

# Highlights of the Texas Foster Care Lawsuit, State Action During the Interim, and Next Steps

*After years of litigation, Judge Janis Jack ruled in December 2015 that the Texas foster care system is unconstitutional. Over the past year, the media and others have brought to light significant problems related to both CPS investigations and the foster care system. In response, state leaders have demanded action from DFPS and taken some steps of their own. This policy brief highlights significant changes to CPS and foster care that took place during the interim and key recommendations the court is considering, including some that require legislative action and appropriations. This brief seeks to provide context and identify opportunities as state policymakers consider legislative changes during the 85th legislative session to improve the safety and success of children at risk of abuse or neglect and those already in the foster care system.*

## State Action in Late 2016 on CPS

The state's Child Protective Services (CPS) agency has two primary functions. The first is preventing child abuse and neglect and removing children from unsafe homes. The second is providing safe homes for children to grow up in and effective support services if they cannot stay safely with their families. Last year, responding to media attention to significant problems in investigations as well as a federal judge's ruling against the state's foster care system, Texas took a number of proactive steps on both fronts.

### *Addressing Investigations and Caseworker Salaries*

On October 4, 2016, after the Dallas Morning News reported that CPS had not yet investigated more than 4,700 reports of alleged neglect and abuse, the Governor, Lieutenant Governor, and Speaker of the House sent a letter to the Department of Family and Protective Services (DFPS, the parent agency to CPS) that urged DFPS to make sure CPS investigators were responding to reports of neglect and abuse quickly enough to ensure that children were safe in their homes.

After the DFPS Commissioner submitted a plan to hire more caseworkers and special investigators to address the investigations backlog, the Senate Finance Committee called an emergency hearing on October 26, 2016 to discuss providing immediate funding rather than waiting until the legislative session. During this hearing, the Senate Finance Committee pointed out that DFPS could not simply rely on hiring more people when most of DFPS's caseworkers quit during their first year on the job. Additionally, Senator John Whitmire demanded that law enforcement be recruited to help investigate the cases in the backlog.

Responding to Senators' demands during the hearing, the following day DFPS presented a recruitment and retention plan, including pay raises, to stabilize the CPS workforce and bring caseloads down to a more manageable level so caseworkers can do a better job of keeping children safe. More controversially, Commissioner Whitman worked with the Department of Public Safety (DPS) to send DPS troopers to visit homes that had been reported as unsafe but had not yet been investigated by CPS. Child welfare experts have long preferred the social work approach to assessing risks to children and needed family supports over the law enforcement approach. There has been great concern that expanding the role of law enforcement in investigations of CPS cases would lead to a spike in arrests of parents who could benefit from child neglect and abuse prevention services designed to help keep families together.

Although the DPS troopers were able to locate and visit a number of children whom CPS had not yet seen, CPS caseworkers still took over the investigations, so the short term law enforcement "fix" did not effectively address the ongoing shortage of CPS investigative caseworkers.

Fortunately, on December 1, 2016, the state leaders on the Legislative Budget Board (LBB) approved funding for the Commissioner's plan to hire 828 more caseworkers for both investigations and foster care and immediately raise caseworker salaries by \$1,000 per month. The plan was funded by TANF (Temporary Assistance for Needy Families) and Medicaid. This plan was a huge step toward stabilizing the CPS workforce and making sure people with the right training were investigating cases. It is an acknowledgement that a CPS workforce with high turnover is ill-equipped to provide the stability that children with trauma need. State leaders recognized that the plan will not only increase the number of caseworkers who are able to support children, but also help improve the quality of care that caseworkers are able to provide.

Implementation of this plan has hit snags. State law prevents state employees who have received a raise or promotion within the last six months from getting an immediate raise. On the ground this has meant that some recently promoted caseworkers, including some supervisors, are getting paid less than new recruits. The delayed raises for some may undermine staff morale just as CPS is trying to boost it. Fortunately, since the issues came to light, CPS has announced that caseworkers will receive the delayed raises as back pay.

#### *Increase Placement Options and Support for Children with High Needs in Foster Care*

In addition to investigating neglect and abuse, the state is responsible for the care and well-being of children who are removed from unsafe homes and placed in foster care. Prior to the 2017 legislative session, Texas made some strides toward increasing the number of foster homes for children with high needs and improving services for those children.

The new staffing plan discussed above includes foster care caseworkers, also known as conservatorship or "CVS" caseworkers, who help address the needs of children who have been removed from their parents and need safe homes and treatment services.

Additionally, on October 12, 2016, when Gov. Abbott, Lt. Gov. Patrick, and Speaker Straus asked DFPS to develop the plan to address the investigations backlog, they also asked DFPS for a plan to increase the number of foster homes for children with high needs and improve access to behavioral and physical health services. This plan has not yet been released but we eagerly await the details.

Finally, on December 7, 2016 Governor Abbott created a promising pilot project to support children who are victims of abuse and neglect and are in psychiatric hospitals or residential treatment centers to address the highest emotional and behavioral needs. Using an innovative funding source, the pilot project is aimed at providing wraparound services and less restrictive housing to 500 children. If successful, it will improve both the placement options and treatment for some of the most vulnerable children in Texas' child welfare system.

