰

(Nevada census), with *State & County QuickFacts: Connecticut*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/09000.html> (last visited Oct. 28, 2013) (Connecticut census), and *State & County QuickFacts: Iowa*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/19000.html> (last visited Oct. 28, 2013) (Iowa census).

²⁰² CONN. GEN. STAT. § 46b-129a(2)(A) (2013); IOWA CODE § 232.89 (2013).

²⁰³ See Dolce, *supra* note 15, at 602.

²⁰⁴ CONN. GEN. STAT. § 46b-129a(2)(C) (2013) (explaining that the primary role of any counsel should be to advocate for the child according to the Rules of Professional Conduct, except if the child is incapable of expressing wishes because of age or other incapacity, the counsel for the child shall advocate for the best interests of the child); IOWA CODE § 232.89(4)–(5) (distinguishing a child's legal interests from the child's best interests).

²⁰⁵ IOWA CODE § 232.89(4).

²⁰⁶ 2011 Conn. Pub. Acts 11-51.

²⁰⁷ IOWA CODE § 232.89(4) (“[T]he court may appoint a separate guardian ad litem, if the same person cannot properly represent the legal interests of the child . . . and also represent the best interest of the child . . .”).

²⁰⁸ See IOWA CODE § 232.2(22) (2013). “‘Guardian ad litem’ means a person appointed by the court to represent the interests of a child in any judicial proceeding to which the child is a party . . .” *Id.* The duties of a guardian ad litem include, for instance, interviewing the child, parents, guardian, or other person having custody of the child; visiting the home, residence, or both of the child and any prospective home or residence of the child; interviewing any person providing medical, mental health, social, educational, or other services to the child; obtaining firsthand knowledge of the facts, circumstances, and parties involved in the matter; and attending hearings. *Id.*

²⁰⁹ See, e.g., *Ireland v. Ireland*, 717 A.2d 676, 688 (Conn. 1998) (finding an attorney for a child must argue on behalf of his or her client, based upon the evidence in the case and the applicable law); *In re J.V.*, 464 N.W.2d 887, 893 (Iowa Ct. App. 1990) *overruled on other grounds by In re P.L.*, 778 N.W.2d 33 (Iowa 2010) (stating “[i]nvestigation has to be the cornerstone of the guardian ad litem’s representation of a child’s best interest”).

²¹⁰ See Glynn, *supra* note 43, at 1250.

Although most states clearly define a child's status as that of a party to the litigation,²¹¹ Nevada does not treat children as a party. Nevada statutes only refer to a child as a party if the child has an attorney and thus tie this status to representation—and representation is not mandatory.²¹² As early as 1984, a report to the Nevada Legislature recommended that each child victim of abuse or neglect be assigned an independent advocate or guardian ad litem,²¹³ but even now, almost thirty years later, not every child is assigned a guardian ad litem.²¹⁴ Recently, Nevada received a “D” letter grade in a report that evaluates states by their child representation laws,²¹⁵ ranking behind thirty-five other states.²¹⁶

On paper, Nevada complies with the federal law that mandates a guardian ad litem for every child, but in reality, as the court in *Henry A.* noted, children often do not have a guardian ad litem because there are not enough volunteers given that Nevada law allows no compensation for a guardian ad litem's efforts.²¹⁷ In Nevada, child-directed attorneys may represent a child at any stage of a child welfare proceeding, but the appointment of an attorney for abused and neglected children remains discretionary only.²¹⁸ Even if Nevada appoints a child-directed attorney to represent the child, the state has no mandatory training mechanisms for these attorneys in place to educate them on the specific needs of children in dependency court.²¹⁹ Although some non-profit organizations in Nevada offer training programs for volunteer attorneys²²⁰ and such efforts are commendable and should be encouraged, it is

²¹¹ See, e.g., ALASKA CT. CHILD IN NEED OF AID R.P. 2(l) (“‘Party’ means the child . . .”); FLA. R. JUV. P. 8.210(a) (“‘[P]arty’ and ‘parties’ shall include . . . the child . . .”); HAW. REV. STAT. § 587A-4 (2013) (“‘Party’ means . . . a child . . .”); OHIO R. JUV. P. 2(Y) (“‘Party’ means a child . . .”).

²¹² NEV. REV. STAT. § 432B.420(1) (2011) (“If the child is represented by an attorney, the attorney has the same authority and rights as an attorney representing a party to the proceedings.”).

