Juvenile Law Reader

Youth, Rights & Justice
ATTORNEYS AT LAW
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A View from the Bench
Still Something New Every Day

By Megan Jacquot, Coos County Juvenile Court Judge

How long have you been a judge on the juvenile law bench?

I've been on the bench for ten months. Before that, I had a private law firm that specialized in juvenile law and all types of law involving kids. My work was split between the Circuit Courts and the Court of Appeals.

What has surprised you most since joining the juvenile law bench?

So many things have surprised me. This is a humbling job. I work in a small county and have a number of dockets. We don't have enough judges for someone to do just juvenile law. When I work on juvenile cases, I am comfortable because I am familiar with the statutes, case law and procedures. I thought I would just not make mistakes on these cases. It turns out that I make mistakes all the time. Most are harmless, some I catch on my own and fix, and I'm sure some are lurking and waiting for other people or courts to catch. As an advocate, I would focus on the most important thing for my client. As a judge, I have so many findings I have to make I don't get to just focus the case on what's important without dealing with the other requirements.

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Determining the Parenting Capacity of Parents with Low IQ

Nicole Brisson, Ph.D., LCMHC, Competence-Based Parenting Evaluator, Sage Haven Associates, Inc.

Persons with cognitive difficulties have fought to attain self-determination and the right to have children since *Buck v. Bell*, 272 U.S. 200 (1927), the decision in which the United States Supreme Court upheld a Virginia statute that provided for the eugenic sterilization of people deemed 'unfit.' This right to bear children, however, does not always equate to the right to raise children. Presumptions of unfitness, inadequate parenting assessments, and misgivings about the best interest of the child account for some of the reasons why.

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If you could change one thing, what would it be?

I would create more time for shelter hearings. A good shelter hearing can change the way a case develops. I want to have enough time to explain to the parents what's going on, make the findings, talk about ICWA, focus on the big question of whether the case can proceed with the child in the home, examine reasonable efforts, make sure visitation is set up, and explain enough about trial procedure that the parents are aware of when they need to come back and what will happen if they don't. On a day when we have one or two shelters, I can do it. On a day when there are three or four, I have less time to devote to each case, and I think the way the parents look at the case is different if this initial appearance is rushed. I used to think shelters were the least important hearing, because they are not appealable and are totally subsumed by the jurisdictional trial in a short time. In ten short months, my thinking has completely turned around on this issue. Anecdotally, I think that families that have a good shelter hearing get their kids back sooner.

What practices do you observe (and encourage others to emulate) from the most effective lawyers?
I have the benefit of working in a place where the bar is excellent and works together well. The people they are appointed to represent have a high incidence of problem behaviors and personality disorders. It is very important to me that the attorneys model courtesy, respect and professionalism. Especially because I always have young people in my court, I don't like accusatory or belligerent questioning or arguments.

I appreciate when the attorneys tell me up front when there is a novel issue that might take some time to figure out, so I can focus my notes and thoughts about the testimony ahead. I appreciate attorneys who come to their hearings with a plan, have their exhibits pre-marked, and have witnesses organized so that we are not wasting time. I appreciate attorneys who advocate zealously for their client's position, even when it isn't the best position. This is a system, it requires due process, and it only works if everyone fulfills their part in it.

Like most of the judges who write here, I feel blessed and lucky to get to spend my time with juvenile law practitioners. This work isn't always an easy road, but it makes a tremendous difference to people who find themselves caught up in the system. The dedication and compassion I see in the attorneys and judges who work these cases makes me want to do better.

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Evidence suggests that the removal of children of parents with low IQ is frequently unwarranted and based on misguided assumptions about the parent's disability versus an issue of child protection (Booth & Booth, 2004). The National Council on Disability (2012) warns that the "presumption of unfitness" is an unfortunate attitudinal bias that child protection agencies are laboring under today and reminds us that the "ADA forbids the child welfare system from presuming that parents with disabilities are unfit" (p.118). It is incumbent upon child welfare agencies to provide evidentiary support for statements made about a parent's disability and their capacity to parent. However, the level of evidentiary support required varies from state to state and sometimes case to case, as does the reliability and quality of parenting capacity assessments.