#### *Emergency Item and Omnibus Bill*

During his State of the State address, Gov. Abbott named child protection as an emergency item, allowing it to be considered during the first 60 days of the 2017 legislative session. Senate Health and Human Services Chairman Charles Schwertner has also filed the omnibus Senate foster care bill (SB 11), which contains key provisions aimed at the foster care capacity shortage, improving accountability within CPS, and providing timely access to the kinds of support services that have been shown to improve child safety, permanency, and well-being. Member of a bipartisan House workgroup on CPS also recently announced several recommendations for improving child protection. These steps reflect a growing sense of urgency surrounding the problems that have plagued CPS.

## **Background on the Federal Lawsuit and Initial Court Order**

At the same time the state has taken these positive steps, state officials have also fought a federal lawsuit in which Judge Janis Jack of the United States District Court for the South District of Texas ruled on December 2015 that the state's foster care system poses an unreasonable risk of harm to children. Because the state has taken on the duty of providing care for these children and currently has policies and practices in place causing an unreasonable risk of harm, the court held that the state's foster care system violates the constitutional rights of children under the substantive due process clause of the 14th Amendment. In response, the court issued an injunction as a remedy for the injuries caused by the violation of the children's constitutional rights.

#### *Scope of the Federal Lawsuit*

It is important to remember the limited scope of the lawsuit. It only addresses minimal safety standards for children in long-term foster care. The scope excludes a number of critical CPS responsibilities:

1. It does NOT consider whether children in foster care have the support they need to recover from trauma, grow up healthy, do well in school, and become successful adults.
2. It does NOT address children who are in foster care for less than a year (i.e. children in Temporary Managing Conservatorship or "TMC").
3. It does NOT apply to families receiving child neglect and abuse prevention services.
4. It does NOT address the crisis in CPS investigations of reports of child neglect and abuse.

Given these constraints, the federal lawsuit technically only focuses on basic safety concerns for approximately 40 percent of children in CPS custody. These 40 percent are the children who are in Permanent Managing Conservatorship (PMC), meaning they have generally been in state custody for over 12 to 18 months and a judge has appointed DFPS as the permanent guardian of that child until she is adopted or ages out of the system at age 18. Some of the recommendations coming out of the lawsuit to address caseworker caseloads and foster care capacity (i.e. having enough of the right homes and services in place) will also help children in TMC by extension.

### *Initial Order*

Finding the state in violation of the U.S. Constitution, the court's initial order from December 2015 did two things. First, the order shut down all foster group homes that were operating without 24-hour supervision by an "awake" adult. Recently, Judge Jack learned that the state has been in violation of that injunction, which the state says it incorrectly interpreted. State officials stated they believed the order only applied to future placements and not to children who were already living in unsafe group homes. Judge Jack issued a clarifying order on December 27, 2016.

Second, the initial order appointed Special Masters, who are experts in child welfare, to work with DFPS to develop an implementation plan to address issues with numerous state policies and practices that are contributing to the risk of harm to children in the state's care. The court instructed the Special Masters to recommend changes that would bring the child welfare system up to minimal levels of safety and no longer violate the constitutional rights of children in Texas.

The initial December 2015 order outlined goals for the Special Masters' recommendations. Since that order, the Special Masters have released their recommendations, the defendants (Governor Abbott and the leadership at the Texas Health and Human Services Commission and DFPS) have responded to those recommendations, and the plaintiffs (the children in foster care who sued the state officials) have responded to the objections raised by the state. The next sections of this brief will discuss in more detail the scope of the lawsuit, the goals the court set as part of the remedy section of its initial order, the Special Masters' recommendations designed to meet the court's goals, and the subsequent responses of the defendants and the plaintiffs.

## **Goals Outlined by the Court and Special Masters' Recommendations**

The court outlined goals to guide the Special Masters' recommendations and address issues related to caseloads and turnover, adequate foster homes and services, and administrative and investigative issues. The recommendations will not result in a perfect system. They simply outline improvements to bring the system up to minimal constitutional safety standards so Texas is no longer violating children's constitutional right to be protected from an unreasonable risk of harm while in the state's care.

### *Caseloads and Turnover*

With respect to conservatorship caseworkers, the court set the following goals for the Texas foster care system to guide the Special Masters' recommendations:

- track caseloads on a child-only basis;

- conduct a workload study to determine the time required for caseworkers to adequately perform their tasks;
- establish a manageable caseload level;
- hire and maintain enough caseworkers to ensure caseloads are manageable;
- lower the caseworker turnover rate; and
- evaluate secondary caseworkers (i.e. Centralized Placement Unit or “CPU” and I See You workers).

The Special Masters’ recommendations 8 through 14 address caseworker caseload and workload goals. In evaluating caseloads, the Special Masters emphasized that DFPS needs to change the way it tracks the number of cases and the number of caseworkers. Texas has historically tracked CVS caseloads in terms of “stages.” Stages represent an aspect of work that needs to be done on a child’s case. One child can be in several stages at the same time. No other state counts caseloads in stages, and it is a very confusing method of measurement. The Special Masters’ recommendations would require the state to track caseloads on a child-only basis, meaning one child counts as one case.

The Special Masters also note that the state has made caseload calculations that include secondary or part-time caseworkers, workers in training, and “fictive” caseworkers that are not actually additional staff members but are created on paper out of caseworkers’ overtime. For example, if a single caseworker worked 80 hours one week, that would count as two caseworkers doing 40 hours of work each. For the purposes of the Special Masters’ recommendations, only full time CVS caseworkers should be counted when calculating caseloads and caseload data must be tracked regionally and at the county-level, not just statewide.