²¹³ See NEVADA LEGISLATURE 1984, *supra* note 132, at 24.

²¹⁴ *Henry Appeal*, 678 F.3d 991, 1009 (9th Cir. 2012).

²¹⁵ The report card ranks states by their child representation laws, not the laws' implementation. NATIONAL REPORT CARD, 3d, *supra* note 200, at 6, 18.

²¹⁶ *Id.* at 10, 18.

²¹⁷ See NEV. REV. STAT. § 432B.500(2) (2011); *Henry Appeal*, 678 F.3d at 1009. While states are required to meet CAPTA mandates, states are not actually reporting whether they are meeting these mandates, such as that every child have a representative. See Glynn, *supra* note 43, at 1251.

²¹⁸ NEV. REV. STAT. § 432B.420(1) (2011) (“The court may, if it finds it appropriate, appoint an attorney to represent the child.”)

²¹⁹ NATIONAL REPORT CARD, 3d, *supra* note 200, at 84–85. Only twenty-four percent of states mandate multidisciplinary training for a child's counsel. *Id.* at 10. For instance, in Arizona, attorneys and guardians ad litem are required to be familiar with juvenile law and with “changes and developments in relevant federal and state laws and regulations, Rules of Procedure for the Juvenile Court, court decisions and federal and state laws concerning education and advocacy for children in schools.” ARIZ. R.P. JUV. CT. 40.1(J).

²²⁰ Buck Wargo, *Children's Attorneys Project Marks 10 Years of Helping Kids*, LAS VEGAS SUN (Sept. 18, 2009, 3:00 AM), <http://www.lasvegassun.com/news/2009/sep/18/childrens-atorneys-project-marks-10-years-helping/>.

unrealistic that eleven in-house attorneys²²¹ working with volunteer attorneys are able to provide quality representation to more than 3,700 foster children in Nevada's most populous county.²²²

When deciding which representation model to implement, neither a rigid child-directed nor rigid best-interest representation model is appropriate.²²³ Children in foster care are of varying ages and therefore have different representation needs.²²⁴ Forty percent of Nevada foster children would likely have difficulty giving direction to an attorney on their interests because of their age.²²⁵ Additionally, although a younger abused child may be able to direct an attorney, these children may ask to be placed back home with abusive parents.²²⁶ Therefore, despite criticisms of the guardian ad litem representation model,²²⁷ in cases involving younger children the guardian ad litem function likely would be necessary.²²⁸ In contrast, Nevada's older foster children, who are able to understand the impact of their decisions, could benefit from a child-directed representation model.²²⁹

To avoid having to decide on a one-size-fits-all approach, legislation as passed in Iowa could be beneficial for Nevada's children because of the dual role attorneys are able to serve under this model. Although the primary role of any counsel should be to advocate for the child according to the Rules of Professional Conduct,²³⁰ a dual role would allow Nevada to incorporate the federal mandate of appointing a guardian ad litem in every abuse or neglect proceeding and allow the child's voice to be heard in the proceeding.²³¹ In the event the attorney could no longer represent the child's wishes and best interests at the same time, Nevada courts, like Iowa courts, could appoint a different person as the guardian ad litem.²³² In fact, attorneys should have the ability and duty to

²²¹ Staff, LEGAL AID CTR. OF S. NEV., <http://www.lacsn.org/who-we-are/staff-and-board> (last visited Oct., 28, 2013) (listing eleven attorneys as working on the Children's Attorneys Project).

²²² NEVADA 2012 WELFARE REPORT, *supra* note 7, at 29.

²²³ Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240, 1241 (2006).

²²⁴ See Maze, *supra* note 185, at 1.

²²⁵ See Duquette, *supra* note 223, at 1241. If a child is non-verbal, the child-directed model mandates that the attorney should take direction from other objective information available in the environment instead from the child him or herself. *Id.*

²²⁶ *Id.* at 1242.

²²⁷ See, e.g., Dolce, *supra* note 15, at 602 (noting that the guardian ad litem representation model does not primarily safeguard the legal interests of a child).

²²⁸ *Id.* An attorney representing the legal interest of a child cannot assure to provide for the best interests of the child, such as where an abuse victim wants to return to an abusive home. *Id.*

²²⁹ See Duquette, *supra* note 223, at 1244. The pure child-directed model requires that the attorney not substitute his or her judgment as to what is best for the child, but rather take direction from the child, if the child is verbal. *Id.*

²³⁰ See CONN. GEN. STAT. § 46b-129a(2)(C) (2013).