Unreliable assessments are those that rely heavily on psychometric tests and measures, especially intelligence tests, to determine parenting ability. In fact, researchers state that there is no reliable correlation between IQ and competent parenting until IQ drops below 60 (Tymchuk & Feldman, 1991). In addition, many studies have shown the parent-child relationship, and not IQ, dictates parental fitness (Lawless, 2008). Certainly, IQ tests do not measure empathy, patience, nurturance, or love, among other qualities necessary for good parenting, nor do they even fully measure intelligence.

David Wechsler, creator of one of the most widely used intelligence tests today, states that how well one does in life depends not solely on cognitive abilities but on 'conative' functions such as drive, persistence, and will. This may explain the research demonstrating that intellectual ability is an unreliable predictor of parenting performance, and that with appropriate training, perseverance, and support many parents with low IQ can redress parenting skill deficits (Glazemakers & Deboutte, 2013).

Much like Dr. Wechsler's belief that multiple factors influence intelligence, Dr. Feldman's model of parenting adequacy considers multiple variables that influence parenting. He reminds us that unlike most other parents, parents with learning difficulties must cope with society's negative bias toward them, and that factors such as stigmatization and discrimination affect parents' mental health and service provision (Aunos & Feldman, 2010).

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For instance, some parents will become angry and show a reluctance to engage with professionals who they perceive to hold negative assumptions about their ability to parent and learn. Anecdotal evidence suggests that when parents respond in this manner they are frequently misdiagnosed with mental health problems. This practice is indicative of diagnostic overshadowing, the importance of differential diagnosis, and clinician's lack of education about the unique mental health needs of this population.

Parents are not only misjudged by their overt behavior, but through psychopathology, personality, and risk inventories administered during psychological evaluations. These tests are perceived as being scientific and impartial. However, this is not the case when it comes to custody decisions or parents with disabilities. Many standardized assessment instruments lack appropriate norms and do not accommodate parents with specific disabilities. Therefore, when norm-referenced tests are used, (sub)normal may be equated with (in)adequate rather than simply different (McConnell & Llewellyn, 2002). In addition, the use of standardized tests may contribute to false attributions, where parenting difficulties are credited to a parent's disability rather than other factors (e.g., poor housing, lack of social support).

The use of personality tests in parenting capacity assessments is problematic, as the very trauma of facing the loss of children creates personality traits that influence the outcome of psychological testing (Lowenstein, 2010). There is no research that links observed or reported parenting behaviors to specific test results from these tests (Klass & Peros, 2011). Similarly, risk inventories are a poor predictor of future parenting. Since they are based on statistics, they cannot be used to measure a person's response to treatment programs or how they manage their risk, nor do they consider potential protective factors such as the development of significant positive relationships.

Competence-Based Parenting Assessments (C-BPAs), on the other hand, not only consider these factors but offer an alternative: they rely heavily on functional behavioral observations of parents with their children across settings, consider the parent and child welfare's perspectives, and evaluate the effectiveness of the family's supports. C-BPAs do not portray parenting capacity as a static trait, as it varies depending on the circumstances (Feldman & Aunos, 2010). Parenting also may be distributed within a parent's social network. It is not an attribute of a person as an individual and therefore, cannot be measured as such. No parent raises a child solely on their own, yet it is often the misapprehension of the court that a parent must be able to parent a child independently. See *State ex rel Dept. of Human Services v. Smith*, 338 Or. 58, 86, 106 P.3d 627 (2005) (ability to parent independently is not a legal requirement for parental fitness; rather, all that is required is that "the parent's inability to parent the child independently not work to the detriment of the child").

Some of the factors that are considered in determining parenting capacity in C-BPAs include: proficiency in performing childcare tasks; ability to use interpersonal and self-regulation skills essential to promoting positive child outcomes; 'goodness of fit' between the parent's ability and the child's needs; parent's knowledge of how to

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handle parenting scenarios regarding children of different ages; their understanding and management of their disability; and contextual variables that may impact parenting.

C-BPAs look to answer the question, "Under what circumstance can a parent be successful?" and make recommendations with the best interests of the child in mind. Some recommendations provided in C-BPAs include: strategies to meet child specific needs, tips for parent educators (e.g., how to teach skills, write objective goals and keep data on progress), books, curricula, community services, support groups, services for children, adaptive equipment, mental health resources, and ways to build natural support.