Expanding on the court’s goals, the Special Masters specifically suggested that DFPS implement a caseload standard in the range of 14 to 17 cases for full-time CVS caseworkers who are assigned to PMC children. This number was based on a DFPS work measurement study. On average, the study showed that CVS caseworkers log about 137.9 case hours per month and spend about 9.7 hours per month on an individual PMC case. These numbers suggest that 14 is the average manageable caseload. The Special Masters did not recommend a fixed caseload cap because the agency needs some flexibility, but they indicated that 14 to 17 PMC cases for CVS caseworkers should be the goal.

The Special Masters also made specific recommendations to reduce CVS caseworker turnover. These recommendations included graduated caseloads for newly hired and qualified caseworkers, a mentorship program for caseworkers, a better balance of field-based and classroom-based training, salary increases, and better supervisor-to-caseworker ratios.

Finally, the Special Masters made many recommendations related to secondary caseworkers’ caseloads. Secondary caseworkers are just what they sound like. They perform caseworker functions without having primary responsibility for children in care. There are two types of secondary caseworkers: CPU and I See You caseworkers. CPU caseworkers simply help find placements for children in care; they do not interact with children in foster care at all. I See You caseworkers conduct face-to-face visits when the primary caseworker is out of the region and unavailable. The recommendations for CPU and I See You caseworkers included reducing the number of children placed outside of their home region, significantly

reducing I See You and CPU caseloads, setting standards to improve the quality of I See You and CPU contacts, and requiring at least quarterly face-to-face contact with primary CVS caseworkers even when I See You and CPU caseworkers have been involved.

#### *Adequate Foster Care Homes and Services*

Turning to capacity, the court asked the Special Masters to make recommendations to meet the following goals:

- prevent unrelated children with significantly different levels of need to be placed in the same room in any facility;
- determine whether children with only somewhat different levels of need (one “Authorized Service Level” apart) may be appropriately placed in the same room;
- determine an age range for appropriate placement of unrelated children in the same room;
- ensure DFPS performs an assessment of statewide needs for single-child homes, the number of placements available, the geographic distribution of placements, and placement types across the state;
- ensure DFPS tracks how many children are in each residential facility and each facility’s capacity;
- evaluate whether Foster Care Redesign should be allowed to continue;
- recommend strategies to solve the problem of children being removed from a successful placement because of a change in their Authorized Service Level;
- recommend strategies to solve the perverse incentive of DFPS providing additional funds to caregivers for children at increased levels of care; and
- evaluate foster group homes to determine whether they should continue to operate and what provisions are needed to ensure they operate safely if they are continued.

Special Masters’ recommendations 21 through 31 deal with the above issues. To begin, the Special Masters recommended that unrelated children of different authorized service levels can only be placed in the same room if DFPS staff has conducted a thorough, documented assessment and certified that the placement is safe and appropriate. Likewise, unrelated children more than three years apart in age have to go through the same kind of assessment and certification.

The Special Masters chastised Texas for inappropriately relying on “congregate care” for PMC children, particularly for young children. Congregate care generally means housing several children together in a foster group home or an institution like a Residential Treatment Center. They recommended building more kinship and therapeutic foster care placements to accommodate children in family-like settings with exceptions for large sibling groups, children with significant physical or behavioral health treatment needs, and parenting foster youth. They set specific targets for reducing the use of congregate care facilities for PMC children based on their age. For example, after the final court order is issued, the Special Masters recommended that DFPS be given 6 months to ensure all PMC children under the age of 2 are in family-like settings, 12 months for children under the age of 6, and 24 months for children under 13. For youth over 13, congregate care would only be considered appropriate if family-like settings are unavailable to meet the child’s needs and DFPS is actively working to secure a family-like setting for that child.

The Special Masters recommended that DFPS track “single child homes” where no other children (including birth, adoptive, relative or non-relative kinship, or foster children) are present. These types of homes are often needed to accommodate children who have been sexually abused.

The Special Masters recommended that DFPS conduct a placement needs assessment and develop a placement plan informed by the assessment to develop capacity to fill the gaps in various geographic regions and for specialized or hard-to-place groups of PMC children like large sibling groups, teenagers, children with developmental disabilities, and children who require placement in a home with no other children. They further recommended that the plan be evaluated and updated annually.

The Special Masters recommended prohibiting overnight placement of PMC children in offices or other locations that are not regulated directly by DFPS or a Child Placing Agency (CPA) except for kin placements.

The Special Masters recommended a number of accountability measures. For one, they recommended placement information be publicly available on the DFPS website and updated quarterly. They also recommended semi-annual reports on PMC children’s placement stability.

As directed by the court, the Special Masters also examined Foster Care Redesign. Foster Care Redesign is an effort the Legislature started in 2011 that shifts management of a regional network of foster care providers from the state to a local nonprofit organization. The goal is to prevent abuse and neglect in foster care, keep children close to their home communities and social connections, and reduce the number of times children move between foster homes.

The Special Masters noted the failure in the first Redesign attempt in Regions 2/9 as well as the early promise of the current Redesign effort in Region 3b, based in Fort Worth. Because Redesign has not been fully implemented anywhere in Texas, the Special Masters recommended DFPS submit a Redesign implementation plan that the court can continue to evaluate and assess as the state expands Redesign into more regions.

Finally, regarding capacity in foster group homes, the Special Masters recommended that DFPS verifies that all group homes provide 24-hour awake night supervision, have no more than eight children living in any one home, and never exceed six children per home except for the purpose of placing siblings together.