²³¹ See 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2012).

²³² See IOWA CODE § 232.89 (2013).

determine whether their child clients at any age are competent to voice their wishes.²³³

Alternatively, Nevada could follow the federal guidelines and appoint a guardian ad litem in all cases, and a court determination or a bright-line age requirement²³⁴ could decide when the child is of the maturity to be heard in the proceeding. The court could subsequently appoint a child-directed attorney.²³⁵ This solution would address the concern that as soon as a child is capable to direct counsel, the child's voice becomes essential to life-changing abuse and neglect proceedings.²³⁶

Nevada's comprehensive children's representation statute should address the training of attorneys in both roles, child advocate and guardian ad litem, and should clarify the distinction between both.²³⁷ Similar to the child representation statutes in Iowa and Connecticut, Nevada's statute should provide for reasonable compensation for the efforts of advocates and guardians ad litem.²³⁸ Connecticut started its route toward mandatory child representation by creating a Commission on Child Protection, an independent agency to improve representation for children in child protection cases.²³⁹ This Commission set practice and caseload standards for attorneys and guardians ad litem in child welfare proceedings, guidelines to determine children's best interests, and guidelines on conflicts between child-directed and best-interest representation.²⁴⁰ Connecticut subsequently codified regulations on caseload standards²⁴¹ and a recent

²³³ See Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interests Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381, 384 (2011); Husain, *supra* note 188, at 253.

²³⁴ See Duquette, *supra* note 223, at 1246.

²³⁵ See *id.* (discussing the impact of age on representation requirements).

²³⁶ An intangible benefit of representation for children is that a child tends to be more invested in the outcome if the child feels that his or her voice mattered. See Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, 917 (1999). Further, children are likely to be more satisfied with the outcomes if they believe the court heard and seriously considered their views. *Id.* Most importantly, research also found that participation in court proceedings helps a child's emotional recovery. Jaclyn Jean Jenkins, Note, *Listen to Me! Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings*, 46 FAM. CT. REV. 163, 167-68 (2008).

²³⁷ The literature has addressed the frequent confusion between best interest and child directed representation. See, e.g., David R. Katner, *Coming to Praise, Not to Bury, the New ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 14 GEO. J. LEGAL ETHICS 103, 108 (2000) (reasoning that the best interest role creates ethical conflicts for licensed attorneys and that attorneys rarely are trained in this role).

²³⁸ See CONN. GEN. STAT. § 46b-129a(2)(E) (2013) ("The counsel and guardian ad litem's fees, if any, shall be paid by the office of Chief Public Defender unless the parents or guardian, or the estate of the child, are able to pay . . ."); IOWA CODE § 232.141(2)(b) (2013) (mandating "[r]easonable compensation for an attorney appointed by the court to serve as counsel to any party or as guardian ad litem for any child" in case the party is unable to pay).

²³⁹ See Signorelli, *supra* note 201, at 393.

²⁴⁰ *Id.* at 397-98. Groups involved in the commission's early efforts also consulted the recommendations of the conference on representing children in families at UNLV. *Id.* at 397; see *supra* text accompanying note 194.

²⁴¹ CONN. GEN. STAT. § 51-296(c)(3) (2013).

report found the average caseload per attorney has reached reasonable levels.²⁴² Therefore, establishing a commission may lay an effective foundation for high-quality representation of Nevada's abused and neglected children while standardizing attorney and guardian ad litem training and practice.

However, proponents of mandatory representation for every foster child will encounter resistance because of the cost of representation and because a lack of data that shows representation will result in measurable improvements for Nevada's children. Critics will argue that the State already funds some services targeted at increasing permanency and that the statistics of Nevada foster care have not shown much, if any, improvement.