Tips for legal and child welfare professionals:

1. Replace speculation with evidence obtained from well informed assessments that emphasize parent-child observation and do not rely largely on data from psychometric tests and measures.

2. Insist that observations are done in a natural environment, preferably the parent's home and community, and that assessors are given ample time to observe. Observation data should be presented in an objective manner and include detailed descriptions of the parent-child interaction and parenting tasks performed.

3. Do not accept that a parent cannot make or has not made progress without knowing: a) If there were reasonable, objective, and measurable goals set; b) How data was collected on these goals; c) Whether the parent was taught in a manner conducive to their learning ability and in accordance with best practices (e.g., individualized, home-based parent education using behavioral teaching methods such as task analysis, prompting, modeling, role playing, practice, feedback and positive reinforcement); d) The level of rapport between the parent and service provider; and e) If visitation has been in natural settings and frequent enough to allow parents time to learn, retain, and generalize skills and for a mutual adaptive process to develop between the parent and child (i.e., time for parent and child to learn each other's idiosyncratic behaviors and respond accordingly).

4. Request an extension of time as an accommodation to allow an appropriate assessment to be completed and data to be collected. The U.S. Department of Justice and U.S. Department of Health and Human Services has provided technical assistance to child welfare agencies[1] and explains, "In some instances, providing appropriate supports for persons with disabilities means selecting an appropriate alternative already provided in the Federal child welfare statutes. For instance, section 475 of the Social Security Act provides that the child welfare agency is required to file a petition to terminate parental rights when the child is in foster care for the preceding 15 out of 22 months. However, the law provides exceptions to this requirement[2] and gives child welfare agencies the flexibility to work with parents who have a child in foster care beyond the 15 month period, including parents with disabilities."

5. Recognize that parents may experience cognitive overload and mental health symptoms (e.g., difficulty processing information, anxiety, depression) because of the stress from the case. This may result in missed visits, disorganization, and fatigue and should not be mistaken as a lack of cooperation, disinterest in parenting, or used against them. To decrease stress, ensure parents understand the court process and what CPS is asking them. Provide empathy, validation, encouragement, and coping strategies.

6. Ensure that custody evaluators consider the etiology of parent's mental health symptoms, make differential diagnoses, or refer for further evaluation before making recommendations for mental health treatment. Custody evaluators should be specific in the type of therapy they recommend, why it is important, and assess a parent's interest in and previous experience with mental health services prior to making recommendations. Counseling should not be mandatory for reunification and should be a personal choice.

7. Instead of analyzing test data, evaluators must make numerous clinical judgments about the parent's functioning and ability to meet a child's needs. Therefore, evaluators with experience providing direct

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[1] U.S. Departments of Justice and Health and Human Services (2015). Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

[2] 42 U.S.C. § 675(5)(E); 45 C.F.R. § 1356.21(i).

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support to families with disabilities and who are skilled in developing rapport are most qualified.

8. Obtain a C-BPA early in the case to challenge presumptions of unfitness. This is most obvious in cases where a parent has done nothing to harm their child or the parent has never actually had custody (e.g., when a child is taken after birth).

For more information contact: Dr. Nicole Brisson, (802) 598-8410

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Senate Bill 20 Improves Education for Children and Youth in Foster Care

By Lisa Kay, YRJ Supervising Attorney

When Governor Brown signed Senate Bill 20 into law on August 16, 2017, Oregon took another step forward in promoting educational stability for children and young adults in foster care. SB 20 amends ORS 339.133, which governs an individual's residency for school purposes. Pursuant to SB 20, it is presumed that it is in the best interest of every child and young adult in foster care to continue attending their school of origin, and/or school district of origin, while they remain in foster care. Foster children and young adults, ages 4 to 21, may only move schools or school districts when the juvenile court finds it is not in their best interests to continue attending their school or school district of origin. Without such a finding, foster children and young adults remain in their school district of origin throughout their time in care, moving from elementary school to middle school to high school and transition services in the same district. Further, SB 20 guarantees foster children publically funded transportation to their school of origin. If a school move must occur following a court finding, SB 20 ensures that foster children be immediately enrolled, and therefore admitted, in their new school even if they cannot produce normally required enrollment documents or school records.