#### *Administrative and Investigative Issues*

The court set the following goals to guide the Special Masters’ recommendations related to administrative issues:

- ensure DFPS staff and the child have the opportunity to speak privately;
- improve the efficiency of DFPS paperwork requirements and the electronic filing system, including IMPACT, CLASS, and the External files;
- ensure DFPS files include an updated portrait photograph of each child;
- establish a 24-hour hotline for receiving and responding to reports of abuse and neglect in foster homes;

- improve programs and outreach for children who will age out of foster care; and
- ensure PMC children shall be entitled to representatives that are necessary for PMC children's safety and well-being.

These administrative goals were addressed in the Special Masters' first seven recommendations, which spelled out several ways to make improvements in these areas. The recommendations included a call for children in PMC to be granted a right to an attorney *ad litem* and a CASA volunteer. Based on a catch-all instruction the court provided, the Special Masters recommended that health and trauma screenings should be conducted more regularly for children in PMC and that DFPS improve informed consent protocols for prescribing psychotropic medication.

The court outlined the following goals related to residential child care licensing and investigations:

- ensure DFPS completes a Workload Study to determine the time required for investigators and inspectors to adequately perform their tasks;
- recommend the point at which caseloads are manageable for investigators and inspectors;
- ensure the Performance Management Unit (PMU) review Residential Child Care Licensing (RCCL) investigations;
- recommend strategies to solve RCCL's unwillingness to institute corrective actions against violating facilities; and
- ensure DFPS tracks child-on-child abuse.

The court case highlighted several examples of DFPS' office of RCCL failing to address licensed foster care facilities where there were violations of minimum safety standards and allegations of abuse and neglect. These issues with RCCL investigations, inspections, and licensing were addressed in recommendations 15 through 20. The Special Masters set a timeline for DFPS to complete the Workload Study. Further, the Special Masters recommended that the Performance Management Unit develop a semi-annual assessment tool to evaluate RCCL investigations and report the results to the court. The Special Masters recommended that DFPS or Child Placing Agencies begin tracking child-on-child abuse that occurs in their facilities and that CVS caseworkers receive training on how to help children who have experienced sexual abuse. They also recommended that DFPS be required to publicly report all substantiated cases of abuse and neglect for children in the PMC class to improve transparency and reduce risk of future harm.

## **Defendants' Objections to the Recommendations and the Plaintiffs' Response**

Following the filing of the Special Masters' recommendations, both parties had a chance to respond before the court makes its final order. The state (i.e. the defendants) made several global objections that applied to each and every recommendation. Then they made clustered and specific objections that applied to a narrower set of recommendations, respectively. After the state filed its objections, the plaintiffs responded. In their response, the plaintiffs (i.e. a set of children in foster care) highlighted out-of-court statements the state had made that contradicted their position in court. Then plaintiffs responded to the state's global and more narrowly focused objections.



## *Global Objections*

The state objected to every single recommendation on a dozen different grounds:

1. Any injunctive remedy is improper because any purported constitutional violation is not supported by evidence.
2. Any findings of constitutional violations are too vague to be effectively remedied by any of the Special Masters' recommendations.
3. Each recommendation relies on a misunderstanding of the children's substantive due process rights and duty owed to children in foster care. Recommendations should be tailored to make sure children in foster care have a right to "personal security and reasonably safe living conditions" specifically where a "state official acted or failed to act despite his knowledge of a substantial risk of serious harm."
4. The recommendations are based on best practices, rather than the state's constitutional duty.
5. The Special Masters' proposed remedies are not the least intrusive into the administration of foster care by DFPS.
6. There is no evidence that the proposed remedies will, in fact, cure the alleged class-wide constitutional violations.
7. The 5th Circuit incorrectly ruled against the defendants' claim that the appointment of the Special Masters was improper, so any recommendations resulting from that improper appointment are also improper.
8. The recommendations are not specific enough.
9. Injunctive relief is not appropriate for the all the plaintiffs in this class action lawsuit.
10. Because these recommendations are intended to apply to a class of people, they are invalid because the questions of law or fact in the case are not common to everyone in the class, the claims and defenses of the class representatives are not typical of the whole class, and injunctive relief is not appropriate on a class-wide basis both before and after trial.
11. The Special Masters rely on their own interpretations of the evidence in making the recommendations.
12. And finally, if the court adopts the recommendations the state will be beholden to the court for an indefinite or possibly indefinite period of time, which is not warranted.

Before directly responding to the state's objections, the first 11 pages of the plaintiffs' response detail every instance in which Governor Abbott, the Commissioner of DFPS, the Executive Commissioner of HHSC, or another state official has made a public statement that directly contradicts the stance state officials have formally taken in the lawsuit.

On the subject of inadequate placements, plaintiffs point out that state officials insisted in court that the occasional use of overnight office placements was not harmful to children and objected to every Special Masters' recommendation related to increasing foster care capacity. By contrast, outside of court the DFPS Legislative Appropriations Request (LAR) highlights the lack of adequate, high-quality foster homes and the Governor wrote in a public letter to the Commissioner that "[i]t is unacceptable that children are sleeping in Child Protective Services offices," urging Commissioner Whitman to address the foster care capacity crisis in Texas. Plaintiffs pointed out similar statements in the Commissioner's

response to that letter, statements made by both officials to the press, and statements at legislative hearings.

The plaintiffs' response goes on to discuss caseworker caseloads, turnover, and child safety. They argue that although the state objected to every recommendation related to caseworker caseloads and turnover, the DFPS LAR administrator statement said that even with the additional caseworkers requested, caseloads would continue to be far in excess of what is needed to ensure that children do not face an unreasonable risk of harm. This section goes on to cite further examples in which state officials have made public statements or testified that caseworker caseloads and the high turnover rates have significantly threatened child safety in Texas.