B. Representation for Nevada's Foster Children—what's in it for Nevada?

States generally adopt models of representation based on financial constraints.²⁴³ Although economic evaluations of general reforms aimed to achieve permanency for foster children remain rare,²⁴⁴ other states' financial return on mandating child representation may provide insightful analogies. For instance, Connecticut is rated highest for its legislation on foster-child representation and its generous services to foster children.²⁴⁵ There, an independent research group estimated the costs and benefits of representing children and found significant long-term cost savings, despite the expansiveness of services offered.²⁴⁶ Another recent study of the fiscal returns on improved representation is from a county in Florida.²⁴⁷ There, the county contracted with a legal aid society to provide representation to foster children with a focus on achieving timely permanency.²⁴⁸ The study found that the savings associated with a reduced number of children in the state's care considerably offset the costs of

²⁴² See COMM'N ON CHILD PROTECTION, THE SECOND ANNUAL REPORT OF THE CHIEF CHILD PROTECTION ATTORNEY 26 (2009), available at http://www.ct.gov/ccpa/lib/ccpa/CCPA_Second_Annual_Report_FY_2008.pdf. The average caseload in Connecticut was sixty-eight cases per attorney. *Id.* at 7. Although this number may seem high, to compare, the recommended caseload of attorneys representing children in California is 188 and the actual caseload in California is 273. CAL. BLUE RIBBON COMM'N ON CHILDREN IN FOSTER CARE, FOSTERING A NEW FUTURE FOR CALIFORNIA'S CHILDREN: ENSURING EVERY CHILD A SAFE, SECURE, AND PERMANENT HOME 4 (2009), <http://www.courts.ca.gov/documents/brc-finalreport.pdf>.

²⁴³ Atwood, *supra* note 233, at 393.

²⁴⁴ Jeremy D. Goldhaber-Fiebert et al., *Economic Evaluation Research in the Context of Child Welfare Policy: A Structured Literature Review and Recommendations*, 35 CHILD ABUSE & NEGLECT 722, 736–37 (2011).

²⁴⁵ See NATIONAL REPORT CARD, 3d, *supra* note 200, at 40.

²⁴⁶ WILLIAM BOWEN ET AL., CONN. VOICES FOR CHILDREN, GIVING FAMILIES A CHANCE: NECESSARY REFORMS FOR THE ADEQUATE REPRESENTATION OF CONNECTICUT'S CHILDREN AND FAMILIES IN CHILD ABUSE AND NEGLECT CASES 40–43 (2007), available at <http://www.ctvoices.org/sites/default/files/welf07reformsforrep.pdf>.

²⁴⁷ ANDREW E. ZINN & JACK SLOWRIVER, CHAPIN HALL CTR. FOR CHILDREN AT THE UNIV. OF CHI., EXPEDITING PERMANENCY: LEGAL REPRESENTATION FOR FOSTER CHILDREN IN PALM BEACH COUNTY 1 (2008), available at http://www.chapinhall.org/sites/default/files/old_reports/428.pdf. These results could be applicable in Nevada because, similar to Nevada, most children in Florida dependency courts currently do not receive legal representation at all. See NATIONAL REPORT CARD, 3d, *supra* note 200, at 45–46, 84–85.

²⁴⁸ ZINN & SLOWRIVER, *supra* note 247, at 1.

the representation program,²⁴⁹ and the net savings of each additional day in a permanent home were about thirty-six dollars.²⁵⁰ Therefore, given the high cost to the state of around nine thousand dollars per year for every foster child,²⁵¹ Nevada may realize long-term savings when appointing attorneys to safely reduce children's time in care.

These examples provide guidance for Nevada: the studies' methodology could be implemented as a local child-representation program in cooperation with a legal aid society.²⁵² A research center,²⁵³ for instance at the University of Nevada, could evaluate a representative sample of this local representation program, and provide evidence on fiscal returns by extrapolating the data as if the program was implemented statewide. Irrespective of the initial expense, other states' studies showed that providing attorneys for children results in long-term financial benefits to the state.²⁵⁴ In fact, the cost of providing an attorney could be offset by the positive long-term effect of advocacy on behalf of an abused and neglected child, and result in increased permanency through a shorter time in foster care.²⁵⁵

Although mandating representation leads to significant expenditures, "[p]roceeding without representation puts children at risk for poor outcomes in the justice and child welfare systems."²⁵⁶ For instance, enhanced representation that increases permanency could have a broader impact on children's educational attainment and on the likelihood of children becoming juvenile offenders. In fact, the enhanced income associated with educational attainment²⁵⁷ and

²⁴⁹ See *id.* at 24.

²⁵⁰ *Id.* at 24–25.

²⁵¹ Betty Weiser, Soc. Servs. Program Specialist 3, Dep't Health & Human Servs., Differential Response Program, Presentation before the Nevada Legislative Committee on Child Welfare and Juvenile Justice (Apr. 4, 2012), available at <http://www.leg.state.nv.us/Interim/76th2011/Exhibits/ChildWelfare/E040412E.pdf>. The cost of foster care in Nevada is almost \$8200 per year for a child aged twelve and under and almost \$9300 per year for a child aged thirteen and over. *Id.*

²⁵² See *supra* text accompanying notes 247–51.