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All school districts are required to admit, free of charge, all persons between the ages of 5-19 who reside within the school district as well as individuals ages 19-21 who are receiving special education services. School districts may admit an individual who has not yet attained 21 years of age, prior to the beginning of the school year, if the individual needs additional education in order to achieve a high school diploma.

SB 20 affords several improvements to existing law to promote educational stability for individuals in foster care. Under the previous version of ORS 339.133, court action was required to maintain educational stability for children in foster care because children in foster care were presumed to be residents of the school district in which their foster parents resided unless the juvenile court found that it was in their best interest to continue to attend the school the child attended prior to placement in foster care. Now, no action is required to ensure that foster youth have the right to continue to attend their school of origin. Further, pursuant to the prior version of ORS 339.133, once the court made the finding, the child was permitted to attend the school attended prior to placement through the highest grade level of that school. With the amendments of SB 20, youth remain not only in the school they attended prior to placement through the highest grade level of that school, they remain residents of the same district throughout their stay in foster care. This means that children in foster care can move with their peers from elementary school to middle school to high school to transitional services (if receiving special education services) in the same district, so long as they remain in foster care. Another clarification made by SB 20 is that the provisions apply to individuals aged 4 to 21 years of age.

Thus, young adults in foster care are afforded school stability until the age of 21, as opposed to only until age 18. Additionally, the provisions apply to preschoolers so long as the preschooler in foster care is attending a public preschool program sponsored by the school district. Perhaps the most significant improvement provided by SB 20 is that all foster children and young adults are guaranteed publically funded transportation to their school of origin. Pursuant to a statewide inter-agency agreement between the Department of Education and the Department of Human Services, school districts are responsible for transporting foster children and young adults to their school of origin while the costs of the transportation will be shared by the two agencies. To arrange transportation for individuals in foster care living outside of their school district of origin, the DHS caseworker must submit a Foster Student School District of Origin Transportation Request form to the Foster Care Point of Contact in the school district of origin. Every school district has named a Foster Care Point of Contact.

Full text of SB 20 is available online.

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JLRC Contact Information

Natalie O'Neil is the contact person for trainings and other JLRC services.

To receive a call back within two business days from a JLRC attorney for advice, email the workgroup and please include your name, telephone number, county, and brief description of your legal question.

CASE SUMMARIES

By Amy S. Miller, Deputy General Counsel, Office of Public Defense Services

Dept. of Human Services v. L. S. H., 286 Or App 477 (2017)

On June 28, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. L. S. H.*, 286 Or App 477 (2017) in which the Court affirmed the juvenile court's judgment establishing jurisdiction over mother's child C, after mother admitted to a modified jurisdictional allegation.

Under an agreement with DHS, mother waived her right to an evidentiary hearing and admitted to the following allegation:

> "The mother's physical health, mental health, and disabilities interfere with her ability to parent in the safest way possible and creates risks that are unacceptable to mother. Mother and child will benefit from the services of the court, DHS, and caseworker Traci Noonan."

Following mother's admission, the court found C to be within the jurisdiction of the court and ordered mother to participate in a range of services recommended by DHS. It then entered a "Judgment of Jurisdiction and Disposition." Mother made no objection to jurisdiction in the juvenile court.

On appeal, mother argues that the allegation was insufficient to permit a jurisdictional determination. DHS argues that mother consented to the entry of judgment and therefore, under ORS 19.245(2), her appeal is barred. Furthermore, DHS argues that mother failed to preserve her error.

The Court of Appeals concluded:

> 1. ORS 19.245(2) does not bar mother's appeal because mother was never asked whether she consented to the entry of judgment and there are no other indications (besides mother's admission) that mother consented to the entry of judgment. It appears that the juvenile court determined, on its own, that mother's admission demonstrated jurisdiction was warranted, not because mother consented to the entry of judgment.
>
> 2. The admission made by mother is sufficient to support the juvenile court's jurisdictional finding. The Court, relying on *Dept. of Human Services v. D. D.*, 238 Or App 134 (2011), states that the allegation is to be liberally construed to determine whether, if DHS had offered evidence, it would have been sufficient to establish jurisdiction. If the allegation is ambiguous, but at least one interpretation would permit DHS to offer evidence that would establish jurisdiction, the juvenile court does not error in establishing jurisdiction.
>
> 3. DHS' preservation argument, that mother may not contest jurisdiction on appeal without first contesting it below, is not addressed in the opinion.