Then the plaintiffs' response highlights each time a state official has made a public statement regarding the urgent need to fix Texas' child welfare system. These statements can be found in press releases, correspondence between state leaders, testimony given at legislative hearings, and newspaper articles.

Next the plaintiffs provided the following responses to the defendants' 12 global objections:

1. The defendants' first global objection is not focused on the content or substance of the recommendations. It simply indicates their apparent intention to seek another appeal.
2. This objection is also not focused on the content or substance of the recommendations. Rather, it generally objects, without offering any supporting legal authority, that the court's opinion is too vague in rendering findings of constitutional violations for anyone to shape a proper remedy.
3. The defendants misunderstand the Special Masters' role. The Special Masters were not instructed to remedy constitutional violations through application of the appropriate legal standard. Rather, the Special Masters were tasked with making recommendations related to the specific goals outlined by the court that will inform the court's final order.
4. The recommendations never suggest that conformance with best practice is the goal to be achieved. The state does not identify any recommendation that is crafted to impose a best practice as opposed to a constitutional standard.
5. Without citing legal authority, the state seeks to impose a duty on the Special Masters to design the least intrusive possible remedy for the state's constitutional violations. But the court, not the Special Masters, will ultimately decide the final remedy with the benefit of input from the Special Masters and the parties through their objections. Defendants fail to provide any less intrusive remedial recommendations that would suitably remedy any constitutional violations found by the court.
6. The law does not require that an injunction remedy all factors contributing to a constitutional harm. Here, the recommendations target DFPS practices or conditions that clearly relate to the unreasonable risk of harm to children in the state's foster care system.
7. The state is simply trying to revive an earlier, failed challenge.
8. The recommendations clearly and succinctly identify the actions to be taken or restrained by defendants, and the court can further define or refine the remedy in its final injunction order as appropriate.

9. The recommendations focus on common conditions and practices that place all children in DFPS custody at unreasonable risk of harm.
10. This objection was resolved early in the case when the court certified the class, making the case a class action lawsuit.
11. The Special Masters have not made independent legal or factual findings in shaping their recommendations. Defendants do not point to a single recommendation that is based on facts or evidence outside of the court record.
12. Injunctive remedies designed to cure ongoing, systemic, constitutional violations do not reasonably lend themselves to a predetermined timeline. In cases like this, the duration of the injunction will depend on the defendants' performance and progress.

### *Specific and Clustered Objections*

In addition to the global objections discussed above, the state as defendants made a series of "clustered objections." These objections each applied to several recommendations, but not all of the recommendations. Then they made a series of objections to individual recommendations.

The state's first set of clustered objections refers to recommendations that are "redundant" or moot because DFPS is already doing them. The recommendations the defendants' object to on these grounds relate to caseworkers seeing children in PMC privately and regularly, maintaining a photo of each child in case files, operating a statewide reporting system for allegations of abuse and neglect, reducing caseworker turnover, and tracking child-on-child abuse.

The plaintiffs argue that the standard for determining whether the state's voluntary conduct has mooted a judgment is very strict. The defendants are actually required to prove that "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," which plaintiffs argue the state has not done in this case. Further, plaintiffs argue that courts have held that defendants are not absolved from a judgment against them just because they have discontinued an activity, particularly when the defendant insists the actions the defendant has stopped taking are legal.

The state's second set of clustered objections challenge recommendations that call on DFPS to submit a plan instead of the Special Masters crafting a specific solution. They argue that the plaintiffs did not meet their burden of proving an appropriate remedy in the case. These recommendations related to improving DFPS's paperwork and electronic filing, screening allegations of abuse and neglect in DFPS facilities, improving programs and outreach for children who are aging out of care, improving health and trauma screenings and assessments, reducing caseloads to 14 to 17, reducing caseworker turnover, reducing the number of children placed out of their home region, a work study of I See You workers, developing a contact guide for I See You workers, expanding enforcement actions available to remedy RRCL facility violations, tracking child-on-child abuse, improving PMU's case record review, strengthening oversight of licensed foster care facilities, tracking single child homes, submitting the 2016 Placement Needs Assessment, updating that assessment each year, and evaluating the implementation of Foster Care Redesign in light of each assessment.

Plaintiffs responded to this set of objections by arguing that the court's finding of liability and the remedial goals set in the court opinion demonstrate that the plaintiffs met their burden. They also argue

that the recommendation that the state submit a plan is a way the court can provide equitable relief to abate constitutional violations while simultaneously giving deference to the state by allowing it to retain control over its operations throughout the implementation of the judicial remedy.

The state's third set of objections is that certain recommendations are too vague and are, therefore, unenforceable. The following are examples of the terms or phrases that the defendants consider too vague: "quality time," "adequate training," "all the case information they need to serve children," "anonymously and privately," "caseload standard," "caseworker caseloads," "decrease," "remote, rural, or substantially less populated areas," "impractical," "strengthens," "family-like setting," "young," and many more.

The plaintiffs responded to these objections by arguing that courts will find the language of injunctions vague when the only thing they do is require an agency to follow law, policies, and procedures. They argue the Special Masters' recommendations are far from a simple "follow the law" directive. Rather, they set forth specific and well-defined actions that would bring DFPS into constitutional compliance. All that the law requires is that an ordinary person reading the court's order should be able to understand what's required.