²⁵³ ZINN & SLOWRIVER, *supra* note 247, at 1. The Children's Services Council of Palm Beach County sought to examine the impact of representation on permanency, and contracted with Chapin Hall at the University of Chicago, a policy research center, to evaluate the program. *Id.*

²⁵⁴ See *supra* text accompanying notes 245–50.

²⁵⁵ Taylor, *supra* note 188, at 616.

²⁵⁶ See Jennifer K. Pokempner et al., *The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, 47 HARV. C.R.-C.L. L. REV. 529, 530 (2012).

²⁵⁷ JENNIFER CHEESEMAN DAY & ERIC C. NEWBURGER, U.S. CENSUS BUREAU, THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATES OF WORK-LIFE EARNINGS 2–3 (2002), available at <http://www.census.gov/prod/2002pubs/p23-210.pdf>. Estimates show that an individual with a bachelor's degree could have lifetime earnings of \$2,100,000 compared to someone with a high school diploma, who has expected earnings of \$1,200,000 (both estimates are in 1999 dollars). *Id.* at 3–4. Further, children placed in foster care are less likely to hold a job as young adults for at least three months compared to similarly situated children who remained with their families. See Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1601–02 (2007).

reductions in criminality²⁵⁸ would result in significant financial returns for the State.

Nevada's residents pay a high price for the State turning a blind eye toward victimized children. A study among fifteen thousand children who were in contact with the child welfare system showed that these children are three times more likely to be involved in the juvenile justice system than children left in their familial homes, even when the care they received in these familial homes met the statutory definition of abusive or neglectful.²⁵⁹ This study also found that girls placed in foster care are more likely to become teen mothers than similarly situated children left in their own homes.²⁶⁰ Ranked on a scale against all other states, where first place represents the highest teen pregnancy rate, Nevada was ranked second in pregnancies of females aged fifteen to nineteen in 2005.²⁶¹ Therefore, qualified legal representation for Nevada's foster children that shortens the time a child spends in the system would not only benefit those children, but would also result in long-term cost savings for the state.

Representation not only affects hard costs, but also the human cost of foster care. Experts emphasize the importance of stable and permanent homes for children,²⁶² and one of the fundamental goals of dependency law is to resolve child-welfare cases as quickly as possible.²⁶³ A lack of representation "increases the chance that the state will be intervening with the wrong child for the wrong reasons,"²⁶⁴ and, given Nevada's current practices, the interests of Nevada's foster children likely "fall victim to the litigation interests of other parties."²⁶⁵ This may be "particularly [true] as to delays in the progress of litigation which may only be in the interests of the child welfare agency or birth

²⁵⁸ Anirban Basu et al., *Social Costs of Robbery and the Cost-Effectiveness of Substance Abuse Treatment*, 17 HEALTH ECON. 927, 942 (2008).

²⁵⁹ Doyle, *supra* note 257, at 1584, 1599. Another study on how foster care placement might affect an adult's involvement with the criminal justice system found that former foster children had "two to three times higher arrest, conviction, and imprisonment rates" than similarly situated children who remained with their families. Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. POL. ECON. 746, 766 (2008).

²⁶⁰ Doyle, *supra* note 257, at 1599–1601.

²⁶¹ GUTTMACHER INST., U.S. TEENAGE PREGNANCIES, BIRTHS AND ABORTIONS: NATIONAL AND STATE TRENDS & TRENDS BY RACE AND ETHNICITY 13 (2010), available at <http://www.guttmacher.org/pubs/USTPtrends.pdf>. The average annual cost to the state for a child of a teen mother in Nevada is \$3040. COMM. ON YOUTH, S. NEV. REG'L PLANNING COAL. TEEN-AGE PREGNANCY, PARENTING AND PREGNANCY PREVENTION IN SOUTHERN NEVADA 15, available at http://nvpef.org/pdfs/Teenage_Pregnancy_Summit_Report_Final.pdf.

²⁶² See JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 35 (1973).