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Dept. of Human Services v. M. M. N., 286 Or App 520 (2017)

On June 28, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. M. M. N.*, 286 Or App 520 (2017) in which the Court accepted DHS' concession that the juvenile court erred in appointing a *guardian-ad-litem* (GAL) for mother. Furthermore, because the appointment of a GAL was in error, the admissions made by the GAL which were the basis for jurisdiction were in error. Therefore, the juvenile court's jurisdictional judgment is reversed and remanded.

Dept. of Human Services v. A. B., 286 Or App 578 (2017)

On July 6, 2017, the Court of Appeals issued an opinion in *Dept. of Human Services v. A. B.*, 286 Or App 578 (2017) in which the Court reversed and remanded the juvenile court's permanency judgment and guardianship judgment due to violation of Interstate Compact on the Placement of Children (ICPC). The relevant facts are as follows:

The child K became a ward in 2010 and parental rights were terminated in 2013. Beginning in 2012, grandfather (GF), who lived in California, expressed interest in being a placement resource for K. However, in March 2015, California denied the ICPC home study request due to GF's criminal history.

On September 7, 2016, GF filed a motion for a juvenile court guardianship (*ORS 419B.366*) and the juvenile court held a permanency hearing which was continued until September 23, 2016. GF argued that the juvenile court could avoid the need to comply with ICPC if the court set aside the TPR judgment as to mother and then granted GF guardianship. DHS argued that the court would violate ICPC by establishing a guardianship. The court *sua sponte* set aside mother's TPR judgment pursuant to ORS 419B.923 and then changed the permanency plan for K from adoption to guardianship, granted GF's motion for guardianship and dismissed DHS' legal custody of K. The juvenile court retained wardship and planned to continue to supervise the guardianship.

The Court of Appeals, reviewing the court's actions for legal error, concluded that ICPC does apply to this case and that the juvenile court erred when it changed the plan to guardianship and appointed GF as guardian knowing that California refused to accept the placement under ICPC.

The Court, applying the legal principles of statutory construction, construed the terms of ICPC with the goal of implementing the intent of the Compact—to facilitate cooperation in the placement and monitoring of dependent children across state lines. GF argued that ICPC didn't apply because K's placement wasn't in foster care, it was with a guardian and independent of publicly funded foster care. (See *ORS 417.200 Art III* stating that "no sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein.")

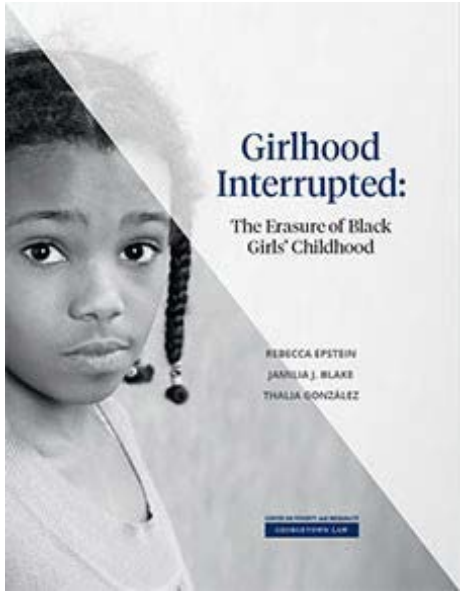
However, ICPC is intended to promote cooperation between states in ensuring the safety and adequacy of care for each child requiring placement. (*ORS 417.200 Art I*) And, a child in a durable guardianship is one who cannot return home safely within a reasonable time and therefore is a child requiring placement, a child within the class covered by the ICPC. (*ORS 417.200 Art I(a)*)

Note that DHS also assigned error to the court's decision to set aside the TPR on its own motion; the Court found this issue unpreserved.

Black Girls Viewed As Less Innocent Than White Girls, Georgetown Law Research Finds

First study focused on "adultification" of black girls shows significant bias toward girls starting at age 5, younger than in previous research on black boys

The following is reprinted with the permission of Georgetown Law's Center on Poverty and Inequality. Download the full report here: Girlhood Interrupted: The Erasure of Black Girls' Childhood



> "We urge legislators, advocates and policymakers to examine the disparities that exist for black girls in the education and juvenile justice systems and to pursue reforms that preserve childhood for all."