The fourth cluster of objections refers to recommendations that the defendants assert they cannot tackle because they do not have the power or authority to enact legislation of appropriate funds. These recommendations relate to improving the DFPS paperwork and electronic filing system, establishing a 24-hour hotline for receiving and responding to reports of abuse and neglect in foster care facilities, improving programs and outreach for youth aging out of care, recruiting caseworkers and reducing caseloads, reducing caseworker turnover, reducing RCCL investigator caseloads, tracking child-on-child abuse, improving the placement array for children in foster care, and closing foster group homes that lack 24-hour awake night supervision.

The plaintiffs responded to the objection by asserting that budgetary constraints do not absolve constitutional violations. The state must pay the cost associated with caring for people in its custody, which includes children in foster care. Courts have consistently rejected the notion that a state is exempt from remedying a constitutional violation because it is financially unable to do so.

The defendants' final cluster of objections asserts that certain recommendations were not based on any applicable legal standard and exceed the scope of what the court is allowed to do. These recommendations relate to improving the DFPS paperwork and electronic filing system, improving health and trauma screenings and assessments, strengthening oversight of RCCL facilities, and improving the placement array for children in foster care.

Plaintiffs argue that the state solely relied on the Special Masters' statement at the beginning of their recommendations that "[t]his report does not address any legal issues; legal issues are reserved for the Court." The recommendations are not intended to bind the state or the court, but simply to guide the court's independent determination of how to proceed with a final order. The judge is the person who will determine the legal standard and use the recommendations accordingly.

The defendants then move onto their specific objections. They go through several recommendations and assert the various ways that each of these recommendations are not tailored to remediate a constitutional violation because no evidence shows that the absence of the recommended reforms deprive children of personal security or reasonably safe living conditions.

In response, the plaintiffs incorporated a 192-page appendix demonstrating a non-comprehensive sample of evidentiary support for each recommendation that the defendants claim were unsupported by evidence and not tailored to remediate a constitutional harm. They offer to provide additional evidentiary support upon the court's request.

## **Judge Jack's Interim Order**

On January 9, 2017, the court issued an interim order regarding the Special Masters' recommendations, which takes into account the responses of the state and the plaintiffs. The court began its order with a reminder that these recommendations only apply to children in PMC, not to children in TMC, kinship care, or any other part of the Texas child welfare system. The court acknowledged the state's proactive steps to fix various aspects of the state's foster care system. The court decided it could not enter a final order at this time because the court needs more data to determine the proper measures to ensure the order will correct any constitutional deficiencies for children in PMC.

### *Judicial Notice and the Court's Response to the State's Objections*

The court took judicial notice of several out-of-court statements the plaintiffs pointed out in their response that demonstrate Texas has "a firm understanding of the dire straits of children in the foster care system." Judicial notice means that the court considers well-known statements of fact as evidence the court can rely on in making its ruling. The court also noted that despite the statements numerous state officials have made over the last several months regarding foster care, the state objected to all the Special Masters' recommendations.

The court noted that the state's objections largely reiterated arguments that were already raised throughout the course of litigation. The court illustrated this with the defendants' objection that many recommendations were already in state policy. The court asserted that policy and practice are not the same, so this was not a valid objection.

One of the state's objections was that rather than outlining a plan for DFPS to cure certain constitutional deficiencies, the Special Masters recommended that DFPS come up with its own plan. The court overruled this objection. The court essentially argued that the reason this lawsuit came about is because DFPS has failed to fulfill its responsibility to protect children in its care and custody from unreasonable risk of harm and that allowing DFPS to come up with a plan for how it will fulfill its obligations in the future is an acceptable remedy that the court could order.

Finally, the court noted that all the other objections the state raised are not "ripe." Ripe in this context means the issue raised is contingent on future events that may not occur as expected or at all. Essentially, the court ruled that most of the defendants' objections could potentially be relevant to the court's final order, but do not apply to the Special Masters' recommendations.

### *Court's Response to the Special Masters' Recommendations*

Judge Jack determined that more work would be needed to accomplish the goals laid out by the court and developed by the Special Masters. The court directed the Special Masters to continue working with DFPS as outlined below:

#### Monthly Visits:

Special Masters must work with DFPS to create policies for monthly in-person visits between CVS caseworkers and children in PMC that include time with the child separate from the caregivers if the child can communicate.

#### Creation of a Central Databank:

The court ordered the Special Masters to work with DFPS to create a databank for children in PMC that includes medical, dental, mental health, school, and court records; caseworker notes; and placement evaluations. The databank should be accessible to caseworkers, CASA volunteers, attorney ad litem, foster parents, and the Special Masters with all relevant privacy laws taken into account.

#### Creation of a 24-hour Hotline:

Special Masters will also work with DFPS to create a plan for statewide reporting of allegations of abuse and neglect for children in PMC. The system should allow children in PMC to report abuse and neglect without fear of punishment or retaliation. The Special Masters and DFPS should also create a plan to facilitate, screen, and investigate these calls and publish any necessary training.

#### Recommendations Regarding Children who "Age Out" of PMC:

On October 26, 2016, DFPS Commissioner Hank Whitman testified that 27 percent of children who age out of care end up in the criminal justice system and a majority end up victims of human trafficking. Because 1,300 to 1,400 children age out of foster care every year and this population is at "high risk for low educational attainment, poverty, unemployment, early pregnancy, mental illness, and incarceration," Special Masters' must work with DFPS to establish a plan for children in PMC beginning at age 14 to help prepare them with the life skills needed to survive when they leave state care. This should include making a birth certificate available to each child before age 18 either physically or by email to assist in determining eligibility for social services as an adult.