²⁶³ See, e.g., *In re Melvin A.*, 82 Cal. App. 4th 1243, 1248 (Cal. Ct. App. 2000) ("This action by the court was inconsistent with the fundamental policy of dependency law which seeks to resolve cases expeditiously."); *In re Amendments to the Fla. Rules of Judicial Admin.*, 24 So. 3d 47, 52 (Fla. 2009) (Pariente, J., concurring) ("[T]his Court's adoption of these amendments are based on the recognition that for every day of delay on appeal, which is added to the length of the prior ongoing court proceedings, the future of the child is in limbo to his or her potential detriment.").

²⁶⁴ Pokempner et al., *supra* note 256, at 530.

²⁶⁵ Dolce, *supra* note 15, at 598.

parents.”²⁶⁶ A recent study found that represented children moved from case plan approval to adoption, reunification with their families, or placement in long-term custody at approximately twice the rate of unrepresented children.²⁶⁷ A 1999 study in Clark County revealed that among Clark County foster children who became wards of the court in 1994, those who had a court appointed special advocate, fulfilling the function of a guardian ad litem, had significantly fewer placements, tended to be more likely to achieve permanent outcomes, and spent less overall time in the system.²⁶⁸

Representation of foster children could also help Nevada meet some of the current challenges of its federally mandated Program Improvement Plan²⁶⁹ and help ensure the State continues to receive federal funding.²⁷⁰ According to a Nevada Department of Health and Human Services report, between 2010 and 2012, an aggregate total of over three thousand foster children in Nevada were away from their homes for over twenty-one months, and had not had a termination of parental rights filed.²⁷¹ These facts are in contravention of Nevada law mandating a hearing regarding the permanent placement of a child no later than twelve months after the removal of the child from the home.²⁷² Further, federal law requires that if a child is in foster care for fifteen of the most recent twenty-two months, a petition for termination of parental rights must be filed absent compelling reasons.²⁷³ Nevada’s recent report did not address whether there were compelling reasons,²⁷⁴ but thousands of children who are away from their parents for almost two years show that there is a clear violation of federal mandates.

Similarly, the report also pointed out Nevada’s challenge to comply with the timeliness requirement for adoptions.²⁷⁵ Federal law requires that states ensure concerted efforts to timely achieve the goal of finalized adoption.²⁷⁶ Nevertheless, Nevada averages thirty-seven months from removal to adoption.²⁷⁷ The report cited a delay in filing termination of parental rights petitions as one of the reasons for the non-compliance.²⁷⁸ Compared to other states, Nevada takes an excessive amount of time from terminating parental rights to

²⁶⁶ *Id.*

²⁶⁷ Taylor, *supra* note 188, at 615; ZINN & SLOWRIVER, *supra* note 247, at 14–15.

²⁶⁸ Cynthia A. Calkins & Murray Millar, *The Effectiveness of Court Appointed Special Advocates to Assist in Permanency Planning*, 16 CHILD & ADOLESCENT SOC. WORK J. 37, 39–40, 43–44 (1999).

²⁶⁹ See *supra* text accompanying notes 128–31.

²⁷⁰ See *supra* text accompanying notes 85, 116.

²⁷¹ NEVADA 2012 WELFARE REPORT, *supra* note 7, at 34.

²⁷² NEV. REV. STAT. § 432B.590(1) (2011). If aggravating circumstances were found in the home, the hearing must be within thirty days. *Id.*

²⁷³ 45 C.F.R. § 1356.21(i) (2012).

²⁷⁴ NEVADA 2012 WELFARE REPORT, *supra* note 7, at 34. The report noted that the main reasons for the delay were increasing wait times for treatment programs for parents with substance abuse problems. *Id.*

²⁷⁵ See *id.* at 35.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 36.

²⁷⁸ *Id.* at 56.

finalizing adoption.²⁷⁹ A Nevada child must wait for more than twelve months after his or her parent's rights are terminated to find a forever home while, for instance, in Connecticut and Iowa the median time is around six and a half months and seven and a half months, respectively.²⁸⁰ Therefore, competent child representation produces several dollars' worth of benefit for every dollar spent because representation can ensure Nevada meets a child's permanency guidelines in a cost- and time-efficient manner that is in line with federal mandates.

Nevada should not be behind other states that already support their foster children with representation.²⁸¹ The lawsuit in *Henry A. v. Willden* clearly and publicly exposed Nevada's failed child welfare efforts, and showed that Nevada is one of the few states where a children's rights organization had to step in by litigating Nevada's shortfalls with respect to nationally accepted standards.²⁸² The lawsuit was not only expensive and embarrassing for Nevada to defend, but also diverted State officials' attention away from their main focus, which should be Nevada's abused and neglected children.²⁸³

Although a child is the most vulnerable and weakest party in a dependency proceeding, other states have reported significant improvements using a more holistic representation model that incorporates representation for the child's parents.²⁸⁴ This model proves worthy of consideration in Nevada since most of Nevada's foster children are reunified with their parents.