A groundbreaking study released today by Georgetown Law's Center on Poverty and Inequality finds that adults view black girls as less innocent and more adult-like than their white peers, especially in the age range of 5-14.

"What we found is that adults see black girls as less innocent and less in need of protection as white girls of the same age," said Rebecca Epstein, lead author of the report and executive director of the Center on Poverty and Inequality at the Georgetown University Law Center.

The study, detailed in the new report, Girlhood Interrupted: The Erasure of Black Girls' Childhood, is the first of its kind to focus on girls, and builds on previous research on adult perceptions of black boys. That includes a 2014 study led by Phillip Goff that found that, beginning at age 10, black boys are more likely to be viewed as older and guilty of suspected crimes than white peers.

Authors of the new Georgetown Law report adapted the scale of childhood innocence developed by Goff and colleagues to include items associated with stereotypes of black women and girls. They then applied the scale to a new survey on adult perceptions of girls. The findings showed significant bias toward black girls starting at age 5.

"This new evidence of what we call the 'adultification' of black girls may help explain why black girls in America are disciplined much more often and more severely than white girls – across our schools and in our juvenile justice system," said Epstein.

The new report reveals that adults think:

-Black girls seem older than white girls of the same age.

-Black girls need less nurturing than white girls.

-Black girls need less protection than white girls.

-Black girls need to be supported less than white girls.

-Black girls need to be comforted less than white girls.

-Black girls are more independent than white girls.

-Black girls know more about adult topics than white girls.

-Black girls know more about sex than white girls.

The study applied statistical analysis to a survey of 325 adults from a variety of racial and ethnic backgrounds and educational levels across the United States. Across the four age brackets examined, the

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most significant differences in adult perceptions were found in relation to girls in mid-childhood (ages 5-9) and early adolescence (10-14), continuing to a lesser degree in the 15 to 19-year-old group. No statistically significant differences were found in the 0-4 age group.

Biases revealed by the study may shed new light on why black girls are consistently disciplined more harshly than white girls. The report authors point out that educators, school-based police officers and officials across the juvenile justice system often have significant discretion in their decision making, including for minor, subjective infractions such as dress code violations, disobedience and disruptive behavior.

Until now, few scholars have thoroughly investigated why black girls are subjected to differential disciplinary treatment, such as:

-Black girls are **five times more likely to be suspended** as white girls, and twice as likely to be suspended as white boys.

-Black girls make up just under 16% of the female school population, but account for 28% of referrals to law enforcement, and 37% of arrests. White girls account for 50% the female school population, but only 34% of referrals and 30% of arrests.

-Black girls are **nearly three times as likely to be referred to the juvenile justice system** as white girls.

-Black girls are 20% more likely to be charged with a crime than white girls.

-Black girls are 20% more likely than white girls to be detained.

-Black girls are less likely to benefit from prosecutorial discretion. One study found that prosecutors dismissed only 30% of cases against black girls, while dismissing 70% of cases against white girls.

The report authors call for further study into the adultification of black girls and its possible causal connections to negative outcomes across public systems, including education, juvenile justice and child welfare. They also recommend providing teachers and law enforcement officials with training on adultification to help counteract the negative consequences of this bias against black girls.

"These findings show that pervasive stereotypes of black women as hypersexualized and combative are reaching into our schools and playgrounds and helping rob black girls of the protections other children enjoy," said report coauthor Jamilia Blake, an associate professor at Texas A&M University. "We urge legislators, advocates and policymakers to examine the disparities that exist for black girls in the education and juvenile justice systems and to pursue reforms that preserve childhood for all."

Resources

Webinar: Working with Parents with Intellectual Disabilities and their Families
September 27, 2pm EST
Webinar

The National Research Center for Parents with Disabilities is presenting a free webinar for social workers, which is being held on September 27th at 2p EST. This webinar will provide information about how to best work with parents with intellectual disabilities and their families, including the definition of intellectual disabilities, background information on parents with disabilities, the application of disability law in the child welfare system, strategies for supporting families, and how to conduct accessible and appropriate parenting assessments. Continuing education credits will be provided by NASW.

Registration required.

Save the Date

OCDLA Juvenile Law Training Academy 2017

Safe & Strong Families: Advocacy Strategies for Success

October 16–17, 2017
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