#### Appointment of an Attorney Ad Litem:

The Special Masters recommended that each child in PMC be appointed both a CASA volunteer and an attorney ad litem. The court noted that DFPS has no authority over CASA and that CASA does not operate throughout the entire state. The court therefore is not ordering a CASA volunteer for each child in PMC, but is ordering that all children in PMC are entitled to representation of counsel at each stage of their legal proceedings and at every court hearing because each child in state custody has lost at least some of her freedom. The court cannot require DFPS to provide attorneys to children in PMC, but the court is asking the Special Masters and DFPS to evaluate two options: (1) DFPS will request ad litem appointment from each court in which a suit is pending, or (2) DFPS will reimburse ad litem attorneys' fees to the appointing court.

#### Health Care:

The court ordered the Special Masters to work with DFPS to develop a health care plan to address missing or nonexistent health care records that is in line with the American Academy of Pediatrics guidelines in "Fostering Health: Healthcare for Children and Adolescents in Foster Care." The court further ordered that each child's medical record be made available within 24 hours of entering DFPS custody. Even though each child technically enters DFPS custody in TMC, those children may transition to PMC, and by the time that happens, their medical records may no longer be available.

#### Caseworker Workload:

The court ordered the Special Masters to work with DFPS to develop a plan with specific time frames to ensure that PMC caseloads will be reduced to between 14 and 17 children statewide. The plan must include a provision that explains why any PMC caseload above 17 is safe. The plan must also include a monitoring system.

#### Caseworker Turnover:

The court ordered the Special Masters to work with DFPS to create a plan with specific time frames to reduce caseworker turnover that includes a monitoring system.

#### I See You Workers:

The Special Masters are ordered to retain an expert as part of their team to create a workload study of I See You workers to aid the court in determining whether the I See You worker program should be continued and in what capacity. The Special Masters must also work with DFPS to develop a contact guide for I See You workers and a plan for monthly in-person visits between the I See You worker and child and quarterly visits between the primary caseworker and child.

#### Residential Child Care Licensing:

DFPS failed to start an RCCL workload study, as the court previously ordered. The court, therefore, has now ordered the Special Masters to formulate and institute the study. The Special Masters must also work with DFPS to create an exclusive group to work on maltreatment investigations in RCCL facilities except for in rural areas of the state where exclusive assignment is impractical. The Special Masters are charged with developing and implementing protocols and quality controls for this group.

#### RCCL Website Creation:

The court ordered the Special Masters to work with DFPS to create a public website for all licensing inspections conducted by RCCL that will detail the inspections of facilities and what corrective actions will be taken for violating facilities. The Special Masters will also work with DFPS on the ways DFPS can enforce regulation of facilities. For example, DFPS may be able to suspend or close violating facilities. The plan should also include monitoring methodology.

#### Identifying Single Child Homes:

The Special Masters will work with DFPS to provide the court with specific time frames to document and track available single child homes and establish processes to match those placements to children in PMC who need such a home.

#### Reporting Sexual Abuse:

The Special Masters will work with DFPS to require that all alleged incidents of sexual abuse by one child against another are reported immediately. They will also develop a plan to investigate instances of child-on-child abuse. The court also ordered that all the case records for each child who has sexually abused another child or has exhibited "sexually aggressive behavior" be prominently labeled as such. Further, the court ordered that each child's records should be word-searchable for the terms "sexually abused" and "sexually aggressive" and that placements should be informed of a child's "sexually aggressive" or sexual abuse history. The Special Masters will help DFPS train caseworkers on how to make the designation of "sexually aggressive" or "sexually abused" youth and where to find that designation in a child's records. They will also work on a plan regarding placement of PMC children who are labeled this way and determine whether these youth need therapy or other appropriate services.

#### Monitoring Reports of Abuse and Neglect:

The Special Masters and DFPS are required to develop a plan to strengthen monitoring and oversight of children's PMC placements and the placing agencies contracted by the state. This plan should take into account all incidents of and failure to report alleged abuse and neglect.

#### Placement in Family-like Settings:

The court ordered the Special Masters and DFPS to ensure that unrelated children in PMC with different service levels not be placed in the same room unless a thorough, documented safety assessment is performed to confirm that placement is appropriate. The plan is also required to prohibit placing unrelated children that are more than three years apart in the same room.

The judge required that this plan follow a particular timeline from the date of the court's final order, which has not been issued yet:

- Within 6 months: All children in PMC under age 2 shall be placed in a family-like setting
- Within 12 months: All children in PMC under age 6 shall be placed in a family-like setting
- Within 24 months: All children in PMC under age 13 shall be placed in a family-like setting

Family-like settings are non-relative foster care, tribal foster care, kinship care, and therapeutic foster care. The court carved out exceptions for sibling groups of four or more children; children who require in-patient psychiatric hospitalization, treatment, or medical care; and young children who are placed with their minor parent.

#### Placement Arrays:

The Special Masters are ordered to work with DFPS to create a solution to the lack of appropriate placements. DFPS is ordered to submit its 2016 Statewide Placement Needs Assessment, which must include the number, geographical distribution, and placement types available in the DFPS placement array as well as the expected needs for children in PMC for 2017 listed by catchment area.