C. Focus on Nevada's Families: Mandatory Representation for Parents

Zealous representation of parents is essential for a well-functioning child welfare system.²⁸⁵ Similar to the case with children in child welfare proceedings, appointing an attorney for indigent parents is discretionary under Nevada law.²⁸⁶

Many states remove children from their homes because of poverty-related neglect, and Nevada is no exception.²⁸⁷ The parents of these children likely will be unable to afford representation. However, research from other states shows that competent legal representation for parents may result in an

²⁷⁹ *Time Between Termination of Parental Rights (TPR) and Adoption Finalization: Oct. 1, 2010 to Sept. 30*, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, <http://www.acf.hhs.gov/sites/default/files/cb/tpr2011.pdf> (last visited Oct. 28, 2013).

²⁸⁰ *Id.*

²⁸¹ See *supra* text accompanying note 216.

²⁸² See *supra* text accompanying notes 5–9. See also Amy C. Harfeld, *The Right to Counsel Landscape After Passage of the ABA Model Act—Implications for Reform*, 36 NOVA L. REV. 325, 341–42 (2012). Harfeld recommends widely publicizing the plight of individual foster children whose case and life outcome was dramatically impacted either by a lack of representation, or who had a highly beneficial outcome as a result of good representation. *Id.*

²⁸³ Lawsuits against the State of Nevada's child welfare practices have been ongoing since 2006. See *supra* text accompanying note 24.

²⁸⁴ See CTR. FOR FAMILY REPRESENTATION, EVERY FAMILY MATTERS 1–2 (2012), available at <http://www.cfrny.org/wp-content/uploads/2012/12/Annual-Report-2012.pdf>.

²⁸⁵ See Vivek S. Sankaran, A HIDDEN CRISIS THE NEED TO STRENGTHEN REPRESENTATION OF PARENTS IN CHILD PROTECTIVE PROCEEDINGS, MICH. B.J. 36, 37 (2010).

²⁸⁶ NEV. REV. STAT. § 432B.420(1) (2011).

²⁸⁷ See *supra* text accompanying notes 164–65.

increased and timelier rate of family reunification.²⁸⁸ For instance, Washington implemented a pilot parent representation program to support indigent parents, custodians, and legal guardians involved in dependency and termination of parental rights proceedings.²⁸⁹ Evaluations of this program consistently found that it is succeeding in meeting its goals and has achieved better outcomes for children and their families.²⁹⁰ Specifically, Washington's pilot program for parents translated into almost one month less time the average child spent in foster care before reunification.²⁹¹ Similarly, programs that represented families as a whole reported that, with their assistance, more than fifty percent of children avoided foster-care placement altogether,²⁹² and the median length of foster care of children in the program was just over two months compared to a state-wide average of nearly two and a half years.²⁹³

Similar to mandatory child representation, appointing counsel for indigent parents could also result in long-term cost savings for Nevada. The annual cost of foster care in Nevada is between \$8,200 and \$9,300 per child²⁹⁴ and the median length of stay per Nevada foster child is around fifteen months,²⁹⁵ while a New York program reported that its family representation efforts providing lawyers, social workers, and parent advocates costs an average of \$6,500 per family.²⁹⁶ Successful family-oriented representation programs come in different forms;²⁹⁷ however, as implemented in Washington, the program has had more far-reaching effects on the state's child welfare system.²⁹⁸ In fact, case processing became more efficient and effective,²⁹⁹ and the attorneys' interac-

²⁸⁸ See, e.g., Mark E. Courtney et al., *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, 1 PARTNERS FOR OUR CHILD. DISCUSSION PAPER 1, 4 (2011), available at http://pocweb.cac.washington.edu/sites/default/files/pdfs/PRP_Discussion_Paper.pdf.

²⁸⁹ *Id.* at 1–2.

²⁹⁰ *Id.* at 3–4. The evaluation was based on a study with 12,000 children in foster care from 2004 through 2008. *Id.* at 3.

²⁹¹ See *id.* at 4.

²⁹² See CTR. FOR FAMILY REPRESENTATION, *supra* note 284, at 10.

²⁹³ *Id.* at 2, 10.

²⁹⁴ See *supra* note 251.

²⁹⁵ See U.S. CHILD WELFARE OUTCOMES REPORT, *supra* note 11, at 214.

²⁹⁶ See CTR. FOR FAMILY REPRESENTATION, *supra* note 284, at 10. In New York City, the program resulted in nine million dollars in taxpayer savings because the average cost of representation for families is a fraction of the cost per child in the foster care system. *Our Work*, CTR. FOR FAMILY REPRESENTATION, <http://www.cfrny.org/our-work/> (last visited Oct. 28, 2013).

²⁹⁷ See Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253, 1295–1300 (1994). For more information on how a family-oriented representation approach could be implemented considering the American Bar Association's Model Rules of Professional Conduct, see Cynthia Godsoe, *All in the Family: Towards a New Representational Model for Parents and Children*, 24 GEO. J. LEGAL ETHICS 303, 350–55 (2011).

²⁹⁸ JOANNE MOORE, WASH. STATE OFFICE OF PUB. DEF., WASHINGTON STATE OFFICE OF PUBLIC DEFENSE COMMENTS ON THE PARENTS REPRESENTATION PROGRAM AND EARLIER PERMANENCY, 2–3 (2011), available at http://www.opd.wa.gov/Reports/Dependency%20&%20Termination%20Reports/110311_OPDCmmntsonPRPandEarlyPermanency.pdf.

²⁹⁹ *Id.* at 3.

tion with parents resulted in parents becoming more willing to engage in services with caseworkers and thus in fewer terminations of parental rights.³⁰⁰

The possibility of these improvements benefiting the youngest citizens of Nevada and their families, combined with evidence from other states, should offer encouragement to Nevada that enhancing representation can shorten the length of time to permanency and associated expenses of keeping children in foster care. However, if Nevada's budget does not allow for a comprehensive reevaluation, then monies should still be invested into an evidence-based cost-versus-benefit analysis that focuses on findings from a representative sample.³⁰¹ This regional data can provide persuasive insight to state officials and the child welfare community about cost savings associated with high-quality child and parent representation.³⁰²

VI. CONCLUSION: OLIVIA'S STORY REVISITED

Currently, thousands of children linger in foster care in Nevada.³⁰³ *Henry A. v. Willden* illustrates that the State denied stability, individualized health-care, and a minimal level of safety to many of these children.³⁰⁴ Nevada's high rate of removing children from their families warrants a closer look at the State's family preservation efforts and response mechanism to child maltreatment allegations.³⁰⁵ Clarifying which efforts are required to keep children with parents and expanding a differential response mechanism to children of all ages could positively affect Nevada's removal rate.³⁰⁶ Once a child is removed from the home, the high number of young children among the foster population suggests that Nevada laws should provide for the distinctive needs of these young children by shortening permanency deadlines.³⁰⁷ Further, other states credit mandatory representation for children and parents in dependency proceedings as a cost-efficient way to ensure permanent outcomes for foster children.³⁰⁸ Nevada's foster children do not currently have their voices heard in proceedings, and although mandating representation will initially increase costs to Nevada, the long-term cost savings and other societal benefits are significant and outweigh the increase in short-term costs.³⁰⁹

Children like Olivia—who spent over three years in Nevada's foster care system and suffered abuse before finding a permanent family—would benefit from representation. At nine years of age, Olivia was old enough to direct an attorney on where she would like to live. Had the State assigned an attorney to Olivia immediately upon removal from her parents' home in 2006, the attorney

³⁰⁰ *Id.* at 4–5.

³⁰¹ See Elizabeth Thornton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, 46 FAM. L.Q. 139, 152–53 (2012).

³⁰² *Id.*

³⁰³ NEVADA 2012 WELFARE REPORT, *supra* note 7, at 29.

³⁰⁴ *Supra* Part II.

³⁰⁵ *Supra* Part IV.

³⁰⁶ *Supra* Part IV.A–B.

³⁰⁷ *Supra* Part IV.C.

³⁰⁸ *Supra* Part V.

³⁰⁹ *Id.*

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could have appealed the agency's decision to place her with abusive relatives. Although there is no guarantee that Olivia would have been in a permanent living arrangement sooner, an attorney could have argued for the timely resolution of her case and made her feel that her opinion was important. In Nevada, children like Olivia have the most at stake in dependency proceedings. Attorneys can ensure that these voices are heard.