DFPS must work with the Special Masters to determine performance targets, time frames, and benchmark strategies to address the need for placements for difficult-to-place groups of children in



PMC including sibling groups, teenagers, children with developmental disabilities, and children requiring single child placement. DFPS is prohibited from placing PMC children overnight in DFPS offices or any other location not regulated by DFPS except kinship placements or where necessary to meet individualized medical or behavioral needs.

The court also ordered closure of foster group homes without 24-hour awake night supervision. The Special Masters will verify that all homes with more than six children provide supervision or are closed. The defendants also must develop a system to verify and monitor the number of non-foster children living in foster homes without solely relying on the representation of child placing agencies.

Regarding Foster Care Redesign, the Special Masters are ordered to work with DFPS to address the service array, the capacity of providers across Texas to serve as Single Source Continuum Contractors, and proposed timelines for staged statewide implementation through the end of fiscal year 2021.

Finally, the Special Masters will work with DFPS to report placement stability to the court on a semiannual basis.

#### *Timeline for the Court's Interim Order*

- Immediate:
  - Access to birth certificates before turning 18 for all children in PMC
  - DFPS will track child-on-child abuse
  - DFPS will not place children in DFPS offices or other locations not regulated by DFPS or a CPA
- January 2017:
  - DFPS 2016 Statewide Placement Needs Assessment submitted to court
- March 2017:
  - Special Masters will verify that all foster group homes without 24-hour supervision are closed.
- April 2017:
  - Monthly visits plan submitted to court
  - Progress report on creation of a central databank submitted to court
  - Attorney *ad litem* plan submitted to court
  - I See You monthly visit plan submitted to court
  - Plan for RCCL website creation submitted to court
  - Plan to identify, track, and match single child homes submitted to the court
  - Plan for reporting child on child sexual abuse fully implemented
- June 2017:
  - I See You contact guide submitted to court
  - Plan for children who "age out" of PMC submitted to court
- July 2017:
  - Plan for creation of a 24-hour hotline submitted to court
  - Health care plan submitted to court
  - Caseworker workload plan submitted to court
  - Caseworker turnover plan submitted to court

- RCCL specialized work group identified and established
- Plan for identifying and designating sexual abuse submitted to court
- Plan for monitoring reports of abuse and neglect submitted to court
- Placement stability report due to the court (repeated every six months)
- September 2017:
  - RCCL workload study completed
- October 2017:
  - I See You workload study completed
- January 2018:
  - Placement array plan submitted to the court
- Before Final Order (TBD)
  - Plan for placing children in family-like settings submitted to the court

In sum, although the court has outlined a tremendous amount of work for the Special Masters and DFPS, there may not be a final court order until January 2018.

## Going Forward in the 85th Legislative Session

As you can see, lawmakers have numerous CPS issues to work on during this legislative session, including CPS staff caseloads, foster care capacity, investigations of neglect and abuse, data collection, youth aging out of care, and the quality of foster care facilities. Each of these issues was discussed during the interim by state leaders or in the lawsuit, and each requires legislation and/or the appropriation of funds to resolve.

Texas needs to continue focusing on workforce recruitment and retention in CPS. Reducing caseloads and improving the quality of work CPS caseworkers are able to provide is essential to keeping children safe and helping them succeed. The approval of the Commissioner's recruitment and retention plan was a huge step, but it is not permanent, and it was partially blocked by a technicality related to certain pay raises. During the 85th legislative session, legislators should make the changes permanent and work to address legal issues hindering implementation of the plan.

Legislators must work on expanding the availability of appropriate foster care placements and services for children with high needs. One of the key steps is improving reimbursement rates for these homes and services as the state currently only pays 80 percent of the cost. At the same time, legislators should pursue opportunities to build on the important work the Governor started with his pilot project for children with high needs. The forthcoming release of the DFPS plan for expanding foster care capacity will be a critical opportunity to address this crisis.

Legislators should also pay close attention to the court's recommendations that the Attorney General said would require legislation or appropriation of funds. These issues include improving the DFPS paperwork and electronic filing system, establishing a 24-hour hotline for receiving and responding to reports of abuse and neglect in foster care facilities, improving programs and outreach for youth aging out of care, recruiting caseworkers and reducing caseloads, reducing caseworker turnover, reducing RCCL investigator caseloads, tracking child-on-child abuse, improving the placement array for children in foster care, and closing foster group homes that lack 24-hour awake night supervision.

The RCCL challenges will require special attention. RCCL investigations of child abuse and neglect in foster care facilities use a lower standard than the state applies to investigations of allegations of abuse and neglect in biological families. RCCL investigators also ensure compliance with minimum facility standards. Under the HHSC transformation initiated through the Sunset Review process, RCCL now operates under HHSC, separate from DFPS and CPS. As a result, two different units in two different agencies (RCCL in HHSC and CPS in DFPS) investigate reports of abuse and neglect using different standards. Going forward, although RCCL investigators need to retain their specialized knowledge of minimal standards for licensed foster care facilities, Texas should also make sure that children are at least as safe from abuse and neglect in foster care as they are at home with their biological parents.

Clearly, the child welfare system is in need of urgent reform. We do not know at this time what the court will do with the Special Masters' recommendations or what steps it will require Texas to take to reach minimal constitutional safety standards. However, the hard work that has taken place over the last several months and the actions in court have positioned state legislators to make significant progress during the legislative session. Progress will require the right mix of policy changes and appropriations to ensure that all children in Texas foster care have the chance to live the lives they deserve. It is time for Texas to not only take steps to establish basic safety, but also to build on that foundation and create a system in which children in foster care can reach their potential, live healthy lives and grow into successful, contributing members of society